



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

IRAQ

IAA reference: IAA16/01509

Date and time of decision: 4 January 2017 19:05:00

Grace Ma, Reviewer

Decision

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473ED(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 Shia Arab from Basra, Iraq. [In] March 2016 he lodged an application for a safe haven enterprise visa (SHEV).
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [In] November 2016.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).

Applicant's claims for protection

4. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
 - The applicant worked as [occupation] in Basra. He first worked in his [Sibling 1's business], he then opened his own [business] in 2006 and trained his [Sibling 2] to work with him in that profession.
 - The Islamic militias imposed strong surveillance on their work. They bar them from [certain work]. Many [in his industry] were attacked and killed in Iraq.
 - In May 2010, the applicant left his [business] under the custody of his [Sibling 2]. He got a job in a foreign [company] called [Company 1]. During the two years of his service with [Company 1], he worked as [occupation]. This company was entrusted with [certain work] in the Basra sector and used to also carry out [particular] projects.
 - In April 2012, he received a telephone call from a group called Asa'ib Ahl Al-Haq (AAH), who threatened to kill him if he did not join them and leave his job.
 - AAH raided their home and opened fire while they were asleep. The applicant, his [Sibling 2] and mother escaped from the backdoor and hid at their neighbour's house. They then left to the city of [Town 1] in Basra and remained there for several months.
 - AAH burnt the applicant's [business] and destroyed it.
 - He maintained in regular contact with a friend who briefed him of the security situation and the news of AAH, the Mahdi Army (JAM), and others. His friend proposed that he leave Iraq.
 - In March 2013, he left Iraq for Australia.
 - In June 2013, his [Sibling 2] was killed.
 - He fears being killed or harmed by AAH, JAM or other militant groups on the bases of his work as [occupation] and his work with a foreign company. He also fears harmed as a non-practising Muslim.

Refugee assessment

5. 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

6. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

Applicant’s background

7. I accept on the basis of the applicant’s Iraqi national ID card and citizenship certificate that the applicant is a national of Iraq, and that he is a Shia Muslim of Arab ethnicity from Basra.
8. I accept that the applicant trained and worked as [occupation] from 2003 until 2012. He first worked at his [Sibling 1’s business] in 2003; he opened his own [business] in 2006; and in 2010, he left his [business] with his [Sibling 2] and he commenced working as [occupation] at [Company 1]. This is supported by a copy of the applicant’s [training] certificate and employee badge from [Company 1]. I accept that the applicant taught his [Sibling 2] [occupation] and his [Sibling 2] worked in his [business].

Brother’s death

9. I accept on the basis of a copy of death certificate that the applicant’s [Sibling 2] died after the applicant left Iraq [in] June 2013, and the cause of death was [details deleted].
10. At the SHEV interview, the applicant stated that his [Sibling 2] died partly because of him since he was [occupation], his [Sibling 2] was [occupation] and became [occupation] through his training and guidance; he took his [Sibling 2] to [Town 1], and his [Sibling 2] was killed ‘as a next person in the line’. When asked, the applicant stated that his [Sibling 2] was not killed in [Town 1]. He stated that his [Sibling 2] went to the centre of Basra that day, and on his way back, on the main road, there was a car coming and they shot him.

11. Country information indicates that while southern Iraq, including Basra, has remained significantly more secure than other parts of Iraq, generalised violence do occur. For example, in 2013, the number of casualties in Basra, in southern Iraq, was approximately 10 per cent of the number of casualties in Diyala, in central Iraq.¹
12. On the evidence before me, I consider it entirely speculative to make a finding as to who killed the applicant's [Sibling 2] and the reason for it. I am not prepared to accept that the applicant's [Sibling 2] was killed for reasons relating to the applicant, or because of his [Sibling 2's] work as a [occupation], or that he was killed by the AAH. I am not satisfied on the evidence that the applicant will face a real chance of harm for reasons relating to his [Sibling 2's] death now or in the reasonably foreseeable future.

Work as [occupation] and in foreign company, Shia, non-practising Muslim

13. Country information indicates that since the fall of the Saddam Hussein regime in 2003, [workers in a certain industry] have been targeted and some even killed in Basra and Baghdad. [These businesses] have been bombed or forced to close [by] militias who were sending a signal to all Iraqis that they were empowered to dictate societal norms.² During that period, the continuous attacks on [this industry] aroused fear within some of them, to the extent that they left their jobs and started to secretly practice their profession at home, whereas others have put signs on their stores that informed customers that they did not do [particular services]. It is reported that some extremists visited [businesses] and threatened [workers] not to [provide services] or try to imitate Americans in their [work].³ The applicant also provided an article regarding [occupations] being targeted by militias for [providing particular services] dated [March] 2005.
14. Based on the above information, I accept that the applicant's [Sibling 1] ceased working as [occupation] and sold his [business] in 2006 due to the incidents towards [occupations] at that time, and that his [Sibling 1] is now working in a [different occupation] in Basra.
15. I accept that the applicant's [business] was monitored by militias, who harassed and threatened them not to do western style [services].
16. At the SHEV interview, the applicant stated that in 2012, he received a text message on his phone from AAH requesting him to join them and stop working with [Company 1]. He stated that two days later, he received a phone call from AAH. AAH told him that they sent him a message; he ignored it and did not reply. AAH requested him to attend their office. They told him that they knew he was working in [Company 1] and that next time when they sent him something, he had to reply. He apologised to the AAH and told them that he would attend their office. But he did not attend their office as he was fearful of what they would do with him.
17. There was no mention of having received a text message from AAH, or that the AAH requested the applicant to attend their office in the applicant's written statement. The written statement only mentioned about a threatening telephone call from AAH and the subsequent home attack and arson attack against the applicant's [business].

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 5.21, 5.23.

² [Information deleted].

³ [Information deleted].

18. At the SHEV interview, the applicant stated that 24 hours since the phone conversation, AAH attacked his home. This differs from his written statement which stated that a few days after the phone call from AAH, they attacked his home.
19. In the written statement, the applicant stated that at 2 a.m. his home was raided and shot at. When asked at the SHEV interview, the applicant stated that the shooting at his home started at '1 o'clock...at night time'.
20. According to the applicant, they stormed the house and opened fire, which lasted for about an hour. The threats and the home attack occurred within a short timeframe. In these circumstances, I consider these to be memorable and significant incidents. There is no medical evidence before me to suggest, and I am not satisfied, that the applicant's evidence is affected by any memory or medical conditions. The written statement was made about three years after the applicant's boat journey to Australia. I do not consider that the omission or inconsistencies was due to any effect from the boat journey.
21. The applicant was able to provide detailed and specific evidence in his SHEV application and at the SHEV interview in October 2016, including the contents of the text message and phone conversation, and the timing of the claimed incidents. The written statement was prepared in 2016, about three years after the applicant's arrival in Australia in 2013, and the applicant was assisted by a migration agent in his SHEV application and at the SHEV interview. As such, I am not satisfied that the passage of time since the claimed incidents or trauma could satisfactorily explain the omission and inconsistencies. In my view, if the applicant had in fact received a text message from AAH followed by a threatening call two days later, and his home was attacked 24 hours since that phone call, the applicant would at least be able to provide consistent evidence as to whether the AAH requested him to attend their office; and whether he only received a threatening call, or a text message followed by a threatening call.
22. No independent evidence has been provided to substantiate the claimed threats and attacks, such as the claimed text message from AAH or reports regarding the claimed home attack or arson attack on his [business].
23. Country information indicates that from 2008, the situation for [these] businesses has improved. [These businesses] in Baghdad re-opened and business was buzzing given the improved security situation, where Iraqi security forces were safeguarding residents and local businesses.⁴
24. On the applicant's evidence, he has never been caught doing [services] or the forbidden things which AAH had asked him and other [workers] not to do, and that AAH started to monitor him, his [siblings] and other [workers] in their area from 2006 up to 2010. In these circumstances, it is doubtful that AAH would threaten the applicant and attack his home and [business] in 2012.
25. At the arrival interview held in 2013, the applicant stated that he did not know why AAH wanted him to join them and that they were gangs and involved in crimes.
26. At the SHEV interview in 2016, in response to why AAH wanted him to join them, the applicant stated that they perceived him '...as a person who is outside and not practising Islam, working as [occupation] and [providing services],... labelled as secular,... out of the context of the religion'. He stated that part of their mission was to invite him or convert him, or take him back to Islam religion.

⁴ [Information deleted].

27. The applicant's evidence is that he did not practise his Shia faith when he was in Iraq, he does not pray or attend mosque, and does not know the difference between the Sunni and Shia ways of worship. Apart from the claimed incidents in 2012 which I have not accepted, there is no evidence that the applicant suffered past harm from Shia militant groups or AAH on the basis of being a non-practising Muslim.
28. Country information indicates that Shia militias have conducted attacks on Sunnis and share an anti-Sunni outlook.⁵ The independent information⁶ before me does not indicate, and I am not satisfied, that Shia militant groups targeted Shias; or non-practising Muslims; or impute them with an anti-Islamic or anti-militias opinion. I do not accept that the applicant was targeted or of interest to AAH or other Shia militias on the basis of being a Shia Muslim or a non-practising Muslim. I find there is no real chance that the applicant would be harmed on these bases.
29. The applicant stated at the SHEV interview that AAH told him to stop working with [Company 1] because they are foreigners who want to steal or to take Iraq [products] away from them. The information before me does not suggest that [people] who worked with a foreign company were specifically targeted or threatened by militant groups in Basra. I am not satisfied on the evidence that the applicant was targeted or of adverse interest to AAH, JAM or Shia militant groups because of his work as [occupation] for a foreign company in Basra.
30. Having regard to the totality of the evidence, the applicant's accepted profile and for the above reasons, I do not accept that AAH wanted the applicant to join them because he is a non-practising Muslim, worked as [occupation] or with a foreign company or that they labelled him as secular or wanted to convert him back to Islam religion. I do not accept that the applicant received a text message or threatening call from AAH, JAM or armed militant group; or that AAH, militias, the police or anyone stormed, raided, attacked or opened fire at the applicant's home; or that the applicant's [business] was burnt or destroyed. I do not accept that the AAH requested that the applicant to join them, leave his job, or attend their office. I do not accept that the applicant, his mother and [Sibling 2] were displaced from their home, or that they left their home for the city of [Town 1] for the reasons claimed. I am not satisfied on the information that the applicant is or was known to the radical Islamists as a secularised Arab Shia; that he was perceived as a secularised enemy who has collaborated with foreign companies; or regarded as a 'kafir' or an apostate; or that he is or was imputed to be hostile to the radical Islamist goal of establishing Iraq as an Islamist state under either a caliphate or an Islamic regime based only on Sharia law. I am not satisfied that the applicant is or was of adverse interest to AAH, JAM or any other Shia armed groups, or that he suffered psychological fear or harm from his encounters with Islamist terrorists.
31. As such, I find that the applicant will not face a real chance of harm from AAH, JAM or other Shia militant groups for reasons relating to his previous work as [occupation], his work with a foreign company or [Company 1], or for being a non-practising Muslim, or a combination of these reasons, now or in the reasonably foreseeable future.
32. Country information indicates that [workers in these industries] who were targeted during Iraq's sectarian war, held [an event] in Baghdad in 2013 as a symbolic move to break with years of fear. The event, officially called the [event], was organised over a weekend and was the first of its kind since the 2003 US-led invasion and its violent aftermath. It marked a sharp difference from the climate that once prevailed in the country, when tens of thousands were killed in the insurgency and sectarian war that followed the invasion that ousted now-executed

⁵ DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 2.36.

⁶ DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160.

dictator Saddam Hussein. Militants have weakened and violence has dropped dramatically when compared to years earlier.⁷ It is reported in July 2016 that ‘emos’ - young men who dressed differently, including having special or western [style], are now back, as their attackers are otherwise occupied. These kinds of young men are more courageous and one sees more of them in southern Iraq, such as Nasiriya. Militias are preoccupied with other issues and that gives them some freedom to dress as they like.⁸

33. The applicant submitted an article dated [June] 2015 to the delegate, which stated that IS militants have announced that [dressing western style] was punishable in Mosul. However, unlike southern Iraq, including Basra and Nasiriya, which are under government control,⁹ the city of Mosul was controlled by Daesh and other Sunni armed groups.¹⁰ As the applicant is from Basra, I give weight to the country information regarding the situation in areas under government control in southern Iraq, which is more relevant to the applicant’s circumstances. Country information indicates that IS militants and other Sunni insurgent groups have very limited presence in government controlled areas in southern Iraq,¹¹ and I am not satisfied that IS militants or Sunni extremist groups have the capacity to patrol and target [occupations] or to enforce a ban on [certain trends] in the south, including Basra.
34. On the information, I find that the applicant faces no real chance of harm from IS militant or other Sunni insurgent groups on the bases of his work as [occupation]; his work with [Company 1], a foreign company; for being a Shia or a non-practising Muslim; or for any other reasons, if he were to return to Basra now or in the reasonably foreseeable future.
35. In view of the above country information, and given the passage of time of over four years since the claimed incidents in 2012, I consider that even if the applicant was threatened and attacked, which I do not accept, the applicant will not face a real chance of harm for reasons relating to his past work as [occupation], his work in [Company 1] or for being a non-practising Muslim, or for a combination of these reasons, if he were to return to Basra now or in the reasonably foreseeable future. In addition, the evidence before me does not indicate that the applicant’s [Sibling 1], who used to work as [occupation], was threatened or targeted for harm since he stopped working as [occupation]. The applicant’s evidence that his [Sibling 1] is living unharmed in Basra supports that the applicant will not face a real chance of harm for reasons relating to his past activities as [occupation] if he were to return to Iraq.
36. The referred country information reported an incident of truck bombing in front of a [business] in Baghdad.¹² However, it is not clear as to whether this was a targeted attack or general violence, and who was responsible for this incident. The independent information before me does not suggest that [occupations] or [related businesses] are being attacked or targeted in Basra. As mentioned above, the situation for [occupations] in Iraq have changed since 2008, where violence and attacks against [occupations] have dropped, [these businesses] have re-opened since 2013 and ‘emos’ are back in southern Iraq in July 2016.
37. Country information indicates that Shia militia groups in Iraq, including JAM, AAH (an offshoot of JAM), Kata’ib Hezbollah, the Mukhtar Army and the Badr Corps, have changed their aims and operations, and are now working alongside the Iraqi Security Forces (ISF), the Iraqi

⁷ [Information deleted].

⁸ [Information deleted].

⁹ DFAT, “DFAT Country Report Iraq”, 13 February 2015, CISE96CF1160, 2.28.

¹⁰ Ibid, 2.6.

¹¹ Ibid, 2.34, 2.35.

¹² [Information deleted].

government and indirectly allied with foreign forces, in the fight against Daesh.¹³ I accept that the AAH has institutionalised as a leading member of the Popular Mobilisation Forces (PMU). However, given their change in focus following the 2014 Islamic State offensive, in that they are now in support of the government and fighting against the Islamic State,¹⁴ I do not accept that the applicant's risks heightened as AAH legitimised and institutionalised as a leading member of the PMU.

38. I have also considered the representative's submission of 14 March 2016, including the references to decisions made by the former Refugee Review Tribunal (RRT), some dating back to 2013. Some of these decisions relate to Iraqi students and ex-Ba'athist academic from other provinces of Iraq, which differs from the applicant's circumstances. I am required to consider the circumstances of this particular applicant and recent country information. This is particularly so given the abovementioned change in the situation for [occupations] in Iraq.
39. The applicant has not specifically claimed that he wishes to work as [occupation] upon return. Nonetheless, on the information before me, and having regard to the applicant's accepted profile, I consider there is only a remote chance that the applicant will be harmed or targeted by AAH, JAM, other Shia armed groups or Sunni militant groups if he were to continue working as [occupation] upon return to Basra. I am not satisfied on the evidence that the applicant faces a real chance of harm if he were to continue working as [occupation] in Basra upon return, including working in a foreign company, now or in the reasonably foreseeable future.
40. Considering the evidence as a whole, I am not satisfied that the applicant will face a real chance of harm for being a non-practising Muslim, Arab Shia, on the bases of his past or future work as [occupation], including working for a foreign company, or a combination of the claimed reasons, if he were to return to Basra now or in the reasonably foreseeable future.

General situation

41. DFAT indicates that Shia communities in Iraq are subject to general and targeted violence by Sunni-linked insurgent groups and extremists.¹⁵ Daesh and associated armed groups systematically suppressing, expelling or destroying religious and ethnic minority groups including Shias, from areas under their control.¹⁶ The violence is largely aimed at destabilising the government and communities, rather than being targeted at individuals. However, Shias who are members of government security services, detainees, senior political or government leadership, or ethnic minorities also appear to have been specifically targeted by Daesh.¹⁷ The applicant does not fall within these specific profiles. DFAT indicates that insurgent activity is highest in the northern, western and central provinces, and the level of violence and casualty rate are much lower in the southern provinces.¹⁸
42. I accept that Sunni extremists and associated insurgent groups are targeting Shias in areas that they control, and the security situation in many parts of central and northern Iraq continues to be highly volatile and unpredictable due to ongoing military offensives and counter-offensives.¹⁹ However, the Basra province in southern Iraq remains under the control of the

¹³ DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 2.36 – 2.38; Kenneth Katzman, "Iraq: Politics, Security, and U.S. policy", Governance, and Human Rights, 22 June 2015, CISEC96CF12978, p.17-19.

¹⁴ Kenneth Katzman, "Iraq: Politics, Security, and U.S. policy", Governance, and Human Rights, 22 June 2015, CISEC96CF12978, p.17.

¹⁵ DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.45.

¹⁶ UNHCR, "UNHCR Position on Returns to Iraq", 14 November 2016, CIS38A80122649, p.4.

¹⁷ DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 3.45.

¹⁸ *Ibid.*, 2.32 – 2.35.

¹⁹ UNHCR, "UNHCR Position on Returns to Iraq", 14 November 2016, CIS38A80122649, p.2.

ISF. There is no credible evidence to suggest that the applicant has been targeted or harmed by Sunni militant groups in the past. On the basis of this information and the applicant's accepted profile, I am not satisfied that the applicant will face a real chance of being harmed in Basra by Sunni militant groups now or in the reasonably foreseeable future.

43. Country information indicates that ISIS' advances in northern and central Iraq in 2014 and into 2015 and the ensuing security vacuum in other parts of the country have reportedly resulted in the empowerment of militias and tribes, a rise in criminality, and an overall weakening of the state authority and the rule of law, including Baghdad and the southern governorates.²⁰ The country information set out in the representative's submission of 14 March 2016 is broadly consistent with the above information. However, DFAT advises that southern Iraq has remained significantly more secure than central Iraq, and the southern provinces have been relatively insulated from the increased level of violence in the north and west.²¹ As the majority community with a dominant role in Government, Shias face little or no official discrimination by the Government-controlled areas.²² Overall, DFAT assesses that Shias in Shia dominated areas in the south are at a low risk of generalised violence.²³
44. There is no credible evidence before me to suggest that the applicant himself has suffered harm in Basra due to the general or security situation. Although one of the applicant's [siblings] died in 2013, the applicant's evidence is that his mother [and other siblings] are living in Basra, and most of his siblings are married with children. The applicant has not claimed and the evidence before me does not indicate that his mother, his siblings or their family suffered harm on the basis of the general or security situation or tribal conflicts in Basra. On the evidence before me, I find there is only a remote chance that the applicant will be caught up in generalised violence, sectarian violence or tribal conflicts in southern Iraq upon return.
45. Although the applicant has not expressly claimed to fear harm on the bases of being a returnee who has spent time in Australia or a failed asylum seeker, I have nonetheless considered them. DFAT advises that there is considerable evidence showing a number of Iraqis return home, and the practice of seeking asylum then returning home once conditions permit is well accepted among Iraqis.²⁴ There is evidence of large numbers of people voluntarily returning from US, Western Europe and Australia to take up residence and jobs in Iraq, with no suggestion that they are not assimilated back into their communities.²⁵ Iraqi government offered a range of incentives to encourage Iraqis who have not been able to gain asylum overseas to return voluntarily.²⁶ The information does not suggest that failed asylum seekers or returnees are targeted for harm. Based on the information, I find that the applicant will not face a real chance of harm for reasons of being a failed asylum seeker, a returnee from a Western country or having spent time in Australia.
46. Even considering the applicant's cumulative circumstances as a young Shia Muslim Arab man, a non-practising Muslim, a failed asylum seeker, a returnee who spent time in the west, and who worked in a foreign company, and has worked and would work as [occupation] upon return, I am not satisfied on the evidence before me that the applicant has a well-founded fear of persecution in Basra for any reason now or in the reasonably foreseeable future.

²⁰ Ibid, p.3.

²¹ DFAT, "DFAT Country Report Iraq", 13 February 2015, CISE96CF1160, 5.21.

²² Ibid, 3.44.

²³ Ibid, 3.47.

²⁴ Ibid, 5.27.

²⁵ Ibid.

²⁶ Ibid.

Refugee: conclusion

47. Having considered the applicant's claims cumulatively and singularly, I find that the applicant does not have a well-founded fear of persecution in Basra for any reason now or in the reasonably foreseeable future. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

48. A criterion for a protection visa is that the applicant is a non citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

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

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

50. I have not accepted that the applicant was threatened, or that his home or [business] was attacked, burnt or destroyed by AAH, JAM, or other Shia militant groups or Sunni armed groups relating to his work as [occupation] or his work with a foreign company [Company 1], or for being a non-practising Muslim, or for any other reason. I have not accepted that the applicant will face a real chance of being perceived as an apostate, 'kafir', a secularised enemy who has collaborated with foreign companies, or holding an anti-Islamic view, or being opposed to the militias, or hostile to the radical Islamist goal of establishing Iraq as an Islamist state. I have not accepted that the applicant's [Sibling 2] died because of him or that he faces a real chance of harm for reasons relating to his [Sibling 2's] death. I have also found that the applicant will not face a real chance of harm if he were to continue working as [occupation] or with a foreign company upon return. Further, I have also found: there is no real chance of harm from any Sunni or Shia militant groups, including AAH, JAM, Daesh, or other militant groups, for any reasons in Basra; that there is no real chance that he will be harmed as a young Shia Muslim Arab male who was a returnee from a western country and as a failed asylum seeker. As the 'real risk' test imposes the same standard as the 'real chance' test,²⁷ for the same reasons as set out above, I find that the applicant does not have a real risk of suffering harm on return to Iraq for the purposes of s.36(2)(aa).

51. Considering the applicant's claims individually and in combination, I am not satisfied on the evidence that there are substantial grounds for believing that, as a necessary and foreseeable

²⁷ *MIAC v SZQRB* (2013) 210 FCR 505.

consequence of being returned from Australia to Iraq, there is a real risk that the applicant will suffer significant harm, including mental or physical harm.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.