



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAQ

IAA reference: IAA19/06775

Date and time of decision: 8 August 2019 16:08:00

M Tubridy, Reviewer

Decision

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

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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) claims to be a national of Iraq. On 17 July 2019 he lodged an application for a Safe Haven Enterprise visa (SHEV). A delegate of the Minister (the delegate) refused to grant the visa on 19 June 2019, and the matter was referred to the IAA on 24 June 2019.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 9 July 2019 the applicant's current representative provided a submission to the IAA. In part the submission made arguments about the applicant's claims to protection based on information which was before the delegate. Additionally it provided several pieces of new information. Most significant among these was the claim that the applicant was homosexual and that if he returned to Iraq, and if it became known that he was homosexual, his life would be at risk. Relevantly the submission provided a statement (dated 8 July 2019) from a psychologist, Mr SA, who stated that the applicant had been referred to him on 20 September 2018 and had had ten consultations and then ongoing treatment, and that the applicant had reported that he was homosexual and that he kept this secret for most of his life for fear of being judged and persecuted, and that he also reported experiencing symptoms of depression and anxiety as a consequence of this. In the circumstances I considered it appropriate to interview the applicant and at that interview, and in a subsequent submission, the provided further new information to the IAA. Without coming to a determinative conclusion as to the truth of the various pieces new personal information to the IAA by the applicant I am satisfied that it is personal information which is capable of being believed in the relevant sense of s.473DD(b)(ii). Given the various pieces of probative information provided with regard to the applicant's new claim, and given the particular sensitivities associated with disclosing information of this kind, I am satisfied that there are exceptional circumstances for considering the new information provided in association with this new claim (including the claim itself). Given the relationship between this new claim and his previous claims (in terms of his overall credibility) I am also satisfied that there are exceptional circumstances to justify the new information which has also been provided by the applicant in other regards.
4. I note also that some new country information was provided to the IAA in the July 2019 submission but that this information was provided in a manner not compliant with the relevant IAA practice direction – because in one instances it did not properly identify the source of the information, and in the other instance the information which the submission sought to rely upon was not appropriately provided (as an attached copy or extract). The importance of complying with the practice direction in such matters was underlined to the applicant and his representative at the IAA interview. Even so no amends were made in this regard. I have therefore not accepted any of this new country information.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:

- He is a national of Iraq, an ethnic Arab and a Shia Muslim who was born in [month, year] [in a] District of Iraq's Wassit Governorate. He subsequently lived with his family in [Country] from 1998 until 2012 when he returned to Iraq with his family and lived in Baghdad for a period of months. In Iraq he was affected by discrimination because of his [Country] Arabic and accent. He claims that because of his [Country] Arabic and accent he was detained on several occasions by authorities who suspected that he was not Iraqi and that his Iraqi documents were fraudulent. He also felt at risk of harm from attacks perpetrated by Sunni insurgent groups upon Shia Muslims, and by the broader general security arising from bombings and kidnappings. He felt he was also at risk because he did not understand which areas of the city were populated by Shias and which were populated by Sunnis. He fears that if he were to return to Iraq he would be at risk of persecution as a Shia Muslim, and that he would not be safe or free or able to work because of his [Country] Arabic and accent, and his being unable to speak Iraqi Arabic, and because he does not understand which parts of the city are Shia and which are Sunni. He also fears harm from Shia militias and one of his brothers in Iraq has recently suffered harassment from such a militia. As has been noted above, he also claims that he identifies as being homosexual and that he fears persecution on this basis also if he were to return to Iraq.

Refugee assessment

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.
8. The applicant has provided ample Iraqi identify documentation and I am satisfied that he is a national of Iraq. I am also satisfied that he is a Shia Muslim. I also accept that he lived in [Country] from around 1998 (when he would have been around [number] years of age) until 2011 (when he would have been around [number] years of age). I accept that he can speak

[Country] Arabic and that he has a [Country] accent. I note that from his engagements with Arabic interpreters here in Australia he is able to speak modern standard Arabic, and at the IAA interview the applicant correctly identified from the interpreter's Arabic that she was of Iraqi origin and he indicated that he could understand her (in modern standard Arabic).

9. As has been noted above, the applicant claims that he would face discrimination and other kinds of harm in Iraq because he speaks [Country] Arabic but not Iraqi Arabic, and because he has a [Country] accent, and (in a claim he raised for the first time at his SHEV interview) that while he was living in Baghdad he was detained on several occasions at checkpoints because, owing to his [Country] Arabic and [Country] accent, the authorities suspected his Iraqi identity documents were fraudulent. I accept that the applicant can speak [Country] Arabic (which is significantly different from Iraqi Arabic) and that he speaks Arabic with a [Country] accent. But as will be discussed further below there is no evidence of a trend of Iraqis with [Country] accents, and/or who speak [Country] but not Iraqi Arabic, suffering mistreatment, and his claim to be unable to speak Iraqi Arabic seems doubtful in itself.
10. With regard to the matter of the applicant's claim to have been detained by police on this basis I note that when he first arrived in Australia (at his IMA & Induction interview) he was specifically asked whether he had ever been arrested or detained in Iraq and he indicated that he had not. When this was put to the applicant he said that at that (IMA & Induction) interview he had answered no to this question because he had thought he was being asked if he had ever been arrested at his home. This seems doubtful in itself and having listened to the audio record of the relevant section of that interview I found no evidence to suggest any such misunderstanding. Further, the applicant said nothing about any such matter in his SHEV application either even though one question asked him for details of any harm he had experienced in Iraq (including details of the type of harm and the persons involved). When this was put to the applicant he responded that his former migration agent had served him poorly and that he (the applicant) had subsequently discovered that this man was unlicensed (to be a migration agent). The applicant's current representative submitted in support of this that she had been told by other clients who had come to her that this man had served them poorly also. I put it to the applicant and his representative that they had provided no corroborative evidence to substantiate such allegations. Following the IAA interview a further submission was provided to the IAA interview but this contained no evidence from MARA or the Department or any other credible independent source that would corroborate the assertion that the applicant's former representative was not a registered migration agent (at the time of the applicant's SHEV application), or that this man had been the subject of any complaints. I note also that this man provided a MARA registration number to the Department when he was appointed to represent the applicant and that this was accepted. On the evidence before me these very serious allegations are without foundation. I am not persuaded that there was no mention in the SHEV of the application of the applicants having been arrested because of some negligence on the part of the applicant's former migration agent. It seems much more likely that the applicant said nothing to his former migration agent about such matters, and that this was the case because such matters never occurred.
11. The applicant's claim to have experienced discrimination in Iraq on the basis of his [Country] Arabic and [Country] accent, and on the basis of his claimed inability to speak Iraqi Arabic, also seems doubtful in itself given that there is no evidence of a trend of the mistreatment of such persons along these or any other lines in Iraq in recent years. If there was a trend of such mistreatment it does not seem possible that it could go unreported given the numbers of persons involved. During the worst of the civil conflict in Iraq there had been more than a [number] Iraqi nationals in [Country] whereas in recent years it has been estimated that this has dwindled to around [number] due largely to such person resettling (or in some cases

settling for the first time) in Iraq. Large numbers of these persons would have [Country] accents and given that a large number of these persons would have been born in [Country] (and to Iraqi parents who had themselves already been living in [Country] for some years) many such persons likely spoke only [Country] Arabic and no Iraqi Arabic when they entered Iraq for the first time in their lives. Even so, the reporting before me provides no evidence that such persons have suffered a trend of mistreatment in Iraq such as the applicant has claimed affected him. I raised this matter with the applicant and his representative but it remains the case that, although the applicant's representative did seek to provide various pieces of new country information to the IAA, none of this gave any indication of providing evidence of their having been a trend of mistreatment affecting persons with [Country] accents, or who speak [Country] Arabic but not Iraqi Arabic, in Iraq.

12. Further, and although in certain circumstances an Iraqi national who had lived most of his or her life in [Country] might well be unable to speak Iraqi Arabic when he or she first returned to or settled in Iraq it seems doubtful that this was the applicant's situation. I accept that he was not yet [number] years old when he departed Iraq in 1998 but he would still have had several years' experience of speaking Iraqi Arabic at that time. Moreover when he settled in [Country] he did so with his family who were all speakers of Iraqi Arabic. Concerns of this kind were put to the applicant at the IAA interview. The applicant submitted that that after arriving in [Country] he had spoken only [Country] Arabic and that his family had encouraged him in this by also speaking only [Country] Arabic at home. I have not found this convincing. Even if his family had wished to encourage the applicant's speaking of [Country] Arabic in such a fashion it seems doubtful that such a transition – from everyone speaking Iraqi Arabic to everyone speaking [Country] Arabic – could have occurred so quickly and so absolutely that the applicant would have entirely forgotten how to speak Iraqi Arabic by the time he had reached adulthood.
13. Moreover, the applicant submitted that in 2012 it was decided that he should travel to Australia (in the care of one of his older brothers) while his other older brothers remained in Iraq because his brothers being older than him did not experience the same problems as him in Iraq because while in [Country] these other brothers had begun working very early (rather than remaining in school as he did) and that because of this and because they worked with Iraqis, at places frequented by Iraqis, his brothers never developed [Country] accents nor did they lose their Iraqi Arabic. The applicant thus sought to claim that his brothers had almost no contact with [Country] Arabic (in order to account for why these persons who had remained in Iraq were not being affected by the problems which affected him) aside from when they were at home where they spoke exclusively in [Country] Arabic for the benefit of the applicant (thus accounting for how it could be that he could speak no Iraqi Arabic). Such a situation seems doubtful. I find it implausible that the applicant's family (which included parents in their senior years and elder brothers who continued to earn their livelihood speaking Iraqi Arabic) would have altogether ceased speaking Iraqi Arabic at home during the years in which they resided in [Country]. As noted above, I accept that the applicant can speak [Country] Arabic and that he has a [Country] accent. I do not, however, accept that the applicant is no longer able to speak Iraqi Arabic.
14. The applicant claims that everyone living in Iraq is at risk of being asked to work with the militias and on 9 July 2019 the applicant submitted to the IAA that in around mid-June 2019 "the militia" stole the [vehicle] belonging to his brother, Mr A, because he had refused to join them, and that that now Mr A was too afraid to leave the family home. At the IAA interview the applicant submitted that this had involved Mr A refusing to transport weapons for this militia. Credible reporting indicates that Iraq's various militias are known to sometimes act in a criminal manner, and that their legitimacy, power and size, has increased since 2014 as

consequence of their role in fighting Islamic State. However, the evidence does not indicate that such groups are engaging in forcible recruitment in Baghdad or that they have been stealing [vehicle] or threatening [vehicle] or transport workers for the purpose of having their weapons transported or for some other logistical requirement.

15. At the IAA interview the applicant was asked to provide an account of how he had learned about what he had claimed had occurred to his brother Mr A, and that he should speak about this and what he knew about the matter in as much detail as possible. The applicant spoke in a very general way about having been told about this by his sister and his mother by telephone. It was put to the applicant that this was all very vague and that, given that he was putting forward this claim as a significant matter and something of great concern, that I would expect that he would at least have enquired as to exactly when the matter occurred and which militia was involved if this claim were true (the July 2019 submission expresses concern about Shia militias like Jaish al-Mahdi and Asaib al-Haq but there has never been any indication from the applicant of which militia his brother was allegedly pressured to join). The applicant provided nothing further in the way of convincing detail except to say that these groups were not asking his brother's permission to have him join them, and that they took his car as a warning of what they were able to do. None of this is convincing and the available reporting suggests it is most unlikely. I do not accept that any of this ever occurred.
16. The applicant's other new claim to the IAA is that he fears returning to Iraq because he is a homosexual man. It is of little assistance to the applicant in this regard that his evidence in many of the matters discussed above has seemed so contrived. However, and notwithstanding this, the applicant's evidence at the IAA interview about his sexuality and his relations with his other family members, and his concerns about what disclosure of his sexuality to his family, and to others in Iraq, would mean was convincing enough. The applicant was asked about each of his immediate family members and what these relationships had been like. He said that had been particularly close to his mother, and to one of his sisters Ms Z, and that he was also fond and on good terms with his other sisters including his two sisters who are residing here in Australia (these two sisters arrived some years before the applicant as a result of having married Australian citizens). He said that after being released from immigration detention he had resided with one of these sisters (and with her husband and her family) after which he subsequently resided with various housemates but never with the brother who accompanied him to Australia, Mr M, and with whom he had a falling out because he felt Mr M was always trying to exert control over who he (the applicant) was associating with. He said that he and Mr M now had little or no contact. I asked the applicant about his sexuality and how he became aware of this and how it affected his life. He said that while growing up he had realised he was not attracted to women and that his sexuality was something his family could never know, and that he had kept this to himself until he reached Australia. He said that it was not until around 2014, after he had been living in Australia for more than a year, that he began to feel comfortable in seeking out relationships with other gay men online, and by visit gay clubs [in Australia]. He named and discussed several of the online services and clubs which he had frequented, and he provided a number of written statements from men who testified that they had met the applicant in this way and had a relationship and/or a friendship with the applicant subsequently. The dates and details involved were consistent with what the applicant had claimed and the statements seemed authentic enough.
17. The applicant also submitted that his sister, Ms Z, had once suspected that he was homosexual because he did not date lots of women like his older brothers. His account of this was not convincing in that it was presented from Ms Z's point of view (in the manner of a fictional omniscient narrator) rather in terms of something he experienced from his own

perspective, and because it seemed doubtful that such a sister would have expected the applicant to be dating women in the period prior to his departure for Australia given the manner in which during that period society in Iraq and in [Country] remained very conservative and generally unfolded under close supervision on the basis of extended family relationships (and at the IAA interview the applicant also said that his brothers all remained unmarried because his family had no relationships of this kind).

18. Significantly, and even when the applicant discussed the difficulties he had experienced in his relationships with his brothers, there was never any indication that he feared these persons. When I asked the applicant what he feared would happen if his family ever learned about his sexuality he said that his greatest fear was that his mother would kill herself, and also that his brothers-in-law might divorce from his sisters. At the IAA interview the applicant's only expressed concern – in terms of fearing that he himself might suffer harm because of his homosexuality if he returned to Iraq – was that others in Iraqi society would do him harm, and that he had seen a person in Iraq being seriously assaulted by a crowd because this person was being accused of being a homosexual. All of this was consistent with how the applicant's claims in this matter were presented by his representative in the July 2019 submission to the IAA. However, the applicant's July 2019 psychologist's report states that the applicant had reported to the psychologist that he had faced persecution from his family and friends as a result of his sexual orientation and that his family was unaccepting of his homosexuality and that he feared for his life. This was at odds with the applicant's IAA evidence wherein he had indicated that his family knew nothing about his sexuality. This matter was put to the applicant who responded that his psychologist may have been referring to an incident he had talked about wherein he had been assaulted by a co-worker here in Australia when the applicant's sexual orientation had become apparent to this person. The person in question was neither a friend nor a relative. The applicant's representative said that she too had noticed this problem in the psychologist's report. I note, however, that the outset of the IAA interview I had invited the applicant to correct any matters that might need correcting in the evidence he had provided if it was not accurate and neither he nor his representative had indicated that anything was in error.
19. Either the applicant and his representative knowingly (and without alerting the IAA at any time to the problem in question) provided a psychologist's report which presented an inaccurate account of what the applicant had said to the IAA (which is concerning in itself in terms of the conduct of all the parties involved, including the conduct of the psychologist) or the psychologist's report is an accurate account of what the applicant said and the applicant provided very different evidence to the psychologist to that which he has no provided to the IAA.
20. Following the IAA a further submission was provided to the IAA which included an additional 31 July 2019 statement from the psychologist. This quoted the lines which have been discussed above – that the applicant had reported experiencing persecution from family and friends and that his family were unaccepting of his homosexuality – and then stated that the applicant "perceives that the exact response from his family is indicated above" and he "has not informed his family in fear for his life as indicated above". It was then stated that it was hoped that this clarified matters. This is most unsatisfactory. The meaning now proffered by the psychologist is not at all the meaning of the line he originally penned. If the psychologist now believes that the applicant reported fearing this as possibility (as distinct from reporting something which had happened) then this should have been expressly noted and an explanation provided for how this occurred. Further, and in any event, the psychologist's revised account of what he was told by the applicant remains at odds with the evidence which the applicant had otherwise himself provided via the July 2019 submission and at the

IAA interview (this being that he feared harm from Iraqi society but with no indication of his fearing any harm from any of his family members). Further complicating matters, the August 2019 submission to the IAA (which accompanied the second psychologist's report) tenders that the applicant fears harm from his brothers. None of this is helpful to the applicant's credibility as it raises the concern that the applicant may have proved a very different account of his circumstances to his psychologist, and now also to his representative, to that which he provided to the IAA.

21. Given, however, that the 2 July 2019 psychologist's report also refers to the applicant as having been born in [Country] (whereas he was actually born in Iraq), and given that I can see no reason why the applicant would have said this to the psychologist, I am inclined to consider that the above problems are the result of errors on the part of the psychologist. I am also inclined to consider that the applicant's representative has echoed the psychologist's most recent error (in submitting that the applicant fears his brothers) rather than this being something that the applicant said, and that this was an honest mistake on the part of the applicant's representative. I hope I am correct in this. Taken as a whole, I thus consider that the applicant's evidence about his sexuality and his fears in this regard have, with some minor exceptions (like the matter of his Ms Z's suspicions), been convincing enough when concerns arising from his psychologist's statement and his representative's recent August 2019 submission are put aside, and for the reasons given I have put these concerns aside.
22. One further concern remains. In the July 2019 submission to the IAA it was tendered that the applicant (although he feared persecution in Iraq because of his homosexuality) made no claim about his sexual orientation to the delegate because the applicant was fearful that his former representative would have disclosed this matter to the applicant's family (as this person knew the applicant's family). I accept that it is plausible that the applicant would withhold such information if, as he claims, he is homosexual and if as he claims he fears that disclosure of this might result in his mother taking her own life and in his brothers-in-law divorcing his sisters. Nevertheless for such an explanation to be satisfying it must also account for why in such circumstances the applicant would have engaged the services of such a migration agent (whose confidentiality in the matter of the applicant's most significant claim could not be relied upon). The applicant provided no explanation for this in the July 2019 submission to the IAA and if the applicant really had been in such a situation I expect that he would have. At the IAA interview I asked the applicant to explain why he would have employed such a migration agent. The applicant responded that he had been under the false impression that having engaged this representative he had to remain with him until the matter was concluded. I asked the applicant where he could have had gotten this idea from and he said he had heard it from people. I did not find this convincing. In any event it did not explain why the applicant would have engaged such a person in the first place and this was put to the applicant also. The applicant submitted that at the time he had not been financially able to pay a migration agent himself and that his brother-in-law had provided this migration agent and had paid this. The applicant indicated that he felt he had no alternative. Again, if this was the case I would expect that the applicant would have said so in his July 2019 submission to the IAA and I would also expect that the applicant (who has the assistance of a migration agent) would also have provided corroborating evidence in support of this claim. This too was put to the applicant at the IAA interview and he subsequently provided a note from his brother-in-law to the effect that he (the brother-in-law) paid for these services. But more probative evidence (such as a receipt evidencing the brother-in-law's payment of these services) has not been provided. The applicant also submitted that he had not previously provided such information to the Department because he had heard that in the past the Departments' information about applicants had been hacked, and he had not felt confident about disclosing such matters until he spoke with his current representative. I asked the

applicant if he had made any previous enquiries about this with the Department. He said he had not. All of this has made for a very underwhelming explanation of why this claim was not raised until after his SHEV application was refused.

23. Nevertheless, and whatever the applicant's reasons actually were for not making claims of this kind to the delegate, the applicant's account of his situation in terms of his sexuality has been sufficiently convincing for me to accept this.
24. DFAT reports of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons in Iraq that (according to local and international groups) violence against people on the grounds of their sexual orientation or gender expression occurs, sometimes at the hands of state actors, and can include kidnapping and murder. Local and international groups report that societal discrimination against LGBTI is pervasive and many individuals consequently do not publicly identify. LGBTI individuals that do identify publicly often face abuse and violence from within their families and communities. They may be denied services including health care. LGBTI individuals often do not report abuse for fear of further victimisation or acts of discrimination or violence as a result of admitting their sexuality or gender orientation. Men perceived to be gay, or to display non-masculine behaviour may be subject to discrimination and violence. On 4 July 2017, assailants stabbed Karar Nushi, an actor, model and student, to death in Baghdad because of his perceived femininity. He had been reportedly receiving death threats for months. The government does little to protect the LGBTI community, and officials have prosecuted people participating in same-sex sexual activity for public indecency or prostitution. The US State Department reported in 2017 that Iraq lacked legislation or criminal justice mechanisms to prosecute crimes motivated by bias against the LGBTI community. The government established an LGBTI taskforce in 2012 but disbanded it in 2014. DFAT assesses that people who are LGBTI face a high risk of official and societal discrimination and violence on the basis of their sexual orientation and gender identity. DFAT assesses that an individual is unlikely to be able to live an open life as LGBTI in Iraq.
25. From the applicant's evidence at the IAA interview it was apparent that in Australia he is discreet about his sexuality insofar as his family is concerned (and that he would act discreetly insofar as his family is concerned no matter whether he was in Iraq or Australia) but also that in Australia he has otherwise been living openly as a gay man. Given the evidence noted above I am satisfied that if the applicant were to return to Iraq and live this way he would face a real chance of significant physical harassment and/or ill treatment amounting to serious harm from persons in the broader Iraqi community (though not from his family) for reason of his being a gay man, and that this would amount to his facing a real chance of serious harm for reason of his membership or a particular social group. Given that this would occur for reasons of his sexuality, and not as a result of random or generalised violence, I am satisfied that such persecution would involve systematic and discriminatory conduct in the relevant sense. I am satisfied from the available evidence that the real chance of persecution relates to all areas of a receiving country, and that the applicant cannot be expected to modify his behaviour with regard to his sexuality in order to avoid the real chance of persecution of this kind, and that effective protection measures are not available to the applicant in his receiving country.

Refugee: conclusion

26. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

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

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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.