

1603711 (Refugee) [2016] AATA 3793 (28 April 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1603711
COUNTRY OF REFERENCE:	Iraq
MEMBER:	David Corrigan
DATE:	28 April 2016
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Statement made on 28 April 2016 at 4:28pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 15 March 2016 to refuse to grant the applicant a protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Iraq, applied for the visa [in] July 2015.

CRITERIA FOR A PROTECTION VISA

3. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, he or she is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.
4. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee.
5. A person is a refugee if, in the case of a person who has a nationality, they are outside the country of their nationality and, owing to a well-founded fear of persecution, are unable or unwilling to avail themselves of the protection of that country: s.5H(1)(a). In the case of a person without a nationality, they are a refugee if they are outside the country of their former habitual residence and, owing to a well-founded fear of persecution, are unable or unwilling to return to that country: s.5H(1)(b).
6. Under s.5J(1), a person has a well-founded fear of persecution if they fear being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, there is a real chance they would be persecuted for one or more of those reasons, and the real chance of persecution relates to all areas of the relevant country. Additional requirements relating to a 'well-founded fear of persecution' and circumstances in which a person will be taken not to have such a fear are set out in ss.5J(2)-(6) and ss.5K-LA, which are extracted in the attachment to this decision.

Effective protection measures

7. A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country: s.5J(2). Section 5LA(1) provides that effective protection measures are available if protection against persecution could be provided to the person by either the relevant State, or a party or organisation (including an international organisation) that controls the relevant State or a substantial part of its territory, and that State, party or organisation is willing and able to offer such protection.
8. A relevant State, party or organisation is taken to be able to offer protection against persecution to a person if the person can access the protection, and the protection is durable and, in the case of protection by the relevant State, the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system: s.5LA(2).

Sur place claims

9. Subject to s.5J(6) of the Act, a person may be a refugee in circumstances where the well-founded fear of persecution is a consequence of events that have occurred since arriving in Australia. Subsection 5J(6) provides that any conduct engaged in by a person in Australia must be disregarded in determining whether the person has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, unless the person satisfies the decision maker that he or she engaged in the conduct otherwise than for the purpose of strengthening the claim to be a refugee.

Complementary protection

10. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of the visa if he or she is a non-citizen in Australia 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 being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion'). The meaning of significant harm, and the circumstances in which a person will be taken not to face a real risk of significant harm, are set out in ss.36(2A) and (2B), which are extracted in the attachment to this decision.

Mandatory considerations

11. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal has taken account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and relevant country information assessments prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The applicant's claims can be summarised as follows. He was born in [year] in [town], Al Muthanna, Iraq. He is of the [name] tribe. In March 2004 he joined the Iraqi military and undertook training courses to work as a [occupation]. He has been posted to many locations in Iraq as a result of his military service.
13. In February 2015, the applicant was sent to a base in [Location 1]. A large number of Shia militia members from the Mahdi Army and Asa'ib al Haq were stationed at the base. They were assisting the military fight against Daesh. With his own commander dead, the applicant was now answerable to a new commander who belonged to the Badr organisation.
14. Whilst on patrol, the applicant's convoy was hit by a bomb. A powerful senior militia member named [Mr A] accused a young shepherd boy of being responsible and threatened to shoot him whilst aiming a pistol at him. . The applicant had a heated argument with [Mr A] telling him to leave the young man alone as there was no basis to threaten him. [Mr A] turned his pistol onto the applicant and threatened to kill him. Soldiers intervened and the argument was stopped. [Mr A] was extremely angry that the applicant had criticised his actions and told him "I will get you later".
15. Back at the base after the incident, the applicant's commander counselled him and told him it was not his place to argue with [Mr A]. He was disciplined by being removed from [occupation] duties and sent to the front line to fight Daesh in [Location 1]. They came under heavy fire and the applicant fled with another Shia militia member. Upon returning to base, the militia member was taken away and the applicant was questioned as to why he had

abandoned the battle. He was accused of running away alone and there was a suspicion as to how he was able to escape when so many others were killed. His interrogators asked if he was a supporter of Daesh before taking his weapon and phone. The applicant believed it was [Mr A] causing problems for him in retaliation. As his own commander had been killed, the applicant felt he had no one else to turn to. He discussed his situation with other military officers who advised him to flee, which he did.

16. Upon arriving in his hometown, the applicant found that a Shia militia member from the area and from a rival tribe ([name]) had been killed at the battle of [Location 1]. The rival tribe claimed they had been contacted by the Shia militia at the base from which he fled and were told there were suspicions that the applicant had helped Daesh betray the militia. The rival tribe demanded ten million Iraqi Dinars in compensation for the death of their relative. Despite the applicant being innocent, the money was paid to prevent a tribal war. The applicant worried about the danger to his family moved from [town] to [location]. The applicant contacted some soldiers at his base who told him that [Mr A] was still making threats to kill him. The applicant made arrangements to leave the country.
17. The applicant also fears harm from the military for deserting his post. He fears harm that he will be targeted by Daesh because he is a young man of Shia background who has served in the military and fought against them. He also fears harm as a result of abandoning Islam and his conversion to Christianity.

Country of Reference

18. The applicant claims to be an Iraqi national. Based on the submitted copies of his Iraqi identity card, citizenship certificate and military identity card, I find that Iraq is his country of nationality for the purposes of s.5H(1)(a) of the Act.

Assessment of claims

Christian conversion

19. I have some concerns about the credibility of the applicant's claims to have genuinely converted to Christianity and Catholicism in particular. I am of this view given the timing of his claimed conversion (only after coming to Australia and after he had submitted his protection visa application) and given it could lead to his loss of a relationship with his wife and children and that it would put him in danger upon return to Iraq. However, I am prepared to accept that he has genuinely converted to Christianity and do so for the following reasons:
 - The applicant's claims were supported by oral evidence from a witness, [priest]. He told the Tribunal that services were conducted at the detention centre every week and the applicant always attended and participated by taking communion and reading out scripture. He said a nun had weekly discussions with the applicant and she was of the view that he was a genuine Christian. The witness said that he did not regularly baptise individuals in the detention centre as he preferred to wait until they came out into the community but he had decided to do so in his case. The applicant has submitted a copy of his baptism certificate, dated [in] March 2016 which supports his claims.
 - At hearing, I questioned the applicant extensively about his reasons for converting to Christianity and his level of knowledge of the faith and he provided reasonably detailed reasons and answers for a person who has been practising for six months. For example, he said his experience in the military led him to dislike Islam with its sectarian divisions between Sunnis and Shias and through his contact with Christian

visitors to the detention centre and their kindness, he became initially interested in the religion and then he was given a Bible by an officer and he accessed further information about Christianity on the Internet. He said he felt comfortable with Christianity and had embraced Jesus who had conquered death. He said that in Islam prayer had to be done at particular times, he was able to pray at any time and he had developed a relationship with God. The applicant said he read the New Testament of the Bible every night. The applicant displayed a reasonable knowledge of Christianity in a series of questions that I asked. For example, he understood the nature of the Holy Trinity and the reasons for Baptism. He was able to give a rather detailed account of the events (including the Last Supper and the sentencing by Pilate) that led up to the crucifixion. He also understood the significance of both Easter and Christmas and was familiar with Mary and Joseph

20. Given I accept that the applicant has genuinely converted, it follows that his conduct in Australia was not engaged in solely to strengthen his refugee claims and that this conduct must not be disregarded under s.5J(6) of the Act.
21. In relation to Christian converts in Iraq, the UNHCR have stated:

The Constitution of Iraq requires the Iraqi State to uphold both freedom of religion and the principles of Islam, which, according to many Islamic scholars, includes capital punishment for leaving Islam. Iraqi Penal Law does not prohibit conversion from Islam to Christianity (or any other religion); however, Iraq's Personal Status Law does not provide for the legal recognition of a change in one's religious status. These apparent contradictions have not yet been tested in court and, as a result, the legal situation of converts remains unclear.

A convert would not be able to have his/her conversion recognized by law, meaning that he/she has no legal means to register the change in religious status and his/her identity card will still identify its holder as "Muslim". As a result, children of converts may be without an identification card, unless their parents register them as Muslims. Children of converts cannot be enrolled in Christian schools and are obliged to participate in mandatory Islamic religion classes in public schools. A female convert cannot marry a Christian man, as she would still be considered Muslim by law. A convert may also have his/her marriage voided as under Shari'a Law, as an "apostate" cannot marry or remain married to a Muslim and will be excluded from inheritance rights.

Given the widespread animosity towards converts from Islam and the general climate of religious intolerance, the conversion of a Muslim to Christianity would likely result in ostracism and/or violence at the hands of the convert's community, tribe or family.⁶⁸² Many, including (Sunni and Shi'ite) religious and political leaders, reportedly believe that apostasy from Islam is punishable by death, or even see the killing of apostates as a religious duty. Additionally, Christian converts risk being suspected as working with the MNF-I/USF-I or more generally the "West", which in the opinion of some has fought a "holy war" against Iraq.

Converts and children of converts may face harassment at their place of employment, or at school.

The reporting of harassment to the authorities, may, according to some observers, result in further harassment or violence at the hands of government officials and police.¹

¹ UN High Commissioner for Refugees (UNHCR), *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq*, 31 May 2012, HCR/EG/IRQ/12/03.

22. More recently, the US Department of State has commented that personal status laws and regulations prevent the conversion of Muslims to other religions and require conversion of minor children to Islam if either parent converts to Islam.²
23. I accept that the applicant's family have become aware of his conversion to Christianity through his comments on Facebook and that they have refused to speak to him, though his wife does from time to time as this is consistent with the above country information. The above information from the UNHCR is authoritative and it notes that there is widespread animosity to Islam to Christianity converts that would likely result in ostracism and/or violence at the hands of the convert's community, tribe and family. It states that many, including (Sunni and Shi'ite) religious and political leaders, reportedly believe that apostasy from Islam is punishable by death, or even see the killing of apostates as a religious duty. Given, this I find that the chance that the applicant will be persecuted by these actors, cannot be described as remote. Given the country information, I find that the real chance of persecution relates to all areas of Iraq: s.5J(1)(c).
24. The above country information from the UNHCR notes that the reporting of harassment can result in further harassment or violence at the hands of the police. The Australian Department of Foreign Affairs and Trade have assessed that Iraqi security forces have little willingness and only limited capacity to protect the community from abuse, or to transparently punish perpetrators of crime.³ Given this authoritative information, I find the applicant does not have effective protection measures available to him in Iraq: s.5J(2).
25. There is no evidence before me to suggest that the applicant has the right to enter and reside in any safe third country for the purposes of s.36(3) of the Act and I find that this section does not apply in his case.
26. Considering the applicant's individual circumstances and the country information as a whole, I find there is a real chance that in the reasonably foreseeable future he would be persecuted for reasons of religion. His fear of persecution is well-founded as required by s.5J of the Act and therefore he is a refugee within the meaning of s.5H.
27. Given these findings, I have not addressed the applicant's other claims.

Conclusions

28. For the reasons given above, the Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(a).

DECISION

29. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

David Corrigan
Member

² US Department of State, International Religious Freedom Report for 2014, Iraq.

³ Department of Foreign Affairs and Trade, DFAT Country Report, 13 February 2015.

ATTACHMENT - Extract from *Migration Act 1958*

5 (1) Interpretation

...
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.

...
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.

...
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.

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 them 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

...

(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.

...