

1317610 [2014] RRTA 472 (28 May 2014)

DECISION RECORD

RRT CASE NUMBER: 1317610

COUNTRY OF REFERENCE: Stateless

TRIBUNAL MEMBER: Melissa McAdam

DATE: 28 May 2014

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to 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 stateless, applied to the Department of Immigration for the visa [in] 2013 and the delegate refused to grant the visa [in] 2013.
3. The applicant appeared before the Tribunal on 23 May 2014 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.
4. The applicant was represented in relation to the review by his registered migration agent.

RELEVANT LAW

5. The criteria for a protection visa are set out in s.36 of the Act and 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 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

Refugee criterion

6. 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 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).
7. 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.
8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

10. 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)). Examples of 'serious harm' are set out in 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.
11. 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.
12. 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.
13. 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 '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.
14. 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.
15. 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

16. 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').

17. '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.
18. 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.

Section 499 Ministerial Direction

19. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

SUMMARY OF CLAIMS AND EVIDENCE

Protection Visa application

20. The following is a summary of the claims and information provided to the Department by the applicant in his Protection visa application:
 - a. The applicant was born on [a certain date] in [Kuwait]. He is Bidoun and of Sunni Muslim religion.
 - b. His parents are deceased. He has no surviving siblings. He married his current wife in Iraq in 1994. He has two [children] who are permanent residents in Australia. He has [eleven children] living in Iraq. His current wife and his two ex-wives are living in Iraq. One [child] lives in [Country 1].
 - c. The applicant was born a stateless Bidoun in Kuwait. He completed secondary school in Kuwait. He worked for the Kuwaiti police as a police officer [for eighteen years].
 - d. After the Iraqi invasion of Kuwait and the first Gulf War the applicant was arrested and accused of collaborating with the Iraqi forces. He was detained for two months then released and deported across the border with Iraq in about 1992.

- e. He was resettled inside Iraq in [Town 2] in Basrah province and issued with documents giving him limited rights.
 - f. In Iraq he lived until 2004 in [Town 2]; from [2004] until [2005] in [City 3]; and from [2005] until [2013] in [Town 4].
 - g. During the former Iraqi regime the applicant was forced to join the Ba'ath Party and the People's Army (*Jaysh Al Shaabi*). However he was not able to acquire Iraqi nationality.
 - h. After the Saddam Hussein regime was toppled the applicant was targeted by Islamic Shi'ite because of his combined profile – Kuwaiti Bidoun, Sunni denomination, former Ba'ath Party member, and former member of the People's Army. He was accused of blasphemy, atheism, and spying for Kuwait.
 - i. The applicant was arrested and detained several times by the Al Mahdi Army and the Al Fadheela Party. He was tortured by them and pressured to confess he was a Kuwaiti spy.
 - j. With the help of the [local] clans the applicant fled to [City 3] and lived on a farm owned [by] clan members. However the sectarian violence in Iraq spread. He and his family stayed in their house in fear.
 - k. The applicant's brother stayed in Basrah and was killed by the Mahdi Army militias. The applicant was told the militias were looking for him so he left [City 3] and went to [Town 4] in Wasit province. He obtained protection from a local Sheikh, [Sheikh A], there and stayed on one of his farms away from danger.
 - l. [Two of the Sheikh's sons] became influential parliamentarians. They formed strong relations with the Al Sadr, Al Hakeem and Da'wa Party groups. These groups were targeting Sunni Muslims.
 - m. A Sunni uprising occurred in the provinces of Anbar, Mosul, and Salahedeen. A fatwa was declared in the south permitting the killing of Sunnis in retaliation for the uprising. The applicant faced insults, curses, and threats. His brown complexion and his Kuwaiti dialect identified him as of non-Iraqi origin.
 - n. In 2010 the applicant obtained an Iraqi passport through payment of large bribes. He travelled into Syria in 2012 and approached the UNHCR in Damascus. However it was too dangerous in Syria and many Iraqi passport holders were being killed there. After a few days the applicant was forced to return to Iraq.
 - o. In 2013 the applicant's [child] in Australia obtained a Visitor visa for the applicant. He arrived in Australia [in] 2013. The applicant travelled to Australia on an Iraqi passport issued in Baghdad [in] 2010.
 - p. The applicant's wife and children are living in fear in Iraq.
21. The applicant submitted documents in Arabic, with English Translations, stated to be a 'Warning' from the Al Mahdia Army (undated); the applicant's Kuwaiti Military Card; the applicant's Iraqi Marriage Certificate (1994); the Iraqi Death Certificate for [his brother] ([Town 2], [2005]); the applicant's Kuwaiti School Certificate ([year deleted]); a letter from

the International Committee of the Red Cross (ICRC) confirming the ICRC visited the applicant in prison in Kuwait [on two occasions in] 1991 and then in a Kuwait Deportation centre [in] 1991, the letter also confirms the applicant was deported to [a border town in] 1991 (1991).

Delegate's decision

22. The delegate accepted that the applicant is a Bidoun and was interrogated by the Mahdi Army or a similar group in Iraq in 2004. He accepted the applicant experienced discrimination and verbal insults in Iraq on account of his Bidoun and Kuwait background. He accepted the applicant received a threatening letter in [2012] but found there was no evidence that the applicant continued to be targeted for serious harm up to his departure to Australia. The delegate did not accept there was a real chance the applicant would face serious or significant harm in Iraq.

Information to the Tribunal

23. The applicant submitted written statements by several witnesses, Kuwaiti Bidouns now citizens of Australia, who attested to knowing the applicant and his family and also recently visiting Iraq and attempting to visit the applicant's wife and children now in [Baghdad]. Some of the witnesses wrote that they had also attended the funeral ceremony for the applicant's [brother], in Basrah in 2005. The witnesses refer to the precarious situation for the applicant's wife and children in [Baghdad] and their inability to move outside of home safely. They also state the area in which the applicant's wife and children are living was too dangerous for them to venture in to. Each of the witnesses expresses concerns about the ongoing danger to Kuwaiti-Bidouns in Iraq.
24. In hearing the applicant presented the following additional information, as summarised.
25. While they lived in Iraq the applicant and his family did not have jobs or employment. They had savings and also received financial support from the applicant's [child] in [Country 1].
26. As soon as he arrived in Iraq the applicant was required by the Iraqi authorities to join the People's Army, under the previous regime of Saddam Hussein. It was well known in the applicant's home area that he was a member of the People's Army.
27. After the collapse of the Saddam Hussein regime the Shia militias started to target people they considered collaborators. Many Bidouns from Kuwait were targeted. The applicant was captured by members of the Da'wa Party and later by the Al Fadheela group. He was held by the Da'wa Party for two days and by Al Fadheela for two to three days. He was captured because he was suspected of being a spy for Kuwait, and because he is Bidoun, a Sunni Muslim, and a former member of both the Ba'ath Party and People's Army. He was also accused of responsibility for bombings in the area. The Da'wa Party members bashed and humiliated the applicant and broke his teeth. [A certain sheikh] used his relations and influence to eventually free the applicant on both occasions. The applicant was told he had to leave the area.
28. The applicant moved to [Town 4] with his wife and eleven children. They were able to stay in properties owned by [Sheikh A]. Initially they lived in the city area. They stayed in houses with just two or three bedrooms. When the applicant felt he was becoming known or he

sensed hostility in the neighbourhood he would move his family to another house. They moved houses three times and moved farms once.

29. [Sheikh A] was the leader of a big tribe. His religion was Shia Muslim but he gave the applicant his assistance at the request of [a particular] tribe. The applicant was able to receive help from clans and tribes because he was a Sheikh of his tribe in Kuwait and his status traditionally warranted this.
30. It was not known that [Sheikh A] was helping the applicant. If it became known he was helping the applicant the militias would come to kill the applicant. Also it would affect the Sheikh's reputation in the tribe badly so that his tribe would turn against him.
31. When [Sheikh A]'s sons became parliamentarians the Sheikh told the applicant he had to move him and his family from the city to a farm as it would no longer be safe for them in the city. This was because the sons would be receiving visits from the political groups and information about the applicant's presence in [Town 4] could be disclosed. The sons knew the Sheikh was housing the applicant and his family but after the sons joined the Parliament the Sheikh did not tell them the applicant moved to one of his farms.
32. The applicant and his family rarely went out from their home. Sometimes the applicant's wife would go out to buy things but she would wear a niqab so she would not be recognised as a Kuwaiti Bidoun. Sometimes the applicant's children would attend school but often it wasn't safe for them to do so.
33. The applicant obtained an Iraqi passport by paying a 3 million dinar bribe to a group [in] 2010. He gave them the money and they brought him a passport. The applicant doesn't know how they obtained a passport for him but everything in Iraq can be sold and bought with money. The applicant could not obtain a passport legally because he does not have proof of Iraqi citizenship. He is not an Iraqi citizen. The Iraqi government does not consider him an Iraqi citizen. Each of the applicant's wives are also Bidoun from Kuwait. None of them are Iraqi nationals. The applicant's children do not have Iraqi nationality.
34. The applicant's wife and children have left [Town 4] because [their eldest son was kidnapped] and not released until a ransom of 5 million Iraq dinars was paid. The family moved to [a certain] area in Baghdad under the protection of [a] clan. They do not go out and no one knows they are Sunni or Bidoun. [The area] is a Shia-majority area, the family went there as it was the closest safe haven. The Sunni areas were too far away and they would be targeted in Sunni areas because they are strangers. Their dialect and skin colour would cause others to be suspicious and consider them a threat. Iraqi culture is no longer welcoming to strangers because of all the different political groups and conflicts.
35. In Iraq even under the former regime the applicant did not have rights. He could not get a salary or own a house. He was not legally permitted to work in Iraq.
36. During the days of Saddam Hussein there were many Kuwaiti Bidouns living in Iraq. Now they are dispersed and those who could leave have left Iraq and gone to places like Qatar and Jordan because of fear of the Shia militias.

CONSIDERATION OF CLAIMS AND EVIDENCE

37. The issues in this case are the country of reference for the applicant and the well-foundedness of his fear of serious harm.

Country of Reference

38. The applicant claims to be stateless. He claims he was deported from Kuwait to Iraq and that he does not have Kuwaiti or Iraqi citizenship.
39. According to available country information the Arabic word *bidoun* means ‘without’, and is derived from the Arabic phrase *bidoun jinsiyya*, meaning ‘without nationality’ or ‘without citizenship’.¹ The term Bidoun is used more generally in reference to residents from Kuwait and other Gulf countries who are ‘stateless’.² The UK Home Office’s 2011 *Operational Guidance Note – Kuwait* defines Bidouns as ‘Arabs who have residency ties to the country [Kuwait], some over many generations and some for shorter periods, but who lack or have failed to produce documentary evidence of their nationality.’³
40. During the 1980s, Bidouns comprised between 80 percent and 90 percent of the Kuwaiti army and made up the majority of the police force.⁴ Bidouns were subject to suspicion and poor treatment by Kuwaiti authorities after the 1990-91 Gulf War ended. Kuwait deported many Bidouns for alleged collaboration with Iraqi occupying forces during the war.⁵ In 2010 UNHCR published a report⁶ which stated that between 100,000 and 240,000 Bidoun left Kuwait at this time with the majority going to Iraq.⁷ Bidouns who left Kuwait as a result of the war were not allowed to return and remained stateless in Iraq and other countries.
41. The 2010 UNHCR report noted that Bidouns of Iraq ‘live in the desert in the southern provinces of Basra and Dhi-Qar (also known as Thi-Qar) and especially around Samawa.’⁸ Similarly, in 2011 the US Department of State reported that there were 54,000 stateless Bidoun living as nomads near Basra, Dhi-Qar, and Samawa governorates.⁹
42. Based on this country information the Tribunal accepts that the applicant was born in Kuwait and expelled to Iraq in [1991]. The Tribunal accepts that the applicant does not have Kuwaiti citizenship.

¹ Human Rights Watch 1995, *The Bidoons of Kuwait: “Citizens without Citizenship”*, August, p.2 <<http://www.hrw.org/reports/1995/Kuwait.htm>>

² Human Rights Watch 1995, *The Bidoons of Kuwait: “Citizens without Citizenship”*, August, p.2

³ UK Home Office 2011, *Operational Guidance Note – Kuwait*, May, p. 4

<<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/countryspecificasylumpolicyogns/kuwait-ogn?view=Binary>>

⁴ Human Rights Watch, 2011, *Kuwait: Prisoners of the Past, Bidun and the Burden of Statelessness*, June, p.14 <<http://www.hrw.org/sites/default/files/reports/kuwait0611WebInside.pdf>>

⁵ US Committee for Refugees and Immigrants 2002, ‘World Refugee Survey – Occupied Palestinian Territory, Israel, Iraq, Iran, Kuwait’, ECOI website <http://www.ecoi.net/file_upload/ds115_02295mde.pdf>

⁶ Laura Van Waas is a Senior Researcher and Manager of the Statelessness Programme, Tilburg Law School, Netherlands. See <http://www.lauravanwaas.com/>

⁷ Van Waas, L 2010, *The situation of stateless persons in the Middle East and North Africa*, UNHCR, October, p. 16 <<http://www.unhcr.org/refworld/pdfid/4cea28072.pdf>>

⁸ Department of Foreign Affairs and Trade 2010, *DFAT Report No. 10/54 – Iraq: RRT Information Request: IRQ37183*, 13 September

⁹ US Department of State 2011, *2010 Country Reports on Human Rights Practices*, 8 April, Section D.

43. Reports state that some time following the Gulf War, the Iraqi government offered a one-off grant of Iraqi citizenship to Bidouns who had fled or been deported to Iraq. According to a 2010 DFAT advice, approximately 47,417 Bidouns were granted Iraqi nationality under the one-time assistance package called the *Makremiayah*, meaning a ‘generous act.’¹⁰ To qualify Bidouns had to declare that ‘Kuwait was not their place of birth (i.e., had to renounce association with Kuwait) and often needed sponsorship by a local tribe.’¹¹ The number of Bidouns remaining stateless in Iraq after the war was estimated to be around 54,500 individuals or 5,430 families.¹² In 2010 UNHCR advised that the former Iraqi government granted Bidouns nationality certificates and passports under the *Makremiayah*.¹³ The UNHCR stated that those Bidouns who became citizens under the above arrangement ‘possess the Iraqi ID and nationality certificates’, whereas those who do not hold Iraqi citizenship ‘do not hold Iraqi ID cards, nationality certificates or PDS cards’.¹⁴ Similarly, DFAT noted in 2010 that stateless Bidouns ‘do not hold Iraqi nationality certificates, Iraqi ID cards or Public Distribution System (PDS) cards (which often double as identity cards)’.¹⁵
44. The applicant provided an Iraqi passport issued in Baghdad [in] 2010. He claims he is not legally entitled to the passport and was only able to obtain the passport through bribery. He claims he is not considered an Iraqi citizen by the government.
45. Available country information supports that it is possible to obtain a genuine Iraqi passport unlawfully in Iraq through bribery. For example, a 2012 article in the Guardian newspaper refers to a middle man in Baghdad who, through corruption, obtains passports as part of his ‘business’.¹⁶ A 2014 LandInfo Report¹⁷ also refers to the possibility of obtaining a passport through bribery in Iraq, stating that while it appeared to them there is not “a lot of room to bribe public officials at the passport offices” “the existence of bribery of employees at the passport offices obviously cannot be ruled out either”. The LandInfo report refers to the Iraqi government as “notorious for their widespread corruption” adding that the “country is ranked as one of the most corrupt in the world by Transparency International”.
46. A 2009 article in The Independent newspaper states:
- Several years ago the government starting issuing special passports, which were supposedly more secure than before. But since the easiest way to obtain one is through a bribe, in which case few questions are asked, the new passports are even more insecure than their predecessors.¹⁸
47. The corruption monitoring organisation, Transparency International, wrote in 2013:

¹⁰ Department of Foreign Affairs and Trade 2010, *DFAT Report No. 10/54 – Iraq: RRT Information Request: IRQ37183*, 13 September.

¹¹ Department of Foreign Affairs and Trade 2010, *DFAT Report No. 10/54 – Iraq: RRT Information Request: IRQ37183*, 13 September

¹² Department of Foreign Affairs and Trade 2010, *DFAT Report No. 10/54 – Iraq: RRT Information Request: IRQ37183*, 13 September

¹³ United Nations High Commissioner for Refugees (UNHCR) 2010, Email ‘Bidoon in Iraq’, 8 September

¹⁴ United Nations High Commission for Refugees (UNHCR), 2010, Email ‘Bidoon in Iraq’, 8 September

¹⁵ Department of Foreign Affairs and Trade (DFAT), 2010, *RRT Information Request: IRQ37183*, Report No. 1197, 14 September

¹⁶ *The Guardian*, 2012, “Corruption in Iraq: ‘Your son is being tortured. He will die if you don’t pay’”, 16 January.

¹⁷ *LandInfo*, 2014, “Iraq: Travel documents and other identity documents”, 23 January.

¹⁸ *The Independent*, 2009, “How bribery became a way of life in Iraq”, 28 June.

Passports, taxes and oil distribution offices were the worst offenders, with up to 23% of users declaring having paid a bribe in selected passport offices.¹⁹

48. An article, “Corruption In Iraq: Conflict, Costs And Causes”,²⁰ states:

In Iraq, although laws may call for severe punishment for bribery, the chances of being caught and convicted are near zero. In 2008, the GoI charged only 300 persons with corruption (out of a total of over 2.3 million government employees) and convicted 86. Not only is this believed to be only a small fraction of the corrupt but also the convicted were low level employees charged with selling fake passports. (US Department of State 2008) With subsidies providing large rewards for corruption and little likelihood of being punished, it is not surprising that corruption in Iraq is so pervasive.

49. The applicant has been consistent in his evidence that he is not an Iraqi citizen and was not legally entitled to an Iraqi passport but was able to obtain one through bribery. The possibility of this is also supported by the available county information. On the basis of the evidence before it the Tribunal gives the benefit of the doubt to the applicant and accepts that he is not a citizen of Iraq and that he unlawfully obtained an Iraqi passport. The Tribunal accordingly finds that the applicant is stateless.

50. The applicant has resided continuously in Iraq from 1991 until [2013], apart from a few day stay in Syria in 2012. The Tribunal accepts that the applicant was resident in Iraq with his family for over twenty years before coming to Australia. The Tribunal therefore finds that Iraq is the applicant’s country of former habitual residence and that this is his country of reference for the purposes of assessing whether or not he is a refugee within the meaning of the Convention.

Claimed Fears in Iraq

51. The applicant claims to fear being kidnapped and killed in Iraq by Shia militias and armed political groups. He claims this risk exists because of his profile as a Sunni Bidoun from Kuwait, and former member of the Ba’ath Party and People’s Army.

Fear of Shia militias and armed political groups

52. The Tribunal found the applicant consistent and sufficiently detailed in the presentation of his claims to have experienced harm and threats in Iraq after the fall of the former regime. While he was not very forthcoming in his initial answers to questions at hearing he did provide relevant and required information in his responses to further questions put to him. The Tribunal considered the applicant was well able to present a coherent narrative of his experiences including their causes, unfolding, and aftermath. His account contained simple, logical sequences in terms of timing and reason, without apparent exaggeration or embellishment. Given the brevity of his initial answers the Tribunal many times sought clarification and explanation which the applicant readily gave so that there was no residual confusion or uncertainty.

53. The Tribunal accepts the applicant’s claims of his experiences in Kuwait and Iraq. In summary it finds the following. The applicant is a Bidoun from Kuwait, considered a Sheikh of his tribe. He was deported to Kuwait in 1991 and was required by the Saddam Hussein regime to join the Ba’ath Party and People’s Army. After the fall of the regime he and his family gained the protection of [a] tribe in Basrah because of tribal links. During the

¹⁹ *Transparency International*, 2013: “Iraq: overview of corruption and anti-corruption”, April.

²⁰ Author: Frank R. Gunter PhD, Associate Professor Economics Department, Lehigh University, Pennsylvania

increasing Shia militancy and sectarian conflict the applicant was captured and physically mistreated twice, firstly by the Da'wa group and then by the Al Fadheela group. On both occasions he was kept for two or three days before [the] tribe were able to negotiate his release. The applicant then took his family to [City 3]. The applicant's [brother] remained in Basrah and was killed in 2005. The sectarian violence in Iraq spread and the applicant was informed he would be killed [so] he fled with his family to [Town 4]. In [Town 4] he was given accommodation in houses and farms owned by [Sheikh A] at the request of [the] tribe. He and his family lived in [Town 4] by keeping their presence hidden and staying at home as much as possible.

Country Information

54. The UNHCR *Guidelines* of May 2012 list those individuals who are “likely to be in need of international refugee protection” for various reasons. This includes “Sunni Arabs in Majority Shi'ite Arab areas and Shi'ite Arabs in Majority Sunni Arab Areas”. The Guidelines say:

Both Shi'ites in Sunni dominated neighbourhoods and Sunnis in Shi'ite-dominated neighbourhoods have reportedly been subjected to threatening letters demanding that they vacate their homes. In cases where individuals do not comply, there are reports of violence or harassment, including killings.²¹

55. There is a substantial amount of country information relating to sectarian violence in Iraq.²² News reports from 2013 and 2011 refer to Sunnis receiving threatening letters from Shia militia groups demanding they leave their homes.²³
56. Iraqi security forces are recently reported to have commenced a “crackdown on Iranian-backed Shiite militants” responsible for most of the increasing number of attacks on US soldiers, according to American and Iraqi officials. Hakim al-Zamili, a Sadrist MP with a seat on the security committee, has said the military planned to extend an operation against Shiite militants in the southern province of Maysan to Basra in the coming days or weeks.²⁴
57. The United Nations High Commission for Refugees (UNHCR), in its 2012 *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq*²⁵, advises that levels of violence in Iraq have declined since the height of the conflict (between US and Multi-National Forces and local insurgents and armed groups) in 2006 and 2007. However, while the violence appears to have stabilized, it is still at a high level and continues to affect a large number of Iraqis.²⁶ According to this report, armed groups opposed to the Iraqi Government remain active and capable of inflicting regular mass casualty attacks, often directed at Shi'ite civilians, and are also responsible for targeted attacks on government and security officials and politicians, tribal and religious leaders, among others. As noted above,

²¹ United Nations High Commission for Refugees 2012, UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq*, 31 May, <http://www.unhcr.org/refworld/pdfid/4fc77d522.pdf>

²² For example, the US State Department's *International Religious Freedom Report* for Iraq, July 2011.

²³ *The Independent*, ‘The Sunni rise again: Uprising in Syria emboldens Iraq's minority community’ 2013, March 20 <<http://www.independent.co.uk/news/world/middle-east/the-sunni-rise-again-uprising-in-syria-emboldens-iraqs-minority-community-8521665.html>>

²⁴ Schmidt, M. & Arango, T. 2011, ‘Iraq Assaults Shiite Militants Linked to Iran’, *The New York Times*, 2 July –

²⁵ United Nations High Commission for Refugees 2012, UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq*, 31 May.

²⁶ UNHCR, page 8

the casualty figures suggest that an increasing number of Iraqis are being individually targeted. Moreover,

...in 2010 and 2011 armed groups increased attacks against the ISF in an apparent effort to destabilize the country and undermine confidence in the ability of the Iraqi Government to provide security. Iraqi soldiers and policemen are killed on a daily basis. This trend is expected to continue following the USF-I's withdrawal from Iraq in December 2011. Members of the Iraqi Police are often particularly targeted: they do not have heavy weapons and equipment and receive less training than the Iraqi Army, and are accordingly reportedly considered the weakest element of the ISF. In 2011, according to Iraqi Government statistics, about 40 per cent of Iraqis killed were ISF members, including 609 Iraqi police and 458 soldiers. ISF patrols, convoys, checkpoints, army bases and police stations are subject to daily attacks, mainly by roadside bombs and gunfire. Checkpoints are also regularly attacked by sniper fire. The ISF are frequently targeted in larger attacks involving car bombs or suicide bombers, including in multiple coordinated attacks across the country. Major attacks against the ISF in 2011 and 2012, some of them claimed by Al-Qa'eda in Iraq (ISI/AQI), were carried out in ... In addition, targeted killings of ISF personnel have been increasing since late 2010. .. In southern Iraq, targeted attacks on senior ISF officials are less frequent.²⁷

58. The UNHCR Guidelines state that while the violence is mostly concentrated in the predominantly Sunni or mixed central governorates, it occasionally moves into the mainly Shi'ite governorates further south, including Thi Qar, from where the applicant comes. According to the report, a number of armed groups have a presence in Thi Qar Province, and have targeted, among others, perceived collaborators with the multi-national or US forces in Iraq, including members of the ISF (Al Qaeda in Iraq also known as the Islamic State of Iraq)²⁸, and Jaysh Al-Mahdi (Promised Day Brigades) and Asa'ib Ahl Al-Haq.²⁹
59. *Iraq Business News* releases weekly security updates for 4 July 2012 states that reported incidents in the South East Region increased from ten to thirteen, above the weekly average for 2012, and noted that "unusually activity was focussed in Dhi Qar rather than Basra province".³⁰
60. In December 2012 and January 2013 protests occurred throughout Iraq provoked by the belief that Sunnis are being targeted by authorities.³¹ The protests occurred mostly in Sunni-dominated areas³² such as the northern and western provinces of Anbar, Salaheddin, Diyala, Kirkuk and Nineveh.³³ The demonstrators claim that Iraq's anti-terrorism laws were being used to falsely detain Sunnis.³⁴ According to the protestors, Shia-led authorities have misused such laws to target Sunni communities.

²⁷ UNHCR, page 15

²⁸ UNHCR, pages 10, 12

²⁹ UNHCR, page 11

³⁰ Sandiford, G, 2012, 'Weekly Security Update for 4th July 2012', *Iraq Business News*, 4 July <<http://www.iraq-businessnews.com/2012/07/04/weekly-security-update-for-4th-july-2012/4/>>

³¹ Abduljabbar, N 2013, 'Same scenario repeats itself in Iraq: Real anger in front, Islamists in background', *Middle East Online*, 5 January <<http://www.middle-east-online.com/english/?id=56276>>; 'Iraq Sunni MP killed by suicide bomber' 2013, *BBC*, 15 January <<http://www.bbc.co.uk/news/world-middle-east-21031198>>

³² See the following map for the locations of the Sunni dominated provinces: Stratfor 2011, *Iraq's Ethno-Sectarian Divide*, 19 December <<http://www.stratfor.com/image/iraqs-ethno-sectarian-divide>>

³³ Abduljabbar, N 2013, 'Same scenario repeats itself in Iraq: Real anger in front, Islamists in background', *Middle East Online*, 5 January <<http://www.middle-east-online.com/english/?id=56276>>

³⁴ Abduljabbar, N 2013, 'Same scenario repeats itself in Iraq: Real anger in front, Islamists in background', *Middle East Online*, 5 January <<http://www.middle-east-online.com/english/?id=56276>>; 'Iraq Sunni MP killed by suicide bomber' 2013, *BBC*, 15 January <<http://www.bbc.co.uk/news/world-middle-east-21031198>>

61. The most recent *International Religious Freedom* report notes that ‘Sunnis in Shia-dominated neighborhoods... reported receiving anonymous death threat letters demanding that they leave their homes’.³⁵ Similarly, UNHCR Guidelines³⁶ stated:

While open sectarian violence between Arab Sunnis and Arab Shi’ites ended in 2008, armed Sunni groups continue to target Shi’ite civilians with the apparent aim of reigniting sectarian tension. Sectarian-motivated violence includes: mass-casualty attacks targeting Shi’ite civilians and pilgrims; threats against Sunnis in Shi’ite majority areas and Shi’ites in Sunni majority areas; as well as targeted killings of both Sunni and Shi’ite clerics and scholars.

Both Sunnis and Shi’ites living in or returning to areas in which they would constitute a minority may be exposed to targeted violence on account of their religious identity. Both Shi’ites in Sunni dominated neighbourhoods and Sunnis in Shi’ite-dominated neighbourhoods have reportedly been subjected to threatening letters demanding that they vacate their homes. In cases where individuals do not comply, there are reports of violence or harassment, including killings.

62. In its 2011 *Country Human Rights Practices 2011: Iraq* report, the US Department of State noted an increase in al-Qaida in Iraq attacks against Sunnis cooperating with the government, the Sons of Iraq and Sunni tribal leaders.³⁷
63. The above country information accords with the applicant’s account of his and his family’s experiences post-regime change in Iraq. The Tribunal considers the applicant’s additional profile as a Bidoun from Kuwait increased his vulnerability to the sectarian targeting occurring in the south of Iraq. The Tribunal accepts the applicant is easily recognisable as a Sunni as a Bidoun from Kuwait because of his skin colour and general appearance and dialect.
64. The applicant gave evidence, which the Tribunal accepts, of the hostility and threats shown to him as a Sunni Bidoun when his presence became known in [Town 4]. The Tribunal notes and accepts the applicant’s evidence that his ‘protector’ at the time, [Sheikh A] advised him to move to one of his farms to isolate himself from the threat of being killed. The Tribunal accepts that the applicant’s recent life in [Town 4] was insecure given the ongoing sectarian volatility and conflict in south and central Iraq.
65. There is no indication in the available country information that the threat to a vulnerable and readily identifiable Sunni - particularly a non-Iraqi Bidoun and one with the high-tribal status of the applicant - in a Shia majority area, has evaporated in Iraq or even lessened to the degree that the chance of harm can be considered remote. The Tribunal considers there is a risk of further harm to the applicant from Shia militant groups if he returns to Iraq. In view of the reports of the more sporadic and less frequent nature of sectarian targeting the Tribunal does not consider the risk of harm to the applicant is high. However it does consider that the chance of serious harm to him in the reasonably foreseeable future is a real one and not a remote one. While the Tribunal notes the applicant was able to avoid harm in [Town 4] by living on the remote farm of a powerful Sheikh it considers that such a situation is not only

³⁵ United States Department of State 2012, *International Religious Freedom Report for 2011– Iraq*, 30 July <<http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?dlid=192885>>

³⁶ United Nations High Commissioner for Refugees 2012, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq, 31 May, p.26

³⁷ US Department of State, *Country Human Rights Practices 2011: Iraq*, 8 April, p. 4 www.state.gov/g/drl/rls/hrrpt/2010/nea/154462.htm

highly and unreasonably restrictive of the applicant's and his family's lifestyle, but also far too tenuous to be able to reasonably safeguard him from inevitable discovery and targeting.

66. The applicant's past experiences and the current country information provide a factual basis for the applicant's fear that the Shia militants who would target him on return are likely to resort to violence against him. The Tribunal is satisfied that the applicant is at risk of being kidnapped, seriously physically mistreated and killed by them and that there is a real chance this will occur.
67. The Tribunal is satisfied the reason the applicant would be harmed by Shia militants in Iraq is because of his cumulative profile as a Sunni, Bidoun from Kuwait, of high tribal status. The Tribunal considers that being a Bidoun from Kuwait is a racial aspect of the applicant's identity. The Tribunal further considers that his status as a leader or Sheikh in his tribe gives rise to an imputation by Shia militants that he will or can act politically against them. The Tribunal is therefore satisfied that the essential and significant reasons for the harm the applicant fears are his religion, race and imputed political opinion.

Protection

68. The Tribunal considers that the available country information does not establish the applicant will be able to receive protection from the Iraqi authorities from the harm he fears there. The information shows that the Iraqi authorities still lack the resources to combat the ongoing and widespread violence. For example the 2012 UNHCR *Guidelines* assess that because of the weak law enforcement and justice system in Iraq, persons at risk of persecution are unable to find protection or judicial redress:

Generally, protection by national authorities will not be available given that the national authorities have as yet limited capacity to enforce law and order. Members of the ISF ['Iraqi Security Forces'] and the judiciary are themselves a major target of attacks and are reportedly prone to corruption and infiltration.³⁸

69. The Tribunal has considered whether the applicant could obtain protection through reliance upon the tribal relationships which assisted him and his family in the past in Iraq. The applicant gave evidence, which the Tribunal accepts, of the need for [Sheikh A] to keep both his assistance to the applicant, and the applicant's presence in [Town 4], secret from others. The applicant explained that although [Sheikh A] gave the applicant accommodation the Sheikh did so at the risk of his tribe turning upon him if this was discovered. The applicant further explained that if others were to find out the applicant was being assisted by the Sheikh in [Town 4] the applicant would be killed. On the basis of this evidence the Tribunal accepts that, despite his power, the Sheikh was not able to protect the applicant from violence but merely provide him accommodation, and further that this was at risk to the Sheikh himself. Given this situation the Tribunal is not satisfied that the applicant would be able to rely upon such tribal assistance to protect him from the physical harm he fears in Iraq.
70. The Tribunal is satisfied that there is no effective, or reasonable level of, protection available to the applicant in Iraq from the harm he fears there.

Relocation

³⁸ UNHCR page 13

71. According to the 2012 UNHCR Eligibility Guidelines:

Armed groups reportedly have operatives in many parts of the country and, as a result, a viable IFA/IRA [‘internal flight alternative/internal relocation alternative’] will likely not exist for individuals at risk of being targeted by such groups in southern and central Iraq. As reported throughout these Guidelines, armed groups are present in many parts of the country and have demonstrated mobility in accessing areas where they do not have strongholds. The mobility and reach of armed groups should not be underestimated in determining the relevance of an IFA/IRA. Persons seeking to relocate to other areas in central and southern Iraq may be at risk of facing renewed violence given the high levels of violence prevailing in many areas. UNHCR protection monitoring shows that lack of physical safety remains a concern for both IDPs [‘Internally Displaced Persons’] and returnees, particularly in the central governorates. Reports have been received of returnees being targeted because they do not belong to the majority sect in their area of return. In some cases, these attacks have been fatal. The presence of IDPs can at times result in tensions with host communities that consider them a destabilizing factor.

72. The applicant gave evidence which the Tribunal accepts that he had to move home in Iraq many times to avoid threats that would develop in the areas he and his family lived.
73. To date in Iraq the applicant has had to rely upon the hospitality of Shia-tribal leaders, enabled by his own tribal status and links, so that he and his family could live temporarily, albeit often secretly and in inadequate accommodation, in Shia-majority areas. The Tribunal accepts the applicant’s evidence, supported by the country information, that as strangers with no local connections he and his family would not be welcome in Sunni-majority areas and so could not establish a home there.
74. On the evidence before it the Tribunal is not satisfied there is a reasonable or practicable, or even safe, relocation option for the applicant in Iraq to avoid the harm he fears there.

CONCLUDING PARAGRAPHS

75. Based on the above reasons and the information before it the Tribunal is satisfied that the applicant has a well-founded fear of persecution for a Convention reason in Iraq.
76. The Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

DECISION

77. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Melissa McAdam
Member