



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAQ

IAA reference: IAA19/07276

Date and time of decision: 14 November 2019 17:38:00

V Price, 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 stateless Bidoon of the Shia Muslim faith who has resided in both Iraq and Lebanon. On 7 October 2015 he lodged an application for a protection visa with the Department.
2. On 3 August 2016 a delegate of the Minister for the Department (the delegate) refused to grant the visa to the applicant finding that the applicant was a national of Iraq and that he did not have a real chance or risk of harm on return to that country. On 12 September 2016 the IAA affirmed that decision. [In] September 2019 the Federal Circuit Court of Australia remitted the matter to the IAA for redetermination according to law.

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).

Submissions to the IAA

4. Submissions and new Statutory Declarations made by the applicant were provided to the IAA in September 2016 (the September 2016 submission) and October 2019 (the October 2019 submission). To the extent these documents make legal argument and/or discuss matters raised before the delegate this is not new information for the purpose of s.473DC(1) of the Act, and I have had regard to that material my assessment.
5. The submissions and statutory declarations included new information consisting of: information relating to the 2006/2007 death of his father's cousin in Kuwait; information relating to the recent circumstances of his family in Iraq (their current area of residence; claimed threats against the applicant's father from armed militia groups; and incidents of harassment and discrimination against the applicant's family by the authorities; and a new claim from the applicant to fear forced recruitment by a Shia militia.
6. I accept that this information is credible personal information, in that it is at least capable of being believed, which was not previously known and which may have affected consideration of the referred applicant's claims. Having listened to a recording of the protection visa interview, I accept submissions the applicant was not clearly on notice during that interview that his claimed Statelessness was in doubt and that he may be found to be a national of Iraq. This new information is relevant to assessing the applicant's receiving country and is relevant to assessing his claims for protection. In all the circumstances, I am satisfied that there are exceptional circumstances to justify considering this new information. The new information satisfies the requirements of s.473DD(a) and (b)(ii) and I am not prevented from considering it.
7. The October 2019 submission also included new information regarding the process of transiting through [Country 1] International Airport and the 2018 country Information report on Iraq by the Australian Department of Foreign Affairs and Trade (DFAT).¹ The DFAT report post-dates the delegate's decision and could not have been provided prior to the making of that decision. In relation to the [Country 1] airport material, I accept this was provided in

¹ Australian Department of Foreign Affairs and Trade, 'Country Information Report Iraq', 9 October 2018, CIS7B8839419766 (DFAT Iraq Report 2018).

response to the delegate's finding that the applicant travelled through [Country 1] on a genuine Iraqi passport, and that prior to the decision, he was not on notice that he may be found to be an Iraqi national on that basis. I accept that this material could not have been provided prior to the making of the decision. The [Country 1] airport material was provided to establish that transiting passengers are not required to clear immigration in [Country 1] International airport and is relevant to assessing the applicant's claims his Iraqi passport was not genuine and to assessing the applicant's receiving country. The DFAT report updates that relied upon by the delegate and noting the delegate's decision is now over three years old, is relevant to assessing the current circumstances in Iraq. In all of the circumstances, I accept that there are exceptional circumstances to justify considering both the DFAT report and the [Country 1] airport material. This new information satisfies the requirements of s.473DD(a) and (b) and I have considered it.

Medical information

8. On 16 October 2019, the applicant requested the IAA to provide an additional period of two weeks to enable him to submit material related to his claimed medical conditions. The IAA granted this request. In November 2019 the applicant provided two letters from a Medical Specialist regarding the applicant's [Medical Condition 1] and a letter from a [Consultant] and Physician regarding the applicant's [Medical Condition 2]. This material was not before the delegate at the time of making the decision and is new information for the purpose of s.473DC(1). I accept that these documents constitute credible personal information which was not previously known and which may have affected consideration of the referred applicant's claims. I also accept that they are relevant to an assessment of whether the applicant faces a real chance or real risk of harm in the future. I am satisfied there are exceptional circumstances to justify considering this material. This new information satisfies the requirements of s.473DD(a) and (b)(ii) and I am not prevented from considering it.

Information obtained by the IAA

9. I have obtained a range of new material regarding the current security situation in Iraq and Bidoons in Iraq.² It has been almost two years since the delegate's decision, the situation in Iraq has changed since that time and the new information is directly relevant to assessing the applicant's protection claims. I am satisfied there are there are exceptional circumstances to justify considering this new information for s.473DD(a) of the Act.
10. The IAA put relevant new information from the above sources to the applicant for his comment in October 2019. A response was provided in relation to this letter on 7 November 2019 which contained new information consisting of news articles regarding recent incidents of sectarian and other violence in Iraq (the November 2019 submission). The articles and the

² United Kingdom Home Office, 'Country Policy and Information Note - Iraq: Perceived collaborators', February 2019, 20190214113712 (UKHO Perceived Collaborators Report 2019); EASO Country of Origin Information Report - Iraq Security situation', European Asylum Support Office (EASO), 12 March 2019, 20190313085833 (EASO Security Situation Report 2019); EASO Country of Origin Information Report - Iraq Targeting of Individuals', 7 March 2019, 20190308091632 (EASO Targeting of Individuals Report 2019); United Nations High Commissioner for Refugees (UNHCR), 'International Protection Considerations with Regard to People Fleeing the Republic of Iraq', 3 May 2019, 20190506112913 (UNHCR 2019 Report); Musings on Iraq, 'Review of Security Trends in Iraq 2018', Joel Wing, 15 January 2019, 20190116101402; Musings on Iraq, 'Iraq Saw Lowest Violence Ever March 2019', Joel Wing, 3 April 2019, 20190404082755; Musings on Iraq, 'Islamic State's Offensive Could Be Winding Down', Joel Wing, 5 August 2019, 20190806090730; Musings on Iraq, Security In Iraq Aug 15-21, 2019, Joel Wing, 26 August 2019, 20190827090345; Musings on Iraq, 'Security In Iraq Sep 8-14, 2019', Joel Wing, 23 September 2019, 20190924090804; Musings on Iraq; 'Security In Iraq Sep 15-21, 2019', Joel Wing, 1 October 2019, 20191002085303 (collectively 'Musings on Iraq Reports'); and <http://www.flightstats.com>.

incidents described therein post-date the decision of the delegate and I accept they could not have been provided prior to the making of the primary decision. This material was given in response to the IAA's letter and is relevant to assessing the applicant's claims for protection. I am satisfied there are exceptional circumstances to justify considering this material. The new information satisfies the requirements of s.473DD(a) and (b)(i) of the Act and I am not prevented from considering it.

11. The delegate in this matter found the applicant was a national of Iraq without reference to the relevant laws of Iraq. I have therefore obtained the Iraqi Nationality Law 26 of 2006 (the Iraqi Nationality law) and information on the application of that law from the United Nations High Commissioner for Refugees (UNHCR).³ This information is relevant to determining the applicant's country of reference. In these circumstances, and given the Act requires an applicant's nationality is to be determined solely by reference to the laws of the relevant country, I am satisfied that there are exceptional circumstances to justify considering this information. I have considered whether to obtain information from the applicant in relation to this material, however, noting that the material contained therein relates to a class of persons, it is neutral in the applicant's circumstances, he is now well aware that his potential Iraqi nationality is a live issue and has provided several submissions on this point, I have determined that this is not warranted in this case.

Other matters

12. The September 2016 and October 2019 submissions requested the IAA to invite the applicant to attend an interview to obtain information related to his receiving country and his credibility. I have had regard to the submissions before me on this matter.
13. Under the relevant provisions of the Act, the IAA is to conduct its review on the material provided by the Department, without interviewing the applicant. There is no right to a hearing and no statutory right for an applicant to present his or her case on review. Nor is there any obligation on the IAA to conduct an interview if adverse credibility findings are to be made. The IAA has discretion under s.473DC of the Act to obtain new information from the applicant at an interview but can only consider new information then obtained subject to s.473DD of the Act. I note that the applicant was not represented during the protection visa interview, however, representatives experienced in migration and refugee law assisted him in the making of his visa application to the Department and in the provision of submissions and new information to the IAA including on matters related to his receiving country, credibility and claims for protection in Iraq. The submissions have not identified any new additional information the IAA needs to obtain at an interview, other than generally assessing his credibility and discussing matters raised in the submissions present to the IAA. In all the circumstances, I am satisfied that I have enough material before me to make a decision, and am not satisfied that an interview to obtain further information is warranted in this case.
14. The November 2019 submission noted that the applicant had not been able to obtain up-to-date medical information in the available time frame and that he has a further check-up early next new and will provide evidence of this as soon as he can. There was no express request for the IAA to delay its decision or obtain further information on this matter. I note the following: this is not a new issue as the applicant first raised claims regarding his medical conditions at the protection visa interview in December 2015 and he is live to the fact these matters are relevant to his protection visa assessment; the IAA granted the applicant's requested period of

³ 'Iraqi Nationality Law, Law 26 of 2006', National Legislative Bodies, Refworld, 1 March 2006, CIS29386 (Iraqi Nationality Law); and UNHCR 'Acquisition of Iraqi Nationality by a Child Born Outside Iraq', 7 May 2019, 20190508090531 (UNHCR Advice Iraqi Nationality 2019).

time to provide additional medical information (and as he submitted it two weeks after the stated due date, he in fact had additional time to provide that material); the applicant has provided several submissions to the IAA including in relation to his medical conditions; and the November submission did not indicate why the material could not be obtained in the time frame as extended, when in 2020 the applicant is due to have these check-ups or when this material could be provided. Having regard to these matters and to the relevant statutory scheme governing a fast-track review, noted above, I am not satisfied that a delay to the IAA decision is warranted in this case and nor is it necessary for the IAA to obtain further new information regarding the applicant's medical condition/s.

Applicant's claims for protection

15. The applicant's claims to be a stateless Bidoon of Shia Muslim faith, born in Kuwait. He has resided in Kuwait, Iraq and Lebanon but is not a national of any of these countries. He made the following claims:

- His family were Bidoons from Kuwait and did not have Kuwaiti nationality. His father was [employed] in Kuwait, employed with [an organisation]. After the 1991 Gulf War his family were expelled from Kuwait and the government took their assets. The applicant was a young child at that time.
- The applicant's father became a shepherd. The family lived in a tent along the border of Kuwait and Iraq. They moved around often to graze the sheep and frequently moved across the border between the two countries.
- He and his family were not granted citizenship of any country and as a result he was denied basic human rights. As a stateless Bidoon he was unable to access education, could not work, was not able to register a marriage and could not legally own any property. Life was very difficult and it was hard to survive day to day. His older siblings moved away to make a better life and he doesn't know where they are.
- The applicant moved in Lebanon as a teenager, entering illegally via a checkpoint on the border. He obtained work in a [business] and the owner provided him with accommodation. He remained there for about 3 years. At that time many Bidoons were fleeing Lebanon and the applicant's father decided it was not safe for him to remain there.
- The applicant returned to Iraq via Syria in about November 2011. He resided with his family in the Southern governorates of Iraq for two weeks before leaving Iraq on a fake passport obtained through a people smuggler.
- He married an Australian citizen in July 2015.

16. The applicant made the following claims against Iraq:

- He has no legal right to return to Iraq and no identity documentation. However, he fears that if returned to that country he will be denied the right to work and buy property, cannot register his marriage, and will always be in danger of having the authorities stop him to check his identity. His father has been harassed and had his sheep stolen by the authorities because he is Bidoon.
- His father has received threats from Shia militias after seeking compensation for the execution death of his cousin (a Kuwaiti Bidoon in Iraq) and because he refused their attempts to recruit him.

- He will be forcibly recruited into Shia militias and targeted by religious extremists on the basis of his marriage to an Australian citizen.

17. He made the following claims against Kuwait:

- He has no right to return to Kuwait. He was expelled as a child, has no status, no rights and faces harm as a Bidoon.

18. The applicant claimed to have medical conditions, including a [Medical Condition 1] and [Medical Condition 2], for which he has been receiving treatment in Australia. During the interview he stated that he required surgery [to] address [Medical Condition 1]. As he is Stateless he would not be able to access medical treatment and will face serious or significant harm on this basis.

19. As noted above, the delegate assessed the applicant's claims against Iraq as his country of nationality, and considered whether he faced harm due to his Bidoon ethnicity, his Shia faith, as a returned asylum seeker, and due to the general security situation in that country.

Factual Findings

Applicant's identity, ethnicity and religion

20. The applicant has provided consistent information regarding his family composition and his own name throughout his interactions with the Department. I accept his identity is as claimed. He has also consistently claimed that his parents were born in Kuwait, they were stateless Bidoon, his father served in the Kuwaiti military, that the family were expelled from Kuwait in about 1991; his parents spent some time residing in Jordan and Saudi Arabia but largely settled in an area near the border of Iraq and Kuwait. He has also consistently stated that he is a stateless Bidoon, that he was born in [Location 1] in Kuwait and that he was not issued with a birth certificate. He has also claimed to be adherent of the Shia Muslim faith.

21. The applicant provided copies and translations of his parent's birth certificates supporting that they were both born in Kuwait as claimed. He also provided documentary evidence to support his father's service in the Kuwaiti military, identity document issued to his mother by the Red Cross in Kuwait, and a copy of his grandfather's death certificate which states that his nationality was 'non-kuwaiti'. Independent information states that the term Bidoon, is the shortened form of 'bidoon jinsiya, meaning without nationality.⁴ The Bidoon are a group of mostly (but not exclusively) stateless people who live in Iraq and Kuwait.⁵ Many Bidoon were from nomadic tribes who were in Kuwait at the time of its independence in 1961, but who may have originated in what is now Iraq or Kuwait.⁶ The majority of Bidoon are Sunni, with a small minority being Shia.⁷ Kuwait recruited large numbers of Bidoon into its armed forces at independence, but did not grant them citizenship.⁸ Further, many Bidoon were not issued with birth certificates despite being born in that country.⁹ When Iraq invaded Kuwait in 1990, the Kuwait army viewed Bidoons as a security threat due to their connection with Iraq and between 100,000 to 500,000 Bidoon fled to Iraq.¹⁰ Of those that fled to Iraq, more than 80 per

⁴ DFAT, 'Country Report Iraq', 13 February 2015, CISEC96CF1160 (DFAT 2015 Report); and DFAT 2018 Report.

⁵ DFAT 2015 Report and DFAT 2018 Report.

⁶ DFAT 2015 Report and DFAT 2018 Report.

⁷ DFAT 2015 Report and DFAT 2018 Report.

⁸ DFAT 2015 Report and DFAT 2018 Report.

⁹ UK Home Office, "Country Information and Guidance Kuwait Bidoon", 1 February 2014, OG180885B16 (UKHO 2014 Bidoon Report); and Human Rights Watch, "Stateless 'Bidun' Denied Rights", 13 June 2011, CX266712 (HRW 2011 Report).

¹⁰ DFAT 2015 Report; and DFAT 2018 Report.

cent went to the southern governorates of Iraq, settling in areas near the border of Iraq and Kuwait, including Basra, Dhi Qar and Muthannia others went to areas in the Northern provinces.¹¹

22. On the basis of the documentary and oral evidence provided by the applicant, and the independent information above, I accept that: the applicant and his parents are of Bidoon ethnicity; his parents were born in Kuwait; the applicant's father served in the Kuwait military; the family fled Kuwait in 1991; his parents spent some time in Jordan and Saudi Arabia, but largely resided in Iraq near the border with Kuwait; and that that applicant is a Shia Muslim.
23. The applicant has consistently claimed to have been born in Kuwait and this was accepted by the delegate. In the Irregular Maritime Arrival Entry Interview (the entry interview), conducted shortly after his arrival in Australia, the applicant claimed he was born in [year]. As noted in the decision record, following a further interview in 2012, he was allocated a birthdate in [date]. In his protection visa application, the applicant noted he was unsure of his date of birth given he had no documents to substantiate it and accepted the [date] birthdate as allocated. However, the applicant's family departed Kuwait in 1991 which means he could not have been born in Kuwait in either [date] or [year]. I give weight to his clear and consistent evidence that he was born in [Location 1] in Kuwait, and to his evidence that he is unsure of his actual date of birth, and accept that he was born in Kuwait sometime prior to his family's departure from the country, ie in or before 1991. This timeframe is consistent with other aspects of his evidence, including that he went to Lebanon as a teenager. I accept his evidence that he was born at home and, on the country information above, I accept he was not issued with a Kuwait birth certificate.

Applicant's receiving country

24. The applicant has consistently claimed since his arrival in Australia that he and his family have not acquired nationality of any country and remain stateless. The delegate concluded that the applicant was a national of Iraq. Assessing this matter is complex and not without some difficulty, given there is evidence before me which may support a conclusion either way. However, for the reasons that follow, I have reached a different conclusion to the delegate on this matter.

Iraq

25. Nationality in Iraq is determined by reference to the Iraqi Constitution 2005 (the Iraqi Constitution) and the Iraqi Nationality Law.¹² Iraqi nationality is automatically conferred by birth where an individual is born to an Iraqi father or an Iraqi mother.¹³ There are also provisions enabling a minor child born to an Iraqi mother to obtain nationality in certain circumstances.¹⁴ The applicant's parents were both born in Kuwait, the evidence does not indicate that they were Iraqi nationals at the time of the applicant's birth and I am not satisfied that the applicant acquired Iraqi nationality via these provisions of the Iraqi nationality law.
26. DFAT confirms that the Iraqi government granted citizenship to approximately 47,000 Bidoon through an assistance package called 'makremiyah'.¹⁵ To obtain citizenship, Bidoon had to

¹¹ DFAT 2015 Report; DFAT 2018 Report; and UNHCR, 'Bidoon in Iraq', 8 September 2010, CIS23961 (UNHCR 2010 Bidoon Report).

¹² DFAT 2015 Report; DFAT 2018 Report; Iraqi Nationality law.

¹³ Iraqi Nationality Law; DFAT 2019 Report; and UNHCR Advice Iraqi Nationality 2019.

¹⁴ UNHCR Advice Iraqi Nationality 2019.

¹⁵ DFAT 2015 Report; and DFAT 2018 Report.

declare that Kuwait was not their place of birth and often needed sponsorship from a local tribal group. This scheme was not available after 2003 and Bidoon who were unable or unwilling to accept 'makremiyah' remain stateless. DFAT advises that approximately 54,000 Bidoon remain stateless and the United Nations High Commissioner for Refugees (UNHCR) states that Bidoons who were not granted Iraqi citizenship constitute the majority and live out of the city areas as nomads.¹⁶ I have considered whether the evidence indicates the applicant acquired nationality via this assistance package.

27. I consider that the applicant's evidence in relation to other aspects of his background and the location of his family has at times been extremely vague and/or inconsistent. In the entry interview, the protection visa application and the protection visa interview, he was unable to identify any of the areas between Kuwait and Iraq in which he claimed he and his parents resided and stated at interview that he did not know the names of any nearby towns or villages where he grew up. At the entry interview, he identified with some certainty that several of his siblings resided in Jordan, however in the protection visa application and interview stated that, apart from a sister who resided with his parents, he was unsure where his siblings resided. Even taking into account the passage of time and the circumstances in which he has claimed to reside (as Bidoon), I consider it entirely implausible that the applicant was not aware of these matters and would not be able provide this information, particularly given his evidence that he remained in regular contact with his parents. This raises real questions as to whether he was attempting to conceal that he and his family had attained Iraqi nationality.
28. However, against the above factors, the applicant has since provided information to the IAA that though they moved around, they were living in Samawa (in Muthannia) but moved to Nasiriyah in Dhi Qar province in 2016. This information has been consistent throughout his submissions to the IAA. The applicant has not provided an explanation as to why he was not able to provide this information to the Department, but noting he has now been consistent about this for over two years and that it accords with the independent information above that Bidoon communities settled in these areas, I accept he has provided the correct information to the IAA on this matter. I accept that his parents were living in Samawa and now reside in Nasiriyah in Dhi Qar. I also accept that two of his sisters live with his parents, as do two of his brothers who have returned to Iraq after residing in Jordan (and note this is also consistent with information provided in the entry interview).
29. Throughout his evidence to the Department the applicant was unable to state when exactly he went to Lebanon or how long he lived there, initially identifying a period of between one and five years and then stating it may have been three to five years. I have some concerns in relation to the plausibility of this evidence and his apparent inability to narrow down the time frame. However, I note that: he was there illegally; he has a limited education; and has no records of his time there and I am prepared to give him the benefit of any doubt and accept he was there between three and five years. Moreover, his evidence regarding his illegal entry and exit from that country has been consistent and detailed and I consider his ability to travel to and from that country is not in his particular circumstances indicative that he has Iraqi (or other) nationality. Concerns were noted regarding the ability of his family to fund his residence in Lebanon but I accept his detailed and consistent (since his arrival in Australia) evidence that he resided with a family friend who provided him with accommodation, employment and financed a year of language and literacy studies. I am not satisfied that his stay or travel to Lebanon is indicative that he is a national of Iraq or any country.

¹⁶ DFAT 2015 Report; DFAT 2018 Report; and UNHCR 2010 Bidoon Report.

30. The European Asylum Support Office (EASO) notes that very little is known about Bidoon in Iraq, though the UNHCR, advises that stateless Iraqi Bidoons live in precarious conditions, often in poverty, and generally have only tents as shelter.¹⁷ However more recent advice from the EASO is that while some Bidoon continue to have a nomadic live, many have now developed a more settled lifestyle and many Bidoon (not just stateless Bidoon) make a living tending to other people's livestock.¹⁸ I note that the applicant has been entirely consistent since his arrival in Australia that his father became a shepherd, they lived in tents and had a nomadic lifestyle, and his evidence is generally consistent with this independent information. He has provided details regarding the conditions in which they resided and how he spent his time. He has also provided basic details relating to his father's work tending to sheep and cattle since his arrival in Australia. His evidence was fairly limited, but I accept his knowledge was commensurate with his age at the time and the limited nature of his personal involvement in those activities, particularly given he moved to Lebanon in his late teenage/early adult years. I accept that his father worked as a shepherd and moved around in the course of this work, and overall consider that his consistent evidence is indicative that he and his family are stateless Bidoon.
31. The applicant's evidence that his father travelled to Jordan and Saudi Arabia and that they paid [amount] for his travel to Australia is somewhat at odds with information that stateless Bidoon cannot move freely outside of Iraq due to their lack of documentation and that many Bidoon live in poverty.¹⁹ These matters were raised with the applicant during the interview. I am not entirely persuaded by his evidence that his father's travel was largely related to his work as a shepherd and that he had the assistance of his employer, but am prepared to give him the benefit on this matter. Further, noting it is broadly consistent with advice from the EASO, I do accept as plausible the applicant's explanation that, though limited, the family did have an income (via his father's work) and his mother was able to sell some [goods], which paid for his passage to Australia. I also note that the applicant has never been asked to explain how his siblings were able to travel to and from Jordan and I cannot place any weight on this fact as evidence that the family have nationality. Overall, I am not satisfied that these matters are indicative that the applicant or his family attained Iraqi (or other) nationality.
32. The applicant departed Iraq via Basra airport on an Iraqi passport bearing his correct name and photograph. I accept his evidence that this document was taken by people smugglers and as such the document itself is not before me. Possession of a passport generally creates a *prima facie* presumption that the holder is a national of the country of issue. In this case, while the applicant stated at interview that he was unsure whether the document was 'genuine', he has consistently stated that it was obtained via fraudulent means, in that his father arranged it through a smuggler. Independent information states that it is possible to either manipulate Iraqi passports, or to obtain a genuine Iraqi passport on the basis of fraudulent supporting identity documents (which are relatively easy to obtain).²⁰
33. The delegate concluded that the applicant's Iraqi passport was genuinely issued, largely on the basis that he was able to travel through [Country 1] and [Country 2] without issue and that [Country 1] has sophisticated methods to detect false passports.²¹ The applicant has provided material to the IAA which I accept, that as a transit passenger he was not required to clear immigration in [Country 1] or present his passport for careful inspection and I accept that a fraudulent identity document may not have been detected in those circumstances. There is

¹⁷ UNHCR 2010 Bidoon Report; and EASO Targeting of Individuals 2019 Report.

¹⁸ EASO Targeting of Individuals 2019 Report.

¹⁹ DFAT 2015 Report; and DFAT 2018 Report

²⁰ DFAT 2018 Report; and Norwegian ID Centre, 'Identity Documents in Central Iraq', February 2013, CIS28050.

²¹ [Source deleted].

nothing in the review material regarding the relevant procedures in [Country 2] to detect fraudulent passports and I cannot place any weight on that matter. I accept that his claims to have attained this passport via fraudulent means is plausible and that find that the fact he was able to obtain and travel on this document does not in his particular circumstances of itself establish that he is an Iraqi national.

34. Overall, I accept there are some concerns with aspects of the applicant's evidence relating to his background. However, taking into account all the evidence as a whole, including evidence given shortly after his arrival in Australia, his sworn statutory declarations to the IAA and the independent information, I am not satisfied that his overall credibility is impugned to such a degree that all of his claims and evidence on this matter are to be rejected in their entirety. I consider the applicant has provided plausible explanations to many of the issues raised above both to the Department and to the IAA. Nor am I satisfied that the above matters taken cumulatively lead to a conclusion he is an Iraqi national. On the totality of the evidence before me, I am not satisfied that the evidence supports a conclusion that the applicant is a national of Iraq as found by the delegate. As he was born in Kuwait and resided in Lebanon, I have considered whether he is a national of each of these countries.

Lebanon

35. The applicant claimed to have spent a period of time residing in Lebanon, claiming that he entered the country illegally. I accept his detailed evidence on this matter. He has not claimed to be a national of Lebanon and there is nothing in the evidence before me to indicate that he is. I find that he is not a national of Lebanon and that he does not have a right to enter and reside in that country.

Kuwait

36. Kuwaiti nationality is governed by the 1959 Kuwaiti Nationality Law.²² There have been some attempts by the Kuwaiti government to grant nationality to Bidoons in Kuwait, but in only very limited numbers per year.²³ According to the United Kingdom Home Office (UKHO) the Kuwaiti government maintains that most Bidoon are nationals of other countries and in these circumstances they are regarded as illegal residents and are not granted Kuwaiti nationality.²⁴ The vast majority of applications for nationality remain outstanding.²⁵ An individual granted with Kuwaiti nationality is issued with a civil identity card.²⁶ There is nothing in the evidence before me to indicate the applicant or his family have ever been issued with this identity card. Taking into account this information, and the death certificate of the applicant's grandfather identifying him as 'Non-Kuwaiti', I accept that the applicant and his family are not nationals of Kuwait. I also accept that he does not have a right to enter and reside in Kuwait.

Conclusion on receiving country

37. I have determined that the evidence does not support a conclusion that the applicant is a national of Iraq, Kuwait or Lebanon, and I accept his claim to be stateless. On the accepted evidence, the applicant has resided in Lebanon for three to five years between approximately 2006 and 2011. He resided in Iraq between 1991 and about 2006 and again for a short time in 2011, his parents and four of his siblings continue to reside in Iraq and he has substantial ties

²² UKHO 2014 Bidoon Report.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

to that country. It is possible for an applicant to have more than one country of former habitual residence. In this case, it appears that Lebanon and Iraq are both his former countries of habitual residence and are his receiving countries for the purpose of my assessment. While not entirely clear, I am proceeding on the basis that the applicant is not required to have a well-founded fear of persecution in both countries.

Past harm in Iraq

38. The applicant has claimed that his father has been harassed and had his sheep stolen by the authorities because he is Bidoon. Information before me confirms that stateless Bidoon communities may face harassment and discrimination on that basis²⁷ and I accept this occurred as claimed. I also accept that as a stateless Bidoon in Iraq, the applicant had no entitlement to an education and did not attend school.
39. The applicant claimed his father has received threats from Shia militias after seeking compensation for the execution death of his cousin (a Kuwaiti Bidoon in Iraq) in 2006/2007 and because he refused their attempts to recruit him. I accepted that these claims, on their face, constituted credible personal information in the sense required for the s.473DD assessment. However, I have reached a different conclusion in the context of assessing the applicant's claims. These matters were not raised with the Department during interviews conducted with the applicant shortly after his arrival in Australia, in his protection visa application, or during the protection visa interview. During that interview the applicant was explicitly asked if he had experienced issues in Iraq relevant to assessing his protection claims and these claims were not raised. Noting his evidence that he has been in regular contact with his family, I am not persuaded by the applicant's explanation that his father only advised him of these matters after the making of the decision. Nor are these claims supported by recent independent information that Shia militia groups do not generally undertake forcible recruitment or target those who do not join them.²⁸
40. Independent information supports a heightened period of sectarian violence during 2006/2007²⁹ and I accept that his cousin's father was killed in the course of that violence. However, on the evidence before me, I am not satisfied, and do not accept, that the applicant's father was ever targeted by Shia militias for any reason, including for any reason associated with seeking compensation for the death of his cousin or because he refused to join Shia militia groups. I am not satisfied the applicant would be of any adverse interest on return to Iraq from Shia militia groups for these reasons, or that he would himself be subject to forcible recruitment by these groups.

Medical conditions

41. The applicant provided credible oral evidence during his protection visa interview regarding various medical conditions affecting [Medical Condition 1], including detailed evidence regarding surgeries [to] treat [Medical Condition 1]. His evidence and knowledge was presented in a matter consistent with lived experience. He has also provided material to the IAA (which was not presented to the delegate) from a medical specialist confirming he has been treated for [Medical Condition 1] which required regular medication. A letter from a [Consultant] and Physician confirmed the applicant was experiencing [Medical Condition 2].

²⁷ UKHO 2014 Bidoon Report; DFAT Iraq Report 2018; EASO Targeting of Individuals Report 2019; and UNHCR 2019 Report.

²⁸ EASO Targeting of Individuals Report 2019.

²⁹ UNHCR, 'Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Iraq', 31 May 2012 (UNHCR 2012 Report).

The material before me is dated 2015 and 2016 and there are no more recent reports before me. Nonetheless, I accept that the applicant has the claimed [Medical Condition 1], has had surgery in the past, and will likely require continued monitoring and treatment in the future. I accept he is due for further reassessment of his conditions next year.

Other matters

42. The applicant has provided a copy of his marriage certificate and I accept his evidence that he is married to an Australian citizen.
43. I also accept that due to the manner of his return, he will be identified as a returnee/failed asylum seeker from a western country on return to Iraq and Lebanon.

Refugee assessment

44. 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

45. 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.

Iraq

46. I have accepted that the applicant is a stateless Bidoon, born in Kuwait and a Shia Muslim. I accept he will be returning to Dhi Qar in the southern governorates of Iraq, that he is married to an Australian citizen, will be identified as a returnee/failed asylum seeker from a western country, and has medical condition/s which will likely require continued and ongoing treatment. His parents and siblings currently reside in Dhi Qar province and I accept that this is the area to which he would return.

47. DFAT advises that they have no evidence of targeted violence against Bidoon communities.³⁰ This is somewhat at odds with 2019 advice from the UNCR that minority groups including Bidoon, particularly those that are Shia, have faced targeted harm from Sunni insurgent group, Islamic State of Iraq and the Levant (ISIL). However, in any event, recent information is that the government and its associated forces declared victory over ISIL in 2017.³¹ The Iraqi Security Forces have retaken territory previously held by ISIL and remain in control of Baghdad and the southern governorates of Iraq. ISIL retain some capacity to conduct small scale attacks, however there has been a significant reduction in their operation and activities and they are now operating in rural areas in the west, central and north of the country including Anbar, Diyala, Kirkuk, Ninewa and Salah al-Din.³² Information confirms the general downward trend of violent insurgent activity throughout central and southern Iraq: Musings On Iraq noted that March 2019 witnessed the lowest level of violence since the 2003 invasion and there have been few or no reported instances of violence or insurgent activity in the southern governorates, including in Dhi Qar, into October 2019.³³
48. Shia militias continue to operate in the southern governorates and have greater power now than previously. In about 2014 over 200 such groups, unified to form the Popular Mobilisation Forces (PMF).³⁴ The PMF was formally bought under centralised control as an independent military organisation in 2018 and they now work alongside the ISF fighting against the Sunni insurgency, including against ISIL.³⁵ However, the UNHCR does not suggest that Shia Bidoon are at risk from Shia militia groups, including those in the PMF.³⁶ The EASO has recently identified the following groups who are currently of adverse interest to PMF and Shia militias in Iraq: current political opponents (largely other Shia militias); some members of the Sunni community in retaliatory attacks following major terrorism incidents; activists and journalists critical of the PMF; those who deviate from Shia morality norms (LGBTI individuals, alcohol sellers and Christians); and certain business owners who are targeted for extortion.³⁷ This is generally supported by information DFAT.³⁸ The information does not support that Bidoon communities face violence or harm from members of the community.³⁹
49. On this information, I am not satisfied that the applicant faces a real chance of any harm from ISIL, Sunni insurgents, Shia militias, the PMF, or members of the community as a stateless Shia Bidoon on return to Iraq now or in the reasonably foreseeable future.
50. DFAT advises that in general the treatment of Bidoons in Iraq depends on their citizenship status.⁴⁰ Bidoons who were granted Iraqi citizenship, enjoy all the same rights as all other Iraqi citizens, have the same living conditions as other Iraqi's, are largely integrated with the

³⁰ DFAT Iraq Report 2018.

³¹ DFAT Iraq Report 2018; EASO Security Situation Report 2019; EASO Targeting of Individuals Report 2019; and UNHCR 2019 Report; Musings on Iraq Reports.

³² DFAT Iraq Report 2018; EASO Security Situation Report 2019; EASO Targeting of Individuals Report 2019; UNHCR 2019 Report; and Musings on Iraq Reports.

³³ DFAT Iraq Report 2018; DFAT Iraq Report 2017; EASO Security Situation Report 2019; EASO Targeting of Individuals Report 2019; UNHCR 2019 Report; Musings on Iraq Reports.

³⁴ DFAT Iraq Report 2018; EASO Targeting of Individuals Report 2019; UNHCR 2019 Report; and EASO Security Situation Report 2019.

³⁵ DFAT Iraq Report 2018; EASO Targeting of Individuals Report 2019; UNHCR 2019 Report; and EASO Security Situation Report 2019.

³⁶ UNHCR 2019 Report.

³⁷ EASO Targeting of Individuals Report 2019.

³⁸ DFAT Iraq Report 2018.

³⁹ DFAT Iraq Report 2018; EASO Targeting of Individuals Report 2019; and UNHCR 2019 Report.

⁴⁰ Ibid.

community and face no discrimination from either the Government or the community.⁴¹ In contrast, DFAT, the UNHCR and EASO all state that stateless Bidoon have difficulties obtaining identity documentation and as such do not have access to education, health care, many services (including clean water, electricity and adequate shelter), public sector job opportunities, and nor can they register land in their own names, sign rental contracts or inherit property.⁴² The government does not usually register births and deaths of stateless Bidoons.⁴³ DFAT currently assesses that stateless Bidoon are subject to moderate levels of official discrimination. However, as noted above, the EASO recently advised that despite limited access to formal employment many Bidoon have access to unofficial employment including as shepherds and have been able to develop a more settled lifestyle.⁴⁴ The UNHCR advised in their 2019 report that that members of religious and minority ethnic groups, including Bidoon, may be in need of international refugee protection, depending on the individual circumstances of the case.⁴⁵

51. On the information before me, I accept that stateless Bidoon in Iraq experience official discrimination from the government. However, I am not satisfied that being a stateless Bidoon from Kuwait of itself leads to a real chance of serious harm of the kind intended by the Act. Rather, I accept advice from the UNHCR that whether a stateless Bidoon faces treatment amounting to serious harm will depend on the particular evidence, facts and circumstances of each individual applicant.
52. In this case, I have accepted above that the applicant's father faced some harassment from Iraqi authorities as a stateless Bidoon. However, on the applicant's own evidence his father has been steadily employed since moving to Iraq with the applicant stating that they were financially 'ok'. They have also had access to accommodation and that the applicant's evidence suggested access to sufficient food and clean water to sustain themselves and their livestock. I accept the applicant has a limited education, attending school for a year in Lebanon and English classes here in Australia. However, he has assisted his father to tend their livestock in the past and has attained skills working [in] Lebanon. He is now an adult and has resided away from his family in other countries demonstrating he is adaptable and capable of living in different environments. His parents and four siblings continue to reside in Dhi Qar and I am not satisfied they would not be able to support or assist the applicant on his return if required. I accept he would not be able to obtain government employment. However, taking into account his personal circumstances, I am not satisfied that he would be unable to access accommodation and (unofficial) employment on return such that he faces a real chance of serious harm.
53. However, I have also accepted that the applicant has medical conditions related to [Medical Condition 1], has had surgery in the past, and will very likely require continued monitoring and treatment in the future for these conditions. Relevantly, DFAT and the UNHCR advise that Health infrastructure has suffered from decades of conflict and many primary health care facilities are under-resourced with skilled health care workers moving abroad or to safer areas of Iraq.⁴⁶ Health services are limited, particularly in areas affected by conflict, and areas with large numbers of internally displaced people (IDPs).⁴⁷ However, information still supports that Iraq has a mixture of public and private hospitals, and primary health care is provided by both

⁴¹ Ibid.

⁴² Ibid; EASO Targeting of Individuals Report 2019; and UNHCR 2019 Report.

⁴³ DFAT Iraq Report 2018

⁴⁴ EASO Targeting of Individuals Report 2019.

⁴⁵ UNHCR 2019 Report.

⁴⁶ DFAT Iraq Report 2018; and UNHCR 2019 Report.

⁴⁷ Ibid.

private and public clinics and the government is working to restore many facilities⁴⁸ and I am not satisfied the limitations of the healthcare system in Iraq of itself amounts to serious harm of the kind contemplated by the Act.

54. In this case I accept on the information before me that the applicant has not accessed health services in Iraq in the past and that his mother has been unable to access such services when needed due to her status as a stateless Bidoon. Noting this and the above independent information, I accept that there is a real chance that the applicant will be discriminatorily denied identity documents required to gain access to health care on the basis that he is a stateless Bidoon. As noted above, in most cases, this would also not of itself amount to a real of serious harm. However, when considering the applicant's very specific medical circumstances, I consider the discriminatory denial of identity documentation, would amount to a denial of access to basic services which would threaten his capacity to subsist and live in Iraq. I am satisfied that there is a real chance of the applicant facing serious harm on return to Iraq due to his stateless Bidoon ethnicity and that this involves systematic and discriminatory conduct.
55. I am satisfied the applicant fears persecution on the basis of his ethnic profile, and his status as a stateless Bidoon is the essential and significant reason for the persecution he fears and would face on return to Iraq. As the discriminatory conduct is perpetrated by the authorities, and these issues will be present throughout Iraq, I am satisfied the chance of harm relates to all areas of the country and that the applicant would not be able to obtain effective state protection against the persecution he fears. Further as the persecution relates to his ethnicity and his particular medical conditions, I am not satisfied that he can be required to take any reasonable steps to modify his behaviour to avoid a real chance of persecution.

Summary

56. I acknowledge that the applicant's evidence has been problematic in some respects and this case can be described as a borderline. In particular, his evidence regarding his background and area of residence in Iraq and Lebanon was at times vague. However, his evidence that his family were Kuwaiti Bidoons was supported by documentation and consistent with independent information. He provided a reasonable account of his families circumstances as stateless Bidoon which was largely consistent since his arrival in Australia, and in most cases was supported by the independent information. He also provided plausible explanations for noted concerns. Moreover, while I consider more up-to-date information regarding his health concerns would be beneficial, I accept that he is due for further check-ups next year and the fact that he has medical conditions related to [Medical Condition 1] is not in contention. The assessment of his status in Iraq and that of his family may change in the future, as may information related to his health. However, on the basis of the information that is currently before me, including new material which was not before the delegate, I am satisfied that the applicant has a well-founded fear of persecution in Iraq within the meaning of s.5J of the Act. I have found above he does not have a right to enter and reside in any other country.
57. As I have found the applicant satisfies s.5J for the reasons cited above, I have not considered his remaining claims for protection in Iraq including whether he faces harm due to his Shia faith; his marriage to an Australian woman; the general security situation; and/or as a returnee/failed asylum seeker from a western country.

⁴⁸ DFAT Iraq Report 2018.

Refugee: conclusion

58. 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.