



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAQ

IAA reference: IAA18/04328

Date and time of decision: 3 August 2018 14:52:00

A 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. He arrived in Australia on 2 May 2013. On 7 October 2016 he lodged an application for a temporary protection visa (TPV).
2. On 5 February 2018 a delegate of the Minister for Immigration and Border Protection refused to grant the visa. The delegate accepted the applicant was a 'moderate' non-practising Shia Muslim who believed in a secular state and that he worked for a foreign company for eleven months. However the delegate did not accept the applicant publicly expressed his secular views or that he was threatened for expressing his views. Nor did the delegate accept that the applicant was threatened by the Asa'ib Ahl al-Haq (AAH) militia because he worked for a foreign company.

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 submission to the IAA on 27 February 2018 (the IAA submission). With the exception of the matters discussed below, the IAA submission restates many of the applicant's claims that were before the delegate, addresses the delegate's decision and issues arising and to that extent I regard it as argument rather than information and have considered it.
5. The IAA submission cites an article dated 15 January 2018 by Humanists UK calling on the UK Government to stop ignoring the persecution of non-religious people in Iraq and states that non-religious persons in Iraq suffer severe discrimination and violent practices, including prosecution for blasphemy and killing of those accused of apostasy. In support of this assertion Humanists UK refer to a specific case involving an Iraqi teenager who in 2013 was reported by his father to the police for revealing he no longer believed in God and thought that religion was just a myth and who was arrested and tortured at the police station. The applicant's representative submits that the extract indicates the applicant will be subjected to serious harm for his secular beliefs.
6. The article itself pre-dates the delegate's decision by about three weeks and the case study it refers to pre-dates the delegate's decision by about five years. The article includes general and personal information. Neither the applicant nor his representative, who also represented him before the Department of Home Affairs (the Department), has indicated why this information was not sought or provided prior to the delegate making his decision. And it is not apparent to me what any reason might be. In correspondence sent prior to the TPV interview, and at the TPV interview, the Department emphasised to the applicant and his representative that it was the applicant's responsibility to raise all his claims and provide evidence in support of them and that if his application was refused by the delegate he may not have another opportunity to provide further information unless there were exceptional circumstances. I also note at the end of the TPV interview the delegate advised the applicant that any additional information that he provided before a decision was made would be taken into consideration. Over two months elapsed between the TPV interview and the delegate's decision in which the applicant could have provided the new information. Furthermore, the

single case study referred to in the extract relates to an incident that occurred in 2013; the extract does not indicate where in Iraq the events occurred; and the extract does not disclose the source for the case study. Nor does the submission clearly explain how that incident relates to the applicant's circumstances. I am not satisfied that there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

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

- As a university student he debated ideas about Islam with fellow students and academics and published his views on a notice board at the university until 2008.
- His questioning and secular views were unwelcome and he was perceived as an apostate, particularly because he did not attend prayers or holy events.
- A hard line academic belonging to the Badr organisation failed him two years running and after the applicant complained the academic threatened him.
- He was forced to discontinue his studies and unable to obtain government employment, and so worked as [Occupation 1] and [Occupation 2] and he continued to espouse his views.
- From August 2011 until July 2012 he worked for a foreign [company] in Basra governorate.
- In early July 2012 he was threatened by telephone to quit working with foreign infidels or be killed.
- He quit work that month and returned to working as [Occupation 1] but he continued to receive telephone threats and his parents were questioned as to his whereabouts. For his and his family's safety he went and lived with a friend in another area of Basra.
- In around October 2012 his friend who also worked at the foreign company, and who had also been threatened, but unlike the applicant continued working at the company, was killed by the same militia he believes threatened him, the AAH.
- He fears if he returns to Iraq he will be unable to express his personal opinions and he will be killed by the AAH militia because he represents a threat to them and their belief system.

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. The applicant provided the delegate with an original Iraqi identity card and an original Iraqi citizenship certificate, and translations of those documents, in support of his claimed identity. On the basis of his oral and documentary evidence, 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.
 11. On the basis of the applicant's documentary and oral evidence I also accept: that he is of Arab ethnicity; that he was born in Basra governorate; that he completed primary, middle and secondary school; that he worked in a number of occupations, including as [Occupation 2] and as [Occupation 2]; and that he is single.
 12. In a 7 October 2016 statement of claims lodged with his TPV application he claimed he was Muslim and in July 2012 while working arranging details and opening fuel points for the [Company 1] he received a telephone threat from unknown militias accusing him of being a traitor and working for foreign infidels. They said he should leave his work or he would be harmed. He left his job that month and returned to his previous job as [Occupation 3]. He continued to receive threatening phone calls and his parents were contacted and threatened with harm if they did not tell them his whereabouts. He lived 'under the radar' in [another] area of Basra, with a friend as he did not want to be harmed or bring further trouble to his family. He also claimed his friend who also worked at [Company 1] was threatened and killed by the same group threatening him and as a result his mental health suffered. He claims he could not seek help from the authorities or relocate to another area as corruption is rampant in Iraq and it is common knowledge that the authorities cooperate with militias and other armed groups. He is not married so he decided he had no choice but to leave the country and departed [in] April 2013.
 13. In a further statement dated 21 October 2016 the applicant largely repeated his claims relating to his employment with [Company 1], albeit with a few differences (in the earlier statement he claimed he was [Occupation3], in the latter that he was [another role]) and made a number of further claims. In the later statement he additionally claimed he is Muslim in faith but he is not a practising Muslim and he has secular views. After the collapse of Saddam Hussein's regime in 2003 he claims he was a student [and] new radicals tried to influence the thoughts of young people and religious arguments started between the schools of thoughts. He became eager to self-study religion and came to understand there was much wrong information. When he started his university studies in 2005 he became well educated and was able to argue based on evidence rather than extremism. He was known by many

students and academic staff as having the knowledge to argue but this was unwelcome, and they perceived him as an apostate, particularly because he did not attend prayers or holy events. Academic staff belonging to religious parties hated him so much they did not wish to have him in their classes and one academic belonging to Badr organisation failed him for two continuous years for reasons of revenge and he could not continue studying. He complained to the university but they did not respond to him. He asked the academic why he failed him and he threatened him and accused the applicant of attacking him. He knew the academic could harm him through his party's militias outside the university so he escaped the university his studies were suspended. At the TPV interview he claimed he published written opinions on the university notice board, last doing so in 2008. He also claimed that after he left the university someone called him and said he had become an apostate and nonbeliever and 'that a promise is coming and we are ready to perform punishment on you'.

14. In the later statement he provided additional claims regarding his work with the foreign company. He claimed in 2011 he obtained a position with [Company 1] and while working for them received a threat on the phone from unknown militias accusing him of being a traitor and working for foreign infidels. They abused him on the phone and said he should leave work or be harmed. He left that job in July 2012 and returned to his previous job [providing] private tuition. He applied for many vacancies in the government but was rejected due to his views. He also worked privately as an [Occupation 2]. While working he received phone calls asking him to revert to Islam. He maintained a low profile and was in contact with people of a similar mindset. He was neglected by the community, unable to socialise and was having difficulty subsisting as people stopped their children from obtaining tuition from him and he could not find a private job as an [Occupation 2]. He claims relocating to another province within Iraq would not change his circumstance as he has different views and does not attend prayers and religious activities. He is against all radical groups and wishes his country was led by a secular government. He has no access to a third country and seeks the protection of Australia.
15. At the TPV interview he claimed just before he left Iraq a group of people went to his father's shop, threatened his father and asked the applicant's whereabouts; and that they asked his family members about him until 2014. He also claimed if he returned to Iraq he would be unable to express his personal opinions and he would be killed because AAH feels he represents a threat to them and their belief system.
16. When asked at the TPV interview why he did not include the claims concerning his outspoken and unpopular religious beliefs in his TPV application he stated it was because so many things happened in the past. When asked at the TPV interview whether he thought the 2008 threats were connected with threats he received in 2012, he stated no and he knew they were not connected because he escaped from people's gaze.
17. In a post-interview submission dated 26 November 2017 his representative responded to credibility concerns put to the applicant by the delegate at the close of the TPV interview. His representative submitted the applicant had clearly stated he was posting his opinions on the university notice board and that his opinions were against inherited Islamic rituals and included: that prayers are not compulsory; that prayers are about seeking God's help rather than doing certain actions five times a day; that he criticised pilgrims gathering in Karbala for ceremonies marking the killing of the Prophet Mohammed's grandson as the practice is barbaric and for nothing; and that he posted his opinion against following Islamic scholars and encouraged students to self-study referring to history and true stories; and that he expressed the view that the university was not a mosque where students and staff bring their rituals and practice them at university premises. His representative also submitted the

applicant was confronted by students when he expressed his views toward the leadership of the country and the need to separate politics from religion; and that he expressed that the country is destroyed by religious people who control the country and steal the money and all valuable assets and smuggle them outside Iraq. His representative further submitted that in his statement the applicant had claimed he was threatened while he was at the university in the academic year [year/year] and that the threat against him when he worked for the foreign company was based on his background as a political activist and perceived apostate and was associated with his imputed belief and political opinion. He submitted the militias have interest in him due to his imputed and real political opinions and his religious behaviour that led to his high profile when he published his posts. His representative also referred to the Freedom House report for 2017 stating that political activity was impaired in Iraq 2016 by violence, both threatened and actual.

18. Although the applicant provided no supporting documentary evidence, I am willing to accept that he undertook several years of study at a university in Basra from around 2005. I am also willing to accept that the applicant is a non-practising Shia Muslim, that he may personally hold views about the separation of religion and the state, that he may prefer Iraq to have a secular government, and that he may object to the activities of Daesh, although I find it somewhat odd that he did not mention the claim concerning his faith in his TPV application or his arrival interview. I also note that when asked by the Department in 2013 about any practical religious considerations he indicated he wished to be able to attend prayers and have halal food, which seems to sit uneasily with his later claim to be a non-observant Muslim with strong secular beliefs.
19. While I accept that Iraq's Shia government includes conservative elements, that sections of Iraqi society are religiously conservative and that some individuals may oppose the beliefs held by the applicant, I do not accept that Iraqi society is so rigid and purist as to preclude some diversity in views of Islam. I note that a large survey conducted between 2008 and 2012 found that almost half of Iraqis polled believed that it is possible to interpret Islam's teachings in multiple ways. And while a high proportion of Iraqis surveyed prayed several times a day only a little over a third of them attended a mosque once a week or more¹. There also exist more than 300 political parties in Iraq, and while I accept that the majority are sectarian, country information also indicates there are a few that are secular or liberal². Additionally the country information before me does not contain reports on non-practising Muslims, including those who do not attend prayers or holy events, being targeted.
20. I do not accept the applicant regularly debated his religious views with academics, students and others, or that he publicly expressed dissenting religious or secular opinions or published such views while he was attending university or thereafter, or that he was perceived as an apostate, or that he or his family were threatened because of his expression of his opinions. At the TPV interview the applicant was largely unable to articulate his purported views beyond some generalities and a few phrases he offered sparingly, haltingly and directly in response to the delegate's questions. And the issue he spoke in most detail about, although still in a limited and vague way, his dislike of the actions of Daesh, does not seem particularly controversial given the Iraqi government and security forces have been fighting against them for a number of years. The applicant seemed to struggle to recall the views he claimed to have studied and freely discussed with many people on multiple occasions over a number of years and that his representative outlined in some detail on his behalf in submissions. The

¹ "The world's Muslims: Unity and diversity", Pew Research Center, 1 August 2012, CIS26125, p.11 and p.18.

² Department of Foreign Affairs and Trade (DFAT), Country Information Report for Iraq 2017, 26 June 2017, CISED50AD4631, paragraph 3.45.

applicant was unable to spontaneously discuss any of the topics he claimed to be knowledgeable about, and to feel strongly about, when the delegate invited him to do so, which gave the impression that these were claims that he had invented and rehearsed. I also note his own evidence at the TPV interview that he did not think of leaving Iraq in 2008 as he did not consider his situation serious. I further note he was able to find employment as [Occupation 1] and [Occupation 2] which does not suggest he was ostracised by the broader community. Even if he did place opinions on the notice board, which I do not accept, I note he did not claim that they were attributable to him. The applicant has not claimed, and I find he was not formally charged with being an apostate. His own evidence was in Basra he was regarded as a Shia Muslim. Furthermore, I note he has not claimed that he would publicly express or publish dissenting religious or secular opinions if he were to return Iraq, and I find that he would not.

21. As I have not accepted that the applicant publicly expressed or published contentious religious views, it follows that I am not persuaded he was failed at university as a result of an ideological clash between himself and an Islamist academic or threatened by the academic, although I accept the applicant discontinued his studies at university. Nor do I accept that he was unable to obtain a government position because of his personal opinions. I consider his claim in this regard speculative and place weight on country information before me indicating there are limited employment opportunities in southern Iraq, that access to opportunities is influenced by patronage and nepotism, and that the security and humanitarian situation and falling oil prices have impacted adversely on public sector employment³.
22. I have considered whether the applicant is at risk of harm for being a non-practising and moderate Shia Muslim who does not undertake certain religious rituals. Having regard to country information cited above that indicates that Iraqis interpret Islam in a variety of ways and that a significant proportion of its citizens do not regularly attend a mosque, I am not satisfied there is a real chance he will suffer harm for this reason. I also note that, apart from the verbal threats, exclusion from his studies and failure to secure a government job, all of which I have not accepted occurred or not accepted occurred for the reasons he has stated, he has not claimed that he suffered any other ill-treatment in the decades he lived in Basra and his evidence was that he found other employment.
23. As the delegate considered it, I have also turned my mind to whether the applicant will suffer harm simply because he is a Shia or the security situation in southern Iraq. DFAT indicates 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. Shia communities are subject to both indiscriminate and targeted violence at the hands of ISIL. DFAT assesses that violence targeted at Shias in Iraq, is largely aimed at destabilising the Government and increasing tensions between Sunnis and Shias, rather than at specific individuals. 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. Credible in-country contacts suggest that the risk of being caught up in intra-Shia violence is 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 constituency. Southern Iraq, which includes Basra governorate, has been and remains more secure than other parts of the country, although recent reports suggest a deterioration

³ DFAT, Country Information Report for Iraq 2017, 26 June 2017, CISED50AD4631, paragraphs 2.11, 2.19, 3.31 and 5.19.
IAA18/04328

of law and order in Basra. 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 violence⁴.

24. I have concluded above that when the applicant left Iraq in 2013 he was not of ongoing interest to the AAH or any other militia because he held 'moderate' personal views on Islam or because he did not practise certain Shia rituals. I also note that he does not claim that he, or his family who have remained in Iraq, have suffered harm because of their Shia faith or that they would do so in the future. I accept that Shias have been subject to isolated attacks in Basra governorate in the past. 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, not only is there a lower risk of harm in the Basra governorate from both from sectarian and more general violence 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. I am satisfied there is not a real chance that the applicant will suffer harm because he is a Shia Muslim now or in the reasonably foreseeable future.
25. In relation to the applicant's claimed employment with [Company 1], country information on the treatment of individuals associated with the international community is somewhat mixed but tends to indicate any risk of harm for collaboration with international companies has faded in recent years. On the one hand UNHCR reported in 2012 that since 2003 civilians employed by the international community, particularly those working with the US Forces, had been targeted by Sunni and Shia militias; and DFAT reported in 2017 that the risk of societal discrimination against individuals associated with the international community was high and the risk of societal violence was moderate, although they did not provide any details as to what that assessment was based on, whether the risk varied across the country or who in particular the risk emanated from⁵. Whereas in 2016 a Middle Eastern academic and commentator concluded before UK authorities that the situation had changed since 2012 and that his review of publicly available information and his discussions with other experts did not reveal a single instance in which a person was recorded as having been targeted because they worked with a non-security related Western company. He also stated that the relatively low risk he considered remained emanated not from Shia militias but from Sunni extremist groups⁶.
26. Although I have some doubt about these claims as the applicant provided no supporting documentary evidence of his employment with [Company 1], and no information confirming the company exists or has foreign links although he said there was material about it on the internet, and he did not speak very convincingly about his day to day role in the firm at the TPV interview, I am willing to accept that the applicant worked for less than a year in an unskilled position with a [foreign] company that may have had some association with foreigners. On the information before me it is not clear if anyone, apart from his friend who got him the job, knew about his employment. However if they did I am willing to accept the applicant may have felt some societal disapproval at that time. However I do not accept that he was threatened by the AAH or any other militia, particularly after he resigned in July 2012 or that they continued to seek the applicant until 2014. I consider these claims are

⁴ DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631, paragraphs 3.31-3.34 and 5.17.

⁵ United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq", 31 May 2012, 3577. DFAT, Country Information Report for Iraq 2017, 26 June 2017, CISED50AD4631, paragraph 3.56.

⁶ United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), "BA (Returns to Baghdad) Iraq CG ", United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 23 January 2017, CISED50AD169, pp.18-19.

inconsistent with his own evidence that the militia was pushing him to resign, which he did and which would suggest he would no longer be of interest to them. I also give weight to the particularised evidence of the Middle Eastern academic which indicates his short lived non-security role is unlikely to have attracted much attention. I also note the applicant's evidence about why he was targeted when he worked for the foreign company varied over time and I consider this undermines the credibility of the claim. At the TPV interview he claimed there was no connection between the 2012 and 2008 threats. In the post-interview submission it was claimed that the 2012 threat could be traced to his background as a political activist and perceived apostate. Nor do I accept that his friend was killed by the AAH. His evidence regarding his friend's death was vague and speculative and in any case his own evidence was his friend's circumstances differed from his as his friend did not resign from the company. Also country information does not indicate that persons who formerly worked for a foreign company suffer harm years after they cease to work for that company. And I note the applicant has not claimed he will seek re-employment, or have the opportunity to be re-engaged, by [Company 1]. I am satisfied there is not a real chance the applicant will suffer harm because of his previous low level role with [Company 1] six years ago.

27. Although the applicant made no claims in this regard, the delegate considered the threat posed to him as an asylum seeker and returnee from a Western country. DFAT indicates there is considerable 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.⁷ A July 2016 article noted that the number of returns to Iraq facilitated by the International Organization for Migration (IOM) increased from approximately 100 per month in early 2015 to often more than 1000 per month in mid-2016. Eligible returnees could utilise reception and counselling services and also receive a reintegration grant from IOM. Although it was noted reintegration can be more difficult for returnees who have come back after years rather than months⁸.
28. The information before me does not suggest that returnees to Iraq who have sought asylum in the West are attributed with an imputed political opinion by either the Iraqi government, the AAH or anyone else for that matter. Also I have not accepted that the applicant has any particular profile or was of adverse interest to the AAH or any other militia when he departed Iraq in 2013. The applicant will be returning to his home province where his parents and siblings continue to live. I also note at the TPV interview he stated his family went to Europe and returned to Iraq and he has not claimed they suffered any adverse treatment as a result. I am satisfied there is not a real chance that the applicant will suffer harm as an asylum seeker and returnee from a Western country now or in the reasonably foreseeable future.

Refugee: conclusion

29. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

⁷ DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631, paragraph 5.25.

⁸ Helen Nianias, 'The returnees: what happens when refugees decide to go back home?', The Guardian (UK), 20 July 2016, CX6A26A6E6704.

Complementary protection assessment

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

Real risk of significant harm

31. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
32. I have concluded that the applicant does not face a real chance of harm because he formerly worked for an international company six years ago; because he is a moderate non-practising Shia Muslim who holds some secular views; because of insecurity in Basra governorate; or because he is an asylum seeker and returnee from a Western country.
33. As 'real risk' and 'real chance' involve the application of the same standard⁹, 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.

Complementary protection: conclusion

34. 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.

⁹ *MIAC v SZQRB* (2013) 210 FCR 505.
IAA18/04328

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:
 - (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.