0802435 [2008] RRTA 238 (2 July 2008)

DECISION RECORD

RRT CASE NUMBER:	0802435
DIAC REFERENCE:	CLF2008/15839
COUNTRY OF REFERENCE:	Iraq
TRIBUNAL MEMBER:	Ms Philippa McIntosh
DATE DECISION SIGNED:	2 July 2008
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 the spouse of 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 and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas. The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter.

3. The delegate refused the visa application on the basis that the first named applicant was not a person to whom Australia had protection obligations under the Refugees Convention

4. The applicants applied to the Tribunal for review of the delegate's decisions.

5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision 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 the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.

9. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 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.

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.

"PROTECTION OBLIGATIONS"

20. Subsection 36(2) of the Act, which refers to Australia's protection obligations under the Refugees Convention, is qualified by subsections 36(3), (4) and (5) of the Act. These provisions apply to protection visa applications made on or after 16 December 1999. They provide as follows:

> *Protection obligations*
>
> (3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
>
> (4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.
>
> (5) Also, if the non-citizen has a well-founded fear that:
>
> (a) a country will return the non-citizen to another country; and
>
> (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;
>
> subsection (3) does not apply in relation to the first-mentioned country.

21. This means that where a non-citizen in Australia has a right to enter and reside in a third country, that person will not be owed protection obligations in Australia if he or she has not availed himself or herself of that right unless the conditions prescribed in either s.36(4) or (5) are satisfied, in which case the s.36(3) preclusion will not apply.

22. The Full Federal Court has held that the term "right" in subsection 36(3) refers to a legally enforceable right: *Minister for Immigration & Multicultural Affairs v Applicant C* (2001) FCR 154. Gummow J has suggested in *obiter dicta* that the "right" referred to in s.36(3) is a right in the Hohfeldian sense, with a correlative duty of the relevant country, owed under its municipal law to the applicant personally, which must be shown to exist by acceptable evidence: see *Minister for Immigration & Multicultural & Indigenous Affairs v Al Khafaji* (2004) 208 ALR 201 at [19]-[20].

23. In determining whether these provisions apply, relevant considerations will be: whether the applicant has a legally enforceable right to enter and reside in a third country either temporarily or permanently; whether he or she has taken all possible steps to avail

himself or herself of that right; whether he or she has a well-founded fear of being persecuted for a Convention reason in the third country itself; and whether there is a risk that the third country will return the applicant to another country where he or she has a well-founded fear of being persecuted for a Convention reason.

CLAIMS AND EVIDENCE

24. 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.

25. The applicants appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from a witness The Tribunal hearing was conducted with the assistance of an interpreter in the Chaldean and English languages.

26. The applicants were represented in relation to the review by their registered migration agent.

27. The applicant claimed to be Chaldean Christians, both of whom were born in Iraq. [*Information about the applicants deleted in accordance with s431 of the Migration Act as this information could identify the applicants*]. Only Applicant 1 made claims to be a refugee.

28. Certified photocopies of their Iraqi passports were submitted.

29. The applicant's most recent address in Iraq was at Address 1 in City A from the mid 1990's to the mid 2000's. The applicant spent short periods in Country B, Country C and Country D prior to coming to Australia.

30. Her claims were that she had always served her church in City A. After the collapse of the regime of Saddam Hussein in 2003, Islamic extremists raided churches in Iraq and attacked people serving in them. A few years ago she was attacked while in her church in City A She survived but faced continued threats. She feared going to church. Because of her fear of further harm she and Applicant 2 travelled to Country B. There they approached UNHCR, and also lodged unsuccessful applications for humanitarian or refugee visas in Australia. A certified copy of a "Letter of Temporary Protection" issued by UNHCR in Country B to the applicants and relative A in the mid 2000's was submitted in evidence. In that same year, while still in Country B, she received news that Relative C had been killed in Iraq because of their religion. She returned to Iraq but was unable to attend the funeral. Having inherited some money from them she left Iraq again and travelled to Country C. While she was there, Relative A was kidnapped in Iraq. She had to pay a ransom for his release. The kidnappers left a message with him that there was no place in Iraq for Christians. This frightened the applicant. A friend of another relative, Relative B in Country D, managed to sponsor the applicants and they left for Country D.

31. Their migration adviser submitted evidence from media and other sources with regard to the recent treatment of Christians in Iraq. Broadly speaking, these included evidence that Chaldean Christians form the largest of Iraq's Christian sects, and in 2005 there were about 400,000 of them in Iraq. Since the collapse of the Ba'athist regime in 2003 situation for them had deteriorated. The Chaldean and the broader Christian community

had been targeted by rebels, many churches had been firebombed, and there had been numerous incidents of violence ranging from the killings of individuals to assaults on women for not wearing a head scarf. In 2004 the general secretary of the Assyrian Democratic Movement said that over 100 Christians had already been murdered since the collapse of the previous regime. According to a UNHCR report issued in April 2007, violence was reaching deeper into society and many ordinary people had ties to the radical groups.

32. The migration adviser submitted that the applicant had a well founded fear of being persecuted for the Convention reasons of her religion as Christian, her race as a Chaldean and her membership of a particular social group comprising Iraqis who had spent a significant period in a Western country. It was submitted that she would be readily identified in Iraq as a returnee from a Western country and could face kidnap for ransom or even a political kidnapping. There was no protection from the Iraqi government.

33. The migration adviser also submitted that Applicant 1 had a well-founded fear of being persecuted in Country D because of the financial hardship and homelessness she would face there. He suggested that she and Applicant 2 comprised a particular social group, being "Iraqis who held certain visas and resided in [Country D] subject to the visa's conditions that the sponsor must provide them with financial assistance that the sponsor did not comply with which put the applicants in grave danger to survive". It was submitted that their financial hardship and being homeless in Country D made them cognizable as members of a particular social group. The Tribunal advised the migration adviser that it was not persuaded by the above arguments that Applicant 1 had a well-founded fear of Convention-related persecution in Country D

34. During the Tribunal hearing Applicant 1 confirmed that she was a Chaldean Christian, claimed that she had been threatened while in her City A church and stated that she felt she had been traumatised by that incident and by Relative A's kidnapping.

35. Evidence relating to Country D

36. The applicants entered Country D in the mid 2000's and were issued with "Permanent Resident" cards later that same year. Almost one year after receiving the "Permanent Resident" cards they arrived in Australia and had not since returned to Country D.

37. At the hearing the Tribunal explained to Applicant 1 the criteria relating to Australia's protection obligations when considering an applicant's claims in relation to a third country such as, in this case, the Country D.

38. Applicant 1 told the Tribunal that her Relative B was a citizen of Country D, and lived in Country D with her husband and dependents. Relative B had been diagnosed with a serious illness and had recently had an operation. At the time the applicants were in Country D, Relative B was still very ill and was undergoing treatment

39. Applicant 1 gave evidence that a close friend of Relative B had made all the arrangements for the applicants to be granted visas from Country D. The visa applications had been lodged with evidence from Relative B of the latter's citizenship. Applicant 1 said that she herself had understood very little of the process involved in applying for the visas. When she and Applicant 2 arrived in Country D they lived with

this Relative B and her family. However the relationship broke down because of the financial and other pressures arising from Relative B’s illness. Relative B's family member said that Applicant 1 and Applicant 2 would have to leave the family home or they would divorce Relative B. The latter told Applicant 1 that she would not lose her family member for them. The applicants then moved out. The friend, Person A (she did not know her surname) paid their rent for other accommodation. However Applicant 2 became ill and, having incurred medical costs, Person A then said she could no longer support the applicants. They became homeless and were living on the streets. They approached a church, which provided them with food. The Tribunal asked Applicant 1 if she would have expected the Department of Social Security (or similar) or the police, for example, to treat them the same as anyone else. In response she did not claim that they would be treated any differently, simply saying that she was afraid of getting Relative B's friend into some trouble if the applicants approached the authorities for help. Finally the friend helped the applicants apply for Australian visas and make the trip to Australia.

40. Applicant 1 also stated that she also had siblings in Country D, but did not know if they were citizens of that country. She had not contacted any of her siblings for some years because, she said, neither they nor her other siblings in Australia had responded to her pleas for help to pay the ransom when Relative A was abducted in Iraq The ransom had finally been paid using Relative C's inheritance and money provided by Relative B in Country D. She said she could not remember precisely when she had last had contact with any of her siblings because she had been tortured and Relative A abducted (she expressed considerable distress about these events and her current circumstances throughout the hearing)

41. Of her relationship with Relative B in Country D now, she said she had contacted her since arriving in Australia because of her concerns about Relative B’s illness and treatment, but her relationship with Relative B was not good because Relative B’s family member had "kicked us out".

42. Apart from her siblings in Australia, with whom she had no contact, she just had Relative D (the ex-partner of one of these siblings), and Relative D’s family members, who were now taking care of Applicant 1 and Applicant 2. She also had a relative, Relative A, in Australia (who gave oral evidence to the Tribunal).

43. The Tribunal asked her if she feared being harmed by her sponsor or anyone else in Country D. In response she recounted the events, as above, leading to the breakdown of her relationship with Relative B, Relative B's family and Person A. She said that she had had no contact with Person A since leaving Country D.

44. As to whether she feared any other problems in Country D, apart from the type of hardship she had already faced, she responded merely that Relative A and Relative D were in Australia.

45. As to whether the applicants’ visas were issued on the basis that they were the relatives of a citizen, she indicated that she thought so as Relative B had given documentary evidence of the latter's citizenship to Person A when the application was made.

46. She confirmed that she had no other links of any kind with Country D apart from having the above-mentioned relatives there.

47. The Tribunal asked her how, in her opinion, Relative B might respond to an enquiry, if she were contacted by the country's authorities, as to Applicant 1's continuing links with Country D. She responded that she had no doubt that Relative B would say the relationship had broken down. Relative B was "not ready to give up her [family member]" and would know that the applicants would be back on the street if they returned to Country D. Relative B would not accept her. As to whether Applicant 1 had discussed with Relative B what information Relative B might give to the immigration authorities about the applicants if asked, she said that before her departure she had not discussed with Relative B whether they were leaving permanently. Having come to Australia to see Relative A, and having experienced the kindness of various people, she had very much wanted to stay, and Relative B now knew that Applicant 1 did not intend to return to Country D, and had told Applicant 1 that she did not care and it was not her problem.

48. The Tribunal asked her if she had filed for a re-entry permit before leaving Country D. She said that her friend had organised everything and she did not know, but did not think so.

49. As to whether she had made any enquiries of Country D's embassy or consulate as to whether she and Applicant 2 might be allowed to re-enter Country D, she said she had not. She said she would prefer to go back to Iraq and die.

50. As to whether she and Applicant 2 had their Iraqi passports, valid for a few more years, she said that they were lost. She and Applicant 2 had recently visited the Salvation Army and had had to show these passports for identification. However she thought she had dropped them outside the building. As to whether she had reported their loss to the police, she confirmed that she had and provided the Tribunal with an original "lost property report" issued to her by police, which stated that the passports had been lost earlier the same month She told the Tribunal that she intended to search for them again at home in case they were there.

51. Evidence of Person B

52. The witness told the Tribunal that he was a relative of the applicants. He said he had come to Australia as a refugee. He had been without his family for more than a decade. His Relative E and Relative F had arranged for him to come to Australia, but now Relative E had left Relative F and did not care about Relative F or their family members. He expressed the high value he placed on being reunited with his family.

53. He said that he had last spoken to his sibling in Country D more than a year earlier when he heard that the applicants were going there. He had had no contact with this sibling or her family member since then, because of the breakdown in their relationship with the applicants.

54. Evidence from other sources

55. Christians in Iraq

56. The following evidence comes from the UK Home Office's Country of Origin Information Report, Iraq, 15 May 2008:

57. The UN Assistance Mission for Iraq's (UNAMI) January to March 2007 report noted that "Attacks against religious and ethnic minorities continued unabated in most areas of Iraq, prompting sections of these communities to seek ways to leave the country. The continuing inability of the Iraqi government to restore law and order, together with the prevailing climate of impunity, has rendered religious minorities extremely vulnerable to acts of violence by armed militia." Insurgents and criminal gangs were reported to have harassed, intimidated, kidnapped and at times killed members of specific religious groups, particularly Shi'as, Kurds and Christians. Insurgents and criminal gangs also targeted the places of worship of religious groups. "Threat letters targeting residents based on their religious affiliation were fairly common for almost all religious denominations. Numerous reports indicated that Sunni Arabs, Shi'a Arabs, and Christians received death letters identifying them by sect and urging them to leave their homes or face death. These threats fuelled large-scale internal displacement based on religious or ethnic affiliation." (para. 21.06)

58. The US State Department report for 2007 also stated that "Religious leaders were in several instances targeted for killings." The report mentions the shooting of a Chaldean priest in June 2007. The report also notes there were kidnappings of religious figures with ransoms paid, including that of a Chaldean priest and five other Christians in Baghdad.

59. The USSD report on International Religious Freedom 2007 recorded that:

> Current estimates place the number of Christians at fewer than 1 million, with Chaldeans comprising the majority. In August 2006, Chaldean Auxiliary Bishop Andreos Abouna of Baghdad stated that of the estimated 1.2 million Christians living in the country before the 2003 invasion, only 600,000 remained. According to church leaders, an estimated 30 percent of the country's Christian population lives in the north, with the largest Christian communities located in Mosul, Erbil, Dohuk, and Kirkuk. … 19,000 Armenian Christians remained in the country, primarily in the cities of Baghdad, Basrah, Kirkuk, and Mosul. The population of Armenian Christians reportedly declined from 22,000 in the previous reporting period.

60. At para. 21.65 of the UK Home Office report the Minority Rights Group's report of 2007 was referred to as noting that "People have been abducted or killed in attacks simply because they are in targeted Christian areas, work for foreign companies, or hold official or professional positions. These include civil servants, medical personnel and civic and religious leaders. Such attacks strike directly at the social infrastructure of communities, leaving a void of fear and disabling those who are left from carrying on their everyday lives." In addition to suffering hate speech, violent attacks against their businesses and the targeting of their places of worship, "Christians have also reported receiving threats of violence at the neighbourhood level through leafleting, text messages to mobile phones and one-on-one intimidation."

61. UNAMI's report of April to June 2007 stated that "Representatives of several Christian churches reported a rise of sectarian attacks on Christian families in Baghdad's al-Dora district. By the end of June, the number of displaced Christian families from the Baghdad area reached 1,200, according to church sources." In the so-called 'disputed areas', Christians were increasingly under threat as UNAMI reported: "In Mosul, attacks on churches and religious minorities also continued with the killing of Father Ragheed Aziz al-Kinani and three deacons from the Assyrian Church by four gunmen. The gunmen intercepted their car as they were leaving the Holy Ghost Church after completing evening prayers on 7 June." (UK Home Office, para. 21.66-67)

62. At paras. 21.68-21.70 the UK Home Office report observed that UNHCR's August 2007 paper referred to "… *fatwas* and militia statements calling on Iraqis to expel Christians and atheists from schools, institutions and the streets of Iraq because they offended the Prophet." UNHCR also reiterated that rising extremist attitudes concerning dress and unIslamic practices (such as the sale of alcohol and music, public entertainment and hairstyling that does not conform to strict Islamic principles) have fuelled the violence against Christians, as has the enduring perception that "…Christians assisted and supported the US invasion of Iraq and continue to support the presence of the MNF, as the MNF is composed of mainly Western Christian 'infidel' nations." "A significant number of Christians live in areas currently classified as 'disputed areas', including in the Ninewa Plain and Kirkuk These areas have come under de facto control of Kurdish parties and militias since the fall of the former regime and Christians have resisted attempts by Kurds to assimilate them into Kurdish culture, language and political parties. They have further complained of the use of force, discrimination and electoral fraud by the Kurdish parties and militias."

63. The UNAMI report for 1 July-31 December 2007 said that "According to information received from representatives of Iraq's Christian community, ongoing targeted attacks against their members in both Baghdad and Mosul resulted in 44 people killed during the last six months of 2007." There were several incidents involving the kidnapping of Christian priests; in September 2007, two Syriac Orthodox priests were kidnapped in Mosul and later released. On 7 March 2008, The Times reported on the kidnapping of Mosul's Chaldean Catholic Archbishop; his driver and two guards were killed in the attack. BBC News reported, on 13 March 2008, that the archbishop's body had been found buried near Mosul. The article noted that "The Chaldeans are the largest sect within Iraq's Christian community, which was estimated at 800,000 before the overthrow of Saddam Hussein. Many have left their homes after attacks linked to the continuing insurgency." (UK Home Office, paras. 21.69-70).

64. The UK Home Office went on to note that, according to the ACCORD/UNHCR COI report of November 2007, "Christians are usually considered to be better educated and therefore might have a better income than others. This might also put them at a higher risk or add to other factors for which they are targeted." RFE/RL reported, on 17 April 2008, that:

> Iraq's Christian community says it is being targeted at an unprecedented level by insurgents, in what some claim amounts to a campaign of genocide carried out under the noses of Iraq and U.S. forces.
>
> At least 10 churches have been bombed this year, two leading clergymen have been killed, and scores of worshippers targeted for practicing their religion. Though they make up only 3 percent of the population, Christians comprise nearly half the refugees fleeing Iraq, according to the UN High Commissioner for Refugees.
>
> "Figures on the prewar size of the Christian community vary, with estimates ranging between 800,000 and 1.2 million. Today, estimates on the remaining number of Christians in Iraq put the community at between 500,000 and 700,000.

65. RFE/RL also commented that the al-Sadr's militia, the Mahdi Army, had been one of the main perpetrator of violence against Christians in Iraq. (paras. 21.71-73).

66. Country D

67. The Tribunal has considered evidence from various sources with regard to the “Permanent Resident” cards, and to permanent residents in Country D.

68. The Permanent Resident cards of both Applicant 1 and Applicant 2 list their category type….[i*nformation deleted in accordance with s431 of the Migration Act*].

69. [I*nformation deleted in accordance with s431 of the Migration Act*]

70. [I*nformation deleted in accordance with s431 of the Migration Act*]

71. Permanent Residents

72. Both applicants are holders of Permanent Resident Cards. Country D website provides information on the travel rights of permanent residents and the circumstances in which a permanent resident may lose the right to re-enter Country D. The relevant information follows:

73. [I*nformation deleted in accordance with s431 of the Migration Act*]

74. Country D website states that permanent residents who are overseas for less than one year can re-enter Country D by presenting their permanent residency card. If a permanent resident is overseas for more than one year they require a re-entry permit or a returning resident visa. Re-entry permits must be applied for within Country D prior to travelling overseas. Returning resident visas can be gained from Country D embassies overseas. If a permanent resident is offshore for longer than one year and has not obtained a re-entry permit or a returning resident visa, the person may be found to have ‘abandoned’ their permanent residency. Of particular relevance in the present matter is information on the Country D website that….. [I*nformation deleted in accordance with s431 of the Migration Act*]

75. The Country D website provides the following information on the travel and return rights of permanent residents and the instances in which residency may be considered to have been abandoned:

    [I*nformation deleted in accordance with s431 of the Migration Act*]

76. An information brochure for permanent residents on the Country D website provides advice on travelling outside Country D and the risks of abandoning residency rights:

    [I*nformation deleted in accordance with s431 of the Migration Act*]

77. A form provides instructions on applying for a re-entry permit into Country D. The document states that applications for re-entry permits must be made in Country D prior to travelling offshore. Re-entry permits are valid for two years [i*nformation deleted in accordance with s431 of the Migration Act*].

78. The Country D website reports that permanent residents who have been out of Country D for one year and have not previously applied for a re-entry permit within Country D can apply for a returning resident visa at a Country D embassy offshore. Information on the website for the Country D embassy in Country E reports that to gain returning resident status an individual must provide evidence of their “continuing, unbroken ties with [Country D] that the stay outside [Country D] was truly beyond the applicant’s control and that the intent of the applicant was always return to [Country D]. Evidence

may consist of continuous compliance with [Country D] tax law, ownership of property and assets in [Country D] and maintenance of [Country D] licenses and memberships. Having relatives [in Country D], attending school overseas or stating an intent to return is generally insufficient" *([Information deleted in accordance with s431 of the Migration Act])*.

79. [I*nformation deleted in accordance with s431 of the Migration Act*]

80. According to Country D permanently residency can be revoked if a resident commits an act considered to be a deportable offence [I*nformation deleted in accordance with s431 of the Migration Act*]

FINDINGS AND REASONS

81. The applicants submitted copies of their Iraqi passports to the Department, and there is no evidence before the Tribunal to indicate that they are not Iraqi citizens. The Tribunal is satisfied, and finds, that they are citizens of Iraq and of no other country.

82. The Tribunal is satisfied that, in submissions to the Department, Applicant 2 completed Part D of Form 866 as a family member. There was no implied application as a refugee in relation to him.

83. Only Applicant 1 made claims to be a refugee in relation to Iraq, a fact that she confirmed in oral evidence to the Tribunal. The Tribunal has therefore only considered her in relation to the Refugees Convention criteria.

84. The Tribunal accepts that she is a Chaldean Christian. In relation to whether she has a well-founded fear of Convention related persecution in Iraq, the Tribunal has had regard to the evidence set out above from the UK Home Office, which plainly illustrates that Christians in Iraq are facing a very high level of intimidation because of their religion, and also because they are regarded as in some way associated with Western countries currently occupying Iraq - if that is so, some of the intimidation arises from a political opinion imputed to them. The Tribunal accepts that some Christians have been targeted for serious harm and indeed that some have been killed because of one, or a combination of both, of these factors. The Tribunal also considers that Applicant 1's claims with regard to her own experiences in recent years in Iraq were entirely consistent with the evidence cited in the UK Home Office report, and considers those claims are plausible. The Tribunal is of the view that merely being a Christian in Iraq is now sufficient to give rise to a well-founded fear of Convention-related persecution. It is therefore satisfied, and finds, that Applicant 1 has a well-founded fear of Convention-related persecution in Iraq.

85. The Tribunal is satisfied that, on the basis that she was a relative of a Country D citizen, Applicant 1 has been granted documentation entitling her to the permanent residence of Country D. Therefore the Tribunal has considered whether s.36(3) to (5) applies in this case - that is whether she has a legally enforceable right to enter and reside in a third country (in this case Country D), and has not taken all possible steps to avail herself of that right, and has no well-founded fear of being persecuted in that country or of being "refouled" to a country (in this case Iraq) where she has a well-founded fear of being persecuted.

86. The Tribunal accepts that, if Applicant 1 were denied re-entry to Country D, her only option would be to travel to her sole country of citizenship, Iraq. The Tribunal has accepted that she has a well-founded fear of Convention-related persecution in relation to Iraq. However for the following reasons the Tribunal is not satisfied that she has a legally enforceable right to enter and reside in Country D.

87. In arriving at this conclusion the Tribunal notes the evidence from Country D's Citizenship and Immigration Services website, a government website, that, although a person who has been abroad for *over* a year may be found to have "abandoned" their permanent residency if they have not taken certain steps to ensure they can re-enter Country D, [*information deleted in accordance with s431 of the Migration Act*] and an individual may be found to have abandoned their permanent resident status if they move to another country permanently.

88. This indicates that, although she has been outside Country D for less than one year, Applicant 1 does not have an existing, legally enforceable "right" to enter and reside in Country D. Rather, it is discretionary, relying on the perception of the Country D authorities when she attempts to gain re-entry as to whether she intended to move to Australia permanently and/or has abandoned her permanent residency. The Tribunal considers plausible the claim that Applicant 1 has lost her Iraqi passport, which contains the documentary evidence that she has been granted a Country D visa. Therefore any approach by her to the Country D authorities regarding her status will inevitably lead to checks being made to confirm that status. Her Relative B in Country D is a citizen of that country and the Tribunal is satisfied that it was on that basis that Applicant 1's permanent residence in Country D was granted. If the relevant Country D authorities were to make enquiries of her Relative B about Applicant 1's intentions in departing Country D or her intentions while abroad, there is a real possibility, given the evidence that their relationship has broken down and that Relative B may prefer Applicant 1 not to re-enter Country D, that she will respond that Applicant 1's intention was to live abroad permanently. That appears to be sufficient to allow the Country D authorities to decide that she has abandoned her permanent residency, and to refuse her entry.

89. On the basis of all these considerations the Tribunal finds that Applicant 1 does not have a legally enforceable right to enter and reside in Country D.

90. The Tribunal finds that s.36(3) does not apply to the applicant with respect to Country D.

91. For the above reasons the Tribunal is satisfied that Australia owes protection obligations to her. The Tribunal finds that she has a well-founded fear of Convention-related persecution in relation to her country of nationality, Iraq.

CONCLUSIONS

92. The Tribunal is satisfied that Applicant 1 is a person to whom Australia has protection obligations under the Refugees Convention. Therefore she satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided she satisfies the remaining criteria.

93. The other applicant applied as a member of Applicant 1's family. The Tribunal is satisfied that he is her family member and is thus the spouse of the first named applicant for the purposes of s.36(2)(b)(i). The fate of his application depends on the outcome of her application. As she satisfies the criterion set out in s.36(2)(a), it follows that he will be entitled to a protection visa provided he meets the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa.

DECISION

94. 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 the spouse of the first named applicant.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the Migration Act 1958.

Sealing officer's I.D. prrt44