

1102633 [2011] RRTA 513 (23 June 2011)

DECISION RECORD

RRT CASE NUMBER: 1102633

DIAC REFERENCE(S): CLF2010/46903

COUNTRY OF REFERENCE: Iraq

TRIBUNAL MEMBER: John Cipolla

DATE: 23 June 2011

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the second named applicant satisfies s.36(2)(b)(i) of the Migration Act, being a dependent member of the same family unit as the first named applicant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of Iraq, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicants] January 2010 and applied to the Department of Immigration and Citizenship for the visas [in] March 2010. The delegate decided to refuse to grant the visas [in] March 2011 and notified the applicants of the decisions.
3. The delegate refused the visas on the basis that the applicants are not persons to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal [in] March 2011 for review of the delegate's decisions.
5. The Tribunal finds that the delegate's decisions are RRT-reviewable decisions under s.411(1)(c) of the Act. The Tribunal finds that the applicants have made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Migration Regulations 1994 for the purposes of the definition.
9. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of ‘refugee’

10. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any 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.
11. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
12. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
15. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
16. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

17. Fourth, an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
18. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
19. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

20. The Tribunal has before it the Department's file relating to the applicants. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
21. The applicant provided a statement to the Department which encapsulates his claims for protection. The statement has been replicated in full below:

I am [Applicant 1], an Iraqi national born on [date] in the City of Al Nasiriya of Thigar Province. I am living with my father and brothers.

We experienced the cruelty and terrorism of the Baath Party and the regime of Saddam Hussain. My father had been detained at that era on charges of belonging to Al Da'wa Party. His attendance of the prayers in the mosque was the evidence taken against him as they considered the imam of the mosque one of the supporters of Mr. Baqir *Al Sadr* who was executed in 1980. The whole family remained under charges despite the elapse of the years and despite the fact that he abandoned the mosque after his arrest in 1983. More arrests were made and we became dangerous suspects in the eyes of the peoples of the area. The community started to avoid us. God knows that my father does not speak the Persian language. We are of pure tribal Arab origins and we go back to the [name] and their clans who are densely spread in the south of Iraq.

The routing of the Baathist regime was a great relief to us. Soon my brothers joined work in the various Departments of the state including the police and the security. In 2003 soon after the toppling of the regime my brother [Mr A] joined the special tasks Force of the American Army.

Unfortunately, these commitments to the Iraqi and American security forces turned the tide against us. Soon the family became looked at as hostile and auxiliary to the

occupation and the American forces. Mortars and volleys of the machinegun fire started to fall upon our heads.

We became stigmatised and listed by the Mahdi Army and the groups of Moqtada Al Sadr. They used to regularly raid us in the middle of the night. They used to arrest me as a substitute to my brother [Mr A]. The arrest could be either deliberate or due to the likeness between my brother and me.

I exerted every possible effort to show them that I am innocent. I even abandoned my brothers as they are not really my responsibility. But all went in vain. Despite his advanced age, my father approached the Sadr Current, the groups of Bader Brigade and the Supreme Islamic Council requesting their intervention and make them understand that there is no justification for attacking us, raiding the house at night and searching the rooms and intentionally terrorising and abusing my mother and sisters.

I was obliged to escape to Syria together with my mother two times. One was on [date].08.2008 till [date].09.2008 and the other on on [date].06.2009 till [date].10.2009. at that. time, my mother planned to hide me and rid me of the attempts of the Mabdi Army to arrest me. During our stay in Syria, we applied for the United Nations office. They recognised me and my mother as refugees on [date].09.2008. The United Nations attentively dealt with us without any undue delay. They were about to recommend us for Australia where my brother [Mr B] lives as a citizen. But the precarious situation of the family forced us to return to Iraq because a hand grenade hadd been tossed and exploded inside the house and destroyed its entrance. My father and little sister were wounded. They were extricated from the debris falling from the ceiling and the walls. Then, they were moved to [hospital].

My wife and the family of my brother [name] and others were not at home at the time off the explosion, thus, their lives were saved. We, in fact, returned on the same day we were accorded the status of refugees by the Office of the United Nations. (Attached copies of the two certificates)

Now after the elapse of more than a year and half, we are still facing dangers. We in fact approached the United Nations in 2009 and found out that efforts are still exerted to qualify us for a state to take us as refugees. But still we received no confirmation of the name of that state. They requested us to wait. But the situation of the family is still brimful with dangers. My four brothers are still working in the Iraqi security and police organs and the forces off the USA. They could not bide their identities and malignant eyes are watching them. The groups of the Mahdi Army and Moqtada Al Sadr are still strong and well armed. The clans that are playing the lion's role in Al Nasiriyah cannot protect us. They recriminate my father because he let his sons be involved in carrying arms in support of the international coalition and the police of the Ministry of interior whom they consider responsible for the vengeful acts and elective arrest and persecution of the opposition. members. It is to be clarifedd here that the work of my brothers is executive. They have no leading roles that wouldd make them responsible for such acts.

I arrived in Australia together with my mother in a temporary visit with the purpose of alleviating part of our suffering and be away of the dangers even for a short time. However, news coming from the family increased our worries and focused the light on the grave dangers looming over my brothers and me. Popular circles reiterate that my brothers are responsible for carrying out the drastic measures of the government aimed at curbing the Sadris (Supporters of Moqtada Al Sadr) and the other currents opposing the government and the international coalition.

Faced with these emergent and escalating circumstances, and after consultation with my father and brothers in Iraq, I realised that the bulk of the pressure is centred upon me as I am the only unarmed person and non-attached to the military echelons. Thus I would be an easy defenceless prey to those armed militias. The family can in no way bear their responsibilities towards me. In the meantime, the fact that my brothers are occupied day and night in military duties within their units makes the house unsafe and indefensible. In fact, my father was compelled to take the women including my wife to [District 1] to temporarily stay with their former relatives in order to protect them against the dangers looming over them.

Thus, I am finding myself in a precarious situation as my mother is living days in utmost bitterness and worries. I nearly get crazy when I imagine what might happen to her in case of being kidnapped or killed should the Mahdi Army carry out its threats against us. I cannot ignore the fact that I would fall easily in their trap. My father, brothers, sisters and relatives are displaying before me a record of six years of dangers, confrontations and explosions that targeted us and our house. All confirm that the police forces are not in control. They do not have the ability to protect us or secure the lives of the citizens.

Faced with such abominable circumstances, I realised that it is my duty to bear the responsibility away from Iraq and be beside my mother and brother [Mr B] till, God sends his relief and the Iraqis restore their unity and solidarity and ban the groups of Al Qaeda, the Wahabis and the Mahdi Army from using the arms of Saudi Arabia and Iran to kill the peaceful citizens and violate the sanctity of our homes.

With all these matters simmering in my heart and mind, I decided to lodge this application for protection. It is the only alternative to murder and persecution in a country without a protector and acts on instructions from the mobsters who are controlling the streets and persecute the innocents.

22. The applicants advisor also provided a submission dated [in] March 2010 to the Department which has been replicated below:

We act for the Iraqi asylum-seekers [Applicant 1] and his dependent mother [Applicant 2] who arrived in Perth last January and now find themselves to be refugees *sur place*. They therefore seek Australia's protection.

[Applicant 1], [age] and his mother, [age], are from, a Shi'ite family from Thiqar. They came to Australia to visit his brother [Mr B], now an Australian citizen.

This family suffered persecution first under the Ba'athist regime. His father was imprisoned for allegedly collaborating with the banned Al Dawa'a party. After the 2003 collapse of the regime, his elder brothers worked for the occupying Coalition forces and the new Iraqi Police and Army. Thus they came to the unwelcome attention of Shia Islamist militias such as the Al Mehdi Army and were persecuted. Our client was sometimes mistakenly taken when the raiding parties were after his brother [Mr A].

Twice the applicant went with his mother to Syria, returning once in September 2008 after the family home was bombed, wounding his father and little sister. They fled again in June 2009. They have been subsequently documented as UNHCR refugees.

We have assisted [Applicant 1] in preparing a Form 866 Application for a Protection (Class XA) visa. This application package comprises this covering letter and -

A Form 866B and Form 866C for himself and a Form D for his mother.

A Statement from the applicant, providing answers to Q40-44 of Form 866C

Forms 80 for him and for his mother; &

Supporting documentation, as detailed in Form B.

We submit that [Applicant 1] now has a well-founded fear of persecution on Convention grounds if he has to go back to Iraq.

It is our central submission on behalf of our client that:

There can be no doubt that he has genuine fears of suffering severe persecutory harm on the grounds of religion as a secularised Shi'ite from the province of Thiqr and therefore regarded by the fundamentalist militias as an infidel.

On the grounds of membership of a particular social group of secularised Iraqis working for and collaborating with the Coalition invasion forces and the Iraqi security services.

On grounds of imputed political opinion as secular Shi'ite, considered to be a known collaborator and a visitor to Australia and therefore hostile to the Islamist goal of the imposition of an Islamic regime in Iraq.

2. The cumulative effect of these creates a heightened profile for him which realistically and appreciably increases the risk of severe persecutory treatment against him at the hands of the Islamist sectarian extremists who still sustain their campaign against secular Iraqis working for either the Coalition forces or government agencies. They consider them as enemy collaborators with the invaders and the new Iraqi government.

3. To paraphrase a succession of post-2003 Refugee Review Tribunal decisions, the chance that [Applicant 1] will be persecuted are high, because of his religion, his status as a worker with the occupation forces and now because he has been in the Coalition country, Australia. No reasonable person, therefore, can discount the possibility that he will be targeted nor can they exclude the chance of this occurring as remote and insubstantial.

In a detailed statement with his Form C, [Applicant 1] gives a detailed account of how he and his other family members suffered before and after the 2003 downfall of the Ba'athist regime of Saddam Hussein.

As [Applicant 1] points out, he can no longer return to Iraq because his long agony of persecution his family has been through. Since arriving in Australia he and his mother have received a succession of reports of fresh problems for his brothers, now that they have been stigmatised by the Shi'ite fundamentalist militias of the Al Mehdi Army and the Supreme Council of Iraq.

His fears that he will most probably be liquidated if he returns are, we submit, well founded. The armed insurgents' preparations for conflict as Iraq are concluded and they await the outcome of difficult negotiations to form a government after the Parliamentary elections earlier this month. In addition the final stage of the withdrawal of US forces from Iraq are in preparation.

An upsurge of armed strife seems inevitable in that stricken country. Your country information reports will show that there is already military escalation and daily attacks on civilians and government properties.

In addition his mother has been in poor health, apparently suffering from diabetes. A few days ago, she collapsed in the middle of a interview at her brother's place in Perth by an officer from Perth DIAC Compliance's Community Status Resolution team. An ambulance had to be called.

Our client and his mother are now coming to Sydney to be closer for good medical treatment for her

The Situation of Iraqis seeking Protection in 2010

We note with regret a belief emerging among new case officers that Iraq is now so much safer and more secure than previously - and that applicants should be therefore be tested vigorously. That is far from the truth.

We submit that in assessing applicants for Australia's protection , case officers are required not only to have an open mind but also to have a special regard for the both the Department's own Country Information Service reports on Iraq.

They are required also to have a special regard for Australian case law and the relevant international authorities that applies to Iraq. We cite the following:

International law - The UNHCR

Our applicant is seeking Protection under Article 1 A of the Refugee Convention.

The UNHCR Handbook on Procedures and Criteria notes that under other Convention articles, protection may no longer be required when there is a change of circumstances in the applicant's country of origin. But the eminent international legal authority on the Refugee Convention, Professor James Hathaway in his landmark book *The Law of Refugee Status* points out that the change in the home country's circumstances must involve a fundamental change of governance of not only "substantial political significance" but also that the former "power structure" no longer exists; that the change in the political authority is "durable rather than transient" and "truly effective", resulting in an "ability and willingness to protect the refugee."

The UNHCR Executive Committee has issued a special *Discussion Note on the Application of 'Ceased Circumstances' Cessation Clause in the 1951 Convention* in which it alerts signatory governments to the Refugee Convention (including Australia) that, to be truly stable, the system of national protection available under the new authorities in the country of origin must entail `more than mere physical security and safety" and should include "the presence of a functioning governing authority, the existence of a basic structures of administration including a functioning system of law and justice and the existence of adequate infrastructures to enable residents to exercise their right to a basic livelihood." Further the refugees being returned must be able to return "safely and dignity and when their return is sustainable."

Certainly, the changed situation in Iraq under the new government still cannot be regarded as durable and stable. That government cannot certainly guarantee citizens physical safety and security. Returning refugees cannot return safely and with dignity and be assured their return is sustainable.

International Law - Hathaway

Prof. Hathaway in discussing the situation in a country of origin, declares:

In the context of claims derived from situations of generalised oppression, therefore, the issue is not whether the claimant is at more risk than anyone else in his/her country, but rather whether the broadly-based harassment and abuse is sufficiently serious to substantiate the claim for refugee status. If persons like the Applicant may face serious harm in their country, and if that risk is grounded in their civil or political status, then in the absence of effective national protection, he/she is properly considered to be a Convention refugee.

...while the general proposition is that victims of war and violence are not by virtue of that fact alone refugees, it is nonetheless possible for persons coming from a strife/torn state to establish a claim for refugee status. This is so where the violence is not simply generalised, but is rather directed towards a group defined by civil or political status; or if the war or conflict is non-specific in impact, where the claimant's fear can be traced to specific forms of disenfranchisement within the society of origin."

In short, the status of being a secular Shi'ite in Maysan province and a visitor to Australia ensures he is at a higher risk than many other elements of the community because he has been targeted by non-State agents of persecution, the armed Islamist fundamentalists - clearly a "specific form of disenfranchisement."

The *Chan* "Real Chance of Persecution" Test

It is also required of case officers, we submit, to have a full and informed understanding of the so-called Chan Test imposed by the High Court on establishing whether an applicant's fear of persecution in their country of origin is "well-founded"

The High Court ruled in the *Chan* case of 1989 that an applicant had only to establish that he/she had a "**real chance**" of persecution. The judges on the High Court bench for that case variously defined this further as a chance that was not "remote" or "insubstantial" or a "far-fetched possibility". McHugh J even said in the *Chan* judgement that a one-in-ten chance of persecution would satisfy the "real chance" test. (*Chan Yee Kin v MIEA* [1989] 169 CLR 379; 87 ALR 412).

Case officers must be aware that the Department's own *Refugee Law Guidelines* (in PAM3) summarises the *Chan* Test this way:

The "real chance" test was established by the High Court... It was expressed as follows:

- (a real chance) discounts what is remote or insubstantial
- A real chance is one that is not remote regardless of whether it is less or more than 50%

An applicant for refugee status may have a well-founded fear or persecution even though there is only a 10% chance that he will be ... persecuted ... A far-fetched possibility of persecution must be excluded.

A "real chance" is therefore not a remote or far-fetched possibility and can certainly be below a 50% chance.

It is on this basis that we have submitted that no reasonable person, therefore, can discount the possibility that that our client will be targeted nor can they decide that the chance of this occurring is remote and insubstantial.

Given all the above, we look forward to the Department taking all immediate and reasonable measures to examine [the applicant] and his mother's case and provide them with all assistance as a genuine *sur place* asylum-seeker.

23. A delegate of the Department of Immigration refused the visa application in a decision made [in] March 2011. The reasons for that decision have been replicated below:

Reasons and Assessment

In assessing whether the applicant has a well-founded fear of persecution if he returned to Iraq, I have considered independent country information as well as the claims made by the applicant at interview, and in his application for a Protection visa, as well as previous applications submitted to the Department. Based on the information before me I am not able to be satisfied that the applicant has substantiated a claim of having a well-founded fear of persecution on account of his political opinion, or for any other Convention reason, if he returns to Iraq.

The applicant was interviewed in relation to his Protection visa application on [date] August 2010 with the assistance of an accredited interpreter in Arabic. The applicant's testimony about his travel history, residency history, employment history and education history was contradictory, vague and evasive. The applicant contradicted himself during the interview on all of these matters. For example, at various times during the interview the applicant maintained that he had never worked and was in the final year of a Mechanical Engineering degree from the [university] of Nasariyah, which was broadly consistent with statements made in his Family Visitor visa application (5.1 f.164), to stating that he was a self-employed mechanic then a and taxi driver, as he stated in his Protection visa application. He then stated that he used his brother's taxi only to drive his brother to work, a position he reiterated in a statement he submitted on [date] October 2010 (5.1 f.160). I acknowledge the applicant's explanation, but I cannot be satisfied that it represents the applicant's actual circumstances. He provided a confused and internally inconsistent account of his international travels at interview, which was also at variance with the details provided in his Protection visa application (5.1 f.24). I note that whenever the applicant was challenged regarding conflicting evidence or testimony at interview, he routinely responded that he did not have a good memory.

His narrative regarding his claims at interview was vague, and neither spontaneous nor consistent. His testimony contained numerous internal inconsistencies as well as inconsistencies with the written claims he submitted with his Protection visa application. For example, in his written claims the applicant stated he fled from Iraq to Syria with his mother in 2008 because he was being threatened by members of the Mahdi Army, who regularly mistook him for his brother, who worked with the U.S. military. Following a grenade attack on the family home, however, the applicant and his mother were forced to return to Iraq. At interview, however, the applicant stated that he was at home when the grenade attack on his home was made, and that he subsequently escaped out of the rear of the house, then he fled to Syria with his mother. He later stated that he was unable to remain in Syria because the cost of living was too high. When asked why he sister had not fled to Syria also, he stated that girls were ignored by the Mahdi army, having previously and subsequently stated that his sister had been threatened.

The evidence before me regarding the duration of the applicant's residence in Syria is inconsistent. The applicant claims to have visited Syria twice since August 2008, however he and his mother's UNHCR Refugee Certificates dated [date]/9/2008 (5.1 ff.139-140) indicate that their date of entry into Syria was 2004. At interview the applicant explained this inconsistency by asserting that "Date of Entry" meant "Date of Application", although later in the interview he stated that he had gone to Syria in 2008 and applied to the UNHCR for refugee status. In an attempt to clarify this situation, the applicant was invited to submit a UNHCR Consent to Share and Release Information form on [date] August 2010, and another was sent to him on [date] September 2010 via his Migration Agent. A consent form was not returned to the Department.

This suggests that the applicant and his mother did not actually reside in Iraq during the period of his claimed persecution.

I acknowledge the applicant's response to questions raised about the inconsistencies of the evidence provided by him (5.1 f.160), however I am not satisfied that his response adequately addresses the reason for these inconsistencies, and I am not confident that the version of events he presents in this response accurately reflect his actual circumstances than any of his previous statements.

I acknowledge the independent country information indicating widespread and continuing human right abuses in Iraq, including against those with connections to Iraqi security forces and Coalition forces (5.9, 5.14, 5.20, 5.31, 5.32). Given the degree, however, to which the applicant's actual circumstances have been obscured by the various contradictory and inconsistent evidence he has provided, and the degree to which his credibility has been undermined by these inconsistencies, I am not satisfied that I am able to assess the applicant's real risk of harm in Iraq, either now or for the foreseeable future, nor give significant weight to any of the evidence presented by the applicant.

While it is reasonable that an applicant whose claims of persecution are plausible and credible should be given the benefit of the doubt, the substantial contradictory and inconsistent evidence outlined above casts doubt on the veracity of the applicant's claimed fear of harm, and undermines the credibility of any claim the he has made that he is vulnerable to a real chance of harm.

Summary

Notwithstanding the adverse independent country information regarding widespread and continuing violence and human right abuses in Iraq, I consider that concerns regarding the applicant's credibility arising from the contradictions and inconsistencies in his claims and testimony, that I am not able to be satisfied that the applicant has experienced persecution in Iraq for any Convention reason, or that he would be subject to persecution if he returns to Iraq now, or in the foreseeable future

Finding

I find that I cannot be satisfied that the applicant has a genuine fear of harp and that there is a real chance of the applicant suffering persecution for a Convention reason in the foreseeable future.

I therefore find that the applicant's fear of persecution, as defined under the Refugees Convention, is not well founded.

Assessment Finding

I am not satisfied that the applicant, [Applicant 1], is a person to whom Australia has protection obligations for the grant of a Protection (Class XA) visa. Accordingly, I am not required to consider other criteria prescribed in Migration Regulations, Schedule 2, Part 866.

REVIEW HEARING

24. The Tribunal conducted a hearing [in] June 2011, and the applicant gave evidence to the Tribunal with the assistance of an accredited Arabic interpreter. The applicant's brother, an Australian citizen, also attended the review hearing and gave evidence in English. The applicant's mother did not attend the hearing. The applicant advised that his name was [name deleted: s.431(2)], and that he was born in Iraq on [date deleted: s.431(2)].
25. The Tribunal asked the applicant when he arrived in Australia, and he advised [in] January 2010. The Tribunal asked the applicant what type of visa he arrived on, and he advised a Visitor visa, and that he travelled with his mother who was also the recipient of a Visitor visa. The Tribunal asked the applicant where he applied for the visa, and he advised it was applied through the Australian Embassy in Iran.
26. The Tribunal asked the applicant about his education history. The applicant advised that he only completed primary school in Iraq. The Tribunal asked the applicant why he did not complete middle school and high school, and he advised that he was not able to do so as he reached middle school and high school during the attack on Iraq by the Coalition Forces, and that when the previous Iraqi Baath regime collapsed he had difficulty enrolling in school. The applicant stated also because his name was [name deleted: s.431(2)], a name shared by a son of Saddam Hussein, that he also experienced problems with enrolment in school.
27. The Tribunal asked the applicant to outline any difficulties that he experienced as a result of his limited education. The applicant advised that he had some problems with reading and some problems with writing as a result of his limited education. The Tribunal asked the applicant why in his Visitor visa application, he had noted that he was studying Mechanical Engineering in Al Nasiriyah. The applicant advised that the information that was placed in his Visitor visa application had not been read back to him, the application had been prepared in Australia, and the applicant was not aware of its contents with regard to his education history. The applicant stated that he had never studied Mechanical Engineering, and reiterated that he did not study beyond primary school.
28. The Tribunal asked the applicant prior to his trip to Australia whether he had ever been outside Iraq. The applicant advised that he had been to Syria twice. The applicant advised that he went to Syria for the first time [in] August 2008. The Tribunal asked the applicant why he went to Syria at this point in time, and the applicant advised that at that time the Mahdi army militias and the Al Dawa Party militias were harassing his family. The Tribunal asked the applicant why this came about, and the applicant stated that after the fall of the previous regime of Saddam Hussein, one of his brothers started working for the Coalition Forces, and that as a result of this employment family members of the applicant's brother were targeted by militias. The applicant stated that he and his mother fled Iraq in 2008 because the family home had been targeted.

29. The Tribunal asked the applicant why it was just he and his mother that fled Iraq, and not his siblings and father. The applicant stated that after the family home was targeted, a decision was made that the applicant and his mother should leave Iraq. The applicant stated that some of his brothers in Iraq had work in different parts of the country, his father was old and infirm, and the applicant stated that he was the only one residing at home, and the decision was made that he and his mother exit the country.
30. The Tribunal asked the applicant to outline the current whereabouts of all members of his immediate family. The applicant stated that his father was living in Iraq in [District 1]. The Tribunal asked where this was located, and he advised that it was in the south of Iraq in Al Nasiriyah. The Tribunal asked whether [District 1] was the family home, and he advised it was not, that the family home was in Al Nasiriyah.
31. The Tribunal asked the applicant what his father was doing in [District 1], and he advised that he was hiding there because the family home had been attacked by militias [in] September 2008. The applicant advised that his father and two sisters had been living at [District 1] since 2008. The Tribunal asked the applicant why the home was attacked, and he reiterated that it was because of the fact that his brother worked in the US army base in Al Nasiriyah and was seen to be complicit with the Coalition Forces.
32. The Tribunal asked the applicant how many brothers there were in his family. The applicant advised that he had a brother, [Mr B], who was resident in Australia, that he had three brothers in Iraq and there was one brother in a detention centre on [territory deleted: s.431(2)].
33. The Tribunal asked for more details about the brothers in Iraq. The applicant advised that he had a brother that worked with the Iraqi police in Basra in the south of Iraq. The applicant advised that the rest of the family did not have contact with this brother because he was married, had work, and lived an independent life with his wife and children. He advised that he had a brother, [Mr A], who worked at the Australian and British Base in Iraq and had also worked as [Occupation 1] at [Base 1].
34. The Tribunal asked the applicant why his father was not able to travel to Australia. The applicant stated that his father decided to stay and look after his two sisters in Iraq in [District 1]. The Tribunal asked the applicant what type of life his father and two sisters had in Iraq, and he advised that they lived on a farm in the countryside and did not interact with anyone.
35. The Tribunal asked the applicant whether his father had ever experienced problems in Iraq. The applicant stated that his father was arrested in 1983 because he was a person who prayed behind Imam Hamid Al Sadar.
36. The Tribunal asked the applicant about his experiences during the attack by the Coalition Forces. The applicant stated that during the time of Saddam's regime, Iraqis had hoped for a better government in the future. However, when the new government was formed there were significant problems because of different ethnic and religious groups.
37. The Tribunal asked the applicant about problems he had experienced in Iraq. The applicant stated that there was an attempt at arresting him in Iraq in 2008 in Al Nasiriyah. The Tribunal asked the applicant why he had been targeted and why he had been arrested. The applicant stated that because his brother, [Mr A], had worked for the Americans and had

worked as [Occupation 1] at [Base 1], the whole of the family had been labelled as being pro-American.

38. The Tribunal noted that the applicant in his evidence had stated that they tried to arrest him, and asked for clarification of this. The applicant stated that a group of men came to the house, he could hear them talking with his mother, and he ran out the back door and managed to escape.
39. The Tribunal noted that the applicant in his Statement for Protection submitted to the Department indicated that he and his mother had been found to be refugees by the United Nation's High Commission for Refugees, and asked for more details about this. The applicant stated that he and his mother approached the UNHCR in Syria, and had been found to be refugees and issued with certificates by UNHCR which had been submitted to the Department of Immigration, and copies of which had been provided to the Tribunal at Review. The applicant stated that the finding by UNHCR was contingent upon the applicant and his mother being accepted by a country, and that he and his mother were living in difficult circumstances in Syria and decided to apply for a Visitor visa to Australia. The applicant stated that he was invited by his brother, an Australian citizen to visit Australia.
40. The Tribunal asked the applicant to relay the difficulties he experienced under Saddam's regime. The applicant stated that during that time, anyone who supported the Al Dawa Party, such as his father, was deemed to be a follower of Sheik Mohammed who was a Shia Muslim cleric.
41. The Tribunal asked the applicant whether the statement that had been submitted to the Department of Immigration had been read back to him and whether the information in that statement was true and correct. The applicant stated that it had not been read back to him.
42. The Tribunal, on this basis, adjourned the hearing to enable the interpreter to read the whole of the statement to the applicant to enable him to confirm that all of the details in the statement were true and correct, and to make corrections to any errors. Upon resumption of the hearing, the applicant advised that he was not married and that on page 2 of the statement there is reference to his wife, that that was incorrect. The applicant stated on page 2, in paragraph 3, there is a reference to [his family name], and that this should have been a reference to [Mr A], one of his brothers. The applicant stated that there was the same mistake in paragraph 3 on page 3, namely making reference to his wife, and that this was not correct as he was not married.
43. The Tribunal took evidence from the applicant's brother, [Mr B who]. advised that he was an Australian citizen. He advised that he arrived in Australia in 2001 at [territory deleted: s.431(2)] by boat. The witness advised that he was detained at the [centre deleted: s.431(2)] and held for 55 days by the Department of Immigration. The witness advised that his claims for protection were approved at primary stage and he was released into the community. The witness stated that his claims were around the fact that he was a follower of Imam Sadr Al Sadar and that as a consequence of this he was labelled as being a follower of Iran.
44. The Tribunal asked the witness whether he had returned to Iraq since the grant of Australian citizenship. He advised that he went back to Iraq in 2005 for one month to visit his family. The witness advised that he returned again in 2008 and again in 2010, with regard to a prospective marriage. The witness stated that whilst he was in Iraq, he met with his family at his cousin's house. The witness stated that the situation in Iraq during the visits was very

unsafe. The witness stated that because he is resident in Australia, and he has had a brother that had worked for the Americans and worked as [Occupation 1] at [Base 1], that the family have been labelled as being pro-American, pro-Australian, pro-Italian and pro-Coalition Forces. The witness stated that two of his brothers have worked for the Italians and Americans based in Iraq. He advised that the family also had an adverse profile because his father had issues with the previous regime.

45. The Tribunal thanked the witness for his evidence. The Tribunal took further evidence from the applicant.
46. The Tribunal asked the applicant how he was able to find the United Nations in Syria, and how he was able to elicit their help. The applicant stated that during his first trip to Syria, he approached the United Nation's office [in] September 2008 and made an application to that office. The applicant stated that his application was successful in October 2008 and he was presented with a permit card. This enabled him to be considered as a refugee and put him on a list to be repatriated to a safe country.
47. The Tribunal noted that it appeared that after the application by UNHCR had been approved in Syria, that the applicant and his mother returned to Iraq, and asked what precipitated this. The applicant stated that after his application was approved by UNHCR in Syria the family home in Iraq was attacked by hand grenade attack and his father and younger sister were in the house and were injured as a consequence. The applicant stated that he cancelled everything and returned to Iraq because in his view and that of his mother the family was more important than anything else, including a risk to themselves.
48. The Tribunal asked the applicant how he heard about this incident. The applicant stated that he called the house to check on the welfare of his father and sisters, and heard the news about the grenade attack.
49. The Tribunal asked the applicant what damage was done to the family home, and he advised the front door was damaged, that his father and sisters were inside, that the front walls were damaged, and that his father and sister suffered injuries as a consequence of broken glass, and that his father sustained injuries to his arm and body.
50. The Tribunal asked the applicant what he thought would happen to him if he returned to Iraq and why. The applicant advised that if he returned to Iraq he would be targeted and persecuted. The applicant stated that he believes that there is a perception that the family have links to the Coalition Forces by virtue of the fact that he has had brothers working for the Americans, the Italians, and the Australians, that he has had a brother working as [Occupation 1] at [Base 1]. In addition to this, he believes that the fact that he has an older brother who is an Australian citizen, and he has been in Australia, that it would further lead to him being targeted should he be refouled to Iraq.

The Tribunal noted that the delegate was concerned about the applicant's evidence, being vague, evasive, and somewhat inconsistent. The Tribunal asked the applicant why he told the delegate that he was in the final year of Mechanical Engineering at the [university deleted: s.431(2)]. The applicant stated that this was not correct, that he had not studied beyond primary school and during the interview he was scared and nervous and confused, and that he prior to arriving in Australia was not aware of what had been entered into the Visitor visa application, and conceded that there were a number of mistakes in that application.

51. The Tribunal asked the applicant again whether the Application for a visitor visa had been translated back to him, and he advised it was not translated, that he had not studied at university, and that he was confused and nervous during the Departmental interview.
52. The applicant's representative made an oral submission to the Tribunal at the end of the hearing which has been duly considered.

FINDINGS AND REASONS

53. The applicant claims to be a national of Iraq, and travelled to Australia on an Iraqi passport. The Tribunal finds that for the purposes of the Refugees Convention, the Tribunal has assessed the applicant's claims against Iraq as his country of nationality.
54. The evidence before the Tribunal indicates that the applicant has an elder brother, who is in Australia and holds Australian citizenship. His brother came to Australia in 2001 and was approved for protection at primary stage by the Department of Immigration. The evidence before the Tribunal indicates that the applicant's brother had an adverse profile in Iraq because of his religious conviction and following. The evidence before the Tribunal indicates that the applicant's father had an adverse profile with the previous regime in Iraq, that of Saddam Hussein. This adverse profile was largely because of the fact that the applicant's father was a member of the Al Dawa Party. Indeed, the evidence before the Tribunal indicates that during the regime of Saddam Hussein, the applicant's father was arrested and imprisoned for his connections with the Al Dawa Party.
55. The evidence before the Tribunal indicates that the applicant is one of eight siblings and that he has three brothers in Iraq, two who have worked for the Coalition Forces in security and interpreting roles. Photographic evidence was provided to the Tribunal at Review with regard to the applicant's brother, [Mr A], which confirms his association with the coalition security forces. Further evidence indicates that the applicant's brother, [name deleted: s.431(2)], was also involved with the security forces through his position in the Iraqi army. Also provided to the Tribunal was a Contract of Employment which had been translated, indicating that [Mr A], the applicant's brother, was contracted to work for [Employer 1]. Evidence on Wikipedia indicates that [Employer 1] is a British private military company with overseas offices in Afghanistan, Bahrain, Iraq, Kenya, Nepal, and the United States. Wikipedia indicates that, "[information deleted: s.431(2)]."
56. The applicant claims that the family have been targeted by various militia groups in Iraq, predominantly because of the role of his brothers with the Coalition Forces. The applicant's family home was targeted and substantially damaged in a grenade attack as a result of the role his brothers' involvement with the Coalition Forces, and the family's adverse profile as a consequence of this. The applicant's claims are in essence that the role of his brothers in Iraq brought the family to the adverse attention of insurgent elements in Iraq.
57. With reference to country information, the Tribunal notes as follows, that the United Kingdom Home Office provided the following information on the position of people who were seen to be involved with the coalition and Iraqi authorities and who worked for foreign companies in Iraq:

"The Times reported on 4 January 2005 that the guerrillas launched a substantial campaign of violence towards anyone associated with the coalition and/or the Iraqi authorities. The HRW Report January 2005 observed that, "Revenge killing started slowly but grew to be virtually daily events with perceived Ba-Thist supporters, and

later those identified as supporting the U.S. led occupation, caught in the cross-hairs. The city is one-sided as evidence of the success of the U.S. coalition's occupation, such as Mosul, have become bloody battle grounds."

58. The United Nation's High Commission for Refugees in a Return Advisory, dated September 2004, noted that:

"While most security incidents prior to the handover directly targeted soldiers and/or nationals of countries participating in the Coalition Forces, threats and attacks over the past six months have been increasingly aimed at Iraqi civilians employed by the UN, NGO's and foreign contractors, as well as foreign nationals who worked for any of the above. Furthermore, Iraqi intellectuals, medical staff, doctors, journalists, artists, as well as anyone associated with or perceived to supporting the new interim Iraqi government (IIG) have also become frequent targets of both harassment and violence. Members of the Iraqi Police Force, as well as potential police recruits are often the victims of lethal attacks."

59. Furthermore, the IWPR on 10 August 2004 observed that an unofficial Islamic court imposes harsh sentences on Iraqis who work for the Americans and their allies. The report stated that:

"An Islamic Resistance Court based in Western Iraq has begun to order harsh punishments against Iraqis accused of collaborating with so-called foreign occupiers, inhabitants in the region said. The court, they said, originated in late 2003 as one of a number of Islamic clerical committees that locals have been using to arbitrate personal and family disputes."

60. IWPR noted that in recent months this particular court has become more political, passing sentence on translators, truck drivers, informers, and others who allegedly work with the foreigners.
61. The Tribunal finds that based on this country information, and indeed country information cited in this decision, that it is plausible that the applicant has been attributed with an adverse profile because of the fact that he has brothers that have worked with the Iraqi Police Force, or with the Coalition Forces, and anybody identified as collaborating with foreign forces in Iraq appear to face substantial difficulty, and the evidence indicates that this is also applicable to family members.
62. The country information before the Tribunal indicates that the general security situation in Iraq remains volatile, and that there are a number of factors that would increase risk to the applicant should he return to Iraq. A number of sources cited by the Tribunal indicate that the general security situation for civilians throughout Iraq is extremely dangerous.

Indeed, the UNHCR Eligibility Guidelines of April 2009 noted that:

"There are major uncertainties and risks remaining." The Guidelines stated that, despite the fact that the overall security situation has improved "armed groups remain lethal and suicide attacks and car bombs directed against the MNF-I/ISF and Awakening Movements as well as civilians (often areas attracting crowds, such as markets, bus stations, restaurants, places and areas of religious significance or worship, police stations, and recruitment centres) in addition to targeted assassinations and kidnappings, continue to occur on a regular basis, claiming lives and causing new displacement."

63. The Guidelines noted that violence was mostly concentrated in Central governorates of Ninewa, Diyala, Salah Al-Din, Kirkuk, and Baghdad. With regard to these governorates, the following advice was provided:

“In view of the serious human rights violations and ongoing security incidents which are continuing in the country, most predominantly in the five Central governorates of Baghdad, Diyala, Kirkuk, Ninewa, and Salah Al-Din, UNHCR continues to consider all Iraqi asylum seekers from these five Central governorates to be in need of international protection. In those countries where the number of Iraqi asylum-seekers from those five Central governorates are such that individual refugee status determination is not feasible, UNHCR encourages the adoption of a prima facie approach. In relation to countries which are signatory to the 1951 Convention relating to the Status of Refugees (“1951 Convention”) and/or its 1967 Protocol or relevant regional instruments and have in place procedures requiring refugee status to be determined on an individual basis, Iraqi asylum seekers from the Central governorates of Baghdad, Diyala, Kirkuk, Ninewa, and Salah Al-Din should be considered as refugees based on the 1951 Convention criteria, or the relevant applicable regional criteria.”

64. The Tribunal notes that the UNHCR has affirmed and continued to follow the April 2009 Guidelines in Guidelines released by UNHCR in July 2010, which makes direct reference to the ongoing civilian death toll in Iraq. Indeed, UNHCR in July 2010 noted that:

“The situation in Iraq is still evolving. UNHCR will continue to monitor developments in the country and will update the April 2009 UNHCR Guidelines once it judges that the situation is sufficiently changed. In the interim, UNHCR advises those involved in the adjudication of international protection claims lodged by asylum-seekers from Iraq and those responsible for establishing government policy in relation to this population continue to rely on the April 2009 UNHCR Guidelines. Accordingly, the current UNHCR position on returns to Iraq also remains unchanged.”

65. The Tribunal accepts that the applicant’s brother’s engagement in activities connected with the Coalition Forces in Iraq has brought he and his family to the adverse attention of parties and militias opposed to these forces.

66. The Tribunal has also considered the fact that the applicant would be returning to Iraq from a western country. The Tribunal accepts that the applicant’s brother, [Mr B], has been recognised as a Convention refugee in Australia. The Tribunal considers that this gives rise to a further risk to the applicant. Indeed, reports provide some evidence that those with relatives outside Iraq, and indeed business people returning to Iraq from western countries, have been targeted. Indeed, the Strategic Studies Institute of the US Army War College has reported as follows:

“The gangs also targeted families with relatives in the United States and elsewhere outside Iraq – on the ground that these relatives could contribute towards the ransom. Several businessmen born in Iraq but with Canadian citizenship returned to Iraq for business, but were kidnapped and in some cases killed (US Army War College – Strategic Studies Institute 2009, *Criminals, Militias, and Insurgents: Organised Crime in Iraq June 2011*).Website <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub930.pdf>.”

67. The Tribunal finds, on the basis of the evidence before it, that if the applicant were to return to Iraq, there is a real risk that he would come to the adverse attention of armed militia groups operating in that country and would be subjected to harm, and such harm would constitute

persecution for the purposes of the Convention. Indeed, as noted above, the UNHCR and other sources have pointed to the continued threat from armed groups throughout Iraq, and both UNHCR and the Strategic Studies Institute of the US Army War College have indicated ongoing volatility and connection with western countries and the coalition forces as a precipitant to targeting and violence.

68. The Tribunal, having regard to the country information, finds that the human rights environment in Iraq remains unpredictable. The Tribunal, as noted, has had regard to information that armed Islamic groups have carried out various terrorist attacks and have targeted individuals as members of those linked to the Coalition Forces as well as their families. Evidence indicates that violence persists in Iraq, and the threat of terrorism and kidnap remains high in that country.
69. The Tribunal finds that the harm that the applicant fears arises as a consequence of being a member of a family identified as supporting the Coalition Forces. The Tribunal finds that an adverse imputed political profile is the basis of the threat to the applicant.
70. The Tribunal, having assessed the evidence before it, finds that there is more than a remote chance that the applicant will face persecution amounting to serious harm for the purposes of s.91R(1)(b) of the Act now or in the reasonably foreseeable future, should he return to Iraq, in that it involves a threat to his life or liberty, or significant physical harassment or ill-treatment.
71. The Tribunal finds that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by s.91R(1)(c) of the Migration Act, in that it is deliberate or intentional and involves selective harassment or persecution for a Convention reason, namely imputed political opinion.
72. The Tribunal has considered whether there is an internal flight alternative reasonably available to the applicant. The Tribunal accepts the advice of UNHCR that an internal flight alternative in southern or central Iraq from an Iraqi asylum-seeker is not available, given the widespread violence, insecurity and human rights violations. The Tribunal notes the applicant's father and sisters are living in hiding in the south of Iraq in [District 1] and are not interacting with persons outside the family unit. In the light of UNHCR advice on internal relocation, the Tribunal finds it is not reasonable in the circumstances of the case for the applicant, and indeed his mother as secondary applicant, to relocate safely within another part of Iraq.
73. There is no evidence before the Tribunal that indicates that the applicant has a legally enforceable right, whether permanent or temporary, to enter and reside in any other country apart from Iraq.

CONCLUSIONS

74. The Tribunal finds that the applicant is outside his country of nationality, Iraq. For the reasons provided, the Tribunal finds that the applicant has a well-founded fear of being persecuted for reasons of his imputed political opinion. The Tribunal finds that the applicant is unwilling, owing to his fear of persecution, to avail himself of the protection of the Iraqi government. The Tribunal finds no internal flight alternative is reasonably available to the applicant, having regard to his circumstances. The Tribunal finds that the applicant is not excluded from Australia's protection by s.36(3) of the Act. It follows that the Tribunal is

satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Consequently, the applicant satisfies the criterion set out in s.36(2)(A) of the Act for the grant of a Protection visa.

DECISION

75. The Tribunal remits the matter for reconsideration with the following directions:
- (1) That the first named applicant satisfies s.36(2)(A) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
 - (2) That the other named applicant satisfies s.36(2)(B)(i) of the Migration Act, being a dependent member of the same family unit as the first named applicant.