1609220 (Refugee) [2016] AATA 4423 (16 September 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1609220
COUNTRY OF REFERENCE:	Iraq
MEMBER:	Antoinette Younes
DATE:	16 September 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision to cancel the applicant's Subclass 866 (Protection) visa.

Statement made on 16 September 2016 at 10:41am

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 to cancel the applicant's Subclass 866 (Protection) visa under s.109(1) of the *Migration Act 1958* (the Act).

2. The delegate cancelled the visa on the basis that the applicant has provided incorrect information in the application for a protection visa. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.

3. The applicant appeared before the Tribunal on 1 September 2016 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.

4. The applicant was represented in relation to the review by his registered migration agent.

5. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.

7. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.

8. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

9. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled.

10. In support of the application for review, the applicant provided the Tribunal with a copy of the delegate's decision record in which it is noted that:

    a. On [a date in] October 2011, the applicant arrived [in Australia] as an undocumented unauthorised maritime arrival and he identified himself as [name], Sunni Muslim who was born in Iraq. He carried no identity documents.

    b. [In] November 2011, the Department conducted with the applicant an Entry Interview (records of which are located in the departmental file [number]). At page 16, part C, question 1, the applicant stated, amongst other things, that he

left Iraq because he had received death threats. At page 22, part C, question 18, the applicant stated that, amongst other things, he left Iraq because of Dawa party members looking for him. He claimed that if he were to return to Iraq, there is a 100% chance that he would be killed.

c. In support of his protection claims, the applicant provided a statutory declaration, dated [in] January 2012. At paragraph 24, asking "*WHAT I FEAR MAY HAPPEN IF I RETURN TO THAT COUNTRY"*, the applicant stated "*if I am forced to return to Iraq, I fear I will be abducted and killed like my [Relative 1]*".

d. At paragraph 25 of the statutory declaration, asking "*WHO I THINK WILL HARM / MISTREAT ME IF I WAS FORCED TO RETURN TO THAT COUNTRY",* the applicant stated "*I fear I will be harmed / mistreated by these militias or insurgent groups that seek to harm me and the Islamic Dawa Party*".

e. At paragraph 26 of the statutory declaration, asking "*WHY I THINK WILL BE HARMED / MISTREATED IF I RETURN TO THAT COUNTRY"*, the applicant stated "*if I were forced to return to Iraq, I will also be harmed / mistreated for my political opinion : my refusal to support the Islamic Dawa Party (who is the ruling party in Iraq) has led to me being perceived as a political opponent. Both my [Relative 1] and I refused to obey their demands, and my [Relative 1] was killed because of this*".

f. At paragraph 27 of the statutory declaration, the applicant stated "*I have a very severe [medical condition] and I am not able to defend or protect myself from these groups. This also means that it would be unreasonable and unsafe for me to relocate to other places in Iraq*".

g. At paragraph 28 of the statutory declaration, the applicant claimed "*I also fear that I would be harmed / mistreated for reasons of my religion: I am a Sunni Muslim and I fear attacks from those Shia insurgents who seek to harm Sunnis*".

h. At paragraph 29 of the statutory declaration, asking "*WHY I THINK THE COUNTRY'S AUTHORITIES WOULD NOT PROTECT ME IF I AM FORCED TO GO BACK THERE*", the applicant stated, "*I fear that the authorities in Iraq are unwilling and unable to protect me. The police force has been infiltrated by the insurgents. In addition to this, the Iraqi authorities do not have the capacity or capabilities to protect me. I understand that a person who intentionally makes a false statement in the statutory declaration is guilty of an offence under s. 11 of the Statutory Declarations Act 1959 (Cth) and I believe that the statements in this declaration are true in every particular*". The applicant signed the declaration on that page.

i. In the claimant's declaration and consent form, at page 18, at paragraph 69, the applicant signed the declaration and consent form stating "*I solemnly declare: I have read and understood the information supplied to me in this request for protection obligations determination form. The information I have supplied on all with this request and statement of claims is to the best of my knowledge complete, correct and up-to-date in every detail. I understand that if I have given false or misleading information, my request for refugee status may be refused, or, if I have been recognised as a refugee, the recognition may be revoked if it affects the basis of my claims"*.

11. [In] March 2012, the protection obligations evaluation officer was not satisfied that the applicant met the definition of a refugee and accordingly was not satisfied that the applicant was a person

to whom Australia owed protection obligations. However, [in] July 2012 and based on the information provided by the applicant, a reviewer from the Independent Protection Assessment found that the applicant is a person to whom Australia has protection obligations.

12. It is further noted in the delegate's decision record that [in] October 2012, the applicant lodged an application for a protection visa and in that application he provided the following responses:

    a. At question 20 of Form B of the application, the applicant signed the declaration that "*I declare that: the information I have supplied on or with this form is complete, correct and up-to-date in every detail. I understand that if I have given false or misleading information, my application may be refused, and any visa issued may be cancelled. "I have read and understood the information supplied to me in this application*".

    b. In Form 866C, on page 14, at question 65, the applicant signed a declaration dated [in] January 2012, in part, stating that "…*I solemnly declare: the information I have supplied on all with this Part C of Form 866 is complete, correct and up-to-date in every detail. I understand that if I have given false or misleading information, my application may be refused and any visa issued may be cancelled*".

    c. The applicant also provided a statutory declaration dated [in] January 2012 where he claimed persecution in Iraq. Based on the information that the applicant has provided, he was granted a protection visa [in] October 2012.

    d. [In] December 2012, approximately eight weeks after he was granted the protection visa, the applicant left Australia and returned to Iraq. He completed an outgoing passenger card and in response to the question "*Country where you would get off this flight*", he answered "*Basrah*" (in Iraq). In response to the question "*intended length of stay overseas*", the applicant wrote two months. In response to the question "*Country where you will spend most time abroad*", the applicant answered "*Iraq*". [In] March 2013, the applicant returned to Australia and on his incoming passenger card written in Arabic, in response to the question "*where did you spend the most time abroad"*, the applicant answered Iraq.

    e. [In] January 2014, the applicant departed Australia and on his outgoing passenger card and in response to the question "*Country where you will spend most time abroad*", the applicant answered "*Iraq*" and that the intended length of stay was recorded as "*5 months*". [In] June 2014, the applicant returned to Australia and in his incoming passenger card written in Arabic, in response to the question "*where did you spend the most time abroad"*, the applicant answered Iraq.

13. The delegate was of the view that the applicant had failed to complete the protection application forms in such a way that no correct answers were given or provided. [In] December 2015, the Department sent to the applicant a notice of intention to consider cancellation to which he responded [later in] December 2015. In summary, the applicant's representative summarised provisions of the Act, PAM3, and submitted that:

    a. In the case of visa cancellations, the onus is on the Minister to establish that there was non-compliance.

    b. The applicant departed Australia [in] December 2012 because his father was seriously ill and his family told him to see his father urgently. The applicant's

father suffered from severe [medical conditions]. His father passed away [a few] days before the applicant left Australia to Iraq, however, his family did not tell the applicant that his father had passed away. The applicant spent the whole of the two months in Iraq dealing with funeral processes. The applicant is the eldest in the family so his presence was necessary. The applicant tried his best to hide himself from being seen in the public even during the funeral. He wore head cover and covered half of his face so that he would not be seen by the militia members who had persecuted him in the past.

c. The applicant's family lived on a Nasiriya [property] but the applicant lived with his [Relative 2] because her house was in an isolated area. The applicant travelled to Basra on an old and deserted road which is rarely used. He did so to avoid detection by the militia members. He flew out of Basra airport to return to Sydney.

d. In relation to the second trip, the applicant travelled to Iraq because his son [named] was shot at by unknown persons on [a date in] December 2013. The son sustained severe injuries to his [body] (attached photographs and video). The applicant was unable to purchase a ticket at that time because of the festive season and the first opportunity was [in] January 2014 when he flew [to] Basra. From there, the applicant took the old deserted road to Nasiriya and on his arrival, he discovered that his son had been discharged but he was in bad shape so the applicant could not leave his son. When the applicant tried to book his ticket to return to Sydney, his mother had a [a serious medical condition]. She lost [some bodily functions] (photos attached).

e. The applicant maintains that he went to Iraq on the two occasions because there were compelling and exceptional reasons. When the applicant left Iraq in June 2014, the country was on the verge of war after ISIL control over the third of Iraq. The current situation of Iraq is far worse than before and the applicant is afraid to return.

14. The applicant provided to the Tribunal copies of a letter from Sheikh in Basra confirming the applicant's Sunni faith, untranslated death certificate of the applicant's father, medical notes in relation to the applicant's son, police incident report relating to the applicant's son, medical records and notes, and Department of Foreign Affairs and Trade *Smart Traveller* advice of 8 August 2016 warning against travel to Iraq because of the "*extremely dangerous security situations. Australians in Iraq should depart immediately*". In summary, the medical reports indicate that the applicant has suffered from a number of medical conditions including [various listed conditions].

15. In submissions to the Tribunal dated 29 August 2016, reiterating that the obligation is on the Minister to "*establish the facts which justify cancellation. There is no obligation on the visa holder to establish that the visa should not be cancelled* ". The representative noted that it is not in dispute that the applicant had returned to Iraq on two occasions. The applicant obtained travel documents to enable him to make the trips and he did not hide the fact that he had intended to travel to Iraq. The Departmental position that because the applicant had returned to Iraq means that his claimed persecution was incorrect. The applicant returned to Iraq on both occasions because of family emergencies. His return to Iraq cannot establish that he did not genuinely hold fears and the fact that he did not suffer any harm on either visit to Iraq, could be due to many factors including luck, precautions, or the situation in Iraq. There is no non-compliance but if the Tribunal were to find that the grounds for cancellation exist, there are strong compassionate reasons for exercising discretion not to cancel. The applicant is a pensioner. He is [age] years old, of poor mental and physical health. The quality of healthcare in Iraq is "*likely to be at very low level compared to that available in Australia*".

16. In the course of the hearing, the Tribunal discussed with the applicant the information set out in the delegate's decision record outlining the circumstances that led to the cancellation of the applicant's visa. The applicant agreed that there is no dispute that he had travelled to Iraq on two occasions, namely in 2012 and 2014, and that he stayed in Iraq for over three months on the first visit and for about 5 ½ months on the second visit.

17. The Tribunal discussed with the applicant his return and stay in Iraq on the two occasions. The Tribunal indicated to the applicant that the fact that he returned to Iraq soon after he was granted the protection visa in 2012, and later in 2014 is a strong indication that he did not fear persecution as claimed. The Tribunal noted that on the two occasions, he remained in Iraq for substantial periods of time, raising serious doubts about his claims of harm and fear of returning. The applicant responded by saying "*You have every right to suspect that…*". In explaining his returns to Iraq, the applicant gave evidence that his father had a [medical condition] and was unwell. The applicant said that it was his father's dying wish to see the applicant. He said his father passed away [a few] days prior to the applicant's arrival in Iraq but the family did not tell him that his father had died. He said when he got to the airport, his brother picked him up and they drove on an old road to avoid military or party members' checkpoints. The applicant gave evidence that his father had two wives and there were inheritance complications. He explained to the Tribunal that the inheritance could not be dealt with until the 40th day anniversary of his father's death. He said each wife wanted the biggest share and there were a lot of problems and it took time to sort out the inheritance. Consequently, he remained on that occasion for about 3 and 1/2 months. In relation to the trip to Iraq in January 2014, he said he was told that his son had been in an accident around [a date in] December 2013. The Tribunal asked the applicant about the incident in relation to his son, the applicant stated that whilst his son was on the street, a group of people assaulted him and intended to take him but luckily, a police patrol passed by and the culprits left. The Tribunal asked the applicant and he confirmed that his son did not know the offenders.

18. The Tribunal has carefully considered the applicant's explanations. The Tribunal accepts that the applicant's father died and that his son had an accident. The applicant gave evidence, which the Tribunal accepts as plausible that his son did not know the attackers. On the basis of the available information including the report provided by the applicant in relation to the medical procedures which his son had undergone following the incident, the Tribunal is satisfied that the son was randomly attacked and had suffered injuries consequently.

19. The applicant gave evidence that he was not aware that he had to advise the Australian authorities, apart from centrelink, that he was travelling overseas. He said whilst he was in Iraq and in order to avoid detection, he stayed at his [Relative 2's] house in Nasiriya which is about 250 km from Basra. He said he was frightened to be seen and he is afraid to return to Iraq. He said when he visited his son at the clinic, he wore a mask to avoid detection. He said on the second occasion, he wanted to return to Australia two months later but his mother became unwell; she had a [serious medical condition] and he was her carer. He said two weeks prior to his return to Australia in 2014, there were ISIS insurgents and his family insisted on him returning to Australia. The Tribunal finds it difficult to accept that for substantial periods (3 ½ and 5 months), the applicant would remain with his [Relative 2] rather than his family given that he travelled all the way from Australia to be with his family, and in circumstances of significant events, such as the death of his father, inheritance complications, son's incident. Even if the Tribunal were to accept as plausible that the applicant stayed with his [Relative 2], it is difficult to accept that he was not found by those looking for him and in the context of the claim that if he were to return, there would be a 100% chance that he would be killed.

20. The Tribunal acknowledges that the death of the applicant's father is a significant event and that naturally the applicant would have wanted to see his father prior to his death. The Tribunal also acknowledges that the attack on the applicant's son was another significant event. The Tribunal accepts the applicant's evidence that he felt he needed to return to Iraq. However, looking at the

returns objectively, it is difficult for the Tribunal to accept that the applicant would return if he genuinely feared persecution or the harm he had claimed to fear. Although the two events are significant, the Tribunal is not persuaded or convinced that they fully explain the applicant's returns to Iraq. The Tribunal is of the view that the two returns to Iraq, as well as, the periods the applicant remained in Iraq are an indication that the applicant did not fear the harm that he had claimed when he sought protection from the Australian authorities.

21. Moreover, the Tribunal found aspects of the applicant's evidence in relation to the claimed harm to be problematic, raising doubts about the claims. In the course of the hearing, the Tribunal referred to the applicant's claims that he had received death threats and asked him about those threats. The applicant stated that he had received one letter which was slipped under his door, asking for money and threatening that the applicant would face the same destiny as his [Relative 1]. The Tribunal asked him if he could recall the exact date and other details about this incident and he stated that it has been a long time. The Tribunal noted that the claim related to "*threats*" suggesting more than one and asked him about any other threats. The applicant stated there was only one incident of threat, namely the letter slipped under the door. The applicant stated that in the letter, he was asked to pay $US[amount] otherwise he would face the same destiny as his [Relative 1]. He said he was terrified and 2 to 3 days later, he took his family to Nasiriya. The Tribunal asked the applicant why he had claimed that there were "*threats*" when there is only one claimed incident. The applicant stated that he does not know why and reiterated that there was only one threatening letter. The Tribunal asked him again when the letter had been slipped under the door and the applicant stated he could not recall exactly when but it was approximately 10 days after the [Relative 1's] funeral. He stated he could not recall when that happened. The Tribunal is of the view that the applicant's responses to the question about the claimed threats, were vague and lacked in details. His oral evidence that there was only one incident is inconsistent with the earlier written claim that there were "*threats*". The lack of details, vagueness and inconsistency, raise doubts about the veracity of the applicant's claim of being threatened and his credibility.

22. The Tribunal asked the applicant about his claim that members of the Al-Dawa party were looking for him. He said the problems started long before he had left Iraq. The Tribunal asked him how he knew they were looking for him. He stated that he knew that they were looking for him and his [Relative 1] knew that he would not be safe. He said he and his [Relative 1] were called to a meeting. The Tribunal asked him when this incident occurred and he stated that he was unable to provide any details about dates. The Tribunal is of the view that the applicant's evidence in relation to the claim that members of the party were looking for him was vague, incoherent and lacked significant details, suggesting fabrication and raising doubts about the applicant's credibility.

23. The Tribunal asked the applicant about his claim that if he were to return to Iraq, there would be a 100% chance that he would be killed. The applicant stated that as a Sunni, Shia militia would not have any mercy on him. He stated that there are mostly Shia Muslims in Basra and that after the fall of the regime, that part became controlled by the Iranian regime. The Tribunal is of the view that the claim about the certainty of being killed is vague and general, raising doubts about the claims and the applicant's credibility.

24. The Tribunal is satisfied that when the applicant was asked about a number of the claims that he had made in seeking protection, the applicant's evidence was general, vague, lacked significant details, and inconsistent. The Tribunal recognises that the claimed events had occurred years earlier and that as a result of the passage of time, the applicant's memory may have been impacted. The Tribunal also acknowledges that when the Tribunal asked the applicant about specific incidents of harm, the applicant referred to an incident that occurred in 2006 when he and his wife attended a Christmas function and he was taken at a checkpoint. Although the Tribunal notes that aspects of the evidence were consistent with what the applicant

had previously claimed. However, overall , the Tribunal found the applicant's evidence to be problematic.

25. In consideration of the evidence as a whole and in light of the above noted concerns, the Tribunal finds that the fact that the applicant returned to Iraq soon after he was granted a protection visa, indicates that the applicant did not fear the claimed harm. For those reasons, the Tribunal does not accept that the applicant was threatened by anyone in Iraq, or that he or his [Relative 1] was kidnapped as claimed, or that he had received a threatening letter, or that his [Relative 1] was killed as claimed, or that in 2006, the applicant and his wife were taken, or that his wife had to pay $US[amount], or that there was a 100% chance of the applicant getting killed if he were to return to Iraq, or that the applicant when he went to Iraq in 2012 or 2014, he lived with his [Relative 2] to avoid harm, or that he feared any of the claimed harm on his returns to Iraq in 2012 and 2014. The Tribunal is satisfied that the significant and voluntary travels to Iraq are strong evidence that he did not suffer the claimed harm or feared returning to Iraq. In consideration of the evidence as a whole, the Tribunal is satisfied that the applicant did not complete the application for a protection visa forms in such a way that no incorrect answers are given or provided. Accordingly, the Tribunal finds that the applicant did not comply with s.101(b) of the Act because he provided incorrect answers to questions in his application for a protection visa.

26. For these reasons, the Tribunal finds that there was non-compliance by the applicant in the way described in the s.107 notice. It follows that the discretionary power to cancel the applicant's visa does arises.

Should the visa be cancelled?

27. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).

28. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. Briefly, they are:

- ***The correct information***

29. The Tribunal has found that the applicant was not threatened by anyone in Iraq, or that he or his [Relative 1] was kidnapped as claimed, or that he had received a threatening letter, or that his [Relative 1] was killed as claimed, or that in 2006, the applicant and his wife were taken, or that his wife had to pay $US[amount], or that there was a 100% chance of the applicant getting killed if he were to return to Iraq, or that the applicant when he went to Iraq in 2012 or 2014, he lived with his [Relative 2] to avoid harm, or that he feared any of the claimed harm on his returns to Iraq in 2012 and 2014. The Tribunal has found that the significant and voluntary travels to Iraq are strong evidence that he did not suffer the claimed harm or feared returning to Iraq. Given the applicant's claims, the Tribunal is satisfied that the correct information is that the applicant is not a person who would be considered to be of any adverse interest to any group in Iraq or the Iraqi authorities, or that he would be targeted for any of the claimed reasons. Accordingly, the Tribunal is satisfied that the applicant does not hold the adverse profile that he had claimed when he was granted the protection visa.

30. The Tribunal has given regard to the submissions that the obligation is on the Minister to "*establish the facts which justify cancellation. There is no obligation on the visa holder to establish that the visa should not be cancelled*". Although the concept of onus of proof is not

relevant in this jurisdiction, it is incorrect in the Tribunal's view to be submitting that there is no obligation on the visa holder to establish that the visa should not be cancelled. Indeed, the discretionary factors are intended to give the visa holder an opportunity to fully articulate the reasons and make submissions as to why the visa should not be cancelled.

31. The Tribunal appreciates that there is no intention in the visa cancellation process to 'punish' those who have been granted visas in circumstances when they would not have been granted the visas. However, the Tribunal is of the view that the integrity of the migration program is significant and that a visa holder who has obtained the visa on the basis of false and/or misleading information cannot be overlooked. The Tribunal gives significant weight to the fact that the applicant returned to the country where he had claimed he had suffered serious harm and fear of persecution.

- ***The content of the genuine document (if any)***

32. The content of any document has not been at issue in this case.

- ***Whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document***

33. As discussed above, the Tribunal is satisfied that the applicant was granted a protection visa wholly or partly on the basis of his claims of harm and his fear that he would be killed if he were to return to Iraq. The Tribunal is satisfied that the applicant was found to be owed protection on the basis of the incorrect information that he provided in his application for protection visa. The Tribunal gives significant weight to the fact that the decision to grant the applicant a protection visa was wholly or partly based on the incorrect information.

- ***The circumstances in which the non-compliance occurred***

34. The applicant has offered two explanations about his returns to Iraq, namely his father's death and son's attack. The Tribunal acknowledges that the applicant's father's death is a significant event for the applicant and the Tribunal does not wish to sound harsh or unkind in any way, however and as noted above, the applicant's return in 2012 is not fully explainable on the basis of his father's death. It is difficult to accept that if a person genuinely believed that there would be a 100% chance of being killed, that they would return to the environment which would have ensured that the threat would have become a reality, even in the circumstances of a significant event, like the death of the father. The Tribunal also acknowledges that the attack on the son is a significant, serious event and it is natural that the applicant would want to see his son. He was in Iraq in 2014 for approximately five ½ indicating that he did not fear the claimed harm.

35. The applicant came to Australia as an undocumented maritime arrival claiming that he could not possibly return to Iraq because he would be killed. He did return to Iraq and on two occasions for reasonably lengthy periods of time, and no harm came to him.

36. The Tribunal has carefully considered the circumstances in which the non-compliance occurred but the Tribunal is not satisfied that those circumstances outweigh the reasons to cancel the visa.

- ***The present circumstances of the visa holder***

37. In the course of the hearing, the Tribunal discussed with the applicant his current circumstances. He gave evidence that he suffers from a number of clinical conditions including [listed medical conditions]. He told the Tribunal that his medical specialist in Australia wanted him to undergo [specified] surgery but the applicant refused because the Australian authorities would not grant his wife a visa to come and look after him. He said that when he went to Iraq in

2014, he took his own medicine with him from Australia and when he ran out in Iraq, his medicine was not available. He said a [foreign] resident managed to get the medicine for him at a cost of $[cost].

38. The Tribunal asked the applicant about prior to coming to Australia, what type of treatment he was receiving in Iraq. The applicant told the Tribunal that the [medical condition] was diagnosed in Australia but that he saw a doctor in Iraq in relation to [another condition].

39. The Tribunal discussed with the applicant relevant parts of DFAT's report in relation to Iraq[1], namely,

> *Health system*
>
> *2.19 Iraq's health services deteriorated during the conflict and sanctions of the 1980s and 1990s. Looting of equipment and facilities following the deposition of the former regime in 2003 further degraded health infrastructure. Credible international organisations report that the recent conflict across Iraq has further reduced access to health services in the central and western provinces of Iraq, including through attacks on hospitals and shortages of medical supplies and personnel.*
>
> *2.20 Iraq has a mixture of public, private and university hospitals. In recent years the state has made significant investments in hospitals. Nonetheless, in 2013 Iraq had an estimated 13 hospital beds per 1000 population, lower than the comparable figures in regional countries (for example, 18 in Jordan and 17.3 in Egypt). Specialist facilities exist for a range of issues (including eye disease, cancer, and cardiac disease).*
>
> *2.21 Primary health care is provided by both private and public health clinics. However, many primary health care facilities are under-resourced. Many skilled health workers have moved abroad or to safer areas of Iraq, including Iraqi Kurdistan. As a result, many rural primary health care facilities are inadequately staffed*.

40. The Tribunal acknowledges the submissions of the applicant's representative; the representative's submission that the quality of healthcare in Iraq is "*likely to be at very low level compared to that available in Australia*". The Tribunal is of the view that it is not appropriate to compare the health systems of Iraq with Australia; the question is whether there is a real chance or a real risk of the applicant facing serious or significant harm, as contemplated by the Act, in case of his return to Iraq.

41. The Tribunal notes that whilst the evidence is that the health system in Iraq may not be adequate, the Tribunal is not satisfied that the applicant would not be able to receive adequate medical treatment for the conditions which he suffers. On his own evidence, he was consulting a medical practitioner in Iraq in relation to his [other medical condition]. In relation to his [main medical condition], DFAT's report above indicates that there are specialist facilities servicing a range of specific issues such as [medical] conditions. The Tribunal has given regard to the applicant's evidence that he was unable to obtain his [specified] medication when he was in Iraq in 2014. Whilst the Tribunal accepts this as plausible, it is difficult to accept that the applicant would not be able to obtain or access other medication for his [medical condition]. On the basis of the available information, the Tribunal is not satisfied that if the applicant were to return to Iraq, he would be denied treatment or medical services for any Convention ground, or that any difficulty he may face in getting the same medication amounts to significant harm as contemplated by the Act.

[1] DFAT Country Report, Iraq, 13 February 2015

42. The applicant gave evidence that he lives alone in Australia and that he has [number] children, [most] of whom are under the age of [age] years, all living in Iraq with their mother. The applicant stated that he works as a [occupation] [number] hours a week as required by Centrelink. The Tribunal is satisfied that in fact it would be better for the applicant to be living with his family in Iraq rather than staying in Australia, living alone, without the support of his family.

43. The Tribunal has considered the interest of the [number] children under [age], and the Tribunal is satisfied that indeed it is in their interest that the applicant would return to Iraq and be with his family. The Tribunal is satisfied that the applicant returning to Iraq would not breach Australia's obligation under the *Convention on the Rights of the Child* (CROC). In this regard the Tribunal refers to Article 9 of the CROC that:

> *1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.*
>
> *2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.*
>
> *3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.*
>
> *4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.*

44. Furthermore, Article 18 of the CROC refers to the "*States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child*". It is difficult to see how the applicant being in Australia on his own away from his family could ensure that he shares responsibilities with his wife in relation to the upbringing and development of his [children].

45. On the evidence before it, the Tribunal is satisfied that the applicant's return to Iraq is not in breach of the CROC, and in fact, the action of returning the applicant to Iraq is consistent with the principles espoused in the CROC, of keeping children with their parents.

46. The Tribunal has carefully considered the applicant's circumstances and the Tribunal is satisfied that whilst the cancellation of the visa could ultimately mean that he would return to Iraq, the Tribunal is satisfied that any hardship he would face does not outweigh the reasons not to cancel the visa.

- ***The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act***

47. The applicant responded to the notice of intention to consider cancellation and he attended the Tribunal's hearing. In the course of the hearing, he presented as being cooperative but at no stage did the applicant concede that he had provided false and misleading information when seeking protection from the Australian authorities. In fact in the course of the hearing, the applicant stated that he believes he has done nothing wrong. Whilst the Tribunal does not wish to take those comments out of their contexts, the comments do suggest that the applicant is not prepared to be truthful and to recognise that he had obtained a protection visa when he was not entitled. The Tribunal has given this aspect significant weight.

- ***Any other instances of non-compliance by the visa holder known to the Minister***

48. There is no information before the Tribunal to suggest that there are any other instances of non-compliance.

- ***The time that has elapsed since the non-compliance***

49. The applicant was granted the protection visa [in] October 2012, almost 4 years ago. The Tribunal does not consider this timeframe to be significant or persuasive to outweigh the reasons for cancellation.

- ***Any breaches of the law since the non-compliance and the seriousness of those breaches***

50. There is no evidence before the Tribunal of any breaches of the law since non-compliance.

- ***Any contribution made by the holder to the community***.

51. The Tribunal asked the applicant about his contribution to the Australian community. The applicant stated that he has worked in Australia and he continues to work [number] hours a week, as required by Centrelink, otherwise he would lose his benefits. The Tribunal is of the view that the applicant has not made a contribution to the Australian community which needs to be taken into account favourably; his work of [number] hours a week and on his own evidence, is because he is required to do so otherwise he loses his social benefits.

- ***Other factors***

52. Whilst these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual) PAM3 'General visa cancellation powers'. This policy requires delegates to also have regard to matters such as whether the visa would have been granted if the correct information had been given, whether there are persons in Australia whose visa would, or may, be automatically cancelled under s.140 of the Act, and whether the visa cancellation may result in Australia breaching its international obligations. The Tribunal has given regard to all the relevant matters set out in PAM3.

53. The Tribunal discussed with the applicant the Departmental determination under the International Treaties Obligations Assessment (ITOA) as noted in the delegate's decision record, that Australia does not have any *non-refoulment* obligations to the applicant. The Tribunal indicated that whilst the Tribunal is not bound by that determination, the Tribunal considered the assessment to be thorough and persuasive.

54. The Tribunal asked the applicant if he or any member of his family has ever been involved in any political activities and the applicant confirmed that no one has been involved in any such activities.

55. The Tribunal discussed with the applicant DFAT's report[2] in relation to the security situation in Iraq, namely that whilst sectarian violence has escalated in the central, northern and western provinces of Iraq, as of January 2014, government forces retained control over Baghdad and southern Iraq, as well as parts of Salah al-Din, Diyala, Wasit, Babil, Karbala, Al-Najaf, Maisan, Al-Muthanna, Thi Qar, Al-Qadisiyah and Basra. The Report noted that levels of violence in the southern provinces. Basra where the applicant comes from is in the South. The Tribunal acknowledges that there is a level of insecurity in Iraq but it is the Tribunal's task to consider whether there is a real chance or a real risk of serious or significant harm facing the applicant on his return; a generalised level of insecurity does not normally enliven protection. The Tribunal explained to the applicant that there is no expectation or requirement that any state offers 100% protection to its citizens. He responded by saying that Australia does offer such protection.

56. There is no dispute that the applicant has returned to Iraq on two occasions, 2012 and 2014. Although he claimed that he lived with his [Relative 2] and was masked when he went to see his son, for the stated reasons the Tribunal has not accepted those claims. The fact is the applicant did not suffer any harm during his two significant stays in Iraq. The Tribunal appreciates that past harm is not necessarily determinative of future harm, it is nevertheless a reasonable guide. The Tribunal has carefully considered the applicant's circumstances and on the basis of the available information and in consideration of the evidence as a whole, the Tribunal is not satisfied that there is a real chance or a real risk of the applicant facing serious or significant harm, as contemplated by the Act if he were to return to Iraq. The Tribunal is satisfied that the applicant does not have an adverse profile on the basis of his Sunni faith or any other characteristic that would mean that he would face any of the harm contemplated by the Act.

57. Although this claim has not been articulate, the Tribunal has also considered whether the applicant could face harm on the basis of being a returnee from Australia. In this regard, DFAT's report noted:

> *5.27 DFAT has considerable evidence showing a number of Iraqis return home, sometimes only months after securing residency in Australia, to reunite with families, to set up businesses, or take up or resume positions in the government or public sector. The practice of seeking asylum then returning home once conditions permit is well accepted among Iraqis, as is evidenced by large numbers of dual nationals from the US, Western Europe and Australia returning to take up residence and jobs in Iraq. DFAT has met many Iraqis*[3].

58. The Tribunal is satisfied that there is not a real chance or a real risk of the applicant facing serious or significant harm as contemplated by the Act, on the basis of being a returnee from Australia.

59. In summary and in consideration of the evidence as a whole, the Tribunal is not satisfied that the applicant has any profile of any adverse interest to any militia group, or any group, or the Iraqi authorities that would mean that there is a real chance or risk that he would face harm as contemplated.

60. In essence, in consideration of the evidence as a whole, the Tribunal is satisfied that the applicant does not now or in the reasonably foreseeable future have a well-founded fear of

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[2] *Ibid* at page 8
[3] *Ibid.*

persecution arising essentially and significantly for one or more of the five Convention reasons if he returns to Iraq for any other reason.

61. In consideration of the evidence as a whole, including the applicant's individual circumstances either singularly or cumulatively, the Tribunal is not satisfied that the applicant faces a real chance of persecution, or that there is a real chance that he would suffer serious harm for any other claimed reason, either singularly or cumulatively. Furthermore, in consideration of the evidence as a whole, the Tribunal finds that there are no substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's being removed from Australia to Iraq, there is a real risk that the applicant would suffer significant harm in the form of, arbitrary deprivation of life, or the death penalty being carried out, or torture, or cruel or inhuman treatment or punishment, or degrading treatment or punishment.

62. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, and PAM3 guidelines, the Tribunal concludes that the visa should be cancelled.

DECISION

63. The Tribunal affirms the decision to cancel the applicant's Subclass 866 (Protection) visa.

Antoinette Younes
Senior Member

ATTACHMENT – Relevant Extracts from the *Migration Act 1958*:

5 Interpretation

(1) 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.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: ***Bogus document*** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

(a) all questions on it are answered; and

(b) no incorrect answers are given or provided.

107 Notice of incorrect applications

(1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:

(a) giving particulars of the possible non-compliance; and

(b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:

(i) if the holder disputes that there was non-compliance:

(A) shows that there was compliance; and

(B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or

(ii) if the holder accepts that there was non-compliance:

(A) give reasons for the non-compliance; and

(B) shows cause why the visa should not be cancelled; and

(c) stating that the Minister will consider cancelling the visa:

(i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or

(ii) if the holder gives the Minister a written response within that period—when the response is given; or

(iii) otherwise—at the end of that period; and

(d) setting out the effect of sections 108, 109, 111 and 112; and

(e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and

(f) requiring the holder:

(i) to tell the Minister the address at which the holder is living; and

(ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.

(1A) The period to be stated in the notice under subsection (1) must be:

(a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or

(b) otherwise—14 days.

(1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:

(a) visas of a stated class; or

(b) visa holders in stated circumstances; or

(c) visa holders in a stated class of people (who may be visa holders in a particular place); or

(d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.

(2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.