



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

**Decision and Reasons**

**Referred application**

---

IRAQ

IAA reference: IAA18/05189

Date and time of decision: 8 November 2018 11:27:00

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 a 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 [in] May 2013. On 14 March 2017 he lodged an application for a temporary protection visa (TPV).
2. On 20 June 2018 a delegate of the Minister for Immigration and Border Protection refused to grant the visa. The delegate accepted as plausible that the applicant's [Relative A] was murdered in 2013 because of his work for a foreign company and that the applicant was threatened because of [Relative A]'s employment and / or because he sold un-Islamic goods from his shop. However the delegate did not accept the applicant was at risk of harm for either of these reasons.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 6 August 2018 the applicant's new representative provided a five page submission to the IAA (the IAA submission). Appended to the submission were a five page statutory declaration in English signed by the applicant; extracts of country information on the treatment of perceived collaborators and the human rights situation in Iraq; and a summary of ISIL attacks in Iraq covering the period March-April 2018.
5. A portion of the IAA submission restates some 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. A number of the extracts either cited in the IAA submission or included in the country information annexure - including the 2017 DFAT country report and the Department of Home Affairs' (the Department) Procedures Advice Manuals – were before the Minister when the Minister made the decision under s.65 and are not new information.
6. One of the arguments submitted by the applicant's new representative in the IAA submission is that the adverse issues or concerns relied upon by the delegate in his decision were not put to the applicant so preventing him from responding to them and denying him procedural fairness. I have listened to the audio recording of the TPV interview. Although the delegate afforded the applicant a break towards the end of the interview to allow him to consider what they had discussed during the interview, the applicant's new representative is correct. The delegate did not raise concerns he relied on, and that formed part of the reason for affirming the decision, either during the interview or in writing after the interview. I have taken that into account when assessing whether there are exceptional circumstances to justify considering the information.
7. The remaining country information in the IAA submission and attachments was not before the delegate and is new information. All of this information is general in nature and none of it can be described as personal information. The extracts from the UK Home Office report and the two media articles discuss the treatment of persons who formerly worked with foreigners in Iraq and their relatives, and the extracts from the Canadian Immigration and Refugee Board and LandInfo concern the potential for errors in Iraqi documentation. The information

pre-dates the delegate's decision by several months or in some cases much longer. However, given my observations above about the delegate's failure to put his concerns about the applicant's claims relating to [Relative A]'s death and its consequences for him to the applicant in either the interview or a letter, I accept that the applicant may have been under the impression that it was not necessary for him to provide country information in relation to these matters. In these circumstances I am satisfied that the information was not and could not have been provided to the delegate and that there are exceptional circumstances to justify considering the new information.

8. The Amnesty International and Human Rights Watch extracts primarily concern atrocities committed by ISIL in areas formerly under its control, although there is one mention of an attack in southern Iraq, although not in the governorate the applicant is from. Other credible information is before me concerning occasional attacks by ISIL in southern Iraq. I consider this new information is of very little probative value in relation to the applicant's claims given that he has never lived in an area held by ISIL. And I am not satisfied that there are exceptional circumstances to justify considering the new information. The summary of ISIL attacks also details incidents that occurred in areas previously dominated by ISIL in northern, central and western Iraq, far from southern Iraq where the applicant resided. The applicant has not claimed that either he, or his family, have suffered any past harm as a result of ISIL and he refers only cursorily to fearing future harm from ISIL in a vague and unspecified way. Other credible information before me indicates ISIL lacks operational capability in southern Iraq and that there have been few ISIL attacks in Basra governorate where the applicant is from. Neither the applicant nor his new representative has explained how or why these incidents are relevant to the applicant's case. In my view the summary is of very limited probative value. I am not satisfied that there are exceptional circumstances to justify considering the new information.
9. While some of the applicant's statutory declaration restates some of his claims that were before the delegate, it also includes a number of new claims: that he was at risk before he left Iraq because he accompanied his mother to provide the police statement concerning [Relative A] and continuously pursued and enquired with the Iraqi authorities in relation to [Relative A]'s death; that his enquiries alarmed the Islamic parties or the militias who have close ties with the police and who were responsible for [Relative A]'s death and that both the police and the parties/militia have his name; that the reason his family have not suffered any consequences in his absence is because they did not make any further complaints or follow up on [Relative A]'s death after the threats he received; that the statement accompanying his TPV application erroneously states that [Relative A] was kidnapped on [specified date in] 2013, when this is the date [Relative A] was found; and that he made an error at the TPV interview when he stated [Relative A] was kidnapped on [specified date in] 2013.
10. I have considered his explanations for not having raised the new claims previously - that he was not properly advised or assisted in raising his claims in his protection application; that during the TPV interview he had difficulty understanding the Arabic interpreter's dialect; and that he was quite nervous and anxious during his interview. I have also considered his new representative's submission that given the limited level of assistance he received from his former agent the new claims arise from the evidence produced in support of his application and are not new information; or conversely even if it were to be considered as new information the applicant's very limited English language skills, the difficulties he experienced in the TPV interview and in preparation of his application, amount to exceptional circumstances. And that the TPV interview was short and this meant due consideration was not given to the applicant's claims.

11. I do not accept the new claims arise on the supporting evidence. Nor am I satisfied by the explanations given for the applicant not having raised the claims earlier. Even if the level of representation provided by the applicant's former registered migration agent did not match the standard provided by his current representative, the applicant had a number of opportunities to raise the new claims himself during the TPV interview. I have listened to the audio recording of that interview. At the outset of the interview the delegate asked the applicant whether he had read the brochure, provided in Arabic, titled 'Important information about your protection visa interview.' He confirmed he had read it. The delegate also separately pointed out it was the applicant's responsibility to outline all his claims and provide evidence in support of his claims and that he may not have another chance to provide information. The delegate further asked the applicant whether he would like to add to or correct any of his claims, to which he replied he could not add anything as everything was clear in his application. Then towards the end of the TPV interview the delegate asked the applicant three times whether there was anything else he wanted to add, to which he initially responded if there was safety in Iraq he would not have sought protection in Australia. On a second occasion he answered 'no' to the same question; and on a third occasion he stated he had provided all the documents that related to [Relative A] and that what had happened to him was the truth. As the interview was finishing the delegate also advised the applicant that any additional information he provided before the decision was made would be considered. Over four months elapsed before the decision was made and nothing was provided. I also observe that the matters raised here are not ones that the applicant would have been prevented from raising because of the delegate's failure to put certain concerns to the applicant.
12. Additionally unfamiliarity with the protection process and difficulties with English are issues faced by most applicants. While I accept that the TPV interview was only about an hour long, I do not accept the applicant was denied a meaningful opportunity to advance his claims for protection. There were a couple of occasions where either the interpreter or applicant sought to clarify what they had said but I do not accept that there was a material degree of miscommunication between them. The applicant appeared to comprehend and respond to the questions put to him. And on some occasions the applicant answered in English before the interpreter had an opportunity to interpret, again suggesting he grasped what was being said. The applicant confirmed he understood and had no objection to the interpreter when asked by the delegate. And neither he nor his new agent has identified any specific instances of misinterpretation in the IAA submission. Also in my view the applicant did not sound as though he was intimidated by either the interpreter or the delegate. Furthermore some of the new claims appear to be undermined by his evidence at the TPV interview. That he vigorously and repeatedly pursued authorities about [Relative A]'s death seems at odds with his earlier evidence that he did not stay at home for a few days after [Relative A]'s body was discovered and then returned to work, and that he only remained in Iraq for less than a month after his [Relative A]'s death. And at the TPV interview he indicated he did not go to the police as they could not provide protection. I also note that apart from stating he accompanied his mother when she made a statement to the police, the applicant has not provided any details as to when or how often he followed up about [Relative A]'s death, which in my mind weakens this new claim. It seems highly likely that having become aware of the delegate's decision the applicant has changed his evidence to more closely match the documents he had already provided and address the delegate's concerns. I am not satisfied that there are exceptional circumstances to justify considering the new information.

## **Applicant's claims for protection**

---

13. The applicant's claims can be summarised as follows:
- His [Relative A], who worked as [an Occupation 1] for a foreign [company] around Basra, was tortured and killed in 2013.
  - He was threatened several times because he was related to [Relative A] and / or because his small shop sold goods that were considered un-Islamic, in addition to other [goods].
  - He fears if he returns to Iraq he will be killed like [Relative A].

## **Refugee assessment**

---

14. 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**

15. 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.
16. The applicant provided the delegate with copies of an Iraqi citizenship certificate and an Iraqi identity card, 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.
17. On the basis of the applicant's documentary and oral evidence I also accept: that he is a Shia Muslim of Arab ethnicity; that he was born and lived most of his life in Basra governorate; that he completed compulsory military service under the former regime of Saddam Hussein;

that he worked in various jobs in the private sector including as a [Occupation 2]; that he worked as an [Occupation 3] at several ports; and that he is single.

18. The applicant claimed [in] 2013 [Relative A] was kidnapped by terrorist entities and tortured for [number] days before he was killed. After a few days they found [Relative A]'s body beside a hospital. [Information deleted]. In support of these claims he provided copies, and English translations, of an Iraqi identity card for [Relative A] and other family members, a death certificate for [Relative A], an extract of a death certificate for [Relative A], a forensic autopsy medical report, a second forensic medical report, police investigation correspondence, a police witness statement, a police report and a letter from [an office bearer] at Basra city council.
19. The applicant claimed after a while the terrorists threatened to kill him, although he does not know the reason why. For a couple of days he was absent from his family home before returning because he had his [shop]. He then received a threat from the terrorists to either leave his workplace or they would kill him. Scared that what happened to [Relative A] would happen to him he decided to leave Iraq due to the lack of safety and stability, the terrorism, the explosions, and ISIL.
20. When asked at the TPV interview the applicant stated he could not remember when he was first threatened. All he remembered was he opened the shop and found a message that said that if he continued opening the shop they would kill him. He initially thought someone was playing with him but when they mentioned [Relative A]'s name he took it seriously. He subsequently found another piece of paper with a bullet inside.
21. Although I have some doubt - because his claim about the nature of the un-Islamic goods he sold was vague and generic, because he provided no documentary evidence about the existence of his business, and because his evidence about when he was threatened and who threatened him was sketchy - I am willing to accept that for over three years the applicant operated a small shop in Basra that sold [a certain type of] goods, including some items considered un-Islamic by conservative elements in Iraqi society, such as [Item 1] and [Item 2], and that as a consequence of him selling the un-Islamic items he was threatened in writing on two occasions in 2013 by unknown persons and then closed his shop.
22. However having regard to the information before me I am not satisfied there is a real chance the applicant will suffer harm now or in the reasonably foreseeable future because over five years ago he sold some items considered un-Islamic from a shop that is now closed. Although there have been a few instances where premises selling [Item 1] in Basra have been [targeted] to 'send a message'<sup>1</sup>, apart from the applicant's assertion, the information before me does not suggest that persons who formerly sold un-Islamic goods continue to be hounded years after they have ceased to operate such a business. Furthermore the applicant has not claimed that he intends to, or would have the opportunity, to re-open a shop if he were to return to Iraq, or that if he did start a new business he would re-commence selling un-Islamic goods. I also note that prior to operating his shop he worked in other occupations, including for some years in [Occupation 3] at ports and elsewhere in the private sector. I am not satisfied there is a real chance the applicant will suffer harm because of his former employment if he were to return to Iraq.
23. I am willing to accept the applicant may have a [relative] named [Relative A], although I note that the identification card the applicant provided for [Relative A] is incomplete. However for

---

<sup>1</sup> [Information deleted]  
IAA18/05189

a number of reasons I do not accept that [Relative A] worked as [an Occupation 1] for a foreign [company] or was killed in 2013 because of that role. The applicant's evidence in this regard was vague and unpersuasive. Despite saying he was close to [Relative A] and that they lived in the same family home, he did not know the name of the company [Relative A] worked for, or anything about the company other than it provided [a particular type of service]. And he provided no documentary evidence of the company's existence or that [Relative A] worked for it, despite providing a substantial number of documents about other aspects of his claims. Also the claim is not supported by the country information before me. While I accept that there is limited evidence that some individuals who worked with coalition military forces were targeted by ISIL and some Shia militias after 2003; and that more recently some Shia militias engaged in criminal activities have conducting kidnappings for ransom, and harmed Sunnis in areas formerly held by ISIL in central and northern Iraq, in my view there is very little evidence of such kidnappings or killings occurring in southern Iraq, or of Shia militias targeting fellow Shias for working for the international community, particularly since the withdrawal of the Americans in late 2011. And there is even lesser evidence that family members of individuals who worked with the international community were targeted because of their relative's employment<sup>2</sup>.

24. I have considered the range of documents the applicant has provided concerning [Relative A]'s kidnapping and death. I note that country information indicates fraudulent documents are commonly and cheaply available in Iraq<sup>3</sup>. I also accept that country information observes that Iraqi documents may contain inaccuracies for a range of reasons<sup>4</sup>. However on their face many of the medical and police documents provided by the applicant appear so unprofessional that in my view they are highly unlikely to have been issued by official agencies. They are poor quality copies, handwritten, and tend to lack official letterheads and stamps. Also the purported date of [Relative A]'s death differs among some of the documents. The documents also refer to three different hospitals where [Relative A]'s body was taken and on one autopsy report the autopsy form requesting the report pre-dates [Relative A]'s death by almost three months. In addition, the claimed circumstances of [Relative A]'s death are undermined by the applicant's TPV statement and his evidence during the TPV interview that on [a specific date in] 2013 [Relative A] was kidnapped. Several pieces of documentary evidence he provided indicate [that the same date in] 2013 was the date [Relative A]'s body was discovered after having been missing for some time. In these circumstances, these documents do not overcome the considerable concerns I have with his other evidence concerning [Relative A]'s death. As I have not accepted that [Relative A] worked for an international company or that he was killed because of his employment, it follows that I do not accept that any threats made against the applicant were connected to [Relative A].
25. Although the applicant did not claim to fear harm in this regard, the delegate considered whether he was at risk of harm 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,

---

<sup>2</sup> UK Home Office, Country Policy and Information Note - Iraq: Perceived collaborators, January 2018. Jonathan Allen and Ned Parker, 'Trump refugee order dashes hopes of Iraqis who helped the U.S.', Reuters, 28 January 2017. Austin Bodetti, 'The Iraqi translators betrayed by the United States', The New Arab, 12 April 2018. DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631. Overseas Security Advisory Council (OSAC), "Iraq 2018 Crime & Safety Report: Baghdad", 12 February 2018, CIS7B83941440.

<sup>3</sup> LANDINFO, "Report Iraq: Travel documents and other identity documents", 16 December 2015. Immigration and Refugee Board of Canada, "Iraq: The types of identity cards issued to Iraqi citizens", 13 June 2000. DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631.

<sup>4</sup> LANDINFO, "Report Iraq: Travel documents and other identity documents", 16 December 2015. Immigration and Refugee Board of Canada, "Iraq: The types of identity cards issued to Iraqi citizens", 13 June 2000.

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<sup>5</sup>. In mid-2016 the International Organization for Migration confirmed it was facilitating more than 1,000 returns to Iraq per month and assisting returnees with reintegration grants and counselling services<sup>6</sup>.

26. I accept that it may be suspected that the applicant has sought asylum overseas. I also accept that the applicant has been absent from Iraq for some years. However I note he will be returning to his home governorate where his parents and siblings have continued to live while he has been in Australia. On the information before me I am not satisfied there is 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**

27. 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**

---

28. 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**

29. 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.
30. I have concluded that the applicant does not face a real chance of harm from unknown terrorists or militia or anyone else in connection with [Relative A]; because five years ago he sold some un-Islamic goods from his defunct business; or because he is an asylum seeker and returnee from a Western country. As 'real risk' and 'real chance' involve the application of

---

<sup>5</sup> DFAT, "Country Information Report for Iraq 2017", 26 June 2017, CISED50AD4631.

<sup>6</sup> International Organization for Migration, "Movement and Assisted Migration", February 2013, CXC28129415379; Helen Nianias, "The returnees: what happens when refugees decide to go back home?", The Guardian (UK), 20 July 2016, CX6A26A6E6704.  
IAA18/05189

the same standard<sup>7</sup>, 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**

31. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

**Decision**

---

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

---

<sup>7</sup> *MIAC v SZQRB* (2013) 210 FCR 505.  
IAA18/05189

## 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.