



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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IRAQ

IAA reference: IAA16/00683

Date and time of decision: 5 October 2016 19:57:00

Grace Ma, Reviewer

**Decision**

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The IAA remits the decision for reconsideration with the direction that:

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm

*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. [In] June 2016, the referred applicant (the applicant) lodged an application for a Safe Haven Enterprise Visa (SHEV), claiming to fear harm on account of the applicant's Faili Kurdish ethnicity, his conversion to Christianity and disclosure of his details on the Department of Immigration and Border Protection's (the Department's) website.
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] August 2016. The delegate found that the applicant's claimed conversion to Christianity was his recent invention. The delegate accepted that the applicant's brother disappeared but rejected that the Jaysh Al Mahdi (JAM) was responsible for it. The delegate concluded that the applicant faced no real chance of harm as a Shia Muslim Faili Kurd in Iraq, and did not accept that the applicant would be harmed for reasons of his asylum application or the disclosure of his details on the Department's website.

### Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. I have obtained new information relating to the operation of Sunni militant groups and Daesh in Baghdad and the issue of reasonableness of relocation.<sup>1</sup> While this information pre-dates the delegate's decision, it was not considered by the delegate. Also, I note that as the delegate did not accept that the applicant faced a real chance of harm in Baghdad, the delegate was not required to consider whether it would be reasonable for the applicant to relocate to an area where there would not be a real risk of significant harm for the purposes of s.36(2B)(a). However, for reasons below, I have formed a different view on the issue of whether the applicant will face a real chance of harm in Baghdad, and therefore, I have proceeded to consider whether relocation is reasonable in the applicant's circumstances. Given that this information is highly material to whether the applicant will face harm in Baghdad upon return, and is directly relevant to the assessment of whether Australia has protection obligations under s.36(2)(aa), I am satisfied that there are exceptional circumstances to justify considering this new information.

### Applicant's claims for protection

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5. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
  - The applicant's family were Shia Faili Kurds in Iraq. They left Iraq in 1980 because the Saddam Hussein government targeted Faili Kurds, and they were forced into Iran.

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<sup>1</sup> UNHCR, "UNHCR Position on Returns to Iraq", 27 October 2014, UN4E592C09; UK Home Office, "Country Information and Guidance Iraq: Security situation in Baghdad, the south and the Kurdistan Region of Iraq (KRI)", 12 August 2016, OGD7C848D67; UK Home Office, "Country Information and Guidance Iraq: Return/Internal relocation", 18 August 2016, OGD7C848D68; UK Home Office, "Country Information and Guidance Iraq: Humanitarian situation", 17 August 2016, OGD7C848D66.

- At the end of 2004, his family returned to Iraq. His father had owned land and a [business] in Iraq, but when they returned, these were owned and being used by other people.
- In 2005, one of his brothers disappeared when he left home to obtain a document from a government office in Baghdad, and he never returned. Since then, his mother has received telephone threats from unidentified persons who told her that they were Iranians who did not belong in Iraq, and that her other [children] would be kidnapped as well. The applicant's family moved to Najaf to avoid harm, and left Iraq for Iran in late 2005 as his mother continued to receive phone threats in Najaf.
- The applicant claims to fear harm upon return on the bases of his Faili Kurd ethnicity, his recent conversion to Christianity, imputed Shia religion, and imputed Iranian nationality and Persian ethnicity. He also claims that to have been affected by the Department's inadvertent publication of information on the internet in January 2014 (the data breach).

### **Refugee assessment**

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6. 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**

7. 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.

### **Applicant's background**

8. The applicant claims that he was born in Iraq and that he is an Iraqi citizen. He claims that in 1980, he and his family escaped from Iraq to Iran because Saddam Hussein targeted Faili Kurds. They were issued green and white cards in Iran. In late 2004, they returned to Iraq and returned these cards to the Iranian Government. In late 2005, they left Iraq again.

9. At the entry interview, the applicant stated that the reason he left Iran for Australia was because he was stateless and did not know where he belonged. In the SHEV application form, he stated that he is an Iraqi citizen, not a citizen or national of any other country, and does not have the right to enter or reside in any country other than Iraq. The applicant also claims that the people smuggler arranged a false Iranian passport for him to travel from Iran to [another country], but he does not have Iranian citizenship or documentation. The applicant has provided a copy of his Iraqi citizenship certificate to the delegate. The document was issued in 2005 and stated that the applicant was born in Baghdad, he was a Muslim, and his parents were born in Najaf.
10. Faili Kurds originated from Iran and are largely Shia Muslims.<sup>2</sup> Their ancestors moved from Iran to Iraq and they were living in Baghdad, Diyala, Wassit, Missan and Basrah in Iraq.<sup>3</sup>
11. On the basis of the evidence before me, I find that the applicant is a national of Iraq, and not stateless. I accept that he is not a national of Iran, and had returned his green and white cards to the Iranian Government. I also accept that he was born in Baghdad, Iraq; into a Shia Muslim family; and does not have a right to enter and reside in Iran or any other country.

### **Faili Kurd ethnicity**

12. DFAT advises that there are approximately one to two million Faili Kurds in Iraq.<sup>4</sup> Unlike the majority of other Kurds who are generally Sunni, Faili Kurds are generally Shia.<sup>5</sup>
13. The applicant has consistently claimed that he is a Faili Kurd throughout the visa application process, including at his entry interview and the SHEV application. Based on the evidence before me, I accept that the applicant is a Faili Kurd.
14. In the 1960s to 1980s, the Iraqi Ba'ath regime expelled those it viewed as Iranian, disloyal to Iraq and opposed to the Government.<sup>6</sup> These included Faili Kurds. Tens or hundreds of thousands of Faili Kurds were stripped of their Iraqi nationality, had their property, assets and documents confiscated, and were expelled from Iraq, mostly to Iran.<sup>7</sup> Refugees in Iran have been issued with registration documents including the blue, green and white refugee registration cards. Faili Kurds who arrived in Iran prior to 1979 were mainly issued with white cards, and the majority of those who arrived in the 1980s received green cards.<sup>8</sup> Since 2003, Faili Kurds have been returning from Iran to Iraq, and have since been able to reclaim their Iraqi citizenship.<sup>9</sup> According to Iraqi authorities, 97 per cent of 'denaturalised' Faili Kurds have had their Iraqi nationality restored.<sup>10</sup> This country information supports the applicant's claims regarding the history of his family's movements between Iraq and Iran, and that he obtained his Iraqi citizenship certificate which was issued in 2005.
15. On the information, I accept that the applicant's family fled Iraq for Iran around late 1970s or 1980 as they were Faili Kurds who were targeted by the former Iraqi Government. I accept that his family were not Iranians but had lived in Iran, and that they were issued green cards and

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<sup>2</sup> "Feyli Kurds – obtaining identity travel documents", DIBP Tehran, 17 September 2015, CISEC96CF13392.

<sup>3</sup> "Feyli Kurds – obtaining identity travel documents", DIBP Tehran, 17 September 2015, CISEC96CF13392.

<sup>4</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.8.

<sup>5</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.8.

<sup>6</sup> "Feyli Kurds – obtaining identity travel documents", DIBP Tehran, 17 September 2015, CISEC96CF13392.

<sup>7</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.8;

"Feyli Kurds – obtaining identity travel documents", DIBP Tehran, 17 September 2015, CISEC96CF13392.

<sup>8</sup> "Feyli Kurds – obtaining identity travel documents", DIBP Tehran, 17 September 2015, CISEC96CF13392.

<sup>9</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.9.

<sup>10</sup> "Feyli Kurds – obtaining identity travel documents", DIBP Tehran, 17 September 2015, CISEC96CF13392.

white cards in Iran. I accept that, his family returned to Iraq at the end of 2004 due to difficulties in finding employment in Iran. I am also prepared to accept that the applicant's family owned land and a [business] in Iraq.

16. However, the situation for Faili Kurds in Iraq has changed under the current government. DFAT advises that Faili Kurds are not subject to discrimination under the current government, and that the Iraqi government is now providing financial compensation to many Faili Kurds.<sup>11</sup> They have access to employment and a range of Faili Kurds are represented in senior positions in the government.<sup>12</sup> There is little to no discrimination in access to education or health services. Recovering properties that had been confiscated or occupied previously is sometimes administratively complex but there are legal processes in place for those properties to be recovered.<sup>13</sup> DFAT also advises that there appears to be low level of society discrimination against Faili Kurds in Iraq, and that many Failis who had previously changed their tribal names to avoid discrimination have changed their tribal names back to the original Faili Kurdish names.<sup>14</sup>
17. Based on the information above, I find that the applicant will not face a real chance of harm on the basis of being a Faili Kurd in Iraq now or in the reasonably foreseeable future.

#### **Brother's disappearance and threats**

18. The applicant claims that in 2005, his brother left home to obtain his citizenship certificate at a government office in Baghdad and never returned, and they do not know whether or not his brother is alive. He claims that they went to the police for help but they were unable to assist.
19. The applicant claims that about two to three days after his brother's disappearance, his mother received a threatening call from a person who told his mother that they were Iranians who did not belong in Iraq, they took her son, and that her [other children] would be kidnapped as well. He claims that they did not know who called his mother, but they believed it was the Jayah al-Mahdi (JAM) or a similar militia group, which targeted Iranian. He claims that his mother continued to receive threatening phone calls over the next few days, and therefore, they left Baghdad for Najaf to live with their [relative]. The applicant also claims that his mother received threatening calls when they were in Najaf, and therefore, they left Iraq and returned to Iran in late 2005.
20. At the SHEV interview, the applicant stated that they believe JAM or Al-Qaeda or other groups have abducted his brother, and they guessed it could be JAM because they took over his father's land and [business]. When the applicant was asked whether anyone demanded a ransom from his family given that one of JAM's practices is to demand a ransom, the applicant responded that JAM are Shia Muslims and their leader is Muqtada al-Sadr, they kidnap people for religious matters and not for ransom, and that they were racist against those who do not follow their leader. The applicant did not suggest that anyone demanded a ransom from his family. The applicant has also stated that he did not think it would have been a Sunni group who targeted his brother.
21. While there are reports of Faili Kurds being targeted in Iraq due to their adherence to the Shia Muslim religion,<sup>15</sup> country information before me does not suggest that JAM or other militia

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<sup>11</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.10.

<sup>12</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.10.

<sup>13</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.10.

<sup>14</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.11.

<sup>15</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.45.

groups specifically target Faili Kurds on the basis of their ethnicity, or those that are perceived as Iranians or Persians. According to country information, JAM is a Shia militia group that have been acting under the auspices of supporting Iraqi Security Forces against Daesh in Shia dominant areas in Iraq, including Baghdad and Basra.<sup>16</sup> JAM was founded and led by Islam cleric Muqtada al-Sadr, and they fight to defend the Shia Muslim faith and their country in defiance of the US-led coalition's arms controls, and they protect Shia parts of Iraq.<sup>17</sup> During 2006 to 2008, JAM has conducted attacks on Sunni civilians and Sunni militia groups.<sup>18</sup>

22. Country information indicates that during the period in which the applicant's brother disappeared, areas of gathering such as mosques and markets were targeted.<sup>19</sup> No religious and ethnic groups, including women and children, have been spared from the widespread cycle of violence.<sup>20</sup> It is reported that almost 80% of civilian deaths occurred in 12 cities, and Baghdad accounted for almost half of the civilian deaths during that period.<sup>21</sup>
23. Although no documentary evidence, such as a complaint or a police report for missing person, has been provided to substantiate the claimed disappearance of the applicant's brother, I am prepared to accept that his brother disappeared in 2005 in Baghdad.
24. Based on the available information, I consider it speculative to make a finding as to the reasons for his brother's disappearance, or that if he was abducted, who was responsible and the reasons for it. In light of the information above, I consider it possible that his brother was caught up in the security situation and violence in Baghdad at the time. It is also possible that he disappeared for some other reasons. In any event, I am not satisfied on the evidence that his brother was targeted by JAM, Shia militias or anyone.
25. I have considered the applicant's claims that his mother received threatening calls after his brother's disappearance, and that she continued to receive threatening calls after they moved to Najaf. He claims that the callers threatened his mother that they would come and kidnap her [other children] because they were considered Iranian, and that they knew exactly where they lived and who they lived with. At the SHEV interview, the applicant stated that after his brother's disappearance, his family continued to live in Baghdad for about a month before they moved to Najaf, and that they lived in Najaf for one month before they returned to Iran.
26. I accept that the applicant's family may not have left Baghdad immediately after his brother's disappearance as they were searching for his brother. However, in my view, if the applicant's mother has received constant phone threats as claimed, it is doubtful that they would stay in Baghdad for a few weeks before escaping from Baghdad. Moreover, given the nature and frequency of the claimed threats, I do not consider it plausible that the applicant's family would have remained in Najaf for one month if his mother had in fact received threatening calls where she was told that they knew exactly where they lived in Najaf.
27. For these reasons, I do not accept that the applicant's mother or his family received any threats in Baghdad or Najaf; or that they were targeted or of adverse interest to JAM, militia groups or anyone in Iraq. It follows that I do not accept that they returned to Iran in 2005 for the reasons claimed.

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<sup>16</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 2.36 – 2.38.

<sup>17</sup> Patrick Jackson, "Who are Iraq's Mehdi Army?", BBC News, 30 May 2007, CX320101.

<sup>18</sup> Patrick Jackson, "Who are Iraq's Mehdi Army?", BBC News, 30 May 2007, CX320101; "Rethinking Sadr: From Firebrand to Iraqi Statesman?", Carnegie Endowment for International Peace, 20 November 2014, CX1B9ECAB7538.

<sup>19</sup> UK Home Office, "Country of Origin Information Report", 30 April 2007, Iraq-110507, 8.19.

<sup>20</sup> UK Home Office, "Country of Origin Information Report", 30 April 2007, Iraq-110507, 8.19.

<sup>21</sup> UK Home Office, "Country of Origin Information Report", 30 April 2007, Iraq-110507, 8.20.

28. I accept the applicant's claim that his father's land and [business] were taken by other people when they returned to Iraq in late 2004. This claim is consistent with country information above which indicates that Iraqi Faily Kurds had their property and assets confiscated when they were expelled from Iraq in the 1980s. However, there is no independent evidence to support the applicant's claim that his father's land and [business] were taken or occupied by JAM or JAM affiliated tribes. I am not satisfied on the evidence that JAM or its affiliated tribes had taken or occupied his father's land and [business]. I note that the applicant has not claimed, and there is no credible evidence to suggest, that the applicant or his family wish to reclaim the land and [business], or that they will face a real chance of harm as a result of recovering their properties now or in the reasonably foreseeable future.
29. For reasons given above, I find that the applicant and his family face no real chance of harm on the bases of his brother's disappearance, or his father's land and [business] being taken over, or that they are perceived as Iranian or Persian now or in the reasonably foreseeable future.

### **Data breach**

30. I accept on the evidence before me that the applicant was affected by the Department's inadvertent disclosure of personal information on the internet in January 2014. As the delegate noted, the applicant was one of approximately ten thousand people who had been affected by the data breach, where their information had been briefly available on the internet.
31. The applicant claims that this information clearly identifies him as an asylum seeker who has engaged with the Australian Government seeking protection from Iraq, and this increased the risk of harm that the applicant faces if he were returned to Iraq. His representative submitted that the potential data access and distribution is widespread because this information was publicly available and the data has the capacity to be shared multiple times after download in way that cannot be tracked or recorded. It was submitted that the groups which the applicant fears could have access to his personal data to his detriment.
32. I have not accepted that the applicant was or is targeted, or of adverse interest to any militant groups or anyone in Iraq. I have also not accepted that his family was threatened, or that he will face a real chance of harm upon return for reasons relating to his brother's disappearance or his father's [business] and land being taken over. While I accept the submission that the potential data access and distribution may be widespread, I am not satisfied on the basis of the applicant's accepted profile and the evidence before me, that the data breach would give rise to a real chance of harm to the applicant, or that it would increase any risk of harm to the applicant, now or in the reasonably foreseeable future.

### **Conversion to Christianity**

33. The applicant claims that he has converted from Shia Muslim to Christianity [in detention].
34. I have accepted above that the applicant came from a Shia family. When the applicant was asked at the SHEV interview as to whether he has any religious beliefs before his claimed conversion to Christianity, he responded that he did not have religious beliefs but he did praying, fasting and practiced Shia religion to 'keep his mother happy' when he was around her because his mother was religious. He claims that he only believe in God prior to his conversion.
35. At the SHEV interview, the applicant stated that he lived with another Christian convert in the same tent [in detention], and they talked about Christianity, Jesus and the Bible, which made a change in him. He stated that the prayer and Christianity gave him calmness and peace of

mind. He has a Persian copy of the bible and he attended gatherings on Sunday mornings. He claims that after about two months of religious classes and studies, their religious group asked to be baptised but was rejected. He claims that their group prayed, and it took a while until they were baptised by a lady who belonged to the [denomination church]. The applicant claims that he felt the presence of God in his heart and it was a miracle for their group to be baptised because the lady who baptised them were not favourable for their group, sometimes she was very rough to them and had rejected their previous requests for baptism, but she had a change of heart, and the applicant felt the miracle of their prayers. He also claimed at the SHEV interview that he was baptised and has a baptism certificate from [the detention centre].

36. The applicant has indicated in the SHEV application form that his religion is Christian. However, as observed by the delegate, he did not mention a claim to fear harm for reasons relating to Christianity in the written statement of claims submitted with the SHEV application. I note that the applicant was represented by a migration agent in his SHEV application. The applicant stated at the SHEV interview that the reason he did not mention Christianity in his SHEV application was because it was something coming from his heart, it was something for himself and not for his case.
37. I am prepared to accept that the applicant has attended talks or activities relating to Christianity in [the detention centre]. However, the applicant was not religious when he was in Iran or Iraq, and yet, he was willing to practise Islam to please his mother. This indicates that the applicant was conscious of his mother's attitudes towards his religious beliefs and his family's Shia religion. This also demonstrates that he would behave in a way that respects his mother and her religion despite his personal views or beliefs. Having regard to the applicant's Shia Muslim family background, the timing of his claimed conversion and his evidence, I consider it doubtful that he would become a genuine Christian convert after he arrived [in the detention centre], simply because a friend who lived in the same tent taught him Christianity and that he talked about Christianity with others.
38. I have also considered the applicant claims to have felt miracle in his prayers and presence of God, which was when his group's request for baptism was accepted and at a time when he felt tired and exhausted. However, I do not consider the nature of these events were such that they would cause the applicant to change from having no religious beliefs to being a genuine Christian convert, notwithstanding his consciousness of his family's Shia Muslim faith and his mother's attitudes towards his religious views and practices.
39. Moreover, I share the delegate's concerns that the applicant did not provide a copy of his baptism certificate to the Department despite claiming at the SHEV interview that he was baptised [in the detention centre] and has a baptism certificate.
40. Having regard to the totality of the evidence, I do not accept that the applicant has genuinely converted to Christianity, or that he was baptised. I do not consider that the omission of the Christianity related claims in the applicant's written statement manifests a sincere expression of his religious conviction or it was because he considered his Christianity to be something from his heart and not for his case. I am not satisfied that he has a genuine interest or commitment to Christianity. I find that the applicant would not practise Christianity upon return to Iraq because he lacks commitment and not due to fear of harm. While I have accepted that the applicant has discussed Christianity and attended some activities in relation to Christianity in [the detention centre], there is no credible evidence that anyone in Iraq is aware of this, or that the applicant will inform others of this upon return. On the evidence before me, I do not accept that the applicant will be perceived as a Christian or a Christian convert upon return.

41. As such, I find that the applicant faces no real chance of harm for reasons relating to his claimed conversion to Christianity or Christian faith now or in the reasonably foreseeable future.

#### **Harm as a Shia**

42. As mentioned above, unlike the majority of other Kurds who are generally Sunni, Fails Kurds in Iraq are generally Shia.<sup>22</sup> I have accepted above that the applicant was born into a Shia family and that he has practised the Shia religion at home.

43. DFAT advises that Shia communities in Iraq are subject to both general and targeted violence by Sunni-linked insurgent groups and extremists, where the violence is largely aimed at destabilising the government and communities, rather than being targeted at individuals, but Shia who are members of government security services, senior political or government leadership, detainees or ethnic minorities also appear to have been specifically targeted by Daesh.<sup>23</sup> While the Iraqi government forces currently retained control over Baghdad and southern Iraq, DFAT advises that violence against Shia is more prevalent in Baghdad than the rest of Iraq, where public places including Shia areas where people congregate such as parks, cafes and markets are targeted.<sup>24</sup>

44. Country information indicates that Baghdad is the worst affected governorate in terms of casualty figures, and Baghdad remains the centre of frequent mass casualty attacks where attacks are often launched against Shias and there has been an upsurge in sectarian violence.<sup>25</sup> Daesh and associated armed groups have committed gross human rights abuses with an apparent and systematic and widespread character, including attacks directly targeting civilians, infrastructure, executions and other targeted killings of civilians, abductions and other forms of physical violence.<sup>26</sup> These armed groups intentionally and systematically target religious minority groups including Shias, and are aimed at destroying, suppressing or cleansing them from areas under their control.<sup>27</sup>

45. Recent country information states that despite being constrained by logistical limitations and a lack of freedom of movement in Baghdad, Daesh retains the capability to maintain its operational tempo in the capital.<sup>28</sup> At present, they are targeting the majority Shia community in Baghdad, and targets of high intensity attacks tend to be Shia gathering areas, including cafes, restaurants, markets and mosques.<sup>29</sup>

46. Overall, DFAT assesses that Shias in Baghdad province face a moderate risk of generalised violence.<sup>30</sup> While this has been described as 'generalised' violence, information in the DFAT report referred to above makes clear that Shias are being specifically targeted by Sunni militias in these attacks.

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<sup>22</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.8.

<sup>23</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.45.

<sup>24</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 2.28, 2.30, 3.44.

<sup>25</sup> UNHCR, "UNHCR Position on Returns to Iraq", 27 October 2014, UN4E592C09, p.4 - 6.

<sup>26</sup> UNHCR, "UNHCR Position on Returns to Iraq", 27 October 2014, UN4E592C09, p.2.

<sup>27</sup> UNHCR, "UNHCR Position on Returns to Iraq", 27 October 2014, UN4E592C09, p.3.

<sup>28</sup> UK Home Office, "Country Information and Guidance Iraq: Security situation in Baghdad, the south and the Kurdistan Region of Iraq (KRI)", 12 August 2016, OGD7C848D67, p.29.

<sup>29</sup> UK Home Office, "Country Information and Guidance Iraq: Security situation in Baghdad, the south and the Kurdistan Region of Iraq (KRI)", 12 August 2016, OGD7C848D67, p.29 – 30.

<sup>30</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.47.

47. I have found above that the applicant is not a genuine Christian convert and he will not practice Christianity upon return. I have also found that he would behave in a way that respects his mother and her religion. As such, I am of the view that the applicant will practice Shia religion upon return. Given the applicant's Shia religion practices, his Shia family background and that the majority of Faili Kurd in Iraq are Shias, I find that the applicant will be imputed as a Shia Muslim if he were to return to Iraq despite his personal beliefs.
48. Based on the information before me, I am satisfied that the applicant will face a real chance of being killed, injured or otherwise seriously harmed by Daesh or other Sunni militant groups on the basis of being imputed as a Shia Muslim, if he were to return to Baghdad now or in the reasonably foreseeable future.
49. However, pursuant to s.5J of the Act, the real chance of persecution must relate to all areas of the receiving country.
50. Country information indicates that Daesh and associated Sunni armed groups are currently in control of the northern, western and central parts of Iraq.<sup>31</sup> However, the southern areas remain under government control.<sup>32</sup> The southern areas have remained significantly more secure than central Iraq.<sup>33</sup> As the majority community in Iraq, with a dominant role in government, Shi'ites face little or no official discrimination by the Government in areas that are under government control.<sup>34</sup>
51. Although the southern governorates are not currently controlled by Daesh, there are reports which indicate that southern Iraq also continue to see security incidents, such as killings or kidnappings and attacks against members of political parties, religious and tribal figures, government employees, and professionals.<sup>35</sup> The applicant does not fall within the profile of those targeted by Sunni-extremists groups in the southern areas. Based on his accepted claims and profiles, I am not satisfied that the applicant faces a real chance of harm from Daesh, their associates or other Sunni extremists or militant groups in southern Iraq now or in the reasonably foreseeable future.
52. Overall, DFAT assesses that Shias in Shia dominated areas in the south are at a low risk of general violence.<sup>36</sup> I give weight to the DFAT report and find there is only a remote chance that the applicant will be caught up in generalised violence in the southern parts of Iraq. I am not satisfied that the applicant will face a real chance of harm in the southern areas on this basis.
53. I have also taken into account the applicant's cumulative circumstances as a Shia Faili Kurd who has spent time in Australia, a failed asylum seeker, and affected by data breach. I am not satisfied on the evidence before me that the applicant has a well-founded fear of persecution in relation to all areas of Iraq now or in the reasonably foreseeable future for the purposes of s.5J of the Act.
54. I find that the real chance of persecution does not relate to all areas of Iraq.

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<sup>31</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 2.27.

<sup>32</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 2.28.

<sup>33</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.46, 3.47, 5.21.

<sup>34</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.44.

<sup>35</sup> UNHCR, "UNHCR Position on Returns to Iraq", 27 October 2014, UN4E592C09, p.6.

<sup>36</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.47.

## Refugee: conclusion

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

## Complementary protection assessment

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56. 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

57. 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.

58. I have accepted that the applicant faces a real chance of being killed, injured or otherwise harmed by Sunni militant groups if he were to return to Baghdad for reasons of imputed Shia Muslim religion. Given that the standard for 'real chance' and 'real risk' is the same,<sup>37</sup> I accept for the same reasons that the applicant will face a real risk of harm. I find that the harm will constitute significant harm and will take the form of arbitrary deprivation of life or cruel or inhuman treatment or punishment.

59. In addition, I have found below that it would not be reasonable for the applicant to relocate to an area of Iraq where there would not be a real risk that he will suffer significant harm.

## Qualifications to the real risk threshold

60. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:

- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm
- the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or
- the real risk is one faced by the population of the country generally and is not faced by the person personally.

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<sup>37</sup> *MIAC v SZQRB* (2013) 210 FCR 505.

### *Protection from an authority*

61. Section 36(2B)(b) requires that the level of protection that the person could obtain from an authority is such that there would not be a real risk that the person will suffer significant harm. Country information indicates that the capacity of Iraq's security forces to provide protection has been severely tested by violence across Iraq, and that security forces have little willingness and limited capacity to protect the community.<sup>38</sup> The capacity of Iraqi police force is limited in most provinces and they are unable to prevent violent attacks.<sup>39</sup> DFAT indicates that there are high levels of corruption and human rights abuses within the police force, and credible multiple reports of corruption and lack of resources in the judiciary.<sup>40</sup>
62. Based on this information, I am not satisfied for the purposes of s.36(2B)(b) that the applicant could obtain protection from an authority of the country such that there would not be a real risk that he will suffer significant harm.

### *Risk faced by the population generally and not the applicant personally*

63. The risk of harm to the applicant would be from Daesh and their associated Sunni militia groups in certain parts of Iraq. The country information set out above states that these Sunni militant groups specifically target Shia Muslims in areas under their control as well as in Baghdad; and that they intentionally and systematically target Shias. As such, I consider that the violence perpetrated by the Sunni militias in Baghdad and the northern, western and central parts of Iraq, is targeted against Shia members of the community, rather than attacks on the Iraqi population generally. On the information before me, I find that the risk to the applicant from Daesh and their Sunni militant affiliates arises out of the applicant's imputed Shia religion, which distinguishes him from the rest of the general populace.<sup>41</sup> I find that the real risk of harm to the applicant in Baghdad and northern, western and central Iraq, is one faced by the applicant personally due to his perceived Shia Muslim religion, and not by the population generally. As such, s.36(2B)(c) does not apply.

### *Relocation*

64. As mentioned above, Daesh and associated Sunni extremist groups are currently in control of the north, west and central Iraq. As such, I find that the real risk of significant harm extends to these areas in Iraq.
65. Daesh and their associated Sunni militant groups are not currently in control of Iraqi Kurdistan, and DFAT indicates that the Iraqi Kurdistan area has a relatively stable political and security environment.<sup>42</sup> As such, I find that the real risk of significant harm do not extend to Iraqi Kurdistan.
66. I have considered whether it would be reasonable for the applicant to relocate to Iraqi Kurdistan. DFAT advises that while Kurdistan Regional Government may provide protection in individual cases, authorities implement stringent controls on the presence of persons not originating from Iraqi Kurdistan, with no official and publicly accessible regulations regarding

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<sup>38</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 5.1.

<sup>39</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 5.7.

<sup>40</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 5.9 – 5.10.

<sup>41</sup> *SZSPT v MIBP* [2014] FCA 1245 at [11] – [15].

<sup>42</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 2.15, 2.29, 2.39 – 2.40.

procedures at entry checkpoints into that area. Also, long-term relocation to Kurdistan requires a sponsor for entry, followed by a residency permit, for which there are no uniform procedures in place. Access to employment can be difficult without family, tribal or political connections. Single people are not allowed to rent houses on their own for cultural reasons.<sup>43</sup> DFAT advises that the borders of Iraqi Kurdistan have been closed without advance warning due to security concerns and some areas remain heavily mined.<sup>44</sup> The information before me does not indicate that the applicant would have a sponsor or connections in Kurdistan.

67. Further, there are security concerns in the northern areas bordering Kurdistan, where Sunni militant group Daesh is contesting control of some parts of the disputed territories in these areas.<sup>45</sup> I have found above that the applicant will be targeted by Daesh or other Sunni militias on the basis of his imputed Shia religion. On the information, I consider that it will be dangerous for the applicant to travel from other areas of Iraq into the Iraqi Kurdistan.
68. Having regard to the applicant's particular circumstances and the country information, I do not consider that it would be reasonable for the applicant to relocate to Iraqi Kurdistan.
69. I have found that the applicant does not have a real chance of serious harm in the southern parts of Iraq apart from Baghdad. For the same reasons, I also find that he does not have a real risk of significant harm in these areas in Iraq. However, for the reasons that follow, I am not satisfied that it would be reasonable for the applicant to relocate to southern Iraq.
70. Shia Muslims constitute a majority in Iraq, and as a majority community in Iraq with a dominant role in government, Shia faces little to no official discrimination in Government controlled-areas.<sup>46</sup> Also, as mentioned above, the overall security situation in the southern area is relatively stable. DFAT suggests that overall, internal relocation to southern Iraq might be a reasonable and practical option for Shia Muslims, but in practice, this would be difficult for some minorities to relocate.<sup>47</sup>
71. There is country information which indicates that relocation to southern governorates may not be a reasonable option for all Iraqis, including some Shias. As submitted by the applicant's representative, the UNHCR has advised that lack of access to essential services such as food, drinking water, sanitation, electricity, education and health care, as well as lack of work opportunities and adequate shelter were the main obstacles for persons seeking to relocate to another part of central or southern Iraq.<sup>48</sup> Also, common ethnic or religious backgrounds and existing tribal and family ties in the relocated area are crucial in areas of relocation, as these connections generally ensure access to services and a certain level of community protection.<sup>49</sup>
72. The UNHCR reports that the situation in Iraq remains highly fluid and volatile, and since all parts of the country are reported to have been affected directly or indirectly by the ongoing crisis, UNHCR urges against forcible return of persons originating from Iraq until tangible improvements in the security and human rights situation have occurred. It states that there was massive new internal displacement coupled with a large-scale humanitarian crisis, mounting sectarian tensions and reported access restrictions, particularly into the Kurdistan

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<sup>43</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 5.16 – 5.18.

<sup>44</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 2.29, 5.15.

<sup>45</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 2.29.

<sup>46</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.44.

<sup>47</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 5.26.

<sup>48</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Iraq", 31 May 2012, 3577, p.53.

<sup>49</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Iraq", 31 May 2012, 3577, p.55.

Region of Iraq, and UNHCR does in principle not consider the internal flight or relocation alternative option appropriate.<sup>50</sup>

73. Country information also reported that single men are being refused entry to Basra at checkpoints on the roads,<sup>51</sup> and as the applicant is single and never married, he may be prevented from entering Basra for this reason. I note that the applicant can access Basra via the Basra international airport on return and it is not clear whether these restrictions are in place on entry via Basra airport. In any event, I consider that there are other barriers to relocation for the applicant. Access to Qadisiya and Dhi-Qar provinces is restricted unless a non-resident is sponsored by a relative or resident.<sup>52</sup> Country information indicates that internally displaced persons (IDP) continued to face access restrictions and sponsorship requirements in Babil and Karbala governorates. While acknowledging the legitimacy of security concerns, the Special Rapporteur condemned population movement limitations, documentation and sponsorship requirements, and checkpoints barring IDP entry, and the overall lack of humanitarian access, safety and support afforded to IDPs and other conflict-affected populations countrywide.<sup>53</sup> Also, it is reported that restrictions have generally become more frequently imposed by various provinces.<sup>54</sup> There is no evidence before me to indicate that the applicant would be able to obtain sponsorship to access these provinces.
74. In the post SHEV interview submission, the applicant claims that he has distant family members living in Najaf and Baghdad, but he does not have family anywhere else in Iraq. This is consistent with the applicant's claims that his family moved to his [relative's] place in Najaf for one month back in 2005. I accept that the applicant has distant relatives in Najaf and Baghdad but no family anywhere else in Iraq. I also accept that all of the applicant's immediate family members live outside Iraq as claimed.
75. I have considered whether the applicant can reasonably relocate to Najaf. While the applicant has lived in Najaf with his [relative], this was only for a brief period of one month, and it was some ten years ago, which was prior to the massive internal displacement and humanitarian crisis reported above.
76. According to the SHEV application, the applicant was educated to [school] level and has no other skills or qualifications. The applicant has worked in Iran [in occupation]. He has consistently claimed in his entry interview and the SHEV application that he has never worked in Iraq, and that he was unemployed between 2004 and 2007. The applicant has indicated at the SHEV interview that he did not work in Iraq because there was no work.
77. DFAT advises that Iraq continues to struggle with the economic legacy of 30 years of war and sanctions, and economic growth is hampered by various factors including political and security conditions; weak government and economic situations; underdeveloped private sector and out-dated infrastructure.<sup>55</sup> The oil sector creates few jobs, public sector employment is often insufficient, and underemployment is common.<sup>56</sup> Moreover, country information indicates that in Shia dominated areas, there are reported instances of discrimination associated with

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<sup>50</sup> UNHCR, "UNHCR Position on Returns to Iraq", 27 October 2014, UN4E592C09, p.11.

<sup>51</sup> UNHCR, "UNHCR Position on Returns to Iraq", 27 October 2014, UN4E592C09, p.10.

<sup>52</sup> UNHCR, "UNHCR Position on Returns to Iraq", 27 October 2014, UN4E592C09, p.10.

<sup>53</sup> UK Home Office, "Country Information and Guidance Iraq: Return/Internal relocation", 18 August 2016, OGD7C848D68, p.54.

<sup>54</sup> UK Home Office, "Country Information and Guidance Iraq: Return/Internal relocation", 18 August 2016, OGD7C848D68, p.54

<sup>55</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 2.13.

<sup>56</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 2.13.

patronage, such as not having the right contacts to secure access to jobs or housing.<sup>57</sup> There is no evidence before me which suggests that the applicant has the relevant contacts to enable him to secure access to jobs in southern Iraq.

78. DFAT has advised that there have been voluntary returns to Iraq and over 100 Iraqi failed asylum seekers have returned to southern Iraq without facing significant problems, and some returnees have taken up senior and middle level jobs in the government and public sector.<sup>58</sup> However, the DFAT information does not identify the ethnicity or religion of these returnees; their educational or employment background; and whether they have returned home or an area that they have pre-existing connections.
79. DFAT has also indicates that the Iraqi Government now provides a range of incentives, including financial incentives, employment and educational opportunities to encourage Iraqis to return voluntarily.<sup>59</sup> However, it is not clear whether such incentives would be offered to all Iraqis equally including Faili Kurds who are ethnic minorities in Iraq.
80. On the information before me, even taking into account that the applicant has distant family in Najaf, and that his [family member] travelled between Iraq and Iran, I consider that the applicant will have difficulties in finding employment as a Shia Faili Kurd who only has [school] education, has no other skills or qualifications, has never worked in Iraq, and has spent most of his life outside of Iraq in Iran.
81. The UNHCR advised that before the onset of the crisis in early 2014, Iraq already had one of the largest internally displaced populations in the world, with an estimate of 1.3 million.<sup>60</sup> The advancement of Daesh and associated armed groups and resulting fighting and human rights violations in 2014 have triggered successive large-scale waves of displacement. In 2014, it was estimated that over 1.8 million individuals have been displaced from mainly Ninewa, Al-Anbar, Salah Al-Din, Diyala, Baghdad, Kirkuk and Bable governorates to over 1,850 distinct locations across Iraq. Displacement also continues to governorates south of Baghdad, mainly Najaf, Kerbala, Wassit and Babel.<sup>61</sup>
82. Country information indicates that the persistent violence and scale of the displacement continue to impact IDP's access to basic services, such as housing, clean water and education, and that the number of civilians who have died from these secondary effects of armed conflict and violence is unknown.<sup>62</sup> Displaced persons are currently living in more than 3000 locations throughout Iraq; health providers are struggling to deliver basic support in areas with high concentrations of displaced; destitution is widespread; water and sanitation systems are in disrepair; and overcrowding is a major problem in countless communities.<sup>63</sup>
83. While the Iraqi government, various UN agencies and INGOs are providing assistance to IDPs, government assistance covers only a fraction of the needs,<sup>64</sup> the humanitarian assistance that

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<sup>57</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.44.

<sup>58</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 5.25.

<sup>59</sup> DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 5.28.

<sup>60</sup> UNHCR, "UNHCR Position on Returns to Iraq", 27 October 2014, UN4E592C09, p.4.

<sup>61</sup> UNHCR, "UNHCR Position on Returns to Iraq", 27 October 2014, UN4E592C09, p.4.

<sup>62</sup> UK Home Office, "Country Information and Guidance Iraq: Humanitarian situation", 17 August 2016, OGD7C848D66, 6.1.5.

<sup>63</sup> UK Home Office, "Country Information and Guidance Iraq: Humanitarian situation", 17 August 2016, OGD7C848D66, 6.1.7.

<sup>64</sup> UK Home Office, "Country Information and Guidance Iraq: Humanitarian situation", 17 August 2016, OGD7C848D66, 7.1.4.

has reached people in central and southern Iraq has been sporadic and inadequate.<sup>65</sup> It is reported that humanitarian needs in Iraq are outpacing available resources despite international funding, which is taking a toll on response capacity.<sup>66</sup>

84. Having regard to the totality of the evidence before me and the applicant's particular characteristics and circumstances, I am not satisfied that the applicant would be able to obtain employment in southern Iraq, or that he can obtain adequate support and assistance from the government or his distant relatives such that it will resolve issues around the availability of basic services.
85. On the information before me, I am not satisfied that it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that he will suffer significant harm. As such, I find that the qualification in s.36(2B)(a) does not apply.

### **Complementary protection: conclusion**

86. There are 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.

### **Decision**

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The IAA remits the decision for reconsideration with the direction that:

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm

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<sup>65</sup> UK Home Office, "Country Information and Guidance Iraq: Humanitarian situation", 17 August 2016, OGD7C848D66, 7.2.1.

<sup>66</sup> UK Home Office, "Country Information and Guidance Iraq: Humanitarian situation", 17 August 2016, OGD7C848D66, 7.3.1.

## Applicable law

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### ***Migration Act 1958***

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

...

***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.