



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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IRAQ

IAA reference: IAA15/00104

Date and time of decision: 14 December 2015 13:33:17

Victoria Coleman, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred [applicant] states he was born in Al-Diwaniyah Province, Qadissiya Governorate, Iraq on [date]. He claims to be of Arab ethnicity and that he is a Shia Muslim. The applicant lodged an application for a Temporary Protection (Subclass 785) visa [in] July 2015.
2. A delegate of the Minister for Immigration and Border Protection refused to grant the visa [in] October 2015. The delegate accepted the applicant was a Shia Muslim from Al-Diawaniyah in Iraq. However, having regard to various inconsistencies the applicant's evidence, the delegate considered the applicant was not credible and did not accept his claims that: his father was a supporter [member] of the Ba'ath party; the applicant and his father were kidnapped by the Dawa party; the applicant and his brothers were threatened by Shia militia groups associated with the Government of Iraq; or that the applicant's home was raided and his [child] killed by Shia militia groups.
3. The delegate found that country information suggested there was no real chance or real risk of relevant harm to the applicant on return to his home area in Al-Diwaniyah on the basis of his religion or for his membership of a particular social group. The delegate concluded that the applicant could reasonably and safely access his home area via Basra. For these reasons he did not meet the criteria for the grant of the visa.

### Information before the IAA

4. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. In addition, the IAA received a written submission from the applicant's representative dated 17 November 2015 (the submission to the IAA) which responds to the delegate's findings and provides arguments on relevant points of law. While the submission does not contain any new claims or evidence as such, given the very broad definition of 'new Information' in s.473DC of the Act, it appears to engage s.473DD. The submission includes information that was not before the delegate which could not have been provided before the delegate's decision as it is in response to that decision. It is directly relevant to assessing whether the applicant satisfies the requirements for the grant of the visa. I consider there are exceptional circumstances to justify considering this information.
6. I have also obtained new country information on the treatment of former Ba'athists and their family immediately following the fall of Saddam Hussein's regime (information not specifically about the applicant but about a class of person of which the applicant claims to be a member).<sup>1</sup> As noted above, based on the adverse credibility assessment, the delegate did not accept that the applicant's father was a senior [member] of the Ba'ath party or that the applicant faced past harm for that reason. The delegate did not appear to consider contemporaneous country information indicating that there was little evidence of widespread deliberate targeting of families of Ba'ath party members; and that families of officials or people

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<sup>1</sup> "Iraq Country Report, April 2004", Country Information and Policy Unit Immigration and Nationality Directorate Home Office, UK, April 2004, OG5675B4A38; "Iraq Country Report October 2004", Country Information and Policy Unit Immigration and Nationality Directorate Home Office, UK, October 2004, UKH0R030; "Iraq: reports of violence and acts of revenge by the general population against the officials and their families of Saddam Hussein's regime following Hussein's fall", Immigration and Refugee Board of Canada, 15 January 2004, OG4A5676B6.

associated with the former regime would not be targeted in revenge for crimes committed during Saddam's regime'. Given the direct relevance of this information to assessing the credibility of the applicant's claims for past harm and, noting this material was not before the delegate, I consider there are exceptional circumstances to justify considering this information.<sup>2</sup>

7. In the context of this information, I sought further new information from the applicant, namely evidence which may support his claims to have been abducted due to his father's role in the Ba'ath party ('the s.473DC invitation').
8. In response, the applicant's agent provided a submission which included copies of documents, with accompanying translations, purporting to be:
  - a letter of complaint by the applicant made to [a] Police Centre dated [date]/08/2003, regarding his own alleged abduction and the disappearance of his father ('letter of complaint to police');
  - a letter from the police to [a] Hospital requesting the examination and treatment of the applicant for his injuries and the provision of a report to assist the police investigation, dated [date]/08/2003 ('letter to hospital'); and
  - a letter from the Police Centre to the [Judge] dated [date]/08/2003 regarding the recoding of the applicant's testimony in respect of his alleged abduction ('letter to the Judge').
9. This material is relevant to the assessment of the applicant's claims. The referred applicant has contended that the information could not have been provided earlier due to the difficulty obtaining older records from Iraq.<sup>3</sup> On one hand I would have expected the applicant to provide all relevant material to the Department with his protection visa application. However, the delegate did not consider whether the family of former Ba'ath members were targeted in the past, which the IAA has identified as a relevant issue. Accordingly, I am prepared to accept that the applicant may not have been aware he needed to provide this information at the primary stage and may not have had the opportunity to do so. I consider that there are exceptional circumstances to justify considering this new information. I also accept that this material was not before the primary decision maker and I am satisfied that in the circumstances the new information could not have been provided before the Minister made the decision.

### **Applicant's claims for protection**

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10. The applicant's claims are contained in the information referred and subsequently given to in the submission to the IAA. They can be summarised as follows:
  - The applicant's father was a supporter and [member] of the Ba'ath Party who was threatened and disappeared after the fall of Saddam Hussein's regime.
  - In or about 2003, the applicant was abducted, detained and tortured by the Al-Dawa party (Dawa party) who were seeking the whereabouts of his father. Another boy was taken at the same time for having spent time in a Western country; they escaped but were located and

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<sup>2</sup> s. 473DD(a) of the *Migration Act 1958*.

<sup>3</sup> Submission to the IAA dated 10 December 2015.

returned to detention. After being beaten unconscious they were placed in bags and thrown onto the main road. They were found by locals and taken to hospital, where the applicant remained for almost [months].

- Following his return to Baghdad, the applicant was watched and received a threatening letter stating that he would be taken or [killed]. He and his family fled to [location], but were unable to sustain themselves financially and returned to Baghdad.
  - He travelled between family homes in Baghdad, where he worked, and in Al-Diwaniayah, where he attended [an educational] institute. He finished his studies in 2010; married and had one child. In 2012, his home was raided, his brother [Mr A] kidnapped, and his child killed during the raid. His marriage broke down and the applicant fled to [another country] in October 2011, where he stayed for [number] months, returning to Iraq due to his mother's ill health. After he returned to Iraq, he and his brother were stopped and threatened while out walking and he chose to leave Iraq.
  - The applicant departed Iraq by air in April 2012 using his own genuine passport. He arrived in Australia as an 'Unauthorised Maritime Arrival' [in] October 2012 and currently resides with his Australian citizen spouse, with whom he has one child.<sup>4</sup> His mother and [siblings] remain in Iraq.
  - The Government and militia have records of him and continue to look for him; and [another] brother moved to [location] due to threats.
11. The applicant fears discrimination as a Shia from the State and Islamists and that he will be forced to hide his religion and his own identity to avoid harm. He fears harm as a returnee or failed asylum seeker from a Western country and due to the terrorist threat from Islamic State (Daesh)<sup>5</sup> and the ongoing security and safety situation in Iraq. It is claimed that any future instability in the Dawa party will affect the citizens of Iraq and that the applicant is at a higher risk of violence and forced involvement in irrelevant activities against his will and against his beliefs.

## **Factual findings**

### *Country of Reference*

12. On the basis of the applicant's national ID card and passport, I find that he is a national of Iraq. There is no evidence that he has a right to enter and reside in any other country.

### *Religion*

13. Having regard to the applicant's passport and national ID card, I accept that he was born in Al-Diwaniayah in Southern Iraq. Further, I accept he is a Shia Muslim, on the basis of his consistent evidence on this point and on country information supporting that the religious majority in the South of Iraq is Shia.<sup>6</sup>

### *Father's support for the Ba'ath Party*

14. The applicant contended his father was a supporter [member] of the Ba'ath party before the fall of Saddam Hussein's regime. At the interview with the Department delegate<sup>7</sup> (the TPV interview), the applicant stated his father worked at [workplace] to defend Iraq. In the written

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<sup>4</sup> The applicant and his wife were married [in] 2014 and their child was born on [date].

<sup>5</sup> Also known as: *Ad-Dawlah al-Islamiyah fi al-Iraq; Daesh*; and *Islamic State of Iraq and the Levant*; "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 13 February 2015, CISEC96CF1160.

<sup>6</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 13 February 2015, CISEC96CF1160.

<sup>7</sup> Held [in] September 2015.

submission to the IAA, it was stated that his father was involved in the defence force. I do not consider that these statements are inconsistent; it is plausible, and I accept that, the applicant's father had some involvement in the defence force and worked at [workplace].

15. Country information states that there were at least 2 million members and sympathisers of the Ba'ath party during Saddam Hussein's regime.<sup>8</sup> The National Command represented the highest policy-making and co-ordinating council for the Ba'ath movement. The four top ranks of the party in Iraq were: Regional Command Member, representing the core of the party leadership and top decision-making body; Branch Member; Section Member; and Group Member.<sup>9</sup> This was followed by: cells; candidate members; supporters; and sympathisers.<sup>10</sup> Country information also indicates that millions of people were forced to join the Ba'ath party, particularly as party membership was a precondition for state and other employment and was necessary to get children into good schools.<sup>11</sup> On this basis, I accept as plausible that the applicant's father was a member of the Ba'ath party.
16. However, the applicant has not provided details of the nature of his father's role or the functions his father performed as a senior [member] or high ranking member of the party. At the TPV interview, the applicant's evidence on this point was vague. When asked specifically what his father did, the applicant stated that only that he was a [member], and that he worked in places in defending and protecting Iraq.<sup>12</sup> At the TPV interview and in submission to the IAA the applicant stated that he was young at the time, he did not fully understand his father's role, and in the submission to the IAA he indicated his knowledge has come from his mother. I do not accept this is a plausible explanation for the lack of knowledge regarding his father's claimed role in the party. Firstly, at the time Saddam Hussein's regime fell and at the time of his claimed kidnapping (due to his father's role in the Ba'ath party), the applicant was [age] years of age, and it is reasonable to expect that he would have had some knowledge of the nature of his father's work. Secondly, even if his knowledge was limited at that time, given the significance of this claim to his protection visa application it is reasonable to expect that he would have obtained further details from his mother with whom he claims to be in contact.
17. For these reasons, I do not accept that the applicant's father was, or has a profile as a [member] or a high ranking member of the Ba'ath party or that he performed major and important roles for the party. Rather, I find on the evidence that he was a lower level member of the Ba'ath party due to his employment.

#### *Father's disappearance and the applicant's kidnapping*

18. The applicant initially claimed his father disappeared in 2003 and that applicant was abducted by members of the Dawa party who were searching for his father. The applicant stated in the TPV interview he and another boy were taken when they were walking in their neighbourhood; a car approached them slowly; stopped; and he was hit on the head and taken away. They were detained for [number] days and were tortured during this time.
19. Country information supports that in the aftermath of the fall of Saddam Hussein's regime there were reprisal attacks against former Ba'ath party members. In many reported cases,

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<sup>8</sup> "Iraq Country Report, April 2004", Country Information and Policy Unit Immigration and Nationality Directorate Home Office, UK, April 2004, OG5675B4A38.

<sup>9</sup> "Iraq Country Report, April 2004", Country Information and Policy Unit Immigration and Nationality Directorate Home Office, UK, April 2004, OG5675B4A38.

<sup>10</sup> "Iraq Country Report, April 2004", Country Information and Policy Unit Immigration and Nationality Directorate Home Office, UK, April 2004, OG5675B4A38.

<sup>11</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 13 February 2015, CISEC96CF1160.

<sup>12</sup> TPV interview held [in] September 2015.

those killed were senior or high ranking members of the party or those known to have abused their position. However, there were examples of lower level supporters being targeted throughout 2003 and in December 2003 there was a sharp increase in the number of reprisal killings of former Ba'athists in the south, in particular in Basra, including targeting of lower profile members.<sup>13</sup>

20. However, the applicant's evidence on the circumstances of his father's disappearance has altered over time, as has his evidence over the timing of his father's disappearance relative to his own abduction. In the September 2015 TPV interview the applicant initially stated his father went missing in 2003. In his July 2015 written submission to the Department (the TPV statement) he indicated that his father was missing at the time of his own abduction, that he did know where his father was at that time and that as of the date of the statement he remained unaware of what happened to his father or his whereabouts. In contrast, as the TPV interview progressed, the applicant variously stated: that at the time of his own abduction his father was 'still around'; that his father disappeared after his own abduction; and that his mother received confirmation in 2005/2006 that his father had been kidnapped by the Dawa party and that he was still alive, they were asked to pay money for his release, but that as of 2007 they did not know his location. His evidence as to when and the circumstances in which, his father disappeared is contradictory and cannot be easily reconciled.
21. During the TPV interview, the applicant stated that when he was kidnapped he was asked to call home. Evidence was given that he spoke to his father and told him not to turn himself into the Dawa party. At this time the interpreter corrected his own error, noting that the applicant stated he talked to his mother, not his father. I draw no adverse conclusions from this evidence and accept it was an error in interpreting. However, this was the only interpreting error identified in the course of the interview and it was rectified immediately. I do not accept that this tainted the interview or that any interpreting errors can account for the discrepancies I have identified above in the applicant's evidence. Nor do I accept the submission that the delegate did not understand the applicant and pushed him to make mistakes.<sup>14</sup> The applicant was given the opportunity to address any concerns over his evidence during the interview in the presence of an interpreter and his agent.
22. I have considered that the applicant's wife was [unavailable] at the time of the TPV interview. I appreciate that this would have been stressful for the applicant. Nevertheless, I also do not accept this explains the discrepancies in his evidence regarding his father's disappearance and his own kidnapping. Given the significance of these events, it is reasonable to expect the applicant would recall the timing of his father's disappearance relative to his own kidnapping and whether or not his family knew his father had been abducted by the Dawa party and had been asked to pay money for his release.
23. Further, I have considered whether these discrepancies can be attributed to errors in the written statement. The applicant's agent indicated that it was prepared quickly and the applicant may not have read over the statement as thoroughly as he should have for personal reasons. However, errors identified by the applicant and his agent in the written statement were subsequently corrected by use of Department Form 1023 and pertained only to the name of the organisation alleged to have kidnapped the applicant; and a residential address missing

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<sup>13</sup> "Iraq Country Report, April 2004", Country Information and Policy Unit Immigration and Nationality Directorate Home Office, UK, April 2004, OG5675B4A38; "Iraq Country Report October 2004", Country Information and Policy Unit Immigration and Nationality Directorate Home Office, UK, October 2004, UKH0R030; "Iraq: reports of violence and acts of revenge by the general population against the officials and their families of Saddam Hussein's regime following Hussein's fall", Immigration and Refugee Board of Canada, 15 January 2004, OG4A5676B6.

<sup>14</sup> See submission to the IAA dated 17 November 2015, page 3.

from the TPV application form.<sup>15</sup> There was no suggestion that all other matters in the TPV statement were inaccurate; and nor was this claimed in the IAA submission. Accordingly, I do not accept that this accounts for the identified discrepancies in the evidence.

24. I consider that the applicant's evidence on this father's disappearance and his own abduction is implausible in a number of respects. Firstly if, as contended later in the TPV interview, the applicant's father was not yet missing, it is implausible that his abductors would take the applicant rather than his father at that time. Secondly, if the applicant's father was taken by the Dawa party by 2005/2006, then it is not clear why they would continue to seek out the applicant after that time if their motivation was to locate his father.
25. Finally, country information contemporaneous with the timing of the applicant's claimed abduction indicates that in period following the fall of Saddam Hussein, there was little evidence of widespread deliberate targeting of the families of Ba'ath party members; and that families of officials or people associated with the former regime would not have been targeted in revenge for crimes committed during Saddam's regime.<sup>16</sup>
26. In response to the s.473DC invitation, the applicant's agent submitted that 'this country information may not be enough to provide a full picture of innocent civilians' and 'that it may only be an indicative summary'. Included in the submission were copies of documents with translations, purported to be: a letter of complaint to the police; a letter to the hospital; and a letter to the Judge. However, each of these documents contains statements which are inconsistent with the applicant's own evidence to the Department and to the IAA.
27. Firstly, both the 'letter of complaint to the police' and the 'letter to the Judge' state that the applicant reported he was abducted by unidentified persons from his place of work. This is in direct contrast to his evidence in the TPV interview and the TPV statement that he and another boy were taken when they were 'walking in their neighbourhood'. The applicant did not previously indicate he was taken from his work, and none of these documents mention the other boy who was alleged to have been taken at the same time.
28. Secondly, the 'letter of complaint to the police' stated that the applicant reported his 'father had been abducted some time ago' and the applicant 'did not find him up till now'. While this is consistent with the applicant's initial evidence that his father was missing at the time of his own abduction, it is directly inconsistent with his evidence in the TPV statement that he remained unaware of his father's whereabouts. It is also inconsistent with his evidence later in the TPV interview and repeated to the IAA<sup>17</sup> that: his father was 'still around' at the time of his own abduction and that his father disappeared after his own abduction. It is also inconsistent with evidence in the TPV interview that his mother later found out his father had been kidnapped and that they were asked to pay money for his release, but that did not know his location as of 2007.
29. Thirdly, the 'letter of complaint to police', the 'request to the hospital' and the 'letter to the Judge' are inconsistent with the applicant's previous evidence regarding the events following his release from his detention. Each of these documents suggests that following his release, he

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<sup>15</sup> Form 1023 dated and signed by the applicant [in] September 2015.

<sup>16</sup> "Iraq Country Report, April 2004", Country Information and Policy Unit Immigration and Nationality Directorate Home Office, UK, April 2004, OG5675B4A38; "Iraq Country Report October 2004", Country Information and Policy Unit Immigration and Nationality Directorate Home Office, UK, October 2004, UKH0R030; "Iraq: reports of violence and acts of revenge by the general population against the officials and their families of Saddam Hussein's regime following Hussein's fall", Immigration and Refugee Board of Canada, 15 January 2004, OG4A5676B6.

<sup>17</sup> Submission to IAA dated 17 November 2015.

was picked up by the police, taken to the police station where he lodged his report and then the police sent him to the hospital for treatment for his injuries. However, this is to be contrasted with his evidence in the TPV statement and TPV interview that he was picked up on the side of the road by locals and they, not the police, took him directly to the hospital where he remained for almost six months. He did not mention at any previous stage in his application that he was found by police, or even that his abduction and detention was reported to the police.

30. I note that the 'letter of complaint to police', the 'request to the hospital' and the 'letter to the Judge' are internally consistent with each other. I also note that the injuries said to have been sustained by the applicant in the 'letter of complaint to police' are broadly consistent with evidence that he provided in the TPV interview. However, this does not overcome the inconsistencies between the contents of these documents and the applicant's own evidence as set out above. Accordingly, having regard to these matters, I place no weight on the documentary evidence provided by the applicant to support this aspect of his claims. I have considered the agent's submission that the country information may only provide an indicative picture. However, as noted above, this information from the UK Home Office and the Immigration Board of Canada, was contemporaneous with the timing of the applicant's claimed abduction and clearly applies to treatment of family members of former members of the Ba'ath party. I place weight on this information and find that the available country information supports that the applicant was not abducted as claimed.
31. For these reasons, I do not accept that the applicant's father has disappeared or was taken by the Dawa party. Nor do I accept that the applicant and another boy were abducted, detained for [number] days and tortured by the Dawa party at any time in the past. It follows that I do not accept that the applicant and the other boy escaped but were re-captured or that they were subsequently beaten unconscious and thrown onto the road where they were found by locals and taken to the hospital. I do not accept that the Dawa party, other militia or the Government monitored the applicant after his return home or sent him a threatening letter. I accept that he and his family moved for a short time to [location], however, I do not accept this was the result of the applicant's abduction or because that the Dawa party or the Government were searching for the applicant or his father.

*Events subsequent to claimed abduction*

32. The applicant claimed that between 2005 and 2012 he travelled between family homes in Baghdad where he worked at various jobs, and in Al-Diwaniyah where he undertook studies at [an] Institute. The fact that the applicant was able to travel regularly, work, stay in his family homes, and attend a [school] and that he was not harmed in any way during this seven year period, suggests that he was of no interest to the Dawa party. The applicant contended in the submission to the IAA that he and his family were followed during this time. This is the first time he raised this claim and for this reason, I do not accept it. Further he submitted he was always in hiding, that he often ceased work or study and changed locations during this period to avoid harm. In his TPV application and the Form 1023, he listed addresses in Baghdad; Al-Diwaniyah; and [location] (for three months from 2006-2007). It was not contended previously, including in the TPV interview, that he avoided harm by hiding and staying with friends. For these reasons I do not accept this claim. Rather, I find that he was not harmed during this period because he was of no interest to the Dawa party or the Government.
33. The applicant contended that his home was raided by men from the Government who were searching for him and his father. As I have found that the applicant and his father were not of interest to the Dawa party or the Government and that the applicant was not kidnapped as

claimed, it follows I do not accept that the applicant's home was raided by men searching for him and his father, that his [child] was killed as a result of this raid, that his wife left him for this reason; or that his brother [Mr A] was taken and held for [number] days.

34. I accept that the applicant spent time in [another country] on a [temporary] visa but, for the reasons above, I do not accept that he fled there due to past harm from the Dawa party. Further, given I do not accept the applicant or his father were of past interest to the Dawa party, I do not accept that the applicant and his brother were threatened while out walking; and nor do I accept the Dawa party or the Government continue to search for the applicant or have records of him.
35. In the TPV statement the applicant claimed his brother fled to Kirkuk to avoid threats to his life. However, this is inconsistent with evidence given at the TPV interview where the applicant said his brother was in Kirkuk [studying]. In the IAA submission it was contended that at TPV interview the applicant did not know he had to provide all reasons for his brother's residence in Kirkuk and that his brother remains safe by hiding his identity. Given the importance of this claim to his application I do not accept the applicant would not have given evidence relating to the alleged threats to his brother's life at the TPV interview. I accept his brother is in Kirkuk but find he is there for reasons related to his studies rather than avoiding threats to his life.

### **Refugee assessment**

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36. Section 5H(1) of the *Migration Act 1958* (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**

37. 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
  - 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
38. To meet the definition in s.5H, the applicant must have a well-founded fear of persecution in all areas of Iraq. The applicant claims his family have homes in Al-Diawaniyah and Bagdad. As

he indicated that his mother and siblings current resident in Al-Diwaniyah and I consider he would return to this area and will assess his claims accordingly.

#### *Harm from Dawa Party and the Government*

39. I have rejected that the applicant or his father were harmed by the Dawa party in the past and found that he and his father were not of interest to either the Dawa party or the Government. Further, I have rejected that the Dawa party or the Government have records of the applicant and continue to search for him. I accept that the applicant's father was a low level member of the Ba'ath party.
40. Country information states that while anti- Ba'athist sentiment currently remains high in the South, overall former Ba'ath party members face a low risk of targeted violence. This is in recognition of the fact that millions of Iraqis were forced to join the party. At a societal level it is agreed that what applies to the Ba'ath party should not apply to the Ba'athists at an individual level. While senior members of the party face high levels of discrimination in applying for some jobs, lower profile members face low levels of official discrimination.<sup>18</sup> As noted above, family members were not targeted in the past in retaliation for the activities of party members, and there is no information that former Ba'ath party members or the family members of former Ba'ath party members are currently facing harassment or harm.<sup>19</sup> For these reasons, I do not accept that the applicant will be recognised and questioned based on his father's employment at [workplace] or role in the Ba'ath party. Accordingly, I find that the applicant does not have a real chance of persecution from the Government or the Dawa party on return to Iraq now or in the reasonably foreseeable future.

#### *Harm as a Shia*

41. I have accepted that the applicant is a Shia Muslim. The applicant has claimed he will face discrimination as a Shia and that he will be forced to hide his religion to avoid harm.
42. Country information states that as the majority community in Iraq, with a dominant role in Government, Shia Muslims face little or no official discrimination in Government controlled areas.<sup>20</sup> Reported instances of discrimination are more likely to be associated with patronage, such as not having the right contacts to access jobs and housing.<sup>21</sup> Al-Diwaniyah is the capital of Quadisiya Governorate and Shia is the majority religion in this area.<sup>22</sup> Authoritative country information supports that this region is currently under the control of the Iraqi Security Forces.<sup>23</sup> The applicant has a family home in Al-Diwaniyah where he will be able to reside on return. Evidence provided in his TPV application shows that he has been able to obtain employment in Iraq in past and that has been working in Australia. I consider he will be able to obtain employment on return to Iraq in Al-Diwaniyah in the future. For these reasons, I find that there is no real chance the applicant will face discrimination from the State on the basis of his religion now or in the reasonably foreseeable future.

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<sup>18</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160.

<sup>19</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160; "UNHCR Position on Returns to Iraq", UN High Commissioner for Refugees, 27 October 2014, UN4E592C09; "Human Rights Report 2014 Iraq", US Department of State, 25 June 2015, OG2B06FAF88.

<sup>20</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160.

<sup>21</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160.

<sup>22</sup> "Iraq car bomb attacks kill 17", *Associated Press (AP)*, 11 September 2014, CX1B9ECAB9903; DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 13 February 2015, CISEC96CF1160; "Security situation in Baghdad, southern governorates and the Kurdistan Region of Iraq (KRI)", UK Home Office, 1 April 2015, OG8F59D8D14.

<sup>23</sup> "Security situation in Baghdad, southern governorates and the Kurdistan Region of Iraq (KRI)", UK Home Office, 1 April 2015, OG8F59D8D14; "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160.

43. Country information supports that Shia Muslim communities are subject to targeted violence by Daesh and their associates.<sup>24</sup> The UNHCR has reported that Daesh and associated armed groups intentionally and systematically target religious and ethnic minority groups, including Shi'ites and are aimed at destroying, suppressing or cleansing these groups from areas under their control.<sup>25</sup> Daesh are known to target: community, political and religious leaders; Government employees; policemen and professionals; individuals who do not conform to their strict interpretation of Islam; those who oppose IS; and people who are or are believed to be collaborating with the Iraqi or Kurdish security forces.<sup>26</sup>
44. Daesh and their associated groups are in control of Mosul, parts of Anbar, Ninewa, Salah-al-Din, Diyala and parts of Kirkuk Governorates.<sup>27</sup> While Daesh have conducted mass casualty attacks in Shiite neighbourhoods of Baghdad,<sup>28</sup> the Iraqi Security forces retain control of Baghdad as well as Southern Iraq including Al-Qadisiyah and Basra.<sup>29</sup> There have been recent incidents of targeted violence by Sunni insurgent groups in southern governorates, including killings and kidnappings.<sup>30</sup> However, these groups are also targeting members of political parties, religious and tribal figures, Government employees and professionals.<sup>31</sup>
45. On this information, I accept that Daesh and their associates are targeting Shia Muslims in areas they control and in Shia neighbourhoods in Baghdad. However, Al-Diwanyah is currently under the control of the Iraqi Security forces. Moreover, the applicant does not fall within the profile of people who are being targeted by Sunni insurgent groups. Based on his accepted claims and profile, I find the applicant will not need to hide his identity and that there is no real chance of the applicant being specifically targeted for harm from Daesh, their associates or Sunni insurgent groups in Al-Diwanyah now or in the reasonably foreseeable future.
46. There is also generalised violence in Shia areas which is largely aimed at destabilising the Government and communities, rather than targeting specific individuals.<sup>32</sup> Violent crime has also increased in recent times, particularly in Baghdad.<sup>33</sup> As of October 2014, the UNHCR noted that the security situation in Iraq remains highly fluid and all parts of the country are affected directly or indirectly by the crisis, for this reason, States are urged not to return persons to Iraq until tangible improvements to security are achieved.<sup>34</sup> There have been reports of car bomb attacks as part of sectarian violence in Al-Diwanyah in April 2013 and September 2014.<sup>35</sup> However, country information supports that the attack levels in Al-Qadisiyah remains low in

<sup>24</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160;

<sup>25</sup> "UNHCR Position on Returns to Iraq", UN High Commissioner for Refugees, 27 October 2014, UN4E592C09.

<sup>26</sup> "UNHCR Position on Returns to Iraq", UN High Commissioner for Refugees, 27 October 2014, UN4E592C09.

<sup>27</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160.

<sup>28</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160; UNHCR Position on Returns to Iraq", UN High Commissioner for Refugees, 27 October 2014, UN4E592C09.

<sup>29</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160; Security situation in Baghdad, southern governorates and the Kurdistan Region of Iraq (KRI)", UK Home Office, 1 April 2015, OG8F59D8D14.

<sup>30</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160; "UNHCR Position on Returns to Iraq", UN High Commissioner for Refugees, 27 October 2014, UN4E592C09; "Security situation in Baghdad, southern governorates and the Kurdistan Region of Iraq (KRI)", UK Home Office, 1 April 2015, OG8F59D8D14; "Five car bombs take 26 lives across Iraq", Associated Press (AP), 30 April 2013, CX306771; "Iraq car bomb attacks kill 17", Associated Press (AP), 11 September 2014, CX1B9ECAB9903.

<sup>31</sup> "UNHCR Position on Returns to Iraq", UN High Commissioner for Refugees, 27 October 2014, UN4E592C09; Security situation in Baghdad, southern governorates and the Kurdistan Region of Iraq (KRI)", UK Home Office, 1 April 2015, OG8F59D8D14.

<sup>32</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160.

<sup>33</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160.

<sup>34</sup> UNHCR Position on Returns to Iraq", UN High Commissioner for Refugees, 27 October 2014, UN4E592C09.

<sup>35</sup> "Iraq car bomb attacks kill 17", Associated Press (AP), 11 September 2014, CX1B9ECAB9903; "Five car bombs take 26 lives across Iraq", Associated Press (AP), 30 April 2013, CX306771.

comparison to central, western and northern Iraq<sup>36</sup> and that this area has been relatively peaceful.<sup>37</sup> In 2012, there were 52 reported deaths in Al-Qadisiyah among a population of 1,134,313,<sup>38</sup> and in 2014 the number of security incidents in Al-Qadisiyah totalled 24.<sup>39</sup> DFAT assesses that Shias in Shia dominated areas in Southern Iraq are at a low risk of generalised violence.<sup>40</sup> Accordingly, I find that there is only a remote chance of the applicant being caught up in generalised violence in Al-Diwaniyah. Based on this information, I do not accept that he will be forced to hide his religion on return, or be forced to participate in sectarian violence irrelevant to and against his will and beliefs. I find that he does not face a real chance of harm for these reasons in Al-Diwaniyah now or in the reasonably foreseeable future.

*Returnee/ refugee from Western Country/failed asylum seeker*

47. The applicant has claimed to fear harm as a returnee/refugee from a Western Country. Country information states that many Iraqis who had sought asylum overseas, have returned to Southern Iraq and been able to obtain employment in the Government and public sector at senior and middle level jobs.<sup>41</sup> There are reports of approximately 100 failed asylum seekers having returned from Australia to Southern Iraq, with no evidence they have experienced any problems.<sup>42</sup> The Iraqi Government provides financial incentives for asylum seekers to return and returnees are said to have good prospects. Further, there is evidence of a number people voluntarily returning to Iraq from the US, Europe and Australia with no suggestion that they face problems or are unable to assimilate back into their communities.<sup>43</sup> Rather, the practice of seeking asylum then returning home appears accepted among Iraqis.<sup>44</sup> Based on this information, I find that the applicant does not face a real chance of being persecuted for any reason, including an imputed political opinion, as failed asylum seeker/refugee from a Western Country or as a returnee from a Western country.
48. Finally, I have considered the applicant's circumstances cumulatively, including whether he faces harm on return to Al-Diwaniyah as a Shia Muslim with familial ties to a former member of the Ba'ath party and who is a failed asylum seeker/refugee from a Western country. Having regard to my findings above on the applicants profile and the relevant country information, I do not accept that he will face a real chance of persecution now or in the reasonably foreseeable future based on his cumulative circumstances.
49. The applicant has claimed that being separated from his Australian wife and child will cause him distress. I accept this is the case and I am sympathetic to this issue. However, this distress is not for one of the five grounds in s.5J(1) of the Act; and I do not consider it rises to the level of serious harm, having regard to the non-exhaustive list set out in s.5J(5) of the Act.

*Access to Al-Diwaniyah*

50. Given country information supporting that Iraqi Security forces retain control over Basra, and that this region also remains comparatively secure, with low levels of security incidences and

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<sup>36</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160.

<sup>37</sup> "Five car bombs take 26 lives across Iraq", Associated Press (AP), 30 April 2013, CX306771.

<sup>38</sup> "Violence in Iraq in Mid 2013: The Growing Risk of Serious Civil Conflict", Anthony H. Cordesman and Sam Khazai, Center for Strategic and International Studies, 01 August 2013, CIS26529.

<sup>39</sup> "Security situation in Baghdad, southern governorates and the Kurdistan Region of Iraq (KRI)", UK Home Office, 1 April 2015, OG8F59D8D14.

<sup>40</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160.

<sup>41</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160.

<sup>42</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160.

<sup>43</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160.

<sup>44</sup> "DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160.

deaths<sup>45</sup> I find that the applicant could safely access Al-Diwaniyah via Basra international airport on return to Iraq.

51. Having found the applicant does not have a real chance of persecution in Al-Diwaniyah for any reason now or in the reasonably foreseeable future, I do not need to consider his circumstances for Baghdad. He does not have a well-founded fear of persecution in Iraq under s.5J(1) of the Act.

#### **Refugee: conclusion**

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

#### **Complementary protection assessment**

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53. 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**

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

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

55. I have found above that the applicant does not face a real chance of persecution from the Dawa party or the Government based on his father's past association with the Ba'ath party. Having accepted the applicant will be able to find accommodation and housing, I have found there is no real chance the applicant will face discrimination as a Shia in Al-Diwaniyah. Further, I have also found: there is no real chance of harm from Daesh and associated groups or from Sunni insurgent groups in that area; that there is no real chance the applicant will be harmed in generalised violence in Al-Diwaniyah; and that there is no real chance he will be forced to hide his identity or religion or participate in sectarian violence/irrelevant activities against his will and against his beliefs. In *MIAC v SZQRB* (2013) 210 FCR 505, the Full Federal Court held that the 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear'. Accordingly, for the same reasons set out above, I find that the applicant does not have a real risk of suffering harm on return to Iraq.

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<sup>45</sup> "Security situation in Baghdad, southern governorates and the Kurdistan Region of Iraq (KRI)", UK Home Office, 1 April 2015, OG8F59D8D14; DFAT Country Information Report Iraq", Department of Foreign Affairs and Trade, 15 February 2015, CISEC96CF1160.

56. As noted above, the applicant has claimed that he will be distressed on being separated from his Australian wife and child. However, this does not fall within the exhaustive definition of significant harm in s.36(2A) of the Act, in that it does not amount to being arbitrarily deprived of life; facing the death penalty; torture; cruel or inhuman treatment or punishment; or degrading treatment or punishment.

**Complementary protection: conclusion**

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

**Decision**

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

## Applicable law

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### **Migration Act 1958**

#### **5 (1) Interpretation**

...

**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.

...

**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.

...

**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.

...

#### **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 them 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 under the Refugees Convention as amended by the Refugees Protocol 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.