



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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IRAQ

IAA reference: IAA21/09988

IRAQ

IAA reference: IAA21/09989

Date and time of decision: 9 December 2021 13:04:00

A Wilson, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

## Background to the review

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### Visa application

1. The referred applicants (the applicants) are a mother (IAA21/09988) who claims to be a national of Iraq and her daughter (IAA21/09989) who claims to be stateless. The mother arrived in Australia [in] July 2013. The daughter was born in Australia in [Year]. On 12 September 2017 the mother and daughter lodged combined applications for Safe Haven Enterprise visas (SHEVs), with the assistance of a representative. The mother made claims for protection in the application. The daughter is relying on membership of the same family unit. Although the mother has also made protection claims on her behalf. On 11 August 2021 the mother was interviewed by an officer of the Department of Home Affairs (the Department). On 28 September 2021 a delegate of the Minister for Immigration refused to grant the visas.
2. The delegate accepted the mother was an Iraqi national but did not accept the daughter was stateless, finding she was an Iraqi national also. Nor did the delegate accept the mother's account of her marriage and relationship with her husband. The delegate was not otherwise satisfied that if returned to Iraq the mother and daughter had a well-founded fear of persecution or that there was a real risk they would suffer significant harm.

### 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 28 October 2021 the mother provided an email to the IAA (the IAA submission). Attached to the email was a report by the applicants' general practitioner dated 19 October 2021. The report mainly concerns the mother but also mentions the daughter.
5. The report post-dates the delegate's decision. I am satisfied that s.473DD(b)(i) is met. The report is written by a medical professional and contains credible personal information about the applicants. The report is an update of an earlier report prepared by the same general practitioner two months previously, and provides more recent information about the mother's health and a diagnosis of a medical condition affecting the daughter. The report is pertinent to a claim raised relating to access to medical treatment in Iraq. I am satisfied that s.473DD(b)(ii) is met, and that there are exceptional circumstances to justify considering the new information.

### Applicants' claims for protection

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6. The mother's claims as set out in the 2017 SHEV application and statement of claims can be summarised as follows:
  - she is a citizen of Iraq and she is a Shia Muslim who was born and raised in the city of Nasiriya, Dhi Qar governorate, Iraq.
  - in [Year 1], when she was [Age], she married [Mr A]. They had their first child in [Year 2], their second child in [Year 3], and their third child in [Year 4]. The marriage was unhappy from the beginning and she was the victim of domestic violence for many years. Her husband verbally abused her and when she was pregnant with the first child he began to physically abuse her. From time to time she would run away to her sister's but would return because of the children. Her husband took advantage because she

does not have brothers in Iraq to protect her and her brothers-in-law did not want to be involved.

- her husband and a co-worker, both [Occupation]s who had long history of disputes, had a fight after the co-worker unsuccessfully tried to [harm] the couple's eldest daughter in the street. The next day the co-worker and 30 armed people came to their house. They pushed the mother to the ground. Her husband tried to climb the roof to escape but was shot in the [Body part] and was taken to hospital. She took the children to his parent's place before returning home to get some belongings. But was later advised by one of his cousin's that her husband and children had left the house because they had been threatened. She went to her sister [Ms B] 's house. Her sister mentioned her son was going to Australia, and suggested the applicant escort her nephew and save her life. So in mid-June 2013 the applicant and her nephew left Iraq and travelled to Australia together.
- should she return to Iraq, she fears her husband would kill her because she has shamed him. Anywhere she goes, he will find her and severely punish her. Her husband accused her of escaping Iraq with someone else. Women in Iraq have no rights and are considered to be men's belongings so she would not be protected by the authorities.

7. In a submission lodged a few days prior to the 2021 protection visa interview the mother additionally claimed:

- she was severely mistreated by the Iraqi community she lived in due to her physical appearance / being overweight.
- should she return to Iraq she fears harm as a member of a particular social group of those who are overweight and have been discriminated against and ill-treated.

8. In the second of two post-interview submissions the mother additionally claimed:

- return to Iraq would exacerbate her mental and physical 'wellbeing'. The lack of medical resources in Iraq would put her health at high risk.

## **Refugee assessment**

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9. 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**

10. 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.

### *Receiving country*

11. In the SHEV application and statement lodged in 2017 the mother claimed her name was [Alias], and her daughter's name was [Ms C]. The mother also claimed that she was a national of Iraq, and that her daughter was stateless.
12. I accept the applicants are mother and daughter. The certified copy of the daughter's Victoria Birth Certificate confirms the relationship. The mother provided conflicting information about her name, and as a result I have some doubt about her identity. In the 2017 SHEV application she claimed her name was [Alias] but acknowledged she had also been known by the name [the applicant]. When she arrived in Australia in 2013 she said her name was [Alias – alternative form], and denied that she had been known by any other name. I find the mother's name is [the applicant] and that [Alias] is an alias. She provided certified copies (and English translations) of an Iraqi Civil Status Identification Card in the name [the applicant] and an Iraqi Citizenship Certificate in the name [part of the applicant's name]. On the basis of the identity documents, which country information indicates are issued to Iraqi citizens<sup>1</sup>, I accept the mother is a national of Iraq.
13. I accept the daughter's identity is as claimed. The certified copy of her Victoria Birth Certificate records her name as [Ms C]. However like the delegate, I am not satisfied she is stateless. Rather I find she is a citizen of Iraq. Country information indicates under Iraq's nationality law, the acquisition of nationality from an Iraqi father is automatic at birth (ex lege) via paternal jus sanguinis, irrespective if the child was born inside or outside of Iraq<sup>2</sup>. The SHEV application form identifies the daughter's father as the mother's husband, [Mr A] (Question 42), and that he is an Iraqi citizen (Question 20). The Victoria Birth Certificate also records him as her father<sup>3</sup>. I find that Iraq is the applicants' receiving country for the purpose of this review.

### *Events in Iraq*

14. The mother claimed, and I accept, she is a Shia Muslim from Nasiriya. Her identity documents corroborate her faith, and that she was born and lived in Nasiriya, and she has consistently made these claims about her religion and origins since she arrived in Australia. Furthermore, country information indicates the majority of the population of that region of Iraq is Shia Muslim<sup>4</sup>. On the basis of the mother's documentary and oral evidence I also accept: in Iraq she did not complete primary school; in Australia she has studied Arabic; in both countries she has been a

<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report – Iraq', 9 October 2018, CIS7B839419766.

<sup>2</sup> United Nations High Commission for Refugees (UNHCR), 'Acquisition of Iraqi Nationality by a Child Born Outside Iraq', 7 May 2019, 20190508090531. 'Iraqi Nationality Law', 1 March 2006, CIS18097.

<sup>3</sup> Although the father's second name on the Victoria Birth Certificate is different to his second name in the SHEV application, his first name, age, occupation and place of birth match. Moreover, the father's surname on the Birth Certificate is phonetically consistent with the alternative surname the mother gave for her husband when she arrived in Australia in 2013. I am satisfied [Mr A] and [Mr A – alternative form] are the same person.

<sup>4</sup> DFAT, 'DFAT Country Information Report Iraq', 17 August 2020, 20200817105936.

home maker; she is the mother of three older children who live in Nasiriya; she has [married sisters] and other relatives who live in Nasiriya; and she has [brothers] who live in Australia.

15. Should they return to Iraq, I find it highly likely the applicants will return to Nasiriya. It is the city where the mother was born and lived until she left Iraq, and where a number of her siblings and other relatives continues to live. It is also an area of Iraq in which Shia Muslims, like the applicants, form the majority of the population<sup>5</sup>.
16. In the SHEV application form and supporting statement the mother claimed in [Year 1] she married a man named [Mr A]. She claimed that for most of the subsequent eight years of their marriage he was physically and psychologically abusive to her. She further claimed she took the opportunity presented by her husband being absent following a violent dispute with a co-worker and her three elder children being in the care of their paternal grandmother, to escape her difficult marriage by leaving Iraq in mid-2013 with an adult nephew and travelling to Australia with him. She claimed she has been separated from her husband since that time and has not been in communication with him. At the protection visa interview she additionally claimed earlier this year she had begun preparing to divorce her husband.
17. I accept the mother married a man named [Mr A] in Nasiriya in [Year 1]. She provided an uncertified copy (and English translation) of an Iraqi Contract of Marriage stating she wed a person by that name in that city at that time. Furthermore, the certified copy of her 2008 Iraqi Civil Status Identification Card reflects her status as married to [Mr A]. I am mindful country information before me indicates Iraqi culture is conservative, that domestic violence is a pervasive problem in Iraqi society, that there is no law that criminalises domestic violence, that women sometimes suffer from honour-based violence carried out by family members, and that only very limited support is available to female victims of family violence in Iraq<sup>6</sup>. However, after carefully considering the totality of the review material, like the delegate, I am not satisfied as to the veracity of the mother's account of her married life. Nor am I satisfied she is genuinely separated and estranged from her husband.
18. Firstly, the review material includes financial transactions records that contradict the mother's evidence that because of fear she has not communicated with her husband since they separated in May 2013. The relevant documentation evidences that over the course of 2015, 2016, and 2017 the mother, who claimed she has never worked in Australia, sent more than \$4,300 in family support to her husband in Nasiriya. Secondly, the review material includes financial transactions records that contradict the mother's nephew's claim, that she affirmed was true, that he feared her husband because he also threatened him with violence for assisting her to leave Iraq. The relevant documentation evidences that in 2015 the nephew sent the mother's husband money described as family support and that in 2018 the nephew received money from her husband.
19. The mother offered several explanations for the money transfers that appear to undermine the credibility of her claims. At the protection visa interview she initially stated she sent money to her children under that name, before subsequently claiming the individual she sent money to

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<sup>5</sup> DFAT, 'DFAT Country Information Report Iraq', 17 August 2020, 20200817105936.

<sup>6</sup> 'Domestic Violence in Iraq: Human Rights Watch Commentary on the Draft Law on Anti-Domestic Violence in Iraq', 19 March 2017. 'Gender-Based Violence and Discrimination Against Women and Girls in Iraq', A Report for the United Nations Committee on the Elimination of Discrimination Against Women, January 2019. 'The Violence of Silence: Domestic Abuse in the Middle East', The Vogue, November 2020. HRW, "Iraq, Urgent need for domestic violence law", April 2021. "Iraqi Women struggle to escape abuse as Domestic violence rises", Al Jazeera, 12 February 2021. United Nations High Commissioner for Refugees (UNHCR), 'International Protection Considerations with Regard to People Fleeing the Republic of Iraq', 3 May 2019, 20190506112913. DFAT, 'DFAT Country Information Report Iraq', 17 August 2020, 20200817105936.

was not her husband but was her husband's sister's son. Subsequently, in response to letter from the Department inviting her comments on the potentially adverse information, the mother denied she had sent her husband money, stating the ordering customer was not her, pointing to them having a different date of birth and asserting she did not have identification of the type provided by the ordering customer. She also stated that on the few occasions she sent money to her children she gave it to her nephew to transfer as she is illiterate and unable to complete such transactions. The mother also denied any knowledge of her nephew receiving money from her husband, stating as far as she knew her husband was [an Occupation] and not wealthy, making it unlikely he had money to transfer to Australia.

20. I have considered these explanations but am not persuaded by them, and I am satisfied the mother was the ordering customer for the transactions in her name. The ordering customer's name and address match those provided by the mother in the SHEV application. Furthermore, while it is correct that the ordering customer's date of birth does not match the mother's date of birth as recorded in the SHEV application ([Date 1]), it does match the mother's date of birth as recorded in the medical records she provided ([Date 2]). While there is no evidence in the review material to prove or disprove the mother's assertion that she does not hold a NSW Driver's Licence, I note the serial number recorded against the ordering customer's identification matches exactly the serial number of the mother's Victoria Proof of Age Card. I consider it highly likely the form of identification was recorded inaccurately on the transaction form.
21. It also find it very difficult to believe the mother's earlier explanation, that despite fearing her husband she sent money to her children in his or his sister's son's name, given she also stated one of her sisters was in contact with her children, meaning she had an avenue to send money to her children without any contact with her husband or his family. Nor has the mother provided any evidence to corroborate the receiving customer was her husband's sister's son or a relative rather than her husband. I also am not persuaded by a belated explanation supplied in a post-interview submission, that the recipient's name was sent to her by her sister-in-law and being illiterate she assumed it was her sister-in-law's husband or a different relative's name. Even with her very limited education I consider it highly unlikely the mother would not recognise her husband's name.
22. I am satisfied the mother and her nephew transferred money to or from the mother's husband over a number of years. I consider slight variations in the receiving/ordering customer's name reflect differences in transliteration from Arabic to English of the husband's name or the husband's name being recorded in the common first name, father's name, grandfather's name variant<sup>7</sup>. I note in addition to the name matching the husband's, the money transfers were all sent to Nasiriya, where the mother lived with the husband. Moreover, in relation to the money transfer from the husband to the nephew, the address the husband provided -'[Location]' - matched the address the mother stated she lived at when she arrived in Australia - '[Location - alternative spelling]'.
23. While I accept the mother received little formal education, I am not satisfied she is incapable of transferring money, either alone or with assistance. I note she has mostly lived in Australia with two adult male relatives, and she has also referred to other friends assisting her with various tasks. Nor am I satisfied her nephew could have used her personal details and identification document to make money transfers on her behalf without her presence or knowledge. I am satisfied her nephew sent funds to and received funds from the mother's husband, and consider it highly likely she was aware of this. It is difficult to believe her nephew, who she shared

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<sup>7</sup> Australia: Department of Immigration and Citizenship - Identity Branch, 'Naming Conventions Guide', November 2009, CIS18183.

accommodation with for around eight years, and who at his protection visa interview described their relationship as very close, would not mention to her that he had sent money to or received money from her husband.

24. Thirdly, when the mother arrived in Australia the reason she claimed was behind her departure from Iraq, the circumstances surrounding the triggering event of her husband being shot, and the whereabouts of her family after that event, were different to those she claimed in the SHEV application lodged four years later. In 2013 the mother did not mention she had suffered domestic violence, did not mention she was separated from her husband, did not mention her husband had been shot because of a long running dispute with a co-worker, and did not mention she feared her husband would kill her should she return to Iraq. Rather at that time the mother said she left Iraq because her Shia husband had been shot in the [Body part] in the course of Sunni-Shia conflict. When directly asked, she said nothing happened to her because she stayed with her parents-in-law but added there was no peace there. She stated she feared returning to the country because Iraq was not stable, there was no peace, and their position was very hard. She identified her status as married, rather than separated. She said her husband and three elder children were living at the last address she lived at in [Location – alternative spelling], Nasiriya. Rather than at an unknown location (the SHEV application) or her husband being in hiding and her children having been taken by her mother-in-law to one of her sister's places (protection visa interview).
25. Nor do I accept the mother lacked family protection in Iraq. Her evidence was she sheltered with a sister and the same sister and her husband paid USD\$10,000 for her to travel to Australia. I also note, at the protection visa interview the mother confirmed she has remained in regular contact with all her siblings in Iraq.
26. In the 2017 statement of claims lodged soon after the SHEV application form the mother explained she omitted mentioning what is now her key claim when she arrived in Australia because she was confused and embarrassed, particularly as she had left her children in Iraq. She claimed another asylum seeker advised her to say she had left Iraq because her husband had a problem with the Muslim sects, that there were many issues between Sunnis and Shias.
27. I have considered but am not persuaded by this explanation. I have listened to the audio recording and read the written record of the arrival interview that was conducted with the mother more than two weeks after her arrival in Australia. In the recording the mother does not sound confused or embarrassed. While on one hand I accept it would be natural for a person to feel somewhat reticent to talk about personal issues, on the other hand the mother was advised at the outset of the interview that it was her opportunity to provide any reasons why she should not be removed from Australia and that if she did not answer questions a decision may be made on the basis of the information they had. She was also advised she was expected to give true and correct answers to the questions asked and that if the information she gave at any future interview was different from what she said now, it could raise doubts about the reliability of what she had said. I also note when she was asked during the arrival interview whether anyone had told her what to say to the Australian authorities, she had stated 'no' and that she was by herself all the time. Furthermore, her adult nephew, who travelled to Australia with the mother and lived with her here, did not mention she had suffered domestic violence in Iraq or that both he and she feared her husband would harm them should they return to Iraq until he made a new claim to that effect in his protection visa interview conducted in 2020. Nor has the mother explained why if they were separated and she was estranged from her husband since May 2013 he was listed, along with her, as an informant on the daughter's birth certificate in March 2014.

28. At the 2021 protection visa interview the mother additionally claimed she had decided she wanted to permanently sever her marital relationship and that she had begun collecting documentation that would allow her to divorce her husband.
29. I accept the mother has lodged an application for divorce from her husband in an Australian court. She provided a copy of a receipt and an application for divorce lodged shortly after the protection visa interview was held. Section 5J(6) of the Act states that any conduct engaged in by the person in Australia is to be disregarded (for the purposes of the refugee assessment) 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. In this regard, for the following reasons I am not satisfied that the mother's application for divorce in Australia was engaged in otherwise than solely for the purpose of strengthening her claim to be a refugee. Firstly, I have some concern with the timing of the application. The mother has been in Australia for eight years and purportedly separated from her husband for the entire time yet only lodged the application for divorce after the delegate had raised with her concerns about the credibility of her claims. Secondly, the mother has not provided evidence that she is genuinely pursuing the divorce. The review material does not include any indication she has served the application on her husband as is required<sup>8</sup>. Moreover, country information in the review material indicates that in order for a divorce from her husband to be valid in Iraq she would need to lodge an application in a court in that country<sup>9</sup>. There is no evidence she has done so.
30. In a submission lodged four years after the SHEV application, the mother claimed for the first time that she had in the past, and she would in the future, suffer adverse treatment from her community in Nasiriya because of her obesity and appearance.
31. I accept the mother is overweight. Documentation she has provided from a general practitioner and a counsellor corroborate this. However, I am not satisfied she was mistreated because of her weight or her looks in Iraq. Apart from her husband's purported behaviour, the mother has provided no details about who harmed her, what they did, or when the ill-treatment occurred. Nor has she explained why, if true, she did not mention this claim in the SHEV application or statement she lodged in 2017, with the assistance of a representative. Noting also the statement includes a disclaimer that it was read back to her in her native language Arabic and that she approved the contents.
32. In the statement of claims lodged soon after the SHEV application form the mother claimed she has suffered [Body part 2] since she was a child, and they had been exacerbated by domestic violence. In a submission made after the protection visa interview, the mother claimed for the first time that should she return to Iraq her psychological and physical health would be aggravated and she would be at risk of harm because of a lack of medical resources.
33. I accept the mother has been diagnosed by a general practitioner as suffering from asthma; depression, anxiety, and post-traumatic stress disorder; morbid obesity, menorrhagia, and arthritis and that the daughter has been diagnosed as suffering from ADHD. I accept the mother has been prescribed a number of medications by medical professionals for some conditions, and that over several years she and her daughter have received counselling from staff at a non-government organisation that supports asylum seekers. The applicants provided several reports written by a general practitioner and a report prepared by a counsellor confirming this.

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<sup>8</sup> 'How to apply for a divorce?', Federal Circuit and Family Court of Australia.

<sup>9</sup> 'Personal Status Law No.188 of 1959 and its amendments', Republic of Iraq, 29 December 1959, 20190308132002. Dawoud El Alami, Ph.D and Doreen Hinchcliffe, Ph.D., 'Islamic marriage and divorce laws of the Arab world', CIMEL and Kluwer Law International, 1 January 1994, CIS10769.



However, I am not satisfied the mother has [Body part or function] problems. The medical documentation she has provided does not support this.

34. Country information indicates Iraq has 229 hospitals, and over 2,300 primary health centres. These institutions include a mixture of public and private hospitals and clinics. However, decades of conflict and economic sanctions, combined with chronic underinvestment, the departure of health professionals, corruption, and now COVID-19, have caused health services to deteriorate and created shortages in drugs and other supplies. Country information also indicates despite significant need, there are very few mental health services or financial support schemes available to the general public, and that much of the burden for treating mental health issues falls on international non-government organisations. Often the only care available is family-based or in psychiatric institutions, which have been linked to inhumane treatment and degrading living conditions. There is also significant societal stigma against those suffering from mental health issues, which results in under-reporting of problems and underutilisation of the services that are available<sup>10</sup>.
35. I accept the mother may continue to need to take medication for chronic conditions in the reasonably foreseeable future. While the GP's report referred to her needing regular counselling on the basis of claims the mother had reported to her, I am not satisfied she and her daughter would continue to require counselling. The report prepared by the counsellor she provided was written almost two years ago, and at the August 2021 protection visa interview the mother said she had not seen the counsellor for a few months. Although she claimed to be on a waiting list to see a psychologist she did not provide any documentary evidence to corroborate this.
36. Should the applicants return to Iraq, I am not satisfied the mother could not obtain medication to treat her conditions. Country information does not indicate medication is unavailable. I also note during the protection visa interview the mother referred to having received treatment in Iraq in the past, although she expressed the view the treatment was not appropriate and that she obtained a passport in the hope of travelling to Iran for treatment. In the event the mother and daughter were to require counselling, I am not satisfied they would be unable to obtain it in Iraq. Country information cited above indicates that while health facilities in Iraq, including for mental health, are inadequately resourced and overburdened there is some treatment and medication for psychological illnesses and symptoms available. Moreover, while health facilities in Iraq may be not be resourced as in Australia, the evidence that is available to me does not suggest that in the event treatment or medication were sought, the applicants would be denied medication or other treatment, or restricted in their ability to obtain medication or treatment, as a result of any systematic and discriminatory conduct, including for any of the reasons in s.5J(1)(a) or otherwise. Country information supports that should they seek counselling the applicants may face some stigma in relation to their mental state in Iraq. Although facing some societal stigma in relation to psychological ill-health, whether in the form of negative attitudes, a level of social isolation or otherwise, may be hurtful, I am not satisfied it amounts to significant ill-treatment or any other type of harm that may be regarded as serious harm.
37. The mother has also claimed overweight people, like herself, face unspecified discrimination in Iraq. However, I am not satisfied there is a real chance she will suffer any harm because of her

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<sup>10</sup> DFAT, 'DFAT Country Information Report Iraq', 17 August 2020, 20200817105936. Finnish Immigration Service, 'Iraq: Fact-Finding Mission to Baghdad in February 2019 - Mental Health Issues and Their Treatment in Iraq', 17 June 2019, 20191204132624. Nouri, B, 'After Years of Conflict, Iraq Grapples with a Mental Health Crisis', The Wire, 9 April 2019, 2019050614152. Dutton, J, 'The life we're living is nothing more than hell': Iraq's mental health crisis', The National, 21 November 2019, 20191205142112. Health Cluster and World Health Organization (WHO), 'Health Cluster Iraq - Annual Report 2019', 23 June 2020, 20200625085435. DFAT, 'DFAT Country Information Report - Iraq', 9 October 2018, CIS7B839419766.

appearance now or in the reasonably foreseeable future. I do not accept she suffered past harm as a result of her obesity or appearance, and apart from her assertion the review material does not indicate overweight people are harmed by elements in Iraqi society or the authorities.

38. The applicants are a married middle-aged mother and her school-aged daughter. The mother was born and lived in Nasiriya, the capital of Dhi Qar governorate, prior to travelling to Australia. They are Shia Muslims. They will be returning to an area in southern Iraq in which Shia Muslims, like themselves, are the majority. They will be also returning to a community where their husband/father and children/siblings live. A number of the mother's adult siblings, with whom the mother has maintained contact, and some other relatives, also live there. As Iraqi citizens the applicants will be entitled to public distribution system (food ration) cards<sup>11</sup>. Taking all of this into account, I consider it highly unlikely the applicants capacity to subsist would be threatened in Dhi Qar governorate. I am not satisfied there is a real chance the applicants will suffer persecution now or in the reasonably foreseeable future for any, or a combination, of the reasons claimed.

39. Overall, I am not satisfied the applicants have a well-founded fear of persecution in Iraq.

#### **Refugee: conclusion**

40. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

#### **Complementary protection assessment**

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41. Under s.36(2)(aa) of the Act, a criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

#### **Real risk of significant harm**

42. Under s.36(2A), a person will suffer 'significant harm' if:

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

43. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.

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<sup>11</sup> DFAT, 'DFAT Country Information Report – Iraq', 9 October 2018, CIS7B839419766.

44. I accept the mother lodged an application for divorce from her husband in an Australian court earlier this year. However I am not satisfied she served her husband with the application in Iraq, that she intends to finalise the divorce, or that the couple are genuinely estranged. I am not satisfied that there is a real risk the mother will suffer any harm in connection with having lodged this paperwork.
45. If the mother requires medication or other treatment or the applicants were to require counselling in Iraq, I accept the standard of medical treatment they would receive in Iraq may not match the standard of treatment they would receive in Australia. However, I am not satisfied that there is a real risk the applicants would be unable to access medication, treatment, or counselling or that any restriction on their ability to access medication, treatment or counselling would constitute significant harm. I am also not satisfied that any limitations in the services available are the result of an intention to cause pain and suffering that can reasonably be regarded as cruel or inhuman, severe pain or suffering or extreme humiliation. Nor is there a real risk of the death penalty, torture or the arbitrary deprivation of life as understood in the context of s.36(2)(aa). I am not satisfied on the evidence that if they returned to Iraq, and required medication or counselling, the applicants would be at real risk of being subjected to significant harm. I accept the applicants may face some social stigma were they to require counselling for their mental health. As acknowledged above social stigmas may at times be hurtful, however, I am not satisfied on the evidence that any hurt they may suffer from social stigma will amount to severe pain or suffering, or pain and suffering that could reasonably be considered as cruel or inhuman in nature. Similarly, social stigmas may be hurtful or harassing but I am not satisfied it amounts to extreme humiliation in this case. I am not satisfied that there is a real risk of the death penalty, arbitrary deprivation of life or torture. I am not satisfied that any social stigma suffered by the applicants in relation to their receiving counselling amounts to significant harm. Nor am I satisfied that any limitations on access to treatment and social stigma cumulatively amount to significant harm.
46. I have otherwise concluded that the applicants do not face a real chance of harm for any of the reasons claimed. As 'real risk' and 'real chance' involve the application of the same standard<sup>12</sup>, I am also not satisfied that the applicants would face a real risk of significant harm for the purposes of s.36(2)(aa) on these grounds.

#### **Complementary protection: conclusion**

47. 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 applicants will suffer significant harm. The applicants do not meet s.36(2)(aa).

#### **Member of same family unit**

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48. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include dependent child.

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<sup>12</sup> *MIAC v SZQRB* (2013) 210 FCR 505.

49. As neither of the applicants meets the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

## **Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

## Applicable law

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### **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.