1209724 [2013] RRTA 265 (1 April 2013)

DECISION RECORD

RRT CASE NUMBER:	1209724
DIAC REFERENCE(S):	CLF2012/94036
COUNTRY OF REFERENCE:	Iraq
TRIBUNAL MEMBER:	Giles Short
DATE:	1 April 2013
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

INTRODUCTION

1. [Name deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] is a [age deleted: s.431(2)] citizen of Iraq. He claims that for about a year before he left Iraq he worked as a hairdresser or barber and that the owner of the shop where he worked also sold alcohol. He claims that in October or November 2011 the shop was destroyed by a bomb. He claims that he feared for his life and left Iraq.

2. [The applicant] claims that he fears that if he returns to Iraq he will be killed, harmed or mistreated because of his work as a hairdresser or barber and alcohol seller, because he does not follow the Islamic faith, because he wants to wear tight clothes and jewellery and because he departed Iraq to seek asylum in the West.

3. [The applicant]'s application for a protection visa was refused by a delegate of the Minister for Immigration and Ethnic Affairs and he has applied to this Tribunal for review of that decision. A summary of the relevant law is set out at Attachment A. The issues in this review are whether [the applicant] has a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention in Iraq and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Iraq, there is a real risk that he will suffer significant harm.

FINDINGS AND REASONS

Does [the applicant] have a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention in Iraq?

[The applicant]'s claims

4. [The applicant] belongs to the Arab ethnic group and he is a Shia Muslim by religion although he said at the hearing before me that he was not a committed Shi'ite and his representative at the hearing described him as a non-practising Shia Muslim. He claims that his parents were deported from Iraq to Iran because Saddam Hussein said that they were Kurds but that he is not in fact Kurdish. He claims that he was born in Iran and that his family returned to Iraq in around 2004. However his representatives have produced a copy of a personal identification card issued to him which states that he was born in [Town 3] in Iraq. [The applicant] said at the hearing before me that he had not had any documents in Iran and this had been why he had been registered in Iraq. He denied that the document was fraudulent.

5. [The applicant] said at the hearing before me that his family were still living in [Town 3] in Iraq. He said that his father worked in a local profession which involved [details deleted: s.431(2)]. He confirmed that he had two older brothers, [name and occupation deleted: s.431(2)], and [name deleted: s.431(2), who did any work he could find. He said that [name deleted: s.431(2)] had also worked in his father's profession.

6. [The applicant] claims that he only completed three years of primary school. He claims that he initially learned 'threading' (a Middle Eastern method of removing facial hair) over a period of about ten days at one barber's shop in June 2010 (at which time he says he was [age deleted: s.431(2)]) and that later that same month he began an unpaid apprenticeship

at another barber's shop. (Some confusion was occasioned by the fact that [the applicant] said in the statutory declaration accompanying his original application that this barber's shop was in Baghdad but he confirmed at the hearing before me that he claimed that it had been in [Town 3].) [The applicant] claims that he completed his training in September 2010 and that the owner of the shop then paid him 50 per cent of what he earned rather than a set salary. In his original application he said that his monthly salary had been 250,000 dinars a month (see folio 20 of the Department's file CLF2010/94036).

7. [The applicant] claims that around the same time he began working at the shop (as his representatives said in their submission dated [in] August 2012) or five or six months after he started working there (as he said at the hearing before me) the owner began selling alcohol from the shop. He claims that in October or November 2011 a letter was slipped under the door of the shop demanding that they cease providing Western haircuts, 'threading' and dealing in alcohol. [The applicant] has said that he believes that one of the Islamic militant organisations operating in Iraq such as the Jaish al-Mahdi (the Mahdi Army) was responsible. He claims that two or three days later the shop was destroyed by a bomb.

8. [The applicant] claims that he feared for his life and that the owner of the shop told him to leave Iraq. He has said that he left Iraq one week after the shop was destroyed, crossing the border into Iran using his own genuine Iraqi passport which he had obtained a month before anything had happened. He has said that his family obtained this passport for him because they would have liked to travel to neighbouring countries and they wanted to take him with them.

9. [The applicant] and his representatives have referred to evidence indicating that barbers and alcohol sellers in Iraq have received threatening letters, that their shops have been destroyed and that they have been killed, beaten or forced to close their businesses by Islamic fanatics. In the statutory declaration accompanying his original application [the applicant] also said that he feared that he would be harmed or mistreated by the Government of Iraq 'for breaking prohibition laws against alcohol and threading' and for fleeing from the country and trying to seek asylum in Australia. He also said that he feared that he would be 'harmed/mistreated by the Islamic insurgents which operate throughout Iraq and seek to wipe out the minority populations', for his religious beliefs as a Shia Muslim and for not following the Islamic faith, 'for reasons of my particular social group of selling alcohol to all persons in Iraq' and 'for reasons of my particular social group of returnees who have departed the country to seek asylum in the west'.

10. In their submission dated [in] August 2012 [the applicant]'s representatives submitted that he feared being persecuted for reasons of his membership of two particular social groups in Iraq, namely 'barbers in Iraq' and 'Western-influenced young males in Iraq', and his religion. They referred to press reports suggesting that dozens of teenagers had been murdered by conservative militiamen due to their style of dress, behaviour, Western attitudes and listening to rock music. The press reports suggest that those who have been targeted have been identified as 'emos', said to be distinguished by 'tight clothes and skewed hairdos and body piercing' [The applicant]'s representatives produced copies of what they said were photographs of two Western-influenced young males in Iraq who had recently been killed.

11. With regard their submission that [the applicant] feared being persecuted for reasons of his religion [the applicant]'s representatives submitted that [the applicant] did not practise all aspects of his religion and that, in particular, his views on fashion and personal grooming were at odds with the Islamic extremists in Iraq who viewed conservative attire, hair styles

and facial hair as signs of Islamic piety. They submitted that [the applicant]'s involvement in selling alcohol also meant that he faced a real chance of persecution on religious grounds. They submitted that, regardless of whether [the applicant] would continue to trade in alcohol on return to Iraq, he had already been identified as an alcohol seller.

12. [The applicant]'s representatives also submitted that [the applicant] did not comply with all the rites and customs of Islam and feared persecution on that basis in Iraq. They referred in this connection to *NAQJ v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 946 where Branson J said at [18] that it might have been open to the Tribunal in that case to find that the appellant did not wish to comply with all of the rites and customs relating to the Islamic religion and that, had the Tribunal made such a finding, it might have been open to it, subject to section 91R of the *Migration Act 1958*, to conclude that any persecution that the appellant faced as a consequence would be persecution for reason of religion.

Consideration of the claims

13. A summary of the relevant law in relation to the assessment of credibility is set out in Attachment A. For the reasons given below I have difficulty in accepting that [the applicant] is telling the truth about working at a hairdresser's or barber's shop which also sold alcohol. First, at the hearing before me he said that he had reached Year 3 in primary school in Iraq and then he had stopped. After I put to him that the information available to me indicated that children were required to attend school until the age of 11 in Iraq[1] he agreed but he then said that he had left school because it was not compulsory. After I put to him again that the information available to me indicated that children were required to attend school until the age of 11, he said that he did not know about this but that when he had left school there had not been any problems.

14. Asked what he had done after he had left school, [the applicant] said that he had just stayed at home watching television and not doing anything. After I put to him that I found this difficult to believe he confirmed that he claimed that he had stayed at home and had not done anything except watching television for about four years. I emphasised to [the applicant] that it was important that I believed that he was telling me the truth but he said that it was true that he had stayed at home for four years watching television. He agreed that his family was not well-off but he confirmed that they had been able to afford for him to stay at home for these four years.

15. [The applicant]'s representative at the hearing before me referred to information quoted in their submission dating from 2003 relating to the drop out rate from primary school in Iraq following the US-led invasion of Iraq. However, as I noted, this information appears to be out of date: the US State Department has said that the net enrolment rate for boys aged 6 to 11 is 91 per cent and that 96 per cent of boys who enter the first grade eventually reach fifth grade.[2]

16. [The applicant]'s representative said that there was still a percentage of boys who did not complete primary school. He also submitted that [the applicant] had not been an Iraqi

[1] US State Department, *Country Reports on Human Rights Practices for 2011* in relation to Iraq, Section 7.c, Prohibition of Child Labor and Minimum Age for Employment.
[2] US State Department, *Country Reports on Human Rights Practices for 2011* in relation to Iraq, Section 5, Children - Education.

citizen at the time and so would not have been subject to the same requirements as Iraqi citizens. As I put to him, I consider that if he had wished to pursue this point he would have needed to seek instructions from [the applicant] as to how he had been able to attend school at all. [The applicant]'s representative did not pursue this point. I remain of the view that it is very difficult to accept that [the applicant] would have left school simply to spend four years at home watching television and I consider that this is relevant to his overall credibility.

17. Secondly, in his original application [the applicant] said that his monthly salary for his work at the barber's shop had been 250,000 dinars a month (see folio 20 of the Department's file CLF2010/94036). His representatives said in their submission dated [in] August 2012 that after he had completed his training the owner of the shop had paid him 50 per cent of what he had earned rather than a set salary. At the hearing before me he said that he used to make 250,000 dinars a month and that he had given his employer half of this. He then said that each of them had taken half and that both of them had made 250,000 dinars. He then said that he had in fact been making 5,000, 7,000 or 10,000 dinars a day and they had shared this amount. He said that the figure of 250,000 dinars which he had mentioned had been the monthly income for the whole business. He agreed that this meant that he had been paid 125,000 dinars a month.

18. After I put to him that in his application he had said that he had been being paid a monthly salary of 250,000 dinars, [the applicant] said that it had not been a monthly income but a daily income. He confirmed that he claimed that he had only been receiving 125,000 dinars a month. He said that a haircut and 'threading' or doing the beard would cost about 5,000 dinars. As I put to him, this is a day's wages for an unskilled labourer.[3] [The applicant] said that 5,000 dinars would not get you anything in Iraq. As I put to him, it appears to me that what he was telling me about what he charged for a haircut cannot be true and I put to him that this might lead me to doubt that he had been working as a hairdresser at all. [The applicant] said that he had worked as a hairdresser and that the amount that he had told me was true.

19. [The applicant]'s representative noted that the figure of 5,250 dinars was the minimum daily wage, not the average daily wage. I noted that the point I had been trying to make was that it was a substantial sum by Iraqi standards. [The applicant]'s representative submitted that there was a large proportion of skilled workers in Iraq and that the prevalence of hairdressers showed that people were able to afford this. I noted that there was no evidence before me as to the prevalence of hairdressers in Iraq and that the only evidence I had with regard to what hairdressers charged in Iraq was [the applicant]'s own evidence. I remain of the view that it is difficult to accept that [the applicant] was able to charge 5,000 dinars for a haircut and 'threading', as he claimed at the hearing before me, and I consider that this casts doubt on whether he is telling the truth about having worked as a hairdresser in Iraq.

20. Thirdly, [the applicant] claims that the shop where he worked was destroyed by a bomb in October or November 2011. At the hearing before me he said that the shop had been completely destroyed. He confirmed that he claimed that, as his representatives had said in their submission dated [in] August 2012, he had gone there to see it. He initially said that the doors and all the material in it had been all over the place, then that everything had been burnt and everything had been broken completely. After I put to him that the shop appeared

[3] US State Department, *Country Reports on Human Rights Practices for 2011* in relation to Iraq, Section 7.d, Acceptable Conditions of Work.

from the photograph which his representatives had produced (Appendix E to their submission dated [in] August 2012) to be a substantial brick structure, he said that the door had been broken, the window frame had been broken and all the things that had been inside the shop had been burnt. After I asked him if the brick structure had still been standing he said that it had not. He said that the front of the shop had fallen over and there had just been a pile of bricks there. Given that he claims that he actually went to see the shop after it was supposedly destroyed I find his evidence with regard to the damage to the shop to be vague and inconsistent. Once again I find it difficult to accept that he is telling the truth.

21. Fourthly, [the applicant] claims that he left Iraq using his own genuine Iraqi passport which he had obtained a month before anything had happened. He has said that his family obtained this passport for him because they would have liked to travel to neighbouring countries and they wanted to take him with them. He said, however, that his family had not in fact travelled. He confirmed that his family was not particularly well-off. He said that they would have liked to travel but they had not had the chance. After I put to [the applicant] once again that this sort of thing went to whether I believed that he was telling me the truth he said that everybody in Iraq applied to get a passport even if they did not travel because everybody wanted to travel.

22. As I put to [the applicant], I do not think that this can be true because there are a great many very poor people in Iraq who would not be able to travel and who would not therefore be bothering to get passports. [The applicant] said that it did not cost much to obtain a passport but, as I put to him, citizens of Iraq would not need a passport for personal identification because they would have personal identification cards like the one he himself had produced. The only reason to get a passport would therefore be if one wanted to travel outside Iraq. [The applicant] said that passports were important because you never knew if something might happen. I remain of the view that it is difficult to accept the explanation which he has given for his having obtained a passport a month before he claims the shop was destroyed, namely that all his family had obtained passports because they would have liked to travel to neighbouring countries although they had not been able to do so.

23. Under cover of their submission dated [in] August 2012 [the applicant]'s representatives produced copies of photographs which they submitted showed [the applicant] working at the shop and they referred to the fact that on his arrival in Australia [the applicant] had had in his possession a shaving kit and accessories, hair spray and hair straightener as well as a collection of rings, necklaces and earrings. They also produced evidence that he had worked as a barber while in immigration detention. I do not accept that the fact that [the applicant] worked as a barber while in immigration detention necessarily supports the conclusion that he worked as a barber or hairdresser in Iraq While I accept that he had various items for personal grooming in his possession when he arrived I do not consider that this supports the conclusion that he was working as a barber or hairdresser in Iraq.

24. With regard to the photographs, I do not consider that these photographs outweigh the problems I have with [the applicant]'s own credibility identified above. I consider that [the applicant] planned to come to Australia and to claim that he had been working in Iraq as a hairdresser or barber, knowing that this was a risky profession, and that the photographs were staged to provide support for this claim. Having regard to the problems I have identified with his credibility, I do not accept that he worked as a barber or hairdresser for around a year before he left Iraq, nor that the owner of the shop where he worked also sold alcohol from the shop, nor that the shop was destroyed by a bomb in October or November 2011. I accept that he left Iraq travelling on a genuine Iraqi passport but I do not accept that he obtained this

passport at the same time as all the rest of his family because they wanted to take him with them when they travelled to neighbouring countries.

25. Having regard to my findings of fact above, I do not accept that there is a real chance that [the applicant] will be persecuted by the Iraqi Government or militant groups like the Mahdi Army because he worked as a barber or hairdresser in Iraq or because the owner of the shop where he worked also sold alcohol. At the hearing before me [the applicant] maintained that he loved his profession as a hairdresser but I do not accept that he worked as a hairdresser or barber in Iraq nor do I accept that there is a real chance that he will work as a hairdresser or barber or that he will be engaged in selling alcohol if he returns to Iraq now or in the reasonably foreseeable future. I do not accept that there is a real chance that he will be persecuted for reasons of his real or imputed political opinion or religious beliefs or his membership of any particular social group based on his claimed work as a hairdresser or barber or his claimed involvement in selling alcohol if he returns to Iraq now or in the reasonably foreseeable future.

26. In the statutory declaration accompanying his original application [the applicant] said that he also feared that he would be 'harmed/mistreated by the Islamic insurgents which operate throughout Iraq and seek to wipe out the minority populations' He was unable to explain to me at the hearing what he meant by this. Indeed he indicated that he did not understand what was meant by 'minority populations'. As I put to him, he belongs to the Arab ethnic group and as a Shia Muslim he belongs to the majority religion.[4]

27. [The applicant]'s representative at the hearing submitted that non-practising Shia Muslims and 'Western-influenced young males' were minorities in Iraq but, as I put to him, the claim that [the applicant] feared being persecuted for reasons of his membership of the particular social group of 'Western-influenced young males in Iraq' was only raised in their submission dated [in] August 2012. I do not accept, therefore, that this is what was intended when [the applicant] claimed that he feared that he would be 'harmed/mistreated by the Islamic insurgents which operate throughout Iraq and seek to wipe out the minority populations' I do not accept that he genuinely fears that he will be harmed or mistreated by the Islamic insurgents who operate throughout Iraq and seek to wipe out the minority populations if he returns to Iraq now or in the reasonably foreseeable future.

28. [The applicant] claimed at the hearing before me that he was not committed to his religion and he said that the way he dressed was different because he was not religiously committed to the Shi'ites. However, as I put to him, the photographs which his representatives produced (and which I accept were taken in Iraq although, as I have indicated above, I believe they were staged) do not suggest that he dressed any differently from anyone else living and working in Iraq. [The applicant] said that he always wore tight clothes and he wore bracelets and earrings. He said that he could not go back because no one over there dressed like that. He said that he could not put an earring in his ear.

29. As I indicated to [the applicant], I accept that he had an earring in his ear at the hearing before me but he did not have an earring in his ear in the photographs which his representatives produced. [The applicant] said that this was true. He said that he liked to wear earrings and necklaces but in Iraq he was unable to do this. He said that in Iraq you had to be religiously committed. He said that he wanted to live freely and that he could not go

[4] US State Department, *International Religious Freedom Report for 2011* in relation to Iraq, Section I. Religious Demography.

back because he did not like them giving him orders. He said that he wanted to dress in tight clothes and the Islamic militias would not allow him to do this.

30. I accept that, as [the applicant]'s representatives noted in their submission dated [in] August 2012, [the applicant] had a collection of rings, necklaces and earrings in his possession on his arrival in Australia. I also accept that, as indicated in the evidence they produced, [the applicant] was wearing one of the necklaces on arrival but, as I put to him, many men from the Middle East wear necklaces. [The applicant] agreed but he said that they did not wear earrings or bracelets or rings. However, having regard to the view I have formed of [the applicant]'s credibility I do not accept that he genuinely wants to wear tight clothes, bracelets and earrings. I consider that, as with his claim to have worked as a hairdresser or barber, he has adopted this claim in the belief that it will assist him to obtain a protection visa.

31. Since I do not accept that [the applicant] genuinely wishes to dress in the manner he has claimed, I do not accept that there is a real chance that, if he returns to Iraq now or in the reasonably foreseeable future, he will dress any differently from other young Iraqi men nor that he will dress in a manner that will attract the attention of Islamic extremists or the Islamic militias. I do not accept, therefore, that there is a real chance that he will be persecuted for reasons of his membership of the particular social group of 'Western-influenced young males in Iraq' as submitted by his representatives.

32. I accept that, as [the applicant] said, he is not a committed Shi'ite or that, as his representatives said, he is a non-practising Muslim. [The applicant] agreed that everybody would have known that he did not go to the mosque but he said that they did not know that he was not a committed Shi'ite. However (putting to one side his claims which I have rejected above) he has not suggested that he experienced problems in Iraq because he is not a committed Shi'ite. I do not accept on the evidence before me that there is a real chance that he will be persecuted because he is not a committed Shi'ite or because he is a non-practising Muslim if he returns to Iraq now or in the reasonably foreseeable future.

33. In the statutory declaration accompanying his original application [the applicant] also said that he feared that he would be harmed or mistreated for reasons of his religious beliefs as a Shia Muslim if he returned to Iraq. As I put to him, an uncommitted Shi'ite is far less likely to be harmed for reasons of religion than a committed Shi'ite because the attacks on Shia Muslims in Iraq have been attacks on places of worship and pilgrims.[5] I do not accept that there is a real chance that [the applicant] will be persecuted for reasons of his religion if he returns to Iraq now or in the reasonably foreseeable future.

34. In the statutory declaration accompanying his original application [the applicant] said that he feared that the Government of Iraq would punish him for fleeing from the country and trying to seek asylum in Australia. He said that he feared that he would be harmed or mistreated for reasons of his membership of the particular social group of 'returnees who have departed the country to seek asylum in the west'. [The applicant]'s representative at the Departmental interview submitted that there was information to suggest that there had been violence and abuse of returnees when they had returned to the airport. She said that there were stories of failed asylum-seekers who had returned and that they had faced persecution on arrival by the Iraqi police.

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[5] See the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, 31 May 2012, page 25.

35. As I put to [the applicant] in the course of the hearing before me, the incidents to which his representative at the Departmental interview was referring related to claims that failed Iraqi asylum-seekers had been beaten by British security staff and on one occasion by Iraqi police because they had refused to leave the aircraft on which they had been flown back to Baghdad.[6] As I put to [the applicant], there is nothing in the information available to me to suggest that failed asylum-seekers are being persecuted because they are failed asylum-seekers or specifically because they have sought asylum in Western countries.

36. [The applicant]'s representative at the hearing before me referred to a press report stating that in July 2012 the Iraqi Parliament had banned forced returns to Iraq and that deportees had already been turned back at the border.[7] He submitted that, if [the applicant] were forcibly removed to Iraq and then not permitted to enter, his future would be uncertain and there would definitely be a real chance of persecution wherever he were sent. He submitted that deportees would not be immediately turned back: there would be a period of detention. However, as I put to him, I read the press report as indicating simply that it will not be possible for [the applicant] to be forcibly returned to Iraq.

37. I do not accept on the evidence before me that there is a real chance that [the applicant] will be persecuted because he has sought asylum in Australia if he returns to Iraq I do not accept, in particular, that there is a real chance that he will be persecuted for reasons of his membership of the particular social group of 'returnees who have departed the country to seek asylum in the west'.

Conclusion

38. For the reasons given above I do not accept that [the applicant] ever worked as a barber or hairdresser in Iraq, nor that the owner of the shop where he worked also sold alcohol from the shop. I do not accept that he genuinely wants to wear tight clothes, bracelets and earrings. I have considered the totality of [the applicant]'s circumstances as someone who I accept does not practise his religion as a Shia Muslim and as a failed asylum-seeker returning from a Western country. However, even taking into account the cumulative effect of all these circumstances, for the reasons given above I do not accept that there is a real chance that [the applicant] will be persecuted for one or more of the five Convention reasons if he returns to Iraq I do not accept, therefore, that [the applicant] has a well-founded fear of being persecuted for one or more of the five Convention reasons if he returns to Iraq now or in the reasonably foreseeable future.

Are there substantial grounds for believing that, as a necessary and foreseeable consequence of [the applicant] being removed from Australia to Iraq, there is a real risk that he will suffer significant harm?

39. In their submission dated [in] August 2012 [the applicant]'s representatives submitted that the primary decision-maker had not properly addressed [the applicant]'s claims under the complementary protection criterion. They submitted that the mistreatment or harm which [the applicant] would face would amount to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment.

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[6] UK Home Office, *Iraq - Country of Origin Information (COI) Report*, 30 August 2011, paragraphs 34.05-34.07.

[7] Owen Bowcott, 'Iraq: Iraqi parliament refuses to accept nationals deported from Europe', *The Guardian* (UK), 2 July 2012, CX290659.

40. I have rejected above [the applicant]'s claims that he worked as a barber or hairdresser in Iraq, that the owner of the shop where he worked also sold alcohol from the shop and that he wants to wear tight clothes, bracelets and earrings. I accept on the evidence before me that [the applicant] is a minor but his family remains in Iraq and I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Iraq, there is a real risk that he will suffer significant harm as defined in subsection 36(2A) of the *Migration Act 1958* because of his age. I likewise do not accept on the evidence before me that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Iraq, there is a real risk that he will suffer significant harm because he is not a committed Shi'ite, because he is a non-practising Muslim, or because he has sought asylum in Australia.

41. Having regard to my findings of fact above, I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of [the applicant] being removed from Australia to Iraq, there is a real risk that he will be arbitrarily deprived of his life, that the death penalty will be carried out on him, that he will be subjected to torture, that he will be subjected to cruel or inhuman treatment or punishment or that he will be subjected to degrading treatment or punishment as defined. Accordingly I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of [the applicant] being removed from Australia to Iraq, there is a real risk that he will suffer significant harm as defined in subsection 36(2A) of the Migration Act.

CONCLUSIONS

42. For the reasons given above I am not satisfied that [the applicant] is a person in respect of whom Australia has protection obligations. Therefore [the applicant] does not satisfy the criterion set out in paragraph 36(2)(a) or (aa) of the Migration Act for a protection visa. There is no suggestion in the evidence before me that he satisfies subsection 36(2) on the basis of being a member of the same family unit as a person who satisfies paragraph 36(2)(a) or (aa) and who holds a protection visa. Accordingly, [the applicant] does not satisfy the criterion in subsection 36(2) for a protection visa.

DECISION

43. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

ATTACHMENT A - RELEVANT LAW

44. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:

> '(2) A criterion for a protection visa is that the applicant for the visa is:
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> (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
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> (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; 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.'

Refugee criterion

45. Subsection 5(1) of the Act defines the 'Refugees Convention' for the purposes of the Act as 'the Convention relating to the Status of Refugees done at Geneva on 28 July 1951' and the 'Refugees Protocol' as 'the Protocol relating to the Status of Refugees done at New York on 31 January 1967'. Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.

46. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a 'refugee' as a person who:

> 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.'

47. The time at which this definition must be satisfied is the date of the decision on the application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288.

48. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear 'persecution'. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve 'serious harm' to the person and 'systematic and discriminatory conduct'. Subsection 91R(2) states that 'serious harm' includes a reference to any of the following:

    (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.

49. In requiring that 'persecution' must involve 'systematic and discriminatory conduct' subsection 91R(1) reflects observations made by the Australian courts to the effect that the notion of persecution involves selective harassment of a person as an individual or as a member of a group subjected to such harassment (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Mason CJ at 388, McHugh J at 429). Justice McHugh went on to observe in *Chan*, at 430, that it was not a necessary element of the concept of 'persecution' that an individual be the victim of a series of acts:

> 'A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is "being persecuted" for the purposes of the Convention.'

50. 'Systematic conduct' is used in this context not in the sense of methodical or organised conduct but rather in the sense of conduct that is not random but deliberate, premeditated or intentional, such that it can be described as selective harassment which discriminates against the person concerned for a Convention reason: see *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at [89] - [100] per McHugh J (dissenting on other grounds). The Australian courts have also observed that, in order to constitute 'persecution' for the purposes of the Convention, the threat of harm to a person:

> 'need not be the product of any policy of the government of the person's country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution' (per McHugh J in *Chan* at 430; see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Brennan CJ at 233, McHugh J at 258)

51. Thirdly, the applicant must fear persecution 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'. Subsection 91R(1) of the Act provides that Article 1A(2) does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless 'that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution' It should be remembered, however, that, as the Australian courts have observed, persons may be

persecuted for attributes they are perceived to have or opinions or beliefs they are perceived to hold, irrespective of whether they actually possess those attributes or hold those opinions or beliefs: see *Chan* per Mason CJ at 390, Gaudron J at 416, McHugh J at 433; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

52. Fourthly, the applicant must have a 'well-founded' fear of persecution for one of the Convention reasons. Dawson J said in *Chan* at 396 that this element contains both a subjective and an objective requirement:

> 'There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.'

53. A fear will be 'well-founded' if there is a 'real chance' that the person will be persecuted for one of the Convention reasons if he or she returns to his or her country of nationality: *Chan* per Mason CJ at 389, Dawson J at 398, Toohey J at 407, McHugh J at 429. A fear will be 'well-founded' in this sense even though the possibility of the persecution occurring is well below 50 per cent but:

> 'no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.' (see *Guo*, referred to above, at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

Complementary protection criterion

54. An applicant for a protection visa who does not meet the refugee criterion in paragraph 36(2)(a) of the Act may nevertheless meet the complementary protection criterion in paragraph 36(2)(aa) of the Act, set out above. 'Significant harm' for the purposes of that definition is exhaustively defined in subsection 36(2A) of the Act: see subsection 5(1) of the Act. A person will suffer 'significant harm' if they will be arbitrarily deprived of their life, if the death penalty will be carried out on them or if they will be subjected to 'torture' or to 'cruel or inhuman treatment or punishment' or to 'degrading treatment or punishment'. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are further defined in subsection 5(1) of the Act.

Credibility

55. As Beaumont J observed in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 451, 'in the proof of refugeehood, a liberal attitude on the part of the decision-maker is called for'. However this should not lead to 'an uncritical acceptance of any and all allegations made by suppliants'. As the Full Court of the Federal Court (von Doussa, Moore and Sackville JJ) observed in *Chand v Minister for Immigration and Ethnic Affairs* (unreported, 7 November 1997):

> 'Where there is conflicting evidence from different sources, questions of credit of witnesses may have to be resolved. The RRT is also entitled to attribute greater weight to one piece of evidence as against another, and to act on its opinion that one version of the facts is more probable than another' (citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 281-282)

56. As the Full Court noted in that case, this statement of principle is subject to the qualification explained by the High Court in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 576 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ where they observed that:

> 'in determining whether there is a real chance that an event will occur, or will occur for a particular reason, the degree of probability that similar events have or have not occurred for particular reasons in the past is relevant in determining the chance that the event or the reason will occur in the future.'

57. If, however, the Tribunal has 'no real doubt' that the claimed events did not occur, it will not be necessary for it to consider the possibility that its findings might be wrong: *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 per Sackville J (with whom North J agreed) at 241. Furthermore, as the Full Court of the Federal Court (O'Connor, Branson and Marshall JJ) observed in *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 at 558-9, there is no rule that a decision-maker concerned to evaluate the testimony of a person who claims to be a refugee in Australia may not reject an applicant's testimony on credibility grounds unless there are no possible explanations for any delay in the making of claims or for any evidentiary inconsistencies. Nor is there a rule that a decision-maker must hold a 'positive state of disbelief' before making an adverse credibility assessment in a refugee case.