



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

**Decision and Reasons**

**Referred application**

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IRAQ

IAA reference: IAA17/02230

Date and time of decision: 21 September 2017 14:33:00

Victoria Price, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Shia Muslim of Arab Ethnicity from Najaf, in the south of Iraq. He arrived in Australia [in] April 2016 and lodged an application for a temporary protection visa with the Department of Immigration and Border Protection (DIBP) [in] August 2016.
2. A delegate of the DIBP (the delegate) refused to grant the visa to the applicant [in] March 2017. The delegate found the applicant did not have a real chance or risk of harm on the basis of an illicit relationship with a girl, his Shia faith, or the general security situation in Najaf.

### 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).
4. I have obtained new information regarding the treatment of Shias in the south of Iraq and people who have worked with the international community from the most recent Department of Foreign Affairs and Trade (DFAT) country report for Iraq, dated 26 June 2017.<sup>1</sup> The delegate relied on previous versions of the DFAT report, which have been updated by the new report. I am satisfied that there are exceptional circumstances to justify considering this new information.

### Applicant's claims for protection

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5. The applicant's claims can be summarised as follows:
  - In 2011 the applicant met a girl who was a friend of his [Relative A]. He spoke to his [Relative A] about his desire to marry her friend and she arranged for them to speak on the telephone. They had one telephone conversation and later arranged to meet in the main market. She used to ring him when her family were busy and would visit him in the [market] while her parents were at the shrine.
  - In April 2012 his family proposed marriage to her family. Her father and [sibling] refused as she was already promised to [Mr B]. Her [sibling] questioned the applicant about how he knew her and was rude, so they left. His mother tried unsuccessfully to get the girl's mother to change their mind about the marriage. Her family threatened to harm his if they did not stop their pursuit of the marriage and cease visiting them. He and his family stopped visiting the girl's home and did not pursue the matter further.
  - The day after the proposal was rejected, the girl called him to advise that her [sibling] was suspicious that they were in a relationship. Her [sibling] questioned her about how she knew the applicant and told her that he would be watching her movements. She told the applicant that she could not meet him anymore.
  - The applicant did not see or hear from her for two months. In June 2012 she called to tell him that her family was visiting [City 1]. The applicant went to her house and her

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report—Iraq", 26 June 2017, CISED850AD4631.

[sibling] found them alone in her room. He brought a [Weapon 1] to hit the applicant but the applicant escaped.

- The applicant returned home, told his family what had happened and went into hiding in [a village] on the outskirts of Najaf. The girl's [siblings] came to the applicant's family home and threatened to kill him. The neighbours intervened in the resulting argument between their respective [siblings].
  - The applicant left Najaf for [City 2] because her tribe was big and could reach him everywhere in Iraq. He stayed for five months in his company's accommodation. The company moved to [City 1], but he could not move there because [City 1] is a stronghold for the girl's tribe. He feared that someone from her tribe would kill him because her tribe and his tribe had agreed to 'shed his blood' in a written agreement.
  - He remained in hiding, living with relatives in the desert in Najaf between January and April 2013. However, he believed he was unsafe and departed Iraq in April 2013.
6. The applicant also claimed to fear harm from Shia militias, particularly the Madhi Army, due to his work as [Occupation 1] with the [Organisation 1] in 2006.
7. The applicant's representative submitted that the applicant is a member of a particular social group (PSG) namely, 'Iraqi person who breached strict social norms by initiating illicit relations with a girl', which is 'inextricably linked with religious dictates' because religion and social norms are linked in Iraq. The delegate considered that claims to fear harm on the basis of his Shia faith and the general security situation arose on the material.

## **Refugee assessment**

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8. 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**

9. 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.

10. I accept on the documentary and oral evidence before me that the applicant is a Shia Muslim of Arab ethnicity and is a citizen of Iraq.
11. The applicant has lived in various locations in Iraq including [City 2]. However, he resided in Najaf for most of his life. His father has deceased but his mother and siblings continue to reside in Najaf. I find this is the area to which he would return and is his home area for the purpose of assessing his claims for protection.

*Harm due to relationship with a girl in Iraq*

12. The applicant claimed to fear harm on the basis of his previous relationship with [Relative A's] friend. Independent information confirms that Iraq is a conservative society and that generally women do not have freedom of movement.<sup>2</sup> However, relationships can and do develop without familial knowledge or support irrespective of these conservative societal norms.<sup>3</sup> Information supports that women, and to a lesser extent men, can be killed in so called honour crimes for entering such relationships.<sup>4</sup> The applicant's evidence on the development of the relationship with [Relative A's] friend was consistent and presented in a manner suggestive of lived experience. He spontaneously provided the girl's name, her age and gave basic information regarding their interactions. I accept as plausible that the applicant was in a relationship with a girl who he met through his [Relative A] between approximately [month] 2011 and [month] 2012. I accept they talked on the telephone on several occasions and met twice at the market while her family were visiting the nearby shrine. I accept that her family rejected the marriage proposals from the applicant's family as she was promised to [Mr B]; that her family threatened to harm him and his family if they pursued the matter; and that he and his family ceased to pursue the marriage and the relationship. However, for the reasons set out below, I am not satisfied that the applicant or his family were further threatened as claimed.
13. The applicant's claim that he went to visit the girl two months after the rejection of their proposal at her request and was assaulted by her [sibling] is implausible in a number of respects. The applicant's evidence was that he instructed his family to 'leave it'; that the girl told him they could not meet anymore; and they had no further contact. In these circumstances, it is unclear why the girl would contact the applicant two months later. The applicant stated that they had been 'waiting to see each other', but this does not fit with his evidence that they had no further contact. Further, noting information that women are facing increased pressure to adhere to conservative societal norms,<sup>5</sup> and the applicant's own evidence that the girl believed her family were watching her movements, it is implausible that she would be left on her own while her family went to [City 1]. It is similarly implausible, that she would invite the applicant to her home while she was alone, particularly in circumstances where their previous meetings were in the presence of other people; either his [Relative A], or in a shop at the market, and as they had never been alone together.
14. The applicant has also provided inconsistent evidence regarding the girl's tribe, the visit and the claimed assault. In his arrival interview, he stated that he and the girl were from the same

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<sup>2</sup> United States (US) Department of State, "Iraq 2015 Human Rights Report", 13 April 2016, OGD95BE926170.

<sup>3</sup> USA Today, 'Parents disapprove, but Internet romance a big hit', 21 March 2011, CXCB3E63420990.

<sup>4</sup> US Department of State, "Iraq 2015 Human Rights Report", 13 April 2016, OGD95BE926170; UK Home Office, "Iraq August 2011", 30 August 2011, 3319; United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines Iraq April 2009", 1 April 2009, 1394; Peter Beaumont, "Hidden Victims of a Brutal Conflict: Iraq's Women", Global Policy Organisation, 8 October 2006; and Al Monitor, "In Iraq Honor Crimes Spread to Cities", 11 October 2013.

<sup>5</sup> US Department of State, "Iraq 2015 Human Rights Report", 13 April 2016, OGD95BE926170.

tribe but could not be together for religious reasons and tribal tradition. However, in the protection visa application, he indicated they were from different tribes. He stated at his arrival interview that it was he who contacted the girl two months after the rejection of the proposal, which contradicts his claims in the protection visa application, that she contacted him. He also stated at the arrival interview that her [sibling] entered her bedroom with [Weapon 2] in his hand and began hitting him. In contrast in the protection visa application he indicated that her [sibling] came into the room empty handed, left the room and returned with a [Weapon 1]. Even taking into account the passage of time, given the centrality of these matters to his protection visa application, I would expect the applicant to accurately recall these details. The applicant has not raised any concerns with the quality of interpretation such that his evidence could be misinterpreted, and there is nothing else before me to account for these discrepancies.

15. Further, the applicant's claims that he was hiding with his family in various locations in Najaf, and that he stayed in his company's accommodation in [City 2] for five months without harm, are at odds with his evidence that her family had strong tribal connections everywhere in Iraq and that he was not safe anywhere. Moreover, I consider that the fact he remained in the country for about 10 months after the alleged incident, suggests that he was not in immediate fear for his safety.
16. Finally, the applicant's evidence was that their relationship did not become intimate; the girl's reputation was intact; she was not harmed by her family or anyone else; and, although they were not in contact, he heard from his mother that she subsequently married [Mr B] as intended by the family. I consider that these factors undermine the applicant's claims regarding the intensity of her family's reaction towards him.
17. The applicant provided a copy of a document purported to be from his tribe, denouncing him for his actions and giving authority for the girl's tribe to harm him. The document states that the applicant 'encroached upon their honour (their women)' and did not observe tribal law, but it does not provide any further details of how he is purported to have done so. Nor does the document indicate the applicant breached the honour of her family by trespassing into their home, as he claimed at interview. The document does not appear to be dated. In his statutory declaration provided with the protection visa application, the applicant stated he could not move from [City 2] to [City 1] with his company because he feared that someone from her tribe would kill him, 'especially that her tribe and his tribe agreed to shed my blood, they reached into a written agreement with this regard'. This suggests that the document was issued prior to the applicant's departure from Iraq and provided a basis for his fear about moving to [City 1]. However, this is at odds with his evidence at the DIBP interview that the agreement was issued after he left Iraq and that [Relative C] emailed it to him in Australia. Finally, as noted above, the applicant initially gave evidence that he and the girl were from the same tribe. I place no weight on this document, and find that it does not overcome the concerns I have identified above in relation to the applicant's evidence.
18. Individually the matters identified above may not be significant, however, cumulatively, they lead me to not be satisfied that the applicant visited the girl two months after the proposal was rejected; that he trespassed into their home; that they were discovered in her bedroom by her [sibling]; or that the applicant was assaulted by her [sibling]. I am also not satisfied that: the applicant fled home and informed [Relative C] of the incident; he went into hiding in various locations in Iraq; her [siblings] visited the applicant's family home; they threatened to kill the applicant and had an altercation with his family; or that their respective tribes entered into an agreement to kill, or otherwise harm the applicant. On the totality of the evidence before me, I am not satisfied that the applicant and his family were subject to any further

threats of harm from the girls family or tribe after they ceased their pursuit of the marriage and relationship in early 2012.

19. It has now been over five years since they ceased their relationship and the applicant stated they have not any further contact since he came to Australia. As noted above, the girl is now married to [Mr B] and suffered no reputational damage. In these circumstances I am not satisfied that the applicant faces a real chance of any harm from the girl's family, her tribe or anyone else, as a result of their relationship if he returns to Iraq now or in the reasonably foreseeable future, including as an Iraqi person who breached strict social norms by initiating illicit relations with a girl.

#### *Harm due to work with [Organisation 1]*

20. The applicant claimed, and I accept, that he worked for two weeks as a [Occupation 1] with [Organisation 1] in 2006. His evidence on this matter was detailed and given in a spontaneous manner, and is consistent with country information regarding [Organisation 1] and the operation of the Madhi Army.<sup>6</sup> He claims, and I accept, that he was never subjected to harm, but that he was threatened by the Madhi Army to cease this work. I accept his evidence that he did as instructed and that he stopped working with [Organisation 1].
21. Information supports that Shia militias, including the Madhi Army, remain active in the southern governorates of Iraq, operating as part of the Popular Mobilisation Forces or Units.<sup>7</sup> Recent information from the Australian Department of Foreign Affairs and Trade (DFAT) is that Iraqis who have worked with the international community, including [Organisation 1], face a high risk of societal discrimination and a moderate risk of societal violence.<sup>8</sup>
22. In this case, the applicant gave evidence that he did not experience any harm or further threats from the Madhi Army or anyone else between ceasing his work with [Organisation 1] in 2006 and his departure for Australia in 2013. He has not claimed to have faced any societal discrimination for this reason in that time. It has now been over 11 years since the applicant worked with [Organisation 1] and he has not claimed that he would undertake any work with the international community in the future. He has over 13 years' experience as [Occupation 1] and his family, who he has lived with in the past, continue to reside in Najaf. On the evidence before me, I am not satisfied that he would be unable to obtain work or accommodation on return to Iraq. Finally, I note that the applicant's evidence was that he did not fear harm in Iraq due to his work with [Organisation 1]. On the totality of the applicant's profile and circumstances, I am not satisfied that he faces a real chance of any harm or discrimination from the Madhi Army, other Shia militias, the community, or anyone else, due to his work with [Organisation 1] in 2006 if he returns to Iraq now or in the reasonably foreseeable future.

#### *Harm for other reasons in Iraq*

23. I have accepted that the applicant is a Shia Muslim from Najaf in the south of Iraq. Recent information from DFAT is that Shia's face little or no official discrimination in the government controlled southern governorates.<sup>9</sup> In these areas reported instances of societal discrimination are associated with patronage and nepotism, such as not having the right contacts to secure

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<sup>6</sup> UK Home Office, "Iraq August 2011", 30 August 2011, 3319.

<sup>7</sup> UNHCR, "UNHCR Position on Returns to Iraq", 14 November 2016, CIS38A80122649; and UK Home Office, "Country Information and Guidance Iraq: Security situation in Baghdad, the south and the Kurdistan Region of Iraq (KRI)", 12 August 2016, OGD7C848D67.

<sup>8</sup> DFAT, "DFAT Country Information Report-Iraq", 26 June 2017, CISED50AD4631.

<sup>9</sup> Ibid.

access to jobs or housing. The applicant gave evidence at the DIBP interview that he had not experienced any harm or other issues as a result of his Shia faith. As noted above, the applicant has experience as [Occupation 1] and his family, with whom he used to reside, continue to live in Najaf. I am not satisfied on the evidence before me that the applicant would be unable to secure employment or accommodation on return to Iraq.

24. Information is that Shia communities are subject to harm from ISIL and Sunni insurgents.<sup>10</sup> However, overall, DFAT has assessed that Shias in the south of Iraq face a lower risk of violence than elsewhere in the country<sup>11</sup> and information from the United Kingdom (UK) Home Office and the United Nations High Commissioner for Refugees (UNHCR) supports that violence against Shias is more prominent in central Iraq and areas under ISIL control in northern and western Iraq.<sup>12</sup> In a recent report, the UNHCR confirms that the security situation in central and northern Iraq is volatile due to ongoing military offensives.<sup>13</sup> While this report notes an increase in crime in the south, it does not suggest that the same volatile security situation extends to the southern governorates. Information from the UK Home Office is that the southern governorates have remained more secure than other areas of the country, with fewer security incidents.<sup>14</sup>
25. There have been little or no direct confrontations between ISIL and the Iraqi Security forces in the southern governorates, including in Najaf.<sup>15</sup> The UK Home Office recently assessed that indiscriminate violence in the south is not at such a level that mere presence in the area leads to a real risk of harm<sup>16</sup> and there is nothing before me to suggest that this assessment has changed. In the context of assessing the risk of harm to Shias, DFAT notes that criminal activities in the south of Iraq are often linked to violence between opposing Shia militias or tribal groups.<sup>17</sup> There is nothing in the applicant's accepted profile to suggest he will be caught up in any such criminal activity.
26. On the evidence before me, including the applicant's particular circumstances and the independent information, I am not satisfied that the applicant faces a real chance of harm on the basis of his Shia religion or due to the general security situation if he returns to Najaf now or in the reasonably foreseeable future.
27. Information before the IAA is that there are functional international airports in the southern governorates of Najaf and Basra.<sup>18</sup> Having regard to the information above regarding the security situation in the southern governorates, and to the applicant's accepted claims and circumstances, I am satisfied that he can access his home area.

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<sup>10</sup> Ibid; and UNHCR, "UNHCR Position on Returns to Iraq", 14 November 2016, CIS38A80122649.

<sup>11</sup> DFAT, "DFAT Country Information Report-Iraq", 26 June 2017, CISED50AD4631.

<sup>12</sup> DFAT, "DFAT Country Information Report-Iraq", 26 June 2017, CISED50AD4631, and UNHCR, "UNHCR Position on Returns to Iraq", 14 November 2016, CIS38A80122649.

<sup>13</sup> UNHCR, "UNHCR Position on Returns to Iraq", 14 November 2016, CIS38A80122649.

<sup>14</sup> UK Home Office, "Security situation in Baghdad, southern governorates and the Kurdistan Region of Iraq (KRI)", 1 April 2015, OG8F59D8D14; and UK Home Office, "Country Information and Guidance Iraq: Security situation in Baghdad, the south and the Kurdistan Region of Iraq (KRI)", 12 August 2016, OGD7C848D67.

<sup>15</sup> UK Home Office, "Security situation in Baghdad, southern governorates and the Kurdistan Region of Iraq (KRI)", 1 April 2015, OG8F59D8D14; and UK Home Office, "Country Information and Guidance Iraq: Security situation in Baghdad, the south and the Kurdistan Region of Iraq (KRI)", 12 August 2016, OGD7C848D67.

<sup>16</sup> UK Home Office, "Country Information and Guidance Iraq: Security situation in Baghdad, the south and the Kurdistan Region of Iraq (KRI)", 12 August 2016, OGD7C848D67.

<sup>17</sup> DFAT, "DFAT Country Information Report-Iraq", 26 June 2017, CISED50AD4631.

<sup>18</sup> UK Home Office, "Country Information and Guidance Iraq: Return/Internal relocation", 18 August 2016, OGD7C848D68; and UK Home Office, "Country Information and Guidance - Iraq Internal relocation (including documentation and feasibility of return)", 17 November 2015, OG8F59D8D50.

## Refugee: conclusion

28. I am not satisfied that the applicant faces a real chance of harm due to his previous relationship with [Relative A's] friend, his work with [Organisation 1], his Shia religion or due to the general security situation in Najaf now or in the reasonably foreseeable future. The applicant indicated at interview that he had no other claims for protection.
29. 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

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30. 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

31. 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.
32. I have accepted that the applicant was in a relationship with [Relative A's] friend approximately between October 2011 and April 2012. However, I have found that the applicant does not face a real chance of harm from the girl's family, her tribe, or anyone else due to this relationship, including as an Iraqi person who breached strict social norms by initiating illicit relations with a girl. I have also found that the applicant does not face a real chance of harm or discrimination from anyone, including the Madhi Army, other Shia militias and the community, on the basis of his work with [Organisation 1] in 2006. As real chance and real risk involve the same standard,<sup>19</sup> I similarly find for the reasons set out above, that these claims do not give rise to a real risk of harm for the purpose of s.36(2)(aa) of the Act.
33. I have accepted that the applicant is a Shia Muslim from Najaf in the south of Iraq. I have found above that he does not face a real chance of harm on the basis of his religion, or due to the general security situation in Najaf. For the reasons set out above, I also find that these matters do not give rise to a real risk of harm for the purpose of s.36(2)(aa) of the Act.
34. The applicant has not put forward any other claims for protection.

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<sup>19</sup> *MIAC v SZQRB* (2013) 210 FCR 505.

35. As noted above, information is that there are functional international airports in the southern governorates of Najaf and Basra.<sup>20</sup> Having regard to the country information set out above, regarding the security situation in the southern governorates, and to the applicant's accepted claims and circumstances, I am satisfied that he can access his home area.

#### **Complementary protection: conclusion**

36. 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**

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

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<sup>20</sup> UK Home Office, "Country Information and Guidance Iraq: Return/Internal relocation", 18 August 2016, OGD7C848D68; and UK Home Office, "Country Information and Guidance - Iraq Internal relocation (including documentation and feasibility of return)", 17 November 2015, OG8F59D8D50.

## Applicable law

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

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

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

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

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

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

...

## 5J Meaning of well-founded fear of persecution

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

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

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

## 5K Membership of a particular social group consisting of family

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

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

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

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

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

#### **5L Membership of a particular social group other than family**

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

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

#### **5LA Effective protection measures**

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

...

#### **36 Protection visas – criteria provided for by this Act**

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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