



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAQ

IAA reference: IAA18/04131

Date and time of decision: 13 July 2018 16:01:00

A Wilson, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

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. He arrived in Australia on 24 March 2013. On 2 July 2016 he lodged an application for a temporary protection visa (TPV).
2. On 9 January 2018 a delegate of the Minister for Immigration and Border Protection refused to grant the visa. The delegate accepted the applicant worked as [Occupation 1] in Baghdad from 2005 to 2012 and that his father and brother were killed in 2007. The delegate did not accept the applicant was threatened by the Mahdi Army in 2011 because he was [Occupation 1]. Nor did the delegate accept that two more of his brothers were killed by their tribe; or that the applicant's lover and the [children] he had fathered with her were killed by her husband; or that her husband had threatened to kill the applicant. While the delegate accepted the applicant was a Shia from Baghdad, given country information indicating a sustained decline in violence in the Iraqi capital and as the applicant made no claim in this regard, he was not satisfied the applicant faced a real chance of harm for reason of his religion.

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. The applicant's representative provided a five page submission to the IAA on 4 February 2018 (the IAA submission). The IAA submission restates some of the applicant's claims that were before the delegate and addresses the delegate's decision and issues arising, and as such I regard it as argument rather than information and have considered it.
5. In preference to the now somewhat dated DFAT Country Report on Iraq issued in June 2017, the delegate relied on country information from the second half of 2017 when finding the applicant did not face a real chance of harm for reason of his religion. I have obtained new information on the situation for Shias in Baghdad published during the first half of 2018 in an effort to determine whether any decline in targeting of them by ISIL has been sustained¹. Given the fluidity of the security situation in some parts of Iraq, I am satisfied that there are exceptional circumstances to justify considering the new information.
6. As mentioned above, the delegate did not accept the applicant's family was involved in an intra-tribal dispute or that his lover and the children of his illicit relationship were killed by her husband. In contrast, I have accepted these claims. I have obtained new information on the geographic location of tribes in Iraq and the nature of tribal conflict² in order to assess whether the applicant has a well-founded fear of persecution on these grounds. I have also obtained new more up to date information from an authoritative source on relocation within Iraq³. This issue was not expressly considered by the delegate so the review material contained limited

¹ See sources at footnotes 15 and 16.

² World Heritage Encyclopedia, "Arab tribes in Iraq", 1 January 2018, CIS7B83941335. UN High Commissioner for Refugees (UNHCR), "Tribal Conflict Resolution in Iraq", 15 January 2018, CIS7B83941161. "Roadblocks, Drive-By Killings and Deaths - Tribal Violence Escalates In Southern Iraq", Niqash, 17 September 2015, CXBD6A0DE17841.

³ UNHCR, "Iraq: Relevant COI for Assessments on the Availability of an Internal Flight or Relocation Alternative (IFA/IRA)", 12 April 2017, UNHCR, "UNHCR Letter to Legal Counsel in the Netherlands re Guidance on the Application of an IFA/IRA in Baghdad, Iraq", 5 February 2018, UN3079B833.

and dated information on this matter. I am satisfied that there are exceptional circumstances to justify considering the new information.

Applicant's claims for protection

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

- His father and a brother, [Re], were killed in the family [shop] in Baghdad in 2007. Another brother, [B], was killed in a separate incident in his workplace in 2007.
- The applicant was a [Occupation 1] in Baghdad between 2005 and mid-2012. In 2011 he received a threatening letter from the Mahdi Army indicating that if he did not stop working for [Employer 1] he would be killed like his father and brother.
- He continued working as [Occupation 1] but tended to stay at his workplace rather than at home in order to remain safe.
- In mid-2012 another brother, [Ra], was killed by their family's tribe, [Tribe 1], because in 2010 he had wed and had children with a woman from another tribe engaged in revenge killings with their tribe.
- As [Ra]'s actions had put all the males in their family at risk the applicant and another brother, [M], fled Baghdad city while a further brother [H] remained and tried to negotiate with their tribe. When [H]'s efforts failed he travelled to Australia in late 2012.
- The applicant fled to Australia in March 2013 as he feared his tribe would find him and he also feared the Mahdi Army and other militias.
- In August 2016 their tribe sent a written warning to his uncle's house naming him and his [brothers] as having insulted the tribe.
- Three months later in November 2016 his brother [M], who had been in hiding, was killed by their tribe in his home in Baghdad while visiting his wife who was expecting a baby.
- In January 2017 his lover and the [children] he had fathered with her were killed by her husband who was a member of the Asa'ib Ahl al-Haq (AAH).
- In April 2017 her husband delivered a written warning to his relatives' house denouncing him and vowing to kill him.
- He fears if he returns to Iraq he will be killed by the Mahdi Army or AAH or some other Shia or Sunni militia because of his former work as [Occupation 1].
- He fears if he returns to Iraq he will be killed by their tribe, like his brothers [Ra] and [M].
- He fears if he returns to Iraq he will be killed by his lover's husband or his tribe, [Tribe 2].

Refugee assessment

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. On the basis of the applicant's documentary and oral evidence I accept: that he is of Arab ethnicity; that he was born and lived most of his life in Baghdad governorate; that he received primary school education; that he undertook compulsory military service under Saddam Hussein's regime; that he was self-employed for a decade before joining [Employer 1]; that his mother is deceased; that [a number of] brothers live outside Iraq; that he has lost contact with his [relatives]; and that he was unmarried when he departed Iraq in 2013. The applicant has not claimed to have suffered adverse treatment in the past or to fear future harm as a result of any aspect of his now distant military service and I find that he would not. I am not satisfied that there is a real chance he would suffer harm in connection with his military service.
11. On the basis of an original Iraqi citizenship certificate and an original Iraqi identity card, provided by the applicant, I accept that his name is as claimed and that he is a national of Iraq. Although the applicant spent a short period in [another country], there is no other evidence before me to suggest that he has a right to enter and reside in any other country apart from Iraq. I find that Iraq is his receiving country for the purpose of this review.
12. The applicant claims he joined [Employer 1] in August 2005 [details deleted]. He was promoted to be an [Occupation 2] of [Employer 2] who were responsible for [responsibilities]. He also [undertook further tasks].
13. He also claims his father and brother [Re] were killed in 2007 by unknown masked people in the [shop] that his family own. His other brother [B] was killed by terrorists while at work. In April 2011 he found a threatening letter from the Mahdi Army referring to his work with [Employer 2] and to the killing of his father and brother. However he continued to [work for Employer 1] and in July 2011 was transferred to [Al Kadhimiya], Baghdad, a holy area for Shia and a hub for different militias. He worked there till June 2012. After the threat he spent most of his time at his workplace as he feared the militia would kill him if he went home. When he visited his home he did so secretly.

14. In support of these claims he provided a number of documents relating to his [Employer 1] including: an administrative order from 2005 appointing him as [Occupation 1]; documents from 2008 and 2011 relating to his transfer between [roles]; and a letter from 2010 confirming he remained [in Occupation 1]. He also provided the April 2011 warning letter from the Mahdi Army.
15. At the close of the TPV interview his representative submitted that country information confirms the targeting of members of the Iraqi Security Forces (ISF), which include [Employer 1], and that the applicant has special profile because he was an [Occupation 2]. He also submitted that because the applicant has quit [Employer 1] does not mean that he is immune from harm because country information also discusses the targeting of former members of the ISF. He claimed that Sunni insurgents in particular will never forget about his former employment.
16. I accept the applicant was employed as [Occupation 1] in several locations in Baghdad between 2005 and [2012], including as a [position] but I do not accept he had or has any particular or special profile as a result of this work. At the TPV interview he spoke fluently and at length about which [sections] he was involved with, where he was [located] and what he did in a manner seemingly consistent with lived experience. He also provided several items of documentary evidence in support of his [Employer 1 work]. Additionally he has constantly claimed to have held such a role since he entered Australia in 2013.
17. I am also willing to accept the applicant received a letter from the Mahdi Army in 2011 threatening him with violence. Country information refers to some Shia militia committing human rights abuses, albeit generally against Sunnis, and also being involved in criminal activities⁴. I consider it immaterial that the applicant did not mention the letter in the entry interview. At that interview he was asked to state in two sentences the most important reason for leaving Iraq and referred to the tribal dispute that resulted in the death of his brother [Ra] and the ensuing threats to the remaining male members of his family. I have listened to the audio recording of the entry interview and I agree with his representative that at the point he was giving this evidence the interpreter urgently requested a break and so disrupted the conversation between the applicant and the interviewer. After the break the interviewer pressed on and seemed to lead the applicant by declaring 'so that was the only reason that made you leave' thereby potentially dissuading him from adding more information. I also consider it immaterial that his brother [H] thought their father and brother were killed by Al Qaeda. That his brother surmised they were the possible killers is not inconsistent with the applicant's constant evidence in the entry and TPV interviews that they were killed by unknown masked men and that their deaths occurred in the context of a period of sectarian violence.
18. However I am not persuaded that as a result of his former service as [Occupation 1], including as an [Occupation 2], six years ago there is a real chance the applicant will suffer harm if he were to return to Iraq. While DFAT indicates ISIL have targeted members of the ISF and assess that [people in his occupation] are at high risk of violence in the course of their work, particularly in ISIL controlled areas⁵, apart from his representative's assertion, the information before me does not support that former [Occupation 1] are at risk of harm from Sunni or Shia militia, including the Mahdi Army. I note the applicant remained in Iraq for more than nine months after leaving [Employer 1] and he has not claimed he would seek, or has desire, to re-

⁴ US Department of State, "Iraq - Country Reports on Human Rights Practices 2015 ", 13 April 2016, OGD95BE926170, Executive Summary. The Department of Foreign Affairs and Trade (DFAT), "Country Information Report Iraq", 26 June 2017, CISED50AD4631, paragraphs 5.6 and 3.3.

⁵ DFAT), "Country Information Report Iraq", 26 June 2017, CISED50AD4631, paragraphs 3.48-3.50.

join [Employer 1] if he returned to Iraq. The threat letter the applicant received ordered him to abandon his position, which he has now done by leaving [Employer 1]. I also consider that he did not identify the Mahdi Army threat in the entry interview as the reason for leaving Iraq tends to suggest his fear of harm resulting from his former [Employer 1 work] was not the main factor motivating his departure from Iraq in 2013.

19. I accept his father and brother [Re] were killed in their family business in 2007 and that another brother [B] was killed in a separate incident soon after. As mentioned previously, I also accept the applicant has consistently claimed that he does not know who killed his father and two siblings. I note that country information before me does not indicate that families of individuals associated with the Iraqi government and ISF are targeted as a matter of course.⁶ And I am not persuaded that these deaths that occurred five years prior to the threat were necessarily related to the applicant's role as [Occupation 1], given that they happened in their business and at a time of sectarian conflict and given the significant level of criminal violence in Iraq.
20. The applicant claims in June 2012 he quit work and left his residence in Baghdad because of revenge killings that had occurred between his tribe and another tribe in 2010. In February 2010 his brother [Ra] married a woman from the tribe their tribe was engaged in hostilities with. He provided a copy of a certificate of marriage for [Ra] and a woman in support of this claim. Despite the hostility between the two tribes [Ra] insisted on marrying the woman from the other tribe which started hatred and violence against their family. Their tribe denounced their family and wanted them to expel [Ra]'s children from their family or they would kill them. [Ra] was killed in July 2012 near their [relative]'s home. He had rented a home near their [relative] and was shot and [killed].
21. When it was suggested by the delegate that it seemed risky of [Ra] to live in hiding in Baghdad in a place close to one of their [relative]'s, the applicant stated [Ra] had done so because their [relative] is married to a man from a different tribe and the [location where he was killed] was very close to where he had moved. Also [Ra] was not aware that their tribe knew that he lived in that area. If he had known he would not have left the house.
22. The applicant and his brother [M] did not attend [Ra]'s funeral rituals as they feared for their lives. They fled to [Town 1], north of Baghdad city. [H] stayed in their parents' house as he was the mediator between their tribe and [Ra]. Their tribe prevented [H] from conducting three days of mourning. On the first day some tribe members told him not to proceed or they would kill him. [H] proceeded with the ceremony to challenge to the unfair tribal tradition. [H] then escaped to Erbil for [a number of] days. While there he received a phone call from an unknown number threatening him because he disobeyed tribal orders and that he should be killed. [H] then fled to Australia. In [Town 1] the applicant feared he could be killed at any moment as his tribe is one of the biggest tribes in Iraq and has extensions everywhere. Also the Mahdi Army and other militias control the area where he lived in Al Rashidyah.
23. I accept that [Ra] married in 2010, although I note the marriage certificate itself does not provide any evidence one way or the other that his bride was from another tribe. I am also willing to accept the applicant may have been caught up in intra-tribal violence as a result of [Ra]'s marriage to a woman from a tribe their tribe were in conflict with and fled to an area north of Baghdad city, as since arriving in Australia he has consistently claimed to have feared returning to Iraq for this reason, and it accords with country information indicating that in Iraq, including in the south, personal matters can escalate to family disputes and can then develop

⁶ DFAT, "Country Information Report Iraq", 26 June 2017, CISED50AD4631, paragraphs 3.50.

into tribal feuding⁷. In contrast to the delegate, I do not consider that [H]'s evidence undermines the applicant's claims. I have listened to the audio recording of a supplementary interview with [H] and read the entry interview transcript and his protection visa application and I accept he did claim in his entry and PV interview that he feared their tribe, like the applicant, not [Ra]'s wife's tribe.

24. In August 2017 the applicant submitted additional claims for protection in the form of a statutory declaration. He claimed in August 2016 their family's [Tribe 1] sent a warning to his uncle's house naming him and his then living brothers [H], [M] and brother as people who insulted their family's tribe. Three months later [M] was killed in November 2016 by their tribe. [M]'s wife told them she saw some armed men raid the house and kill [M]. [M] had been on the move fearing for his life. In support of this claim he provided a death certificate for [M] indicating he was killed in November [2016].
25. When asked by the delegate why his brother [M], who he claimed had been hiding inside and outside Iraq, would return to Baghdad where he feared for his life following [Ra]'s murder by their tribe, the applicant stated he returned home because his wife was pregnant. The family told him to leave the area. He said he would leave once his wife delivered the baby. However he was only back for a [number of] months when he was killed inside his house in front of his wife who was pushed and kicked.
26. While it does seem like a lengthy gap between [Ra]'s death in 2012 and [M]'s death in 2016, the applicant has provided a death certificate for [M], and the country information indicates tribal conflict can persist over many years in Iraq.⁸ The applicant spoke at length and emotionally about these circumstances, and I am willing to accept that [M] was killed in 2016 by their tribe as a consequence of their brother's marriage. Having regard to country information I also accept that it is male members of the family that tend to be the target of tribal violence.⁹ I accept the death certificate is genuine and as the written warning was addressed to the three living brothers I am satisfied that the death of [M] does not lessen the risk to the applicant but indicates that the matter continues to be pursued. In all the circumstances I am satisfied there is real chance the applicant will suffer serious harm, in the form of significant physical ill-treatment or death from their tribe in Baghdad, an area where the tribe predominates,¹⁰ because of his brother's marriage to a woman from a tribe their tribe was feuding.
27. I have considered whether this harm would be inflicted for the essential and significant reason of the applicant's race, religion, nationality, membership of a particular social group or political opinion: s.5J(1)(a). I am satisfied that the intra-tribal dispute does not arise because of the applicant's race, religion, nationality or political opinion.
28. I have considered whether the applicant may face this harm as a member of a particular social group, being a male relative of a person targeted in an intra-tribal dispute. Section 5K(a) provides that in determining whether the applicant ("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, the decision maker must firstly 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

⁷ UNHCR, "Tribal Conflict Resolution in Iraq", 15 January 2018, CIS7B83941161. "Roadblocks, Drive-By Killings and Deaths - Tribal Violence Escalates In Southern Iraq", Niqash, 17 September 2015, CXBD6A0DE17841.

⁸ UNHCR, "Tribal Conflict Resolution in Iraq", 15 January 2018, CIS7B83941161.

⁹ UNHCR, "Tribal Conflict Resolution in Iraq", 15 January 2018, CIS7B83941161.

¹⁰ World Heritage Encyclopedia, "Arab tribes in Iraq", 1 January 2018, CIS7B83941335.

in s.5J(1)(a). I am satisfied that the applicant's brother [Ra] was targeted by their tribe because of his failure to disown his children and divorce his wife who was from another tribe, which arose in the context of revenge killings between their tribe and [Ra]'s wife's tribe and that he was not targeted for any of the reasons set out in s.5J(1)(a). Section 5K(b) provides that the decision maker must also disregard any fear of persecution, or any persecution, that the first person or 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 s.5K(a) had never existed. The applicant has not claimed to fear harm from their tribe for any reasons other than [Ra]'s marriage to a woman from another tribe their tribe was involved in revenge killings with. I therefore disregard the applicant's fear of persecution for membership of a particular social group being a male relative of a person targeted in an intra-tribal dispute.

29. The applicant also claimed that in January 2017 his lover and his [children] from his relationship with her were killed by her husband who is a member of the AAH. In April 2017 his lover's husband's tribe, [Tribe 2], sent a warning to his uncle accusing the applicant of tarnishing their reputation because of his illegitimate relationship with her and confirming their support for her husband's killing of her and the children. In support of this claim he provided a warning from [Tribe 2] dated April 2017 referring to his adultery and threatening him with death; and death certificates for his lover and the [children] he claims he fathered with her indicating they were all shot. The review material also included a photograph of a man with [children]. I have listened to the audio recording of the entry interview and it indicates the applicant showed a photograph of the [children] he had fathered with his lover at the entry interview. It is not clear from the review material if this photograph is of his [children] or not.
30. At the TPV interview the applicant claimed his lover's husband went to his uncle's house and gave his cousin the letter denouncing and threatening to kill the applicant. He claimed the husband said 'this [letter] is for you and if you open your mouth I will burn all of your houses'. The applicant claimed because his lover's husband is in the AAH no one can touch him. Also it is an honour killing so no one will say anything to him. When the delegate indicated that country information he was aware of suggested honour killings usually involved women but he had doubts children would be killed, the applicant stated according to their culture honour killing includes everyone. Because they were not her husband's children they were a legitimate target to be killed. His lover's sister sent him the death certificates and said her sister's husband said to her they were all whores because they knew about the relationship but kept quiet about it.
31. At the close of the TPV interview his representative claimed that because his lover was married and had children, rather than being a single woman, her status as a wife and mother magnify her husband's inability to forget the slight, especially given he is a member of the AAH and has a criminal past and that these factors would place the applicant at greater risk of harm.
32. I accept the applicant was in a long term clandestine relationship with a married woman and that he fathered [children] with her. From the time of his entry into Australia, in his TPV application and at the TPV interview, he consistently referred to the existence of the relationship and he included the woman and [children] in his TPV application, even though he initially seemed somewhat embarrassed when he mentioned them at the entry interview but also sufficiently proud to show the interviewer a photo of the children from that relationship. It is unclear how his lover's husband became aware of the relationship in 2017 which he said only he, his lover and her sisters knew about but that others in their community suspected, although he did state at the TPV interview that he and his lover continued to be in contact. The applicant spoke emotionally about his lover and children at the TPV interview, exhibited anger

when referring to her husband, and provided documentary evidence relating to their deaths and the warning letter her husband passed to his relatives. This claim is also plausible in light of country information indicating domestic violence is common and often socially acceptable in Iraq and that honour killings may number in the hundreds per year¹¹. I accept that his lover and the [children] of their relationship were murdered by her husband. The applicant's claim that no action would be taken by the authorities in relation to the murders is also plausible given country information indicating that domestic violence is considered a private matter and is not criminalised, that honour is a mitigating factor in violent crimes and resourcing issues in the police force¹².

33. I accept the warning letter from [Tribe 2] delivered by the husband to the applicant's relative sanctioning the killing of the woman and children and threatening to murder the applicant is genuine and that if he were to return to Baghdad the woman's husband would attack him. The deaths of his children and lover are relatively recent indicating that despite his lengthy absence from Iraq, deep animosity remains. Country information confirms that this type of document is often issued in the context of tribal disputes¹³. Having regard to the information before me, in all the circumstances I am also satisfied there is a real chance the applicant will suffer serious harm, in the form of significant physical ill-treatment or death, from his lover's husband if he were to return to Baghdad.
34. I have considered whether this harm would be inflicted for the essential and significant reason of the applicant's race, religion, nationality, membership of a particular social group or political opinion: s.5J(1)(a). I am satisfied that his lover's husband is motivated by personal revenge to harm the applicant because of the applicant's adultery with his wife and the essential and significant reason for the risk of harm is not because of the applicant's race, religion, nationality, membership of a particular social group or political opinion.
35. While the applicant, who has been represented before the Department and the IAA, consistently claimed he is a Shia Muslim, he did not explicitly claim to fear harm as a result of his faith. And at the entry interview he stated that being Shia does not mean anything to him suggesting he does not actively practise his religion. However the delegate considered whether he would suffer harm for this reason.
36. In their latest report, which is now over a year old, DFAT noted that Shia communities are subject to both indiscriminate and targeted violence at the hands of ISIL and that violence targeted at Shias is particularly prominent in Baghdad where they have been attacked in areas where people congregate such as markets, parks and cafes. DFAT also noted that Shia militias may be involved in violence with other militias or in the course of criminal activities. DFAT assess that Shias in Baghdad face a moderate risk of violence. They also consider that the risk of being caught in intra-Shia violence is predominantly borne by those actively involved in militia rather than ordinary civilians¹⁴.
37. More recent country information from several sources cited by the delegate points to a sharp decline in violence in Baghdad throughout 2017 coinciding with ISIL's loss of territory to the Iraqi government. Information I have obtained for the six month period to June 2018 from a number of sources confirms the downward trend in violence targeted at Shias has been sustained since the delegate's decision in early January 2018, such that in early May 2018 the

¹¹ DFAT, "Country Information Report Iraq", 26 June 2017, CISED50AD4631, paragraph 3.67.

¹² DFAT, "Country Information Report Iraq", 26 June 2017, CISED50AD4631, paragraphs 3.67 and 5.8. US Department of State, "Iraq - Country Reports on Human Rights Practices 2015", 13 April 2016, OGD95BE926170, pp.52-55.

¹³ UNHCR, "Tribal Conflict Resolution in Iraq", 15 January 2018, CIS7B83941161.

¹⁴ DFAT, "Country Information Report Iraq", 26 June 2017, CISED50AD4631, paragraphs 3.32-3.34.

Special Representative of the Secretary-General for Iraq acknowledged that casualty figures reported continue steadily to decline after the military defeat of Dae'sh last year¹⁵. While another commentator stated that security incidents in Baghdad declined from 3.3 incidents per day in January 2018 to 1.1 by June 2018¹⁶.

38. I accept the applicant is a Shia Muslim. I also accept Shias continue to suffer some limited instances of indiscriminate violence in Baghdad primarily at the hands of ISIL. 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, having regard to the nature and frequency of incidents in Baghdad, I am also not satisfied that the level of harm is such that it rises to a real chance. Like the delegate, I consider the nature and frequency of attacks directed at Shias in Baghdad has declined significantly in the second half of 2017 and fallen further in the first six months of 2018 since the Iraqi government has regained control of its territory from ISIL. I do not consider that the applicant has a particular profile as result of his former employment as [Occupation 1]/[Occupation 2] or for any other reason, and I note the applicant did not indicate that his [relatives] or their families who continue to live in Baghdad have suffered difficulties because of their faith. Having regard to the information before me, I am not satisfied there is a real chance the applicant will suffer harm because he is a Shia from Baghdad now or in the reasonably foreseeable future.

Refugee: conclusion

39. 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

40. 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

41. 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

¹⁵ "UN Casualty Figures for Iraq for the Month of June 2018", United Nations Assistance Mission in Iraq also UN Iraq (UNAMI), 1 July 2018, CXBB8A1DA30486. "UN Casualty Figures for Iraq for the Month of May 2018", United Nations Assistance Mission in Iraq also UN Iraq (UNAMI), 31 May 2018, CXBB8A1DA28428. "UN Casualty Figures for Iraq for the Month April 2018", United Nations Assistance Mission in Iraq also UN Iraq (UNAMI), 2 May 2018, CXBB8A1DA26450. "UN Casualties Figures for Iraq for the Month of March 2018", United Nations Assistance Mission in Iraq also UN Iraq (UNAMI), 3 April 2018, CXBB8A1DA24882. "UN Casualty Figures for Iraq for the Month of February 2018", United Nations Assistance Mission in Iraq also UN Iraq (UNAMI), 2 March 2018, CXBB8A1DA23261. "UN Casualty Figures for Iraq for the Month of January 2018", United Nations Assistance Mission in Iraq also UN Iraq (UNAMI), 01 February 2018, CXBB8A1DA21176.

¹⁶ "June 2018 Islamic State Rebuilding In Rural Areas Of Central Iraq", Musings on Iraq, 03 July 2018, CXBB8A1DA30689. "Security In Iraq Largely Unchanged In May 2018", Musings on Iraq, 2 June 2018, CXBB8A1DA28521. "March 2018 The Return Of The Islamic State Insurgency", Musings on Iraq, 2 April 2018, CXBB8A1DA24713. "649 Deaths, 275 Wounded Feb 2018 In Iraq (UPDATED)", Musings on Iraq, 03 March 2018, CXBB8A1DA23262.

- 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.
42. I have concluded that the applicant does not face a real chance of harm from the Mahdi Army or AAH or other militia because he was formerly employed as [Occupation 1]/[Occupation 2] six years ago; because of his military service under Saddam's regime several decades ago; because of his father and brothers' deaths in 2007; or because he is a Shia Muslim from Baghdad.
43. As 'real risk' and 'real chance' involve the application of the same standard¹⁷, 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.
44. However, having regard to independent country information and to the applicant's particular profile and circumstances considered cumulatively, I have found that he faces a real chance of serious harm in his home area of Baghdad, in that he will be killed or significantly physical ill-treated by his tribe because of [Ra]'s marriage to a woman from another tribe their tribe were engaged in hostilities with; or he will be killed or significantly ill-treated by the husband of the woman he conducted a long term affair with or his tribe.
45. As 'real chance' and 'real risk' involve the same standard¹⁸, for the reasons set out above, I find that there is a real risk the applicant will suffer such harm on return to Baghdad for the purpose of s.36(2)(aa) of the Act. I also find that the harm he faces amounts to significant harm for the purpose of s.36(2A) of the Act.
46. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:
- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm
 - the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or
 - the real risk is one faced by the population of the country generally and is not faced by the person personally.
47. The applicant claims tribal traditions in Iraq are harsh and substitute for the law. He also claims the government is unable to prevent tribal killings, like those of his brothers [Ra] and [M], because the power of the tribe is more than that of the government. The government always seeks the tribes' assistance in combating terrorism and imposing security in Iraq. He also claims during Saddam's time it was different. However now there is no law or law belongs in the hands of different parties. There is no legal system in Iraq that would intervene and put a stop to his lover's husband killing him because he tarnished the name of his tribe by his adulterous relationship with his wife.

¹⁷ *MIAC v SZQRB* (2013) 210 FCR 505.

¹⁸ *MIAC v SZQRB* (2013) 210 FCR 505.

48. DFAT has reported that the ability of the Iraqi government to provide protection has been severely tested by ongoing efforts to defeat ISIL. In disputed areas and government controlled areas, the ISF has faced significant capacity constraints, badly maintained equipment, poor logistical support, corruption and fragmented command which is influenced by political and sectarian allegiances. DFAT assesses that the Iraqi Police Service and the Federal Police also face capacity constraints and are often unable to prevent attacks against civilians by ISIL and other armed groups. Shia militias in the PMF are now working with the ISF and DFAT has noted that there is a belief that the Iraq government has failed to hold these groups to account for human rights abuses they have committed. Information also supports that there are significant capacity constraints on the institutional and legal mechanisms for the protection of human rights in Iraq¹⁹. The US Department of State reported problems persist within the country's provincial police forces, including corruption. Security forces made limited efforts to prevent or respond to societal violence. Although 16 family protection units operated through police stations around the country to respond to claims of domestic violence, they lack sufficient capacity²⁰. This year UNHCR has reported that even if prosecution occurs in the formal judicial system it does not necessarily end or avoid tribal conflict. Law enforcement personnel, who are often themselves members of tribes in the area, are said to be reluctant to interfere in tribal conflicts as their involvement may risk further escalating the situation. Others are reported to take sides in tribal disputes along their own tribal affiliation²¹. Having regard to this information, I am not satisfied that the applicant could obtain protection from Iraqi authorities such that there would not be a real risk that he will suffer significant harm on return to Baghdad.
49. As the risk faced by the applicant relates to his repudiation by his tribe because of his brother [Ra]'s marriage to a woman from another tribe that their tribe were involved in a cycle of revenge killings with, or the husband of his lover and his tribe, I am satisfied that the risk is not one faced by the population generally, but rather I find it is one faced by the applicant personally.
50. I have found above that there is a real risk the applicant will suffer significant harm on return to Baghdad from his family's tribe or his lover's husband or his tribe. What I must now consider is whether there is an area of Iraq, such as a southern governorate; a province in central, western or northern Iraq; or an area in Iraqi Kurdistan; where, objectively, there would not be a real risk that the applicant will suffer significant harm and where it would be reasonable for the applicant to relocate to.
51. When asked whether there was any reason why he could not relocate elsewhere in southern Iraq, such as Wasit, Maysan, or Muthanna governorates, the applicant stated he does not have anyone there and he has no clue about these areas. There is also the presence of AAH and the Mahdi Army. Everyone is after him. He is threatened in all areas of Iraq. They can reach him everywhere he goes. Also his tribe has a presence everywhere. Wherever they find him they will kill him. His representative submitted his tribe are spread over all of Iraq, especially in the South, and this is relevant when considering relocation. Also he has no family because most of his family members have been killed. He has no idea about his [relatives] following the tribal issue that resulted in the murder of [Ra] and [M].

¹⁹ DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631, paragraphs 5.1-5.4.

²⁰ US Department of State, "Iraq - Country Reports on Human Rights Practices 2015", 13 April 2016, OGD95BE926170, p.15.

²¹ UNHCR, "Tribal Conflict Resolution in Iraq", UNHCR, 15 January 2018, CIS7B83941161, pp.3-4.

52. Country information indicates there are eight governorates in southern Iraq – namely Basra, Karbala, Najaf, Wasit, Qadisiyah, Maysan, Dhi War, and Muthanna.²² DFAT assesses that the overwhelming majority of the population in these southern governorates is Shia; that official and societal discrimination against Shias is low, particularly in Shia areas; and that these provinces have been and remain more secure than other parts of the country, although recent reports suggest a deterioration of law and order in Basra. While Shia communities are subject to both indiscriminate and targeted violence at the hands of ISIL, Shias in Shia areas such as the south face a lower risk of violence. The risk of being caught up in intra-Shia violence is said to be predominantly borne by those who are actively involved in the militia or tribal group, rather than ordinary civilians who may be perceived to be part of a militia or tribal group's constituency²³. While I accept that a lower risk of harm in an area does not necessarily preclude there being a real chance of harm in that area, in this case not only is there a lower risk of harm in the eight southern governorates from both from sectarian and more general violence but having regard to the nature and frequency of incidents in these governorates, I am also not satisfied that the level of harm is such that it rises to a real risk. I am not satisfied that there is a real risk that the applicant will suffer harm in Basra, Karbala, Najaf, Wasit, Qadisiyah, Maysan, Dhi War, or Muthanna on the basis of his Shia religion.
53. I am also not satisfied that there is a real risk that the applicant will suffer harm from their family's tribe or his lover's husband or his [tribe] in five of the eight southern governorates. Country information indicates the applicant's tribe, [Tribe 1], are [present] in Kut, Wasit governorate, and Basra in southern Iraq, in addition to his home area of Baghdad; while his lover's husband's tribe are present in Baghdad and Amara, Maysan governorate, in southern Iraq²⁴. While I am willing to accept that the risk is alive in Wasit, Basra and Maysan governorates, where one or the other of these tribes are present, I question whether the applicant's tribe or his lover's husband or his tribe would continue to have sufficient interest or resources to pursue the applicant throughout the other five provinces of southern Iraq.
54. As I am not satisfied there is a real risk the applicant will suffer harm in five of the eight governorates, I must now consider whether it would be reasonable for the applicant to relocate to any of the southern governorates. DFAT refers to credible in-country contacts emphasising that Shias without familial, tribal or political networks seeking to internally relocate in the south would face difficulty assimilating into the community and states that ongoing conflict has seen religiously mixed areas become more mono-religious thereby limiting internal relocation options. DFAT also notes lack of employment and lack of services pose serious difficulties in the south²⁵. In April 2017 UNHCR noted the barriers to an individual relocating include the large-scale internal displacement, serious humanitarian crisis, mounting inter-communal tensions, access/residency restrictions in virtually all parts of Iraq and increasing pressure exercised on internally displaced persons to prematurely return to their areas of origin following the retaking of these areas from ISIL. Although they did acknowledge these factors tend to impact more on Sunnis from formerly ISIL held areas²⁶. In February 2018 UNHCR reiterated their earlier advice and expressed the view that an internal flight or relocation alternative would only be available in exceptional circumstances where an individual can legally access and remain in the proposed area of relocation, would not be exposed to a new risk of serious harm there, and has close family links in the proposed area, with the family

²² DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631, paragraph 5.17.

²³ DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631, paragraphs 3.31-3.34.

²⁴ [Source deleted].

²⁵ DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631, paragraphs 3.31, 3.34 and 5.13.

²⁶ UN High Commissioner for Refugees, "Iraq: Relevant COI for Assessments on the Availability of an Internal Flight or Relocation Alternative (IFA/IRA)", 12 April 2017, UNAE5949, pp.2-3.

willing and able to support the individual²⁷. In this case, I have accepted that the applicant's parents and three brothers are deceased, that [a number of] brothers are outside Iraq and that he has lost contact with his [relatives] in Baghdad. And there is no information before me to suggest the applicant has familial, tribal or political networks in any of Karbala, Najaf, Qadisiyah, Dhi War, or Muthanna governorates where I have found he would not be at risk of harm. His educational qualifications are limited having only completed primary school. I have accepted he lived and worked his whole life in Baghdad and he has stated, and I accept, he is not familiar with any of the southern provinces. As a consequence of a lack of contacts in these areas and the presence of significant numbers of displaced persons in these governorates I consider it highly likely he may suffer difficulties in obtaining housing and employment and be subject to pressure to return to Baghdad where I have found he is at risk of harm. Having regard to the evidence before me, I am not satisfied that in the applicant's particular circumstances, it is reasonable for him to relocate to the southern governorates of Karbala, Najaf, Qadisiyah, Dhi War, or Muthanna.

55. Country information indicates that the applicant's family's tribe is also present in Baquba in Diyala governorate in central Iraq²⁸, and as such I accept the risk would be alive in Diyala governorate. However there is no evidence before me to suggest that they are present or have influence in other provinces in central Iraq or in the west or north of the country. Furthermore I question whether the applicant's tribe or his lover's husband or his tribe would continue to have sufficient interest or resources to pursue the applicant throughout these provinces. I am not satisfied there is a real risk the applicant will suffer harm from their family's tribe in central, western or northern Iraq, apart from Baquba.
56. Country information also indicates that while the Iraqi Government regained control of all its territory in December 2017, ISIL retains an ability to carry out attacks resulting in deaths and injuries. Diyala, Kirkuk and Salahaddin, in central Iraq, are now said to be the focus of ISIL activity²⁹. Sources also note that the west, north and central areas of Iraq are Sunni dominated and that in areas where Shias are not the dominant ethnic or religious group, societal discrimination is likely to be more pronounced³⁰. There is no information before me to suggest the applicant has any pre-existing familial, tribal or political networks in these regions. As a Shia he is highly likely to be in the minority in the central, western and northern provinces and more identifiable and potentially at greater risk of targeting by ISIL remnants who continue to mount some attacks. Having regard to the more unsettled security situation in these governorates, the applicant's limited education, his likely minority status, his lack of patronage to assist him to find housing and employment, I am not satisfied that in the applicant's particular circumstances, it is reasonable for him to relocate to central, western or northern Iraq.
57. DFAT has advised that the security situation in the Kurdistan region of Iraq is more stable than other areas of Iraq³¹. Having regard to the evidence before me, I am not satisfied that there is a real risk that the applicant will suffer harm in Iraqi Kurdistan as a result of his Shia religion. For the same reasons as set out above, I am also not satisfied there is a real risk the applicant will suffer harm from their family's [tribe] or his husband's lover or [Tribe 2] in the Kurdistan region of Iraq.

²⁷ UNHCR, "UNHCR Letter to Legal Counsel in the Netherlands re Guidance on the Application of an IFA/IRA in Baghdad, Iraq", 5 February 2018, UN3079B833.

²⁸ [Source deleted].

²⁹ DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631, paragraph 2.6. "June 2018 Islamic State Rebuilding In Rural Areas Of Central Iraq", Musings on Iraq, 03 July 2018, CXBB8A1DA30689.

³⁰ DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631, paragraph 3.31.

³¹ DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631, paragraph 2.32.

58. However in terms of whether it would be reasonable for the applicant to relocate to Iraqi Kurdistan, DFAT notes that a lack of Kurdish language skills is a barrier to relocation to the area and overall they assess that internal relocation to the Kurdish Region is particularly difficult for Arab Iraqis due to official and societal discrimination³². The UNHCR has advised that since the launch of the Mosul offensive on 17 October 2016, residency requirements into the Kurdish Region have been tightened for Arabs from all areas of origin³³. Relevantly information from DFAT and the UNHCR is that entry and residence into this area is at the discretion of the Kurdish Regional Government and requires local sponsorship. Moreover, information is that any internally displaced persons who are able to access the Kurdish Region have difficulty obtaining accommodation and employment due to the current financial crisis in that region, as well as due to patronage and nepotism which significantly influences employment opportunities making it difficult to internally relocate to the Kurdish region without existing networks. The UNHCR has also advised that local authorities throughout Iraq are reportedly increasingly encouraging, pressuring or forcing IDPs to return to their places of origin due to the strain placed on local communities supporting IDP populations³⁴. On the evidence before me I am not satisfied that the applicant will be able to access the Kurdish region of Iraq. I have placed weight on information that an absence of Kurdish language skills is a barrier to relocation, that pre-existing networks are needed to settle in the region and on information that access and residency require local sponsorship. In this case, there is nothing before me to suggest that the applicant speaks Kurdish, or that he has any pre-existing networks in this region, and I am not satisfied that the applicant has or could obtain the required sponsorship to enter and reside in this area. I have also placed weight on information from DFAT and the UNHCR that relocation to the Kurdish Region of Iraq is particularly difficult for Arab Iraqis, with access being tightened for Arabs from all areas of origin. Having regard to the evidence before me, I am not satisfied that in the applicant's particular circumstances, it is reasonable for him to relocate to the Kurdish Region of Iraq.
59. On the evidence before me I am not satisfied that it would be reasonable for the applicant to relocate to an area of Iraq where there would not be a real risk that he will suffer significant harm.

Complementary protection: conclusion

60. There are 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.

Decision

The IAA remits the decision for reconsideration with the direction that:

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

³² DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631, paragraphs 5.13-5.16.

³³ UNHCR, "Iraq: Relevant COI for Assessments on the Availability of an Internal Flight or Relocation Alternative (IFA/IRA)", 12 April 2017, UNAE5949, pp.7-9.

³⁴ DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631, paragraphs 5.13-5.16. UNHCR, "Iraq: Relevant COI for Assessments on the Availability of an Internal Flight or Relocation Alternative (IFA/IRA)", 12 April 2017, UNAE5949, pp.2-3.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

- (1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:
 - (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or

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

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

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
- the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - 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
 - 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:

- conflict with a characteristic that is fundamental to the person's identity or conscience; or
- conceal an innate or immutable characteristic of the person; or
- without limiting paragraph (a) or (b), require the person to do any of the following:
 - 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;
 - conceal his or her true race, ethnicity, nationality or country of origin;
 - alter his or her political beliefs or conceal his or her true political beliefs;
 - conceal a physical, psychological or intellectual disability;
 - enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - 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):

- that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
- the persecution must involve serious harm to the person; and
- 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 threat to the person's life or liberty;
- significant physical harassment of the person;
- significant physical ill-treatment of the person;
- significant economic hardship that threatens the person's capacity to subsist;
- denial of access to basic services, where the denial threatens the person's capacity to subsist;
- 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.