



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

IRAQ

IAA reference: IAA19/06549

Date and time of decision: 15 May 2019 09:44:00

I Sheck, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) is an Iraqi national from Nasiriyah in Dhi Qar province, Iraq. He departed Iraq [in] March 2013 and arrived in Australia [in] March 2013. On 1 June 2016 he lodged an application for a protection visa (PV).
2. On 9 April 2019 a delegate of the Minister for Immigration (the delegate) refused to grant the visa. The delegate accepted that the applicant was a Sunni Muslim and he worked for an Iraqi company [in Occupation 1 located at a location], until late 2011. The delegate did not accept that the applicant or his family were subject to threats because of his perceived dealings with the US Forces prior to the US withdrawal from Iraq in 2011. The delegate did not accept that the applicant was of any interest to the militia group Asa'ib Ahl Al-Haq (AAH) or any other militia groups and concluded that he did not face a real chance of persecution or a real risk of significant harm due to his work history, religion, sectarian violence or for any other reason.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). On 2 May 2019 the IAA received a submission from the applicant. Section 473DD of the Act provides that the IAA must not consider any new information from an applicant unless satisfied there are exceptional circumstances which justify considering the new information, and the new information was not and could not have been provided to the Minister before the decision was made or is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims. The submission by the applicant addresses the delegate's decision and findings. To that extent, it may be regarded as argument rather than 'information' and I have had regard to it.
4. The applicant also contends that the delegate failed to assess his claims:
 - That he would face harm as the member of a "particular social group as a member of a family unit who worked for the Iraqi Police";
 - That he would face harm as a failed asylum seeker.
5. The applicant submits that his representative provided to the delegate a copy of the Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Iraq" published on 9 October 2018. The issues raised in this report "would be considered as my issues or claims". The DFAT report in question discusses the potential risk of harm to a vast number of groups, including Shabaks, Yazidis, former Ba'athists, LGBTI individuals and women to name but a few. The applicant does not claim to fear harm on any of these bases. I do not accept that submitting a DFAT report to the delegate equates to an unarticulated claim for protection on the basis of all or any of the groups specified in that report. In her submissions to the delegate, the applicant's then representative [Ms A] makes specific reference to point 2.36 of the DFAT report, which discusses Shia militia groups. No other issue in this report is referenced.
6. I consider that neither of the new claims made to the IAA were articulated before the delegate. While an otherwise unarticulated claim may arise on the information before a decision maker, there needs to be some evidence or material suggestive of the existence of each element of

the claim to be considered. A fear of persecution or significant harm is an essential factual element of claims for protection and if this does not arise on the material before a decision maker, a relevant claim based on these fears does not arise.¹ Additionally, an implicit claim must be one which arises clearly or squarely from the material, and does not depend “for its exposure on constructive or creative activity” by the decision maker.² The applicant did not indicate any fear of persecution or other harm in respect of either of these new claims and I am satisfied that the new claims did not arise simply on the basis of the DFAT report provided by the applicant’s representative to the delegate, or otherwise, and as such are new information.

7. There is no explanation in the submission as to why these claims are only being made now. The applicant has stated that he has brothers in the Iraqi Police Force, and this is not new information as it was before the delegate and was discussed at both the applicant’s arrival interview and his interview with the delegate. The fact of having brothers in the police force is however different from the claim to fear harm because he has brothers in the police force, and the applicant has not previously made such a claim despite having the opportunity to do so. The applicant now asserts that “It should be noted that anyone who works for the Iraqi government would be considered by anti-Government elements including Sunni and Shite extremists as traitors. They generally target their family members as they are the soft target”. While this may have been a relevant point in 2012,³ the assertion is not supported by the current review material, in particular the DFAT report submitted by the applicant’s then representative, so it cannot be said to arise on the material.⁴ Further to this, the applicant has not indicated at any point that his remaining family members in Iraq, including the two brothers who are not in the police force, have been subject to any harm because of this family relationship. I am not satisfied that there are exceptional circumstances that justify consideration of the new claim.
8. In relation to the second new claim, it is a fact that if the applicant is involuntarily returned to Iraq it would be as a failed asylum seeker. As the applicant was not in fact a failed asylum seeker until after the delegate had rejected his claim I am satisfied that the claim could not have been made earlier. As the applicant has not been invited to specifically comment on this ground and it was not flagged by the delegate as an issue I am satisfied that there are exceptional circumstances that justify its consideration. In support of this claim the applicant has also submitted a media article from the Finnish media outlet Uutiset: “Asylum seeker killed in Iraq weeks after repatriation from Finland”, dated 12 February 2018. The article in question describes the fatal shooting of a recently returned Iraqi in Baghdad. I see no similarity between this situation and that of the applicant, who is from Nasiriyah. I am not satisfied that there are exceptional circumstances that justify consideration of the article and have not had regard to it.
9. The applicant also requests that he be interviewed by the IAA. Having listened to the applicant’s arrival and PV interviews and having regard to all the other material, including post-interview submissions, additional documents provided to the delegate and his recent submissions which I have considered, I consider that the applicant has been given an opportunity to present his claims and respond to relevant issues considered by the delegate. Taking this into account as well as the ‘limited form of review’ provided by Pt 7AA, I am not

¹ *EXV17 v MHA* [2018] FCA 1780; also *AYY17 v MIBP* [2018] FCAFC 89, at [18] and cases there cited

² *EXV17 v MHA* [2018] FCA 1780 at [36]

³ United Nations High Commissioner for Refugees (UNHCR), “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq”, May 2012, CIS27173; p.14 to 15

⁴ DFAT, “DFAT Country Information Report - Iraq”, 9 October 2018, CIS7B839419766; 3.45 to 3.47

satisfied that there is any reason to seek further evidence by way of interview and decline to exercise my discretionary power under s.473DC(3) of the Act.

Applicant's claims for protection

10. After his arrival in Australia the applicant was interviewed by officers of the then Department of Immigration and Border Protection (now the Department of Home Affairs) ("the Department") on 13 April 2013 and 2 May 2013. Together with his PV application the applicant lodged an undated statement of claims. On 13 March 2019 he attended an interview ("the PV interview") with the delegate, at which his then representative was also present. [Ms A] lodged submissions and further documents on 28 and 29 March 2019. The applicant claims:
- His parents were born in Kuwait and came to Iraq before he was born. He always lived in Nasiriyah. From October 2009 ([age]) he started work with his uncle's company, [in Occupation 1]. He worked at [at a location];
 - In March 2013 he received a threat letter with a bullet in it. It said that he must pay [amount] or he would be killed. He was sent this letter because he had worked with the [Americans]. He had to flee the country;
 - He is a Sunni Muslim. Sunnis continue to be targeted by members of the Popular Mobilisation Forces (PMF or Al-Hashd Al-Sha'abi);
 - Because he sought asylum in Australia he will be considered to be a traitor to the nation of Iraq.

Factual findings

11. On the basis of the identity documents provided by the applicant and his consistent oral evidence I accept that his background is as follows: he was born on [date] in Nasiriyah. He has [a number of siblings], including half-siblings from his father's second wife. Two half-brothers are deceased. His father passed away of [an illness] in 2008. His mother and siblings remain in Iraq. He is of Arab ethnicity, Sunni Muslim faith and an Iraqi national. He departed the country legally on his Iraqi passport. He attended school for [number] years but was unable to complete Grade [deleted].
12. The applicant's central claim is that he will be killed by the Asa'ib Ahl Al-Haq (AAH) if he returns to Iraq. This will occur because he worked for [his] uncle's company, who had dealings with the US Forces during the time that they were based at [a location] [near] Nasiriyah. At his arrival interview in May 2013 the applicant stated that he was a "[Occupation 1]" at [a location] from when he was [age] until the end of 2011. From mid-2012 to March 2013 he worked at [a shop], another of his uncle's businesses. In March 2013 he found a letter under the door of the family home. It said that he must pay [amount] or he would be killed. He did not know who sent it. He told his brothers, who were Police Officers, but "they didn't say anything". He fled the country.
13. The applicant addressed this point again in his statutory declaration which was lodged with his PV application in 2016. There is however a considerable difference in the narrative in these documents. The applicant states that he worked for [in Occupation 1] from October 2009. After first working in a [shop] he then worked [in Occupation 1] at the [a location]. In early 2013 "things had begun to decline in Nazriya (sic) and we were being told the US bases would pull out soon." From February 2013 his co-workers began receiving threats. During 2012 and

2013 members of his family were killed. In early March he returned home and was told by his family that they had received a letter demanding [amount] or he or his family would be killed. His family begged him to leave and he did so.

14. In the PV interview the applicant reverted to his initial narrative and stated that he started work around the end of 2009 or 2010. His uncle's companies employed many people. The applicant worked at [a location] until the US Forces departed in December 2011. He was [employed in a particular task]; "if there are other tasks you go and do them". After the US withdrawal he worked at his uncle's [business]. He [completed various work tasks]. The delegate asked why he had been sent a threat letter in 2013 and the applicant responded that he didn't know: "they sent these letters to many people." The letter had been sent because he had worked with the US Forces. He did not know who had sent the first threat because he was illiterate and could not read it. His family then received a second threat in 2015 or 2016. It was from the Asa'ib Ahl Al-Haq (AAH). They are still seeking him. "All people who work for US are traitors that's why they target us".
15. Although there has been considerable variation in the dates, the applicant has consistently stated that in Iraq he only worked for his uncle's company [and] I am satisfied that this is accurate. It is plausible that this work included employment [in Occupation 1] at [a location]. The applicant's statement as set out in the statutory declaration is complete fiction. The claim that people were told in 2013 that the US Forces may be pulling out is a nonsense, given that the last US troops departed Iraq in mid-December 2011. This statement raises significant concerns regarding the applicant's credibility. Notwithstanding this, I accept that he worked at [at a location in Occupation 1] from [age]. Following that, he worked in his uncle's [business] until his departure from Iraq at age [age]. Following the PV interview the applicant provided a number of supporting documents, including a letter stated to be from his [uncle], the owner of [a company]. The uncle claims that the applicant worked for him only until late 2011, at which point the uncle and a lot of his employees received threat letters from AAH. As a result, the uncle fled Iraq in 2012. This letter is entirely inconsistent with the applicant's evidence and I place no weight on it. Again, provision of such a document leads to adverse conclusions regarding the applicant's credibility.
16. The applicant has consistently claimed that he received a threat letter in March 2013. By that time the US Forces had been gone for some time and he had been living in the same home and working in his uncle's [business] without incident. The applicant claims that he does not know who sent the letter as he is illiterate. It follows that the letter must have been read to him by a family member. I consider it unlikely that they would not have identified the author. At his arrival interview the applicant was asked whether there was any Local Group Activity in his area and he named the Mehdi Army but did not mention the AAH. Country information notes that the March 2008 government crackdown on Sadrist and other Shia militias in Basrah spilled over to Dhi Qar, with militias briefly taking control over Nasiriyah. After an agreement was reached between Sadrist leader Moqtada Al-Sadr and the Iraqi government the situation remained relatively peaceful, with Shia factions mainly competing through the ballot box.⁵ This information does not support that militias were actively targeting former employees of [a location] after the US withdrawal in 2011. I am not satisfied that the applicant was targeted by the AAH or any other militia group in 2013 or any later time due to his short period of

⁵ Refugee Documentation Centre (Ireland), 'Information on Thi/Dhi Qar region including: Militia groups operating in the area since 2014; The number of Shia/Sunni; & The number of terrorist incidents in recent years', 08 March 2017, CISED50AD3662

employment at [a location] as a child. I find that he was and is of no interest to any militia groups.

17. At the arrival interview the Departmental officer spent some time trying to establish why an [age] year old illiterate [worker] would have been sent a demand for [amount]. The applicant responded that it was well known in his area that his relatives “are in a good position”. He advised that neither of his parents had ever been in paid employment, but [another] uncle was wealthy and supported his father. As noted above, the applicant’s father had two wives and [number of] children, so I consider this scenario unlikely. At the PV interview the delegate again addressed this point. The applicant denied that his family was rich at all and added “maybe they thought because we worked with Americans, we were rich”. The applicant has not claimed that any other members of his immediate family worked at [a location] and I do not consider it at all plausible that such a conclusion could be drawn solely from the applicant’s work as a [Occupation 1] between the ages of [age]. I do not accept that the applicant, who was [age] at the time of the claimed letter, was perceived as wealthy and/or a target for extortion. I note that in his submissions to the IAA the applicant refers to “my extortion claim”. He has in all dealings with the Department referred to the claimed letter of March 2013 as a threat letter rather than an extortion claim and has been adamant that the letter was sent purely because of his employment at [a location] and consequent association with the US Forces. I do not accept that the applicant was sent a demand for [amount] by either a militia group or a criminal group seeking to extort him. At the PV interview the applicant claimed that his family received a letter from the AAH in 2015 or 2016 saying that they were spies and would be killed. As I have found above that the applicant was of no interest to militia groups I do not accept that a further threat letter was sent to his family by the AAH in 2015 or 2016.
18. The applicant has claimed that he is of Sunni Muslim faith. He has provided no examples of harm or discrimination that he suffered in Iraq due to his faith. At the PV interview the applicant stated that his late father had been a Shia Muslim. All of his sisters were Sunni. He did not know what faith his brothers followed, he has never asked. He had never attended any Muslim festivals in Iraq. Since arriving in Australia he has prayed on occasion but had not done so in Iraq. I accept that the applicant identifies as a Sunni Muslim but is essentially non-practising.
19. In his statutory declaration the applicant noted that due to the general security situation “you could be killed at any time. People, any people have guns and they kill you for nothing.” He has provided the death certificates of two of his half-brothers, who died in 2004 and 2007. The applicant states that they were killed in the course of their duties as members of the Iraqi Security Forces. At the PV interview the applicant opined that “if I didn’t come to Australia I could have faced the same fate”.

Refugee assessment

20. 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

21. 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.
22. The applicant is a national of Iraq. It follows that Iraq is his receiving country. I have not accepted the applicant's central claim that he fled Iraq due to being threatened by a militia group and/or being extorted by a criminal group. I have accepted that he worked at [a location] as a [Occupation 1] between the ages of [age]. I have not accepted that the applicant was of any interest to the AAH or other militia groups prior to his departure from Iraq in 2013, due to this employment. On the basis of the evidence before me, I am not satisfied that there would be a real chance of future harm to the applicant in his home area of Nasiriyah due to his former employment as a [Occupation 1] at [a] US Base.
23. The applicant is a non-practising Sunni Muslim. He states that he is unaware of whether his brothers are Sunni or Shia, therefore I infer that his family is also non-practising. DFAT assesses that Sunnis face a low risk of societal violence on the basis of their religion, also that Sunnis face a moderate risk of official and societal discrimination in areas where they are a minority. The risk of discrimination varies according to an individual's local influence and connections.⁶ The applicant has not claimed that he has at any point suffered any adverse attention due to his religion and I find he has not. There is nothing before me to support a conclusion that the applicant faces a real chance of harm in the future in Dhi Qar, although it is a majority Shia governorate, on the basis of religion.
24. The applicant claims to fear harm due to the security situation in Iraq. The most recent report published by DFAT however notes that violence has reduced following the defeat of ISIS/Daesh in late 2017.⁷ It also notes that ISIS/Daesh will likely continue to indiscriminately target Iraqi civilians and commit human rights abuses as a small-scale insurgency.⁸ Having regard to information about the nature and frequency of the security incidents in the southern provinces including Dhi Qar, the level of influence of ISIS/Daesh and Sunni insurgent groups in the south, the dominance of the Shia population in Dhi Qar, and the general security situation, I am satisfied that the risk of harm is not one that rises to a real chance. On the totality of the evidence before me, including the applicant's particular circumstances, I am not satisfied that the applicant faces a real chance of harm due to sectarian violence, on return to Nasiriyah in Dhi Qar now or in the reasonably foreseeable future.

⁶ DFAT, "DFAT Country Information Report - Iraq", 9 October 2018, CIS7B839419766; 3.37

⁷ Ibid; 3.33

⁸ Ibid; 2.34

25. The applicant has recently claimed that he will face harm on return to Iraq because he sought asylum in Australia. He submits that this will cause him to be considered a traitor to Iraq. The applicant departed Iraq legally using his own passport. The DFAT country report indicates that the practice of seeking asylum and then returning to Iraq once conditions permit is well accepted amongst Iraqis. DFAT has limited evidence to suggest that voluntary returnees from the West face difficulties in assimilating back into their communities.⁹ There is nothing to indicate that involuntary returnees face additional difficulties. The applicant's family remain in his home city of Nasiriyah. I am not satisfied that the applicant faces a real chance of harm on the basis that he has spent time in a western country or that he unsuccessfully sought asylum in Australia.

Refugee: conclusion

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

Complementary protection assessment

27. 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

28. 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.

29. I have concluded above that the applicant does not face a real chance of harm due to his period of employment at [at a location] as a child, due to being a non-practising Sunni Muslim, due to sectarian violence or because he sought asylum and spent some years in Australia. As 'real risk' and 'real chance' involve the application of the same standard,¹⁰ I am not satisfied that the applicant would face a real risk of harm. I am equally not satisfied that the applicant faces a real risk of being killed, seriously injured or facing any other form of significant harm on return for the purposes of s.36(2)(aa) for these reasons, including when considered cumulatively.

⁹ DFAT, "DFAT Country Information Report - Iraq", 9 October 2018, CIS7B839419766; 5.24

¹⁰ *MIAC v SZQRB* (2013) 210 FCR 505

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.