



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

IRAQ

IAA reference: IAA17/03248

Date and time of decision: 31 January 2018 10:40:00

Ailsa Wilson, 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 Arab from Iraq. [In] September 2016 he lodged an application for a temporary protection visa (TPV).
2. [In] July 2017 a delegate of the Minister for Immigration and Border Protection refused to grant the visa.
3. The delegate accepted that the applicant's brother [Mr A], who was a soldier in the Iraqi Army, was abducted in [2013] and that some of the applicant's cousins and friends who joined the Popular Mobilisation Forces (PMF) were killed fighting the Islamic State of Iraq and the Levant (ISIL) in Mosul. The delegate did not accept that the applicant would be conscripted into the Iraqi Security Forces (ISF); forcibly recruited into the PMF; harmed as a result of his Shia religion; harmed by Sunni militias; or harmed as result of insecurity in Dhi Qar governorate.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. The applicant's representative provided a submission to the IAA on 21 August 2017 (IAA submission), comprising three written pages. The IAA submission restates some of the applicant's claims that are already before me. The IAA submission also addresses the delegate's decision and issues arising and to that extent may be referred to as argument rather than information which I have noted.
6. The IAA submission also includes several new claims that were not before the delegate. The first new claim is that the applicant will fall under the profile of an individual with associations to members of the army and Iraqi authorities. His agent argues this profile will increase the risk of harm for the applicant and given his siblings in Iraq are married with children, he will be perceived as the only single, able-bodied male who poses a threat against groups such as ISIL. In support of this claim his migration agent refers to an extract from 'The 2012 UNHCR Eligibility Guidelines'¹ that indicates that individuals associated with, or perceived to be supporting the Iraqi authorities, including members of the army, security and intelligence apparatus, are likely to be in need of international refugee protection because of the their (imputed) political opinion. The second new claim concerns the applicant's ability to secure employment and access government support.
7. The applicant has been represented by registered migration agents before both the delegate and the IAA. Neither the applicant nor his current migration agent has explained why 'The 2012 UNHCR Eligibility Guidelines', which pre-date the delegate's decision, and these claims, could not have been made earlier, prior to the delegate's decision or why they should be considered credible personal information. The new claims do not appear to be based on anything that has occurred since the delegate's decision and the only information provided to support these broad assertions is a somewhat dated report. That these issues are only being raised now leads me to question how genuine these claimed fears are. Nor has the applicant indicated any exceptional circumstances to justify considering the new information and it is not

¹ UN High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq", 31 May 2012, 3577.

apparent to me what any exceptional circumstances might be. The applicant has not satisfied me that the information could not have been provided to the Minister before the decision was made or that it is credible personal information. Overall, I am not satisfied that there are exceptional circumstances to justify considering this information.

8. I have obtained new information from the most recent Department of Foreign Affairs and Trade (DFAT) country report for Iraq which was published on 26 June 2017.² This report was published just after the delegate's decision and was prepared specifically for protection status determination purposes. The 13 February 2015 DFAT report for Iraq which has been superseded by the current report, was before the delegate. I am satisfied there are exceptional circumstances to justify considering the new information.

Applicant's claims for protection

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

- [In] 2013 his older brother [Mr A], who was a soldier in the ISF, was in a vehicle that was hijacked by an Al Qaeda organisation between Baghdad and Mosul.
- [Later in] 2013 [Unit 1] of the ISF concluded that [Mr A] had been killed by this group.
- Around [a number] of his relatives and friends, who joined the PMF, have been killed by ISIL.
- If returned to Iraq he fears he will be conscripted into the Iraqi Army or forcibly recruited by the PMF.
- He fears ISIL, sectarian violence as a result of his Shia religion and insecurity in Dhi Qar governorate.

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

² Department of Foreign Affairs and Trade (DFAT), "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631.

- 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. The applicant provided the delegate with originals of an Iraqi citizenship certificate and an Iraqi identity card in support of his claimed identity. I accept that the applicant's name is as claimed and that he is a national of Iraq. There is no other evidence before me to suggest that the applicant has a right to enter and reside in any other country apart from Iraq, and I find that Iraq is his receiving country for the purpose of this review.
13. On the basis of the applicant's documentary and oral evidence I accept that: he is a Shia Muslim of Arab ethnicity; he was born and lived his whole life in [Town 1], a town near the city of Nasiriya in Dhi Qar governorate; and that he is single.

His brother's and friends' deaths

14. The applicant claims in early 2013 he was pushed to flee the country out of fear for his life. [In] 2013 his [brother] [Mr A] went missing. [Mr A] was like a father to him because he lost his father when he was only [young]. Since then only [Mr A] had supported the family. In [2013] [Mr A] came to visit the family for his usual [break]. When he returned to the army the family never heard back from him. He did not call and they could not reach him. When the family investigated they were informed that he was missing. [Mr A] had been a soldier with the army in the North of Iraq since 2004. He was kidnapped because he was a Shiite and a soldier from the South. This was the main reason that pushed the applicant out of the country.
15. In support of this claim the applicant provided a 'Decision of [Unit 1]' of the [military force] dated [in] 2013. In their decision [Unit 1] concluded that [Mr A] died when a terrorist group affiliated with an Al-Qaeda Organisation hijacked the vehicle he was in. [Unit 1] found he was abducted because he was a soldier in the Iraqi army.
16. When the delegate asked whether anything adverse happened to him or his family after his brother's disappearance, the applicant said 'no nothing'.
17. Although there is a small discrepancy between the applicant's evidence and the translation of the witnesses' evidence cited in the [Unit 1's] report as to whether his brother [Mr A] was returning from leave or embarking on leave, I accept that the applicant's brother [Mr A] was a soldier in the Iraqi Army and that he was kidnapped and killed by a Sunni terrorist group in [2013]. The applicant has consistently made this claim and spoke persuasively about his relationship with his brother and the impact of his death on him. He also provided supporting documents and his claim accords with country information indicating ISIL target ISF personnel.³
18. The applicant claims since he left Iraq in 2013 around [number or number of] close friends, including [cousins], have been killed by ISIL. One of his cousins was killed in a mass massacre. His other cousins were killed as a result of ISIL attacking them in their service with the PMF in Mosul.

³ UNHCR, "UNHCR Position on Returns to Iraq", 14 November 2016, CIS38A80122649, p.4. DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631, paragraph 3.48-3.50.

19. I accept that the applicant may have cousins and friends who joined the PMF and who were killed fighting ISIL in northern Iraq. The applicant has consistently made this claim and it accords with country information.⁴

Conscription into the ISF and forced recruitment into the PMF

20. The applicant claims in order to live in Iraq he would have to go and serve in the army to make a living and support his country. This would mean he is even closer to being killed or kidnapped like his brother [Mr A].
21. At the TPV interview the applicant claimed if he was returned to Iraq, he would either end up in the army or in the PMF and that means imminent death. 'You don't know when you'll be killed. You never know when things will happen to you in Iraq. You could be travelling anywhere and you could face danger'. After his brother was kidnapped, a soldier from Mosul who was his and his brother's friend asked him to join the military but the applicant declined. Given his brother was kidnapped he didn't want the same thing to happen to him.
22. When the delegate suggested another soldier asking him to join the army wasn't government conscription, the applicant claimed there wasn't conscription then but now there is. Now the law is that you have to serve in the military. The war is still continuing in Iraq, his brother was kidnapped, and now military service is by conscription. You have to serve in the army or the alternative is to join the PMF. For example, his nephew is only [age] years old and the Ministry of Defence or the Ministry of the Interior sent for him to be conscripted into the army in [2017]. The army is conscripting people once they are 17 years old, although he doesn't know exactly when the law changed. It means that he would be conscripted into the army and it's something he doesn't want to do. Because of the religious edict (fatwa) you don't have a choice, you must either join the army or the PMF.
23. When the delegate asked who would make him join the PMF, the applicant claimed his friends have been killed. One of his cousins has been martyred as well. So he would be left with no choice but to join the army or the PMF. If he goes back and doesn't fight them they will attack them in their homes. He would have to join them himself because they're killing innocent people. He feels an obligation on him to do something. He would feel he has no alternative because he lost a brother, then his friends and then his cousins. Because they're fighting against ISIL who are killing everyone. ISIL are merciless they don't have any regard to anyone. So he feels he would be compelled if he goes to Iraq to carry arms and fight because he can't see these people killing them and do nothing. It could be from a day to a year before he gets killed in the process.
24. When the delegate asked why he might feel the need to join the PMF or the Iraqi Army, the applicant claimed the main reason is because of what happened to his brother and seeing his friends being killed. The other issue is that he sees the killing of men, women, and children and he feels he can't just sit there and do nothing. It's not right that he sees people sacrificing themselves and he does nothing. When the delegate asked whether he'd considered joining the PMF or the ISF when he was in Iraq, the applicant claimed he couldn't join them because it involves killing and he doesn't want to kill anyone but at the same time he doesn't want to be killed. He's lost a brother to the army and cousins to the PMF. The delegate asked whether he's taken any steps to act on these feelings since he's left Iraq, the applicant claimed while he's here he's still in pain witnessing what ISIL is doing to his people but he doesn't want to think

⁴ UNHCR, "UNHCR Position on Returns to Iraq", 14 November 2016, CIS38A80122649, p.4. DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631, paragraph 3.48-3.50.

about it more than that because if he goes back he doesn't want to be killed or be part of the killing in Iraq. He was always conscious and thinking about joining the army or the PMF but he was also waiting for an opportunity to leave Iraq. In Australia he's still thinking about the killing of innocent people but he's not now thinking about joining either the army or the PMF, otherwise why would he come here if he still had the same thoughts.

25. I accept that following his brother's disappearance a mutual friend may have asked the applicant to join the Iraqi Army. Although I note he does not claim that he suffered any adverse consequences as a result of declining his friend's suggestion. I also accept the applicant may have felt, and continue to feel, upset as a result of his brother's disappearance, his cousins' and friends' killing by ISIL, and by ISIL's attacks on Shias and Iraqi civilians generally. I further accept that the applicant may have mixed feelings about joining the fight against ISIL. His evidence suggests he feels on the one hand pressure to join, on the other hand a declared unwillingness to participate in killings.
26. However I do not accept there is a real chance now or in the reasonably foreseeable future that the applicant will be forcibly recruited by the PMF. Multiple country information sources confirm that the militias recruit volunteers.⁵ I also note the applicant's own evidence that he was not forced to join the PMF in the more than four months he remained in Iraq after his brother's disappearance and that he has not claimed that any of his brothers who remain in Dhi Qar governorate have been forcibly recruited into the PMF. Nor do I accept the applicant's assertion that since his departure from Iraq the Iraqi Government has begun conscripting men into the Iraqi Army. Country information indicates that the ISF has been a voluntary force since the overthrow of Saddam Hussein's regime in 2003.⁶ While I accept that in early 2016 a committee was working on a bill about compulsory military service there is no information before me to suggest that the bill has progressed over the last two years, or is likely to progress in the reasonably foreseeable future.⁷
27. I am satisfied that the chance is remote that the applicant will be conscripted into the ISF or forced to join the PMF. I am also satisfied that the applicant will not volunteer to join either the Iraqi Army or the Shia militias if he is returned to Iraq. He did not feel compelled to join either of these organisations in the more than four months he remained in Iraq after his brother's disappearance. Nor did he take any steps to participate in or contribute to the fight against ISIL in the more than four years he has been in Australia. His own evidence during the TPV interview was that there are several reasons why he would not seek to join either organisation if he is returned to Iraq. He fears being kidnapped and killed like his brother and he has a moral objection to killing. In addition I consider there would be less of an imperative for him to fight if he were to return to Iraq now or in the reasonably foreseeable future. In the period of his absence from the country the Iraqi Government, the ISF and the militias have largely defeated ISIL and re-taken control in the North of Iraq.

⁵ "Absolute Impunity: Militia Rule in Iraq", Amnesty International, 14 October 2014, CIS2F827D91404, p.17. "Iraq - Militias Recruiting Children", Human Rights Watch (HRW), 30 August 2016, CX6A26A6E8630. International Crisis Group, "Fight or Flight: The Desperate Plight of Iraq's "Generation 2000", 8 August 2016, CIS38A80121504, pp.15-17. "Your Country Needs You: Iraq's Faltering Military Recruitment Campaign", Carnegie Middle East Center, 22 July 2015, CXBD6A0DE19085. "Iraq Considering Compulsory Military Service", BasNews, 7 March 2016, CX6A26A6E3564. 19 "Coalition Provisional Authority Order Number 22: Creation of a New Iraqi Army", Coalition Provisional Authority, 18 August 2003, CISA125423471.

⁶ "Your Country Needs You: Iraq's Faltering Military Recruitment Campaign", Carnegie Middle East Center, 22 July 2015, CXBD6A0DE19085. "Coalition Provisional Authority Order Number 22: Creation of a New Iraqi Army", Coalition Provisional Authority, 18 August 2003, CISA125423471. "Iraq Considering Compulsory Military Service", BasNews, 7 March 2016, CX6A26A6E3564.

⁷ "Iraq Considering Compulsory Military Service", BasNews, 7 March 2016, CX6A26A6E3564.

28. I am also satisfied there is not a real chance now or in the reasonably foreseeable future of any action directed at the applicant as a consequence or in connection with his brother's, his cousins' and his friends' deaths five years ago.

Harm as a result of his Shia religion, from Sunni militias or as a result of insecurity in Dhi Qar governorate

29. The applicant claims there is sectarian violence throughout Iraq and he fears he will be harmed as a result of the ongoing violence. He cannot move to any Sunni areas as he will not be accepted and will be harmed. He fears returning to Iraq as he will suffer harm, discrimination and significant dangerous living conditions. The violence and chaos in Iraq and the spread of ISIL in all areas of the country leave no area safe. He cannot return to live in any part of Iraq, specifically Al Nasiriya. No authority will protect him in Iraq. He could not live a peaceful life in Iraq. He did not find the chance to settle, to enjoy life or to have a pleasant living. He could not marry. There is no one place in Iraq where he would be safe. Even its quiet areas and smallest zones are unsafe. His town is considered one of the less dangerous zones but they see and hear bombings every day. To date they have lost over 300 martyrs under the age of 30 years old. He fears he will be killed if he returns to Iraq.
30. At the TPV interview the applicant claimed he feared harm from Daesh (ISIL) as they're destroying everything and killing everyone.
31. When the delegate asked whether there were any other groups he feared harm from, the applicant claimed the militias of the different parties but the main focus is ISIL. When the delegate asked whether he or his family experienced any problems with militia or political parties, the applicant claimed there were just the general problems between Sunnis and Shias but not as severe as losing his brother and the killing of his [cousins]. When the delegate asked whether the applicant, or anyone in his family, personally experienced any problems with any militias or any groups in Iraq, the applicant claimed there were things that happened but that was not the reason why he left. What happened to his brother was why he left. When the delegate asked what the applicant thought these groups would do to him, the applicant claimed there is no choice but killing that is the only language they know. When the delegate asked the applicant whether he feared anything else in Iraq, the applicant claimed there's nothing else to fear but death. When the delegate asked whether he thought he could live in another area of Iraq, the applicant claimed no, he could not. When the delegate asked whether he thought he could seek protection from the authorities, the applicant claimed no, he didn't think so at all.
32. A media article published in May 2015 reported that oil-rich provinces such as Dhi Qar, Basrah and Maysan are some 300 miles from the frontlines with Daesh and life in those areas there goes on as normal. Shia pilgrims travel on foot to holy cities in their tens of thousands. While some terrorist incidents do happen, the ISF and PMF have adopted strict security policies and plans that have contributed to regional stability by significantly reducing such isolated incidents.⁸ In August 2016 the UK Home Office reported that sporadic terror attacks, usually small-scale, are committed mainly in the towns of Kut (Wassit province) and Nasiriya (Dhi-Qar province). With the increase of terror attacks in 2013-2014, security measures were enhanced in the region. The ISIL [Daesh] summer offensive of 2014 did not reach Wassit, Qadisiya, Dhi-Qar, Missan or al-Muthanna province and there were no direct confrontations between ISIL militants and Iraqi troops. Violence in the region is limited to sporadic bomb attacks causing a relatively low number of civilian casualties. Arrests are regularly taking place during security

⁸ "Southern Iraq Is a Safe Place", Huffington Post, The, 27 May 2015, CXBD6A0DE7300.

operations in the region. The number of civilians killed in the five provinces remained low in 2015.⁹ In June 2017 DFAT stated as the majority community in Iraq with a dominant role in the Government, Shias face little to no official discrimination in government-controlled areas. In these areas, DFAT assesses that reported instances of societal discrimination are likely to be associated with patronage and nepotism, such as not having the right contacts to secure access to jobs or housing. Violence between opposing Shia militias (including those that fall under the umbrella of the PMF) does occur and is more pronounced in Shia areas (such as Baghdad and the south). This is sometimes linked to other criminal activities, including robberies and kidnappings. DFAT's in-country contacts assess that active participants in Shia militias or tribal groups, rather than ordinary Shia civilians, are principally at risk of experiencing intra-Shia violence. Overall, DFAT assesses that official and societal discrimination against Shias is low, particularly in Shia areas. Shias in Baghdad face a moderate risk of violence, whereas Shias in other Shia areas (such as the south) face a lower risk of violence.¹⁰

33. I accept that Shias have been subject to isolated attacks in Dhi Qar governorate. Although I consider the applicant's claims to fear harm as a result of his religion, sectarian violence and insecurity are general, vague and unpersuasive. Apart from his brother's disappearance and his friends' deaths while fighting ISIL, which occurred in the North of the country, he does not refer to any specific incidents affecting him or his family while he lived and worked in the South of Iraq for a decade after the fall of Saddam Hussein. Nor does he claim that anything has happened to his large family in [Town 1] in the more than four years he has been outside Iraq. I also accept that a lower risk of harm in an area does not necessarily preclude there being a real chance of harm in that area. However in this case, as noted earlier, not only is there a lower risk of harm in the Dhi Qar governorate but having regard to the nature and frequency of incidents in that governorate, I am also not satisfied that the level of harm is such that it rises to a real chance.

Failed asylum seeker from a Western country

34. Although the applicant made no claims in this regard, the delegate considered whether he will suffer harm as a failed asylum seeker from a Western country.
35. DFAT indicates there is evidence that shows a number of Iraqis return to Iraq, sometimes only months after securing residency in Australia, to reunite with families, establish and manage businesses or take up or resume employment. The practice of seeking asylum and then returning to Iraq once conditions permit is well accepted amongst Iraqis, as evidenced by the large numbers of dual nationals from the US, Western Europe and Australia who return to Iraq.¹¹ I also note the applicant has a family network in the South. His mother and [other] adult siblings continue to live in his home town of [Town 1].
36. I am not satisfied there is a real chance now or in the reasonably foreseeable future that the applicant will suffer harm as a failed asylum seeker from a Western country.

Return to Dhi Qar governorate

37. Although the applicant made no claims in this regard, the delegate considered whether he could safely return to his home in Dhi Qar governorate.

⁹ 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, paragraph 8.2.5.

¹⁰ DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631, paragraphs 3.31-3.34.

¹¹ DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631, paragraph 5.25.

38. Country information indicates that Basrah, the city that the applicant departed from, is serviced by an international airport¹² and the UK Home Office indicates there is not a real risk of an ordinary civilian travelling from Baghdad airport to the southern governorates suffering serious harm en route to such governorates¹³.
39. I am satisfied the chance is remote now or in the reasonably foreseeable future that the applicant will suffer harm returning to Dhi Qar governorate.

Refugee: conclusion

40. 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

41. 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

42. 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.
43. I have concluded that the applicant does not face a real chance of harm as a result of being forcibly recruited into the PMF or conscripted into the ISF; as a result of his brother's, cousins' and friends' killing by ISIL some years ago; because of his Shia religion; from Sunni groups including ISIL; as a failed asylum seeker from a Western country; or because of the security situation in Dhi Qar governorate.
44. As 'real risk' and 'real chance' involve the application of the same standard,¹⁴ I am also not satisfied that the applicant would face a real risk of significant harm for the purposes of s.36(2)(aa) on these grounds.

¹² "Basrah International Airport", Centre for Aviation, 3 August 2016, CIS38A80121429.

¹³ UK Home Office, "Country Information and Guidance Iraq: Return/Internal relocation", 18 August 2016, OGD7C848D68, paragraph 2.2.18.

¹⁴ *MIAC v SZQRB* (2013) 210 FCR 505.

Complementary protection: conclusion

45. 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.