



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

IRAQ

IAA reference: IAA17/02964

Date and time of decision: 26 February 2018 14:01:00

Victoria Price, Reviewer

Decision

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an 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 Muslim from Basra in the southern governorates of Iraq. He lodged an application for a temporary protection visa (TPV) with the Department [in] August 2016.
2. [In] June 2017 a delegate of the Minister of the Department (the delegate) refused to grant the visa finding that the applicant did not face a real chance or risk of harm on return to Iraq.

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. On 10 August 2017 the applicant's representative provided a submission to the IAA to the extent this discusses the findings of the delegate, this does not include new information for the purpose of s.473DC(1) and I have had regard to it in my assessment.
5. In his TPV application the applicant claimed that a Shia militia group made several attempts to recruit him in the past. He claimed he was targeted because he was playing [sports] and had no job. However, the representative's submission to the IAA included a new claim that the applicant was targeted for recruitment because 'he is a vulnerable person without familial or tribal support'. The representative stated to the IAA that the applicant put this forward in the TPV interview with the delegate. I have listened to a recording of that interview, and this was not raised by either the applicant or the representative at that time, nor was it included in the written statement accompanying the applicant's protection visa application, or in the interview conducted with the applicant shortly after his arrival in Australia (the arrival interview). This claim was not before the delegate when the decision was made, and I accept that it may be relevant. It constitutes new information for the purpose of s.473DC(1).
6. The new claim does not relate to an event or an issue arising since the delegate's decision. Rather, as set out above, it relates to a claim previously made and provides a new reason upon which the applicant claims to have been targeted for recruitment by militias in the past. I note that applicant was represented by a migration agent who assisted in preparing the written TPV application and who attended the TPV interview. During that interview, the delegate discussed at length the applicant's claims that a Shia militia group attempted to recruit him and the applicant was given an opportunity to state why he claimed he was targeted. At no stage did he state it was because he was a 'vulnerable person without familial or tribal support' rather, as indicated above, he claimed it was because he was playing [sports] and was not employed. Further, in contrast to the new claim, the applicant stated he resided in the family home and his oral evidence suggested he was close with his family, in particular his mother, which suggests that he did have familial support and was not a vulnerable person. The applicant had the opportunity to confer with his agent during the TPV interview, after which the representative made oral submissions regarding his claims, and towards the end of the TPV interview the applicant stated he had nothing further to add. I note that the representative had time between the TPV interview and the decision to provide additional submissions and he did not do so. Overall, I consider that this new claim is different to the evidence the applicant previously provided and it is not merely an elaboration of his earlier claims. I also consider that the applicant had ample opportunity to raise this new claim prior to the decision being made

and there appears to be no reason as to why he did not or could not have done so. On the totality of the evidence and circumstances before me, the applicant has not satisfied me that this new claim could not have been provided before the delegate made the decision, or that it is credible personal information which was not previously known, and had it been known, may have affected consideration of the applicant's claims. Having regard to all of these matters, I am also not satisfied there are exceptional circumstances to justify considering the new information. I must not consider it.

7. I have obtained new information regarding the treatment of Shia Muslims in the southern governorates of Iraq and people who have spent time in the west, from the most recent Department of Foreign Affairs and Trade (DFAT) country report for Iraq.¹ This report was published after the delegate's decision and updates the previous version of the report which was relied upon by the delegate. I am satisfied that there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:
 - The area where the applicant resided in Basra is controlled by militia groups such as the Madhi Army, the Asa'ib Ahl al-Haq (AAH), Fadhila party and Badr Brigades. These political parties focus on the younger generation in order to recruit them. The applicant was approached at home by members of a Shia militia, who he believed were the AAH, who asked him to join them. They indicated that as he did not have a proper job or education he should join them and they would pay him a monthly wage. The applicant refused their offer, saying that he could not join the militias. They were angry that he used the word "militia", but left without saying anything further.
 - During this time the applicant applied for a passport. He was planning to leave Iraq because in Iraq you either join the parties or you will be targeted.
 - A few days prior to his departure from Iraq, the same group came to his family home. They told his mother that he was playing [sports] all the time while the young people were fighting for the sake of Iraq and told her he had described them as "militia ". They said to her that he was busy playing [sports] and had forgotten about going to prayers. His mother was upset and afraid but told them that the applicant was not interested in joining their group. They said ok, but in a manner which conveyed a threat to teach him a lesson'.
 - The applicant was afraid that they would harm him and his mother told him to leave Iraq as they will not forget about him, especially because he plays [sports] all the time and the militias do not like those who play [sports].
 - Two weeks after the applicant's departure from Iraq, members of the AAH visited his home and asked about him. His mother told them he was in Australia and they told her that he had chosen to live the luxury life in the west over the true life in the battle fields. They said that he had insulted them when he described them as militias and that he should be punished for this insult and for refusing to cooperate with them.

¹ Australian Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information report Iraq", 26 June 2017, CISED50AD4631.

9. The applicant fears harm from Shia militias, in particular the AAH on return to Iraq, for the above reasons. The delegate also considered that claims to fear harm as a Shia Muslim and due to the general security situation arose on the material.

Refugee assessment

10. 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

11. 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.
12. On the documentary and oral evidence before me I accept that the applicant is a Shia Muslim and that he is a citizen of Iraq. The applicant was born in Nasiriyah in Thi Qar province in the southern governorates of Iraq. He moved with his family to [Town 1] in Basra province, also in the southern governorates of Iraq, during his childhood and resided there until his departure for Australia in 2013. His family continue to reside in [Town 1], Basra and I find that this is the area to which he would return and is his home area for the purpose of assessing his protection claims.
13. The applicant claimed to fear harm on return to Iraq due to his past refusal to join the AAH, for insulting that organisation, for forgetting to go to prayers, for engaging in conduct of which the AAH disapproves, namely playing [sports] and, for choosing to live in the west rather than fight. Country information confirms that Shia militias, including the AAH, operated in the southern governorates of Iraq, including the applicant’s home area of Basra, at the time the claimed events occurred.² These groups were resurgent in Iraq in and around 2014 in response to increasing sectarianism and calls to defend Shia religious sites.³ However, for the reasons that follow, I do not accept that the AAH or any Shia militia group attempted to recruit the

² 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;

³ DFAT, "Country Report Iraq", 13 February 2015, CISEC96CF1160.

applicant in the past or that he came to the adverse attention of the AAH or any Shia militia group for any reason, including insulting them, forgetting to attend prayers, for playing [sports] or for choosing to live in the west rather than fight.

14. The applicant has provided differing evidence to the Department regarding his protection claims. In the arrival interview held with the applicant about two months after his arrival in Australia, he was asked why he left Iraq, while he did mention the existence of Shia militia groups, he did not at any stage indicate that the AAH, or any other militia group attempted to recruit him or state that he had been threatened by these groups for any reason, including for insulting them, for forgetting to attend prayers, for playing [sports] or for being in the west. Rather, he stated that: he left because there was no future and no studies; that nothing specifically happened to him but you need to be a member of a militia group to have a future in Iraq and that he was not a member of, and did not want to be a member of, any of these organisations. The applicant was asked what he thought would happen to him on return to Iraq and he indicated that nothing would happen but he has no future and that is why he left Iraq. This is in direct contrast to the claims identified above in the TPV application that the AAH attempted to recruit him and threatened him.
15. The evidence provided by the applicant at the arrival interview was raised during the TPV interview. At this time the applicant acknowledged that he had given different evidence but stated that it was because he was emotionally tired after the sea journey, he was told he would have another interview to discuss his protection claims, and because he was scared that he would be deported. I am not satisfied that these explanations can account for the discrepancies in the information provided to the Department. Even if the applicant was tired and knew he would have a further interview to discuss his claims, it is not clear why he would then state nothing had happened to him when asked to explain why he left Iraq and feared returning. Nor is it clear why he would not raise claims of past harm to explain why he could not return to Iraq, particularly in circumstances when he says he feared he would be sent back to face harm. The applicant's representative submitted that the applicant's statements on arrival were broadly about the claims later made in the TPV application. I do not accept this is the case, the evidence was vastly different, with the applicant stating on one hand that he had experienced no past harm but left Iraq because he limited opportunities and no future, and on the other hand, that he had been threatened by the AAH, and I am not satisfied these accounts can be reconciled. I have listened to the arrival interview recording and while there is some interference with the audio, the delegate's questions and the applicant's responses are discernible. I note that there was no suggestion that the applicant's evidence had been misinterpreted or misunderstood during either the arrival interview or during the TPV interview such that his claims or evidence could be said to have been misunderstood. There is an accurate written record of the interview, and as noted, the applicant acknowledged he had provided a different account of his past experiences in Iraq. Overall, had the claimed events relating to the AAH occurred, I would have expected these matters to have been raised when the applicant had the opportunity to do so in the arrival interview, and that he would not have provided a different account of the reasons for departing Iraq.
16. I further consider that the applicant provided inconsistent evidence in relation to certain aspects of his claims. The applicant's written statement indicated that he sought to obtain a passport a short time after the AAH first approached him attempted to recruit him. In contrast, he stated in the TPV interview, that he had applied for the passport [a number of] months prior to departing Iraq, and that it was not until after the second visit from the AAH that he decided to leave the country. Given the importance of these matters to the applicant's protection visa claims, I would have expected him to provide a consistent account of the claimed events, and as noted above, there is no suggestion that the quality of the interpretation at the TPV

interview was such that the applicant's claims and evidence could be said to have been misunderstood.

17. In addition, I note that the applicant stated that he was chosen for recruitment in part because he was unemployed. However, his evidence was that he was in fact employed as a [Occupation 1] at the time he claims to have been targeted. In these circumstances it is not evident that the AAH or any other Shia militia would consider that he was unemployed and target him for this reason. Finally, I note that the applicant was an adult at the time of the claimed events and there is nothing in the independent information before me to suggest that Shia militias, including the AAH, the Madhi Army or any other group operating in the southern governorates of Iraq, undertook forcible recruitment of adult males or that they targeted [sports] players as contended by the applicant.⁴ I note that the delegate raised this matter in the TPV interview, after which the applicant was provided an opportunity to confer with his representative. The applicant's representative made submissions accepting that Shia militias did not undertake forced recruitment and stated that the applicant was not at risk of this occurring. This was repeated in the submission to the IAA.
18. Having regard to the matters above cumulatively, I am not satisfied on the evidence before me that the claimed events occurred. I am not satisfied that AAH, or any Shia militia group, ever attempted to recruit the applicant or that he refused to join them and insulted them by referring to them as 'militias'. I do not accept that the AAH or any Shia militia threatened to harm the applicant because he refused to join them, because he insulted them by calling them 'militias', because he played [sports] or because he forgot to go to prayers. I also do not accept that members of the AAH or any other Shia militia, visited the applicant's mother two weeks after his departure for Iraq, asked his whereabouts, and again threatened to harm him for these reasons, or because he had chosen to live in the west instead of fighting.
19. I note that independent information supports that Shia militias, including the AAH, continue to operate in the southern governorates of Iraq.⁵ These groups have unified to form the Popular Mobilisation Forces or Units (PMU) and are currently working alongside the Iraqi Security Forces to fight Sunni armed insurgent groups including ISIL.⁶ Information supports that they do engage in criminal activities, including kidnapping and murder, but they primary target Sunni males for such activates.⁷ In this case, the applicant, as a Shia, does not fall within the category of persons currently being targeted. The applicant has stated that he will not join any Shia militia on return to Iraq in the future. I note that the information before me does not suggest that Shia militias are currently engaged in forcible recruitment of adult males, and I find that he will not be forcibly recruited to join any Shia militia on return to Basra or harmed for failing to join a militia group. Further, the information also does not suggest that Shia militias, including the AAH, are currently targeting persons who forget to pray or who play [sports]. Moreover,

⁴ Ibid; 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; and UK Home Office, "Security situation in Baghdad, southern governorates and the Kurdistan Region of Iraq (KRI)", 1 April 2015, OG8F59D8D14.

⁵ DFAT, "Country Report Iraq", 13 February 2015, CISEC96CF1160; 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; and UK Home Office, "Security situation in Baghdad, southern governorates and the Kurdistan Region of Iraq (KRI)", 1 April 2015, OG8F59D8D14.

⁶ DFAT, "Country Report Iraq", 13 February 2015, CISEC96CF1160; 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; and UK Home Office, "Security situation in Baghdad, southern governorates and the Kurdistan Region of Iraq (KRI)", 1 April 2015, OG8F59D8D14.

⁷ DFAT, "Country Report Iraq", 13 February 2015, CISEC96CF1160; 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; and UK Home Office, "Security situation in Baghdad, southern governorates and the Kurdistan Region of Iraq (KRI)", 1 April 2015, OG8F59D8D14.

information before me does not support that they, or anyone else, are targeting persons who have chosen to live in the west rather than fight. Rather, DFAT states there is limited evidence to suggest that people who return to Iraq after living in the west face any difficulties assimilating back into their communities, and notes that the practice of seeking asylum and then returning home is well accepted among Iraqis.⁸

20. On the totality of the evidence before me, including the independent information and the applicant's accepted claims and circumstances, I am not satisfied that he faces a real chance of any harm due from the AAH or any other Shia militia, or anyone else, if he returns to Basra now or in the reasonably foreseeable future for any reason including for: being forcibly recruited into a Shia militia; a past or future refusal to join the AAH or another Shia militia group; for insulting the AAH or Shia militias in the past; for forgetting to pray; for playing [sports]; or for choosing to live in the west rather than fight.
21. The applicant has claimed that you do not have a future if you do not join the Shia militia groups. I note that the applicant is a Shia Muslim from the southern governorates of Iraq. DFAT has recently assessed that as the majority community in Iraq with a dominant role in government, official and societal discrimination against Shias is low, particularly in Shia dominant areas in the south of Iraq which includes the applicant's home area.⁹ Information is that in these areas, instances of societal discrimination are likely to be associated with patronage and nepotism, such as not having the right contacts to secure employment and housing.¹⁰ The information does not suggest that you need to be a member of a Shia militia in order to have a future as contended by the applicant.¹¹ I note that the applicant has not claimed to have experienced any issues in the past due to his Shia faith. The applicant has limited education, completing several years of primary school. However, he has attained skills working as a [particular occupation] in Iraq and has worked as a [Occupation 1]. His application indicates that his family, with whom he used to reside, remains in [Town 1] in Basra, and there is nothing in the evidence before me to suggest that he will not have their continued support on return. I am not satisfied on all the evidence before me that he will be unable to obtain accommodation or employment on return to Basra or that he will face any other harm from the community due to his Shia faith, or that he will not have a future because he will not join a Shia militia group.
22. Independent information is that Shia communities in Iraq are subject to harm from ISIL and Sunni insurgents.¹² However, this is in central Iraq and areas in which ISIL are in control in the north of the country rather than the southern governorates.¹³ In 2016, DFAT assessed that, overall, Shias in the south of Iraq face a lower risk of violence.¹⁴ Broadly, information is that the southern governorates including Karbala, Wasit, Qadisiyah, Maisan, Dhi Qar, Muthanna, Najaf, and the applicant's home area of Basra, have remained more secure than other areas of Iraq, with fewer security incidents and low rates of civilian casualties.¹⁵ A 2015 report from the

⁸ DFAT, "Country Information Report on Iraq", 26 June 2017, CISED50AD4631.

⁹ DFAT, "Country Information Report on Iraq", 26 June 2017, CISED50AD4631.

¹⁰ Ibid.

¹¹ DFAT, "Country Information Report – Iraq", 13 February 2015, CISEC96CF1160; and DFAT, "Country Information Report on Iraq", 26 June 2017, CISED50AD4631.

¹² DFAT, "Country Information Report on Iraq", 26 June 2017, CISED50AD4631

¹³ Ibid; "AA (Article 15(c)) Iraq CG v. Secretary of State for the Home Department", United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 01 October 2015, CISEC96CF14915;

¹⁴ DFAT, "Country Information Report on Iraq", 26 June 2017, CISED50AD4631.

¹⁵ Ibid; DFAT, "Country Information Report – Iraq", 13 February 2015, CISEC96CF1160; 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; UK Home Office, "Security situation in Baghdad, southern governorates and the Kurdistan Region of Iraq (KRI)", 1 April 2015, OG8F59D8D14; and Juha Similä, Head of Section, Finnish Immigration Service, "Administrative

Finnish Immigration Service indicated that the southern governorates of Iraq, including Basra, are safe for their residents,¹⁶ and in 2016, the United Kingdom (UK) Home Office assessed that, in their view, indiscriminate violence was not at such a level that substantial grounds existed for believing that a person, solely by being present there for any length of time, faced a real risk of harm which threatened their life or person.¹⁷ In Basra in particular, the UK Home Office noted that as of 2016 this area had not been directly affected by ISIL's June 2014 offensive and that there were no direct confrontations between ISIL militants and Iraqi troops.¹⁸ The mere fact that the risk of harm is lower in one area, or that one area is more secure than others, does not of itself preclude a real chance of harm in that area. However, having regard to information about the nature and frequency of the security incidents in the south, the level of influence of ISIL and Sunni insurgent groups in the south, the dominance of the Shia population, and the general security situation, I am satisfied that the risk is not only lower but it is also not one that rises to a real chance. In the context of assessing a risk of harm to Shias, DFAT also notes that there is a risk of being caught up in intra-Shia violence but this risk is borne by those active in the militia or tribal groups. In this case the applicant has not claimed he will have any participation in tribal groups and has stated that he will not have any active participation in militias, and I have found above he will not face any harm from Shia militias for the reasons claimed.

23. On the totality of the evidence before me, including the applicants particular circumstances and the independent information, I am not satisfied that he faces a real chance of harm as a Shia Muslim, or on the basis he has no future because will not be a member of a Shia militia group, or due to the general security situation, if he returns to Basra in southern Iraq now or in the reasonably foreseeable future.
24. Information is that the applicant departed from Basra international airport and having regard to the information above regarding the security situation in the southern governorates of Iraq, I am satisfied that the applicant can safely access his home area.

Refugee: conclusion

25. 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

26. 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.

Court confirmed - Asylum seekers from southern Iraq and Kurdistan are not granted protection", 15 September 2015 CISEC96CF14912.

¹⁶ Juha Similä, Head of Section, Finnish Immigration Service, "Administrative Court confirmed - Asylum seekers from southern Iraq and Kurdistan are not granted protection", 15 September 2015 CISEC96CF14912.

¹⁷ 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.

¹⁸ 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.

Real risk of significant harm

27. 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.

28. On the totality of the evidence before me, including the independent information and the applicant's accepted claims and circumstances, I found above that he does not face a real chance of any harm due from the AAH or any other Shia militia, or anyone else, if he returns to Basra now or in the reasonably foreseeable future for any reason including for: being forcibly recruited into a Shia militia; a past or future refusal to join the AAH or another Shia militia group; for insulting the AAH or Shia militias in the past; for forgetting to pray; for playing [sports]; or for choosing to live in the west rather than fight. As 'real chance' and 'real risk' involve the same standard,¹⁹ for the same reasons set out above, I similarly find these claims do not give rise to a real risk of harm for the purpose of s.36(2)(aa).

29. On the totality of the evidence before me, including the applicants particular circumstances and the independent information, I found above that the applicant does not face a real chance of harm as a Shia Muslim, or on the basis he has no future because will not be a member of a Shia militia group, or due to the general security situation, if he returns to Basra in southern Iraq now or in the reasonably foreseeable future. As 'real chance' and 'real risk' involve the same standard, for the same reasons set out above, I similarly find these claims do not give rise to a real risk of harm for the purpose of s.36(2)(aa) of the Act.

30. The applicant departed from Basra international airport and having regard to the information above regarding the security situation in the southern governorates of Iraq, I am satisfied that he can safely access his home area.

Complementary protection: conclusion

31. 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).

¹⁹ *MIAC v SZQRB* (2013) 210 FCR 505.

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.