

1300903 [2013] RRTA 320 (30 April 2013)

DECISION RECORD

RRT CASE NUMBER: 1300903

DIAC REFERENCE(S): CLF2012/183158

COUNTRY OF REFERENCE: Iraq

TRIBUNAL MEMBER: Rodger Shanahan

DATE: **30 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

application for review

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the Migration Act 1958 (the Act).
2. The applicant who claims to be a citizen of Iraq, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] August 2012.
3. The delegate refused to grant the visa [in] January 2013, and the applicant applied to the Tribunal for review of that decision.

CLAIMS AND EVIDENCE

4. The Tribunal has before it the Department's file relating to the applicant. 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. Post hearing submissions were received from the applicant's adviser dated 2 April 2013 (folio 56).
5. The applicant appeared before the Tribunal on 25 March 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages. The applicant was represented in relation to the review by his registered migration agent.

Departmental Interview

6. The applicant was interviewed by a delegate of the Minister [in] September 2012. The Tribunal has listened to the audio recording of the interview and has referred to the applicant's oral evidence to the delegate where relevant. The delegate accepted that the applicant owned a [business] that worked with coalition forces, that two of the applicant's employees were killed in bomb attacks in late 2011, that the applicant received a threatening phone call causing him to move to Baghdad and that a relative's house was painted in graffiti and had shots fired into it in February 2012.
7. He did not accept that the employees were deliberately targeted for their role in the [company], or that the applicant had suffered harm amounting to persecution as a result of his religious identity, or that he would be identified in the future as a government supporter given that he had sold out of his [business]. The delegate also found that his family had not been targeted since he had left Iraq which indicated that the militia have not displayed any ongoing interest in the family. He found that, while there were generalised levels of violence in Iraq he would not be targeted if he were to return to Iraq.

Findings and reasons

8. The applicant arrived at [location and date deleted: s.431(2)] May 2012 without documents. He has subsequently provided copies of his Iraqi citizenship, birth and marriage

certificates I accept that the applicant is an Iraqi citizen, and his claim will be assessed accordingly.

9. The applicant is a [age and marital details deleted: s.431(2)] part-owner of a [company] from [City 1]. The applicant fears returning to Iraq because he claims to fear being killed by Asaib ul-Haq and al-Qaida because he had been accused of being a spy and converting to Christianity and because he had cooperated with the coalition forces.
10. In considering an applicant's account, undue weight should not be placed on some degree of confusion or omission to conclude that a person is not telling the truth, especially in the context of entry interviews constrained by time and the inherent limitations of interpretation and often before an applicant fully appreciates what is relevant and the degree of detail required. Nor can significant inconsistencies or embellishments be lightly dismissed. The Tribunal is not required to accept uncritically any and all claims made by an applicant.
11. I have found the applicant's evidence regarding his claims to lack credibility. For reasons set out below I did not find the applicant to be a reliable, credible or truthful witness, and that he fabricated his claims in order to be granted a protection visa.

General Credibility Issues

12. There were a number of issues to do with the applicant's credibility that do not apply directly to the applicant's particular claims but which go towards the general finding of the applicant's credibility.
13. I do not accept that he, through the director of his company had received offers from the US and Australian forces to leave and come to their country, but that he decided to stay in Iraq. His claim that his director was told by the Australian commander that if he was targeted the Australian forces would make all the arrangements for them to come to Australia is not supported by any country information. The Australian government offered visas to interpreters who worked directly for the Australian military in Iraq¹, however there is no country information available to the Tribunal nor was any offered, that supports the claim that individuals who worked for contractors were offered visas.
14. I do not accept as credible that an Australian military commander, who would be well aware of official policy would make such an offer regarding visas. When this was put to the applicant he claimed that the offer was made to his director and also that approval would be needed from the government first. I find that the applicant fabricated this claim in order to establish a profile as someone who was reluctant to leave Iraq by claiming that he had previously been given an opportunity to come to Australia.
15. I also do not accept that the applicant had become friends with a Christian priest from the [church deleted: s.431(2)] in Baghdad prior to the 2003 invasion. He knew little about him other than his name was [name deleted: s.431(2)], and he appears to have had no contact with him since 2002. The applicant did not know the priest's family name or nationality (although he thought he was [nationality deleted: s.431(2)]). The circumstances of his meeting were implausible.

¹ 'Lawyer questions visa plan for Iraqi interpreters', *ABC Radio*, 9 April 2008, <http://www.abc.net.au/news/2008-04-09/lawyer-questions-visa-plan-for-iraqi-interpreters/2397562>

16. The applicant claimed that his friend [name deleted: s.431(2)] owned a clothes shop in Baghdad where he shopped and that the priest shopped at the same shop and they became friends as a result. The likelihood of the applicant, a Shi'a from [City 1], shopping at the same shop owned by the applicant's friend in Baghdad as the priest is remote. This relationship was never mentioned previously, nor was the manner in which they engaged in religious discussion and the Tribunal finds that this story was fabricated during the hearing in order to establish a profile as someone who had an interest in Christianity and hence would wear a cross.

17. The applicant claimed in his statutory declaration that [certain institutions] are not normally built in Muslim countries, and that this was one of the reasons that he was targeted by the militia. No country information was put forward by the applicant nor is any available to the Tribunal to support such a claim. It was put to him that a cursory internet search revealed the existence of orphanages in Muslim countries such as Syria, Jordan, Oman and Pakistan. He then claimed that orphanages were not forbidden in Islam but that militias come up with adverse claims.

Claim 1: Imputed Christian conversion

18. The applicant claimed that he was given a chain and cross by an American/Iraqi interpreter who worked with the coalition at the US base and with whom he had become friends. He was seen wearing the cross and people started accusing him of being an infidel and spreading Christianity. His house in Baghdad was sprayed with graffiti that called for the death of those who had Christianised.

Claim 1 Finding and Reasons

19. I do not accept that the applicant was given a chain and cross or ever accused of being Christian, or had graffiti painted on his house accusing him of being Christian. To begin with, I find it implausible that a US government employee working as an interpreter on a US base would not understand the sensitivity of giving an Iraqi Shi'a a crucifix to wear, or that such actions had not been expressly forbidden. I also find it implausible that someone would give the applicant such a gift given they had never discussed the issue of religion.

20. I also do not accept that the applicant would have been unaware, or uncaring of the potential danger of wearing the crucifix. This would have been particularly the case given that he claimed to have relatives or close friends in the militia who had warned him about working for the coalition. When this was put to the applicant he then claimed that he was not given a cross but a very small, square icon with a picture of Jesus inside it and that he only wore it three or four times.

21. His claim to have worn a small icon only three or four times is inconsistent with his two statutory declarations he signed in August 2012 (folios 108 & 112, reiterated in his adviser's submission of March 2013 – folio 49 refers) where he stated on both occasions that he wore a cross, and his evidence during his hearing where he said that he wore it for two months before he took it off after he was warned by his friend in the militia.

22. I find that the applicant has fabricated his claim regarding his receipt and wearing of a cross in order to establish a profile as someone who could have been accused of being a Christian convert by Islamist militia in Iraq. Because I do not accept that he was ever given or wore the cross, I do not accept that he would have been perceived to have been Christian or an infidel or that he received any phone calls or experienced any graffiti accusing him of being either. As the

applicant has also never expressed any interest in Christianity since leaving Iraq I also do not accept that there is any reason why he would be perceived to have any connection with Christianity in the reasonably foreseeable future.

Claim 2: Targeted for Collaborating with Coalition Forces

23. The applicant claimed that he had worked on projects for a number of coalition members, including Australian, Italian and US forces starting in 2004. He was the [role deleted: s.431(2)] for the company, and he established the policies and worked on bids to see whether work was profitable enough to tender for.
24. He started working on [a project] for the Australian forces at [location deleted: s.431(2)] in [City 1] in 2008. [Information deleted: s.431(2)] and the militias believed that the [institution] signified Christianity, and hence targeted the company for helping the coalition forces to build it. A close friend of the applicant who was in the militia warned him that the applicant should have been killed by the militia but this did not occur as they were friends. He was warned to stop the project.
25. One of their company [employees] was subsequently injured in a car bombing, and the applicant went to [Relative A]'s house in Baghdad where he rarely went out. The project was completed remotely by [Relative A]. The applicant went on to another [similar] project for British forces in [location in City 1 deleted: s.431(2)] in 2008/09. He and [Relative A] eventually liquidated their businesses in [2010] because of the threats.
26. He returned to [City 1] regularly and stayed at his uncles' or other relatives' house for a month or more at a time from mid-2011 and the company personnel were targeted by the militia after the US forces left. He was targeted by the police and the Soldiers of Heaven. An [employee] from their company, [name deleted: s.431(2)] was killed [in] 2012 in [City 1] and [Employee B] was shot and killed five days later while [another employee] [name deleted: s.431(2)] was killed [late in] 2012 by a missile.
27. He was very cautious about how he went to work and returned home after the coalition left. After [Employee B] was killed he could not leave the house and less than a week after [Employee B]'s death he received a threatening note with a letter in it, and a call that night threatening to kill him because he was spreading Christianity and assisting the Americans.
28. He reported this to the police but nothing happened as they were controlled by the militia. He was also told by [Relative C] (via a friend in the police) that the militia intended to kill the applicant as he travelled to the court house. He returned to Baghdad [in] February 2012 in accommodation rented for them by [Relative C] in a Sunni area. [In] March he took his wife to stay at her [relative]'s house in another part of Baghdad and they stayed overnight.
29. [In] March his neighbour advised him that his house had been shot at, and sprayed with graffiti about him being a collaborator and being a convert. Some hours after that al-Qa'ida elements investigated the shots and graffiti, went to the mosque and received a fatwa, broke into his house and took his laptop that contained photos of him working with Australian and other forces, as well as some papers. Al-Qaida then told people he was a spy and a convert and this spread all over Baghdad. Fearing for his life he fled Iraq through [an airport].

Claim 2 Findings and Reason

30. I accept that the applicant had a position in a [company] in [City 1] and that this company had contracts with coalition forces. I do not accept that these contracts caused the applicant to be labelled as a collaborator or spy or to be targeted by militants in Iraq.
31. I do not accept that three members of his company were deliberately targeted because of their work with the coalition forces. The applicant claimed that he was warned off working on the [project] in 2008 and had liquidated their assets in late 2010 and yet the targeting of [Employee B] and [other employees] occurred in 2012. Although the applicant claimed that one of their employees was wounded in 2008, I find that it lacks credibility that the company's employees would only be targeted four years after they were first threatened for working for the coalition.
32. I lend little weight to his evidence in support of his claims that these people were targeted. A translation of an extremely poor copy of a page from [newspaper and date deleted: s.431(2)] February 2012 reported the death of an unnamed [employee] working for an unnamed company by sticky explosive. There is no corroborative account of the incident in a more comprehensive database such as the Iraq Body Count (IBC). No evidence was offered in support of the claim that [Employee B] was shot and killed five days later and there is no record of such an incident in IBC.
33. The targeted death of another of their [employees later that year] was reported to him by his wife. The IBC does contain the account of the death of someone in [location deleted: s.431(2)] on the day claimed, however the name, age or sex of the victim is not recorded. The death cited also occurred as the result of a mortar round landing on an apartment complex which is indicative of a random, as opposed to targeted killing.
34. More particularly the applicant claims that, despite moving to Baghdad to avoid being targeted he regularly returned to [City 1] for a month at a time. I find it lacks credibility that the applicant, fearing for his life in [City 1] would then voluntarily return there on such a regular basis. Although he claimed that he spent the time at relatives' houses, this appears to be a poor security measure given the number of people who knew him in the city.
35. I also do not accept that the applicant, having claimed to have been targeted and warned by the militia in 2008 and then divesting himself of his ownership of the company in late 2010 would still be targeted by the militia in 2012. There is also no country information that supports the claim that Iraqis in Iraqi companies who worked for coalition forces were targeted by militia groups. There is country information that Iraqis who worked for US and foreign companies were targeted between 2004-06 and that in 2010 current employees of foreign companies may have been targeted but there were no reports that such activities occurred from 2011 onwards once the militias disbanded following the coalition withdrawal²
36. The adviser's post-hearing submission contained a Reuters report concerning the killing of three Iraqis working for a contracting company in 2013. I note that the report also stated that the local al-Qa'ida wing was active along the Syrian border, an area that is far removed from [City 1] or Baghdad. I do not accept the applicant's claim during the hearing that such targeting still occurred but it was not known about because the Iraqi government would not reveal the details.

² RRT Country Information report IRQ41022 'Militia groups active in Iraq' dated 12 October 2012

37. I do not accept that his house in Baghdad was shot at and daubed with graffiti by one group of militia and then a few hours later was ransacked by al-Qa'ida militants. Firstly, I do not accept that people who were seeking to kill the applicant would do so simply by shooting at the compound door and spraying graffiti on the walls. Having located the house in which the applicant lived, it would have been much simpler and more effective to have surveilled it and attacked it once they knew the applicant was inside.
38. I lend little weight to the evidence presented in support of this claim. There are photos of a policeman and two women standing in front of a metal gate with bullet holes in it. There are no photos of the graffiti on the walls that he claimed was sprayed. I also note that, for a house that had allegedly been ransacked by a group of al-Qa'ida militants shortly after the shooting it appears to be intact. There does not appear to be any damage to the house apart from the bullet holes in the metal gate. The gate's lock is also perfectly intact.
39. There are translated, handwritten notes that it is claimed are complaints to the police regarding the shooting incident. While I accept the accuracy of the translation my concerns about the credibility of the applicant and the handwritten nature of the notes mean that I am unable to lend them any weight.
40. I have already noted above that I do not accept that the applicant was targeted because of his occupation or that the applicant ever wore a cross, and hence I do not accept that graffiti accusing him of being Christian and a collaborator would have been sprayed on the house. Because I do not accept that these actions occurred, it follows that the claim regarding al-Qa'ida militants telling people he was a spy, investigating the incident, gaining a fatwa and ransacking the house before taking his computer that revealed photos of him with coalition soldiers is not accepted. This finding is supported by the lack of damage evident in the photos of the house that it is claimed was subject to the attack. For the same reason I do not accept that the applicant received a threatening letter or phone call, or that [Relative C] told him that the militia intended to kill him on the way to the court house.
41. I also find it extremely coincidental that the actions against the applicant's house both occurred within a few hours of each other and on the very day that the applicant had chosen to stay with his wife at his [relative]'s house. I believe that this claim regarding his house being attacked was fabricated in order to establish a profile of someone who was wanted by both Shi'a and Sunni militants in Iraq. Because I do not accept that the applicant has been accused of, or targeted for collaborating with coalition forces and there is no country information that indicates militia groups target people with the applicant's profile I am not satisfied that the applicant will be targeted for this in the reasonably foreseeable future.
42. Having had regard to all the evidence, and the applicant's claims both singularly and cumulatively, the Tribunal finds that the applicant does not have a well-founded fear of persecution for any Convention reason either now or in the reasonable foreseeable future.

Complementary Protection

43. Because I do not accept that the applicant ever wore a cross or was perceived to be Christian, or that he was targeted by militias for his work with coalition forces I am not satisfied that there are any substantial grounds for believing that there is a real risk that the applicant will suffer significant harm.

44. As a consequence I also 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 Iran, there is a real risk that the applicant will suffer significant harm on the basis of these claims as outlined in the complementary protection criterion in s.36(2)(aa).

Conclusions

45. The Tribunal **is not** satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant **does not satisfy** the criterion set out in s.36(2)(a).
46. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal **is not** satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
47. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a protection visa.

decision

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

ATTACHMENT A - RELEVANT LAW

1. 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

2. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.

3. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.

4. 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, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

5. 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.

6. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

7. 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.

8. 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.

9. 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.

10. 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 being persecuted 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.

11. 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.

12. Whether an applicant is a person in respect of 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.

Complementary protection criterion

13. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

14. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

15. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.