

**061017495 [2007] RRTA 24 (12 February 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 061017495

**COUNTRY OF REFERENCE:** Iraq

**TRIBUNAL MEMBER:** Genevieve Hamilton

**DATE DECISION SIGNED:** 12 February 2007

**PLACE OF DECISION:** Melbourne

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

## **BACKGROUND**

This is an application for review of a decision made by a delegate of the Minister for Immigration and Multicultural Affairs to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant arrived in Australia and applied to the Department of Immigration and Multicultural Affairs for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa.

The applicant applied to the Tribunal for review of the delegate's decision.

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 applicant has made a valid application for review under s.412 of the Act.

## **RELEVANT LAW**

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.

Section 36(2)(a) of the Act provides that a criterion for a Protection (Class XA) 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 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Convention). 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'**

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.

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.

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.

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

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.

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.

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.

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.

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.

Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

## **CLAIMS AND EVIDENCE**

The Tribunal has before it the Department’s file relating to the applicant.

The applicant was born in City A in the 1980s. He is an Iraqi citizen. He lived in Country B as a refugee and temporary resident since early 2000s, before coming to Australia. He has destroyed his travel document. In Iraq he worked in the automotive industry. In Country B he worked in the hospitality industry. His parents and siblings live in Iraq.

The applicant said the duration of his residence visa in Country B had recently been reduced to one year and he began to be concerned that Iraqi refugees were going to be repatriated to Iraq.

He grew up in a suburb of City A. As far as he knows his family are still alive but he had not had any contact with them since the early 2000s. His father used to transport goods into Country C. In his teens he was forced to go to a youth military training camp run by the Iraqi authorities. There he was discriminated against for being a Christian. After a short time he absconded, and left the country with the help of a family member and his contact in the north. The applicant describes the process of being smuggled through Turkey into Country B by road.

In the mid-2000s his second temporary residence permit in Country B expired. He was given an extension and made to go to court. He understood that if he was not granted another 2-year permit he would be made to return to Iraq. He heard that this had indeed happened to other Iraqi refugees in Country B. So he contacted a smuggler who obtained a photo substituted passport and tickets for him. He was aware his grandmother had migrated to Australia back in the 1990s. When he arrived here and made contact with the Iraqi community he learned he had relatives here.

The applicant stated that the situation was very dangerous in Iraq for certain groups. He was also at risk because of the time he had spent in the West, and would be accused of supporting the US and its allies.

The applicant submitted his ID card and citizenship certificate.

Advice was obtained from the post in Country B to the effect that the applicant had limited rights of asylum in Country B, in the form of a temporary residence permit; it could be revoked in the case of a change of circumstances, for example substantial changes in the political situation in the applicant's home country, and in any case would cease (in the sense that he would no longer have a right of re-entry into Country B) if he was absent from Country B for more than six months.

The Delegate also records having had the following advice from an official of the Country B's Consulate General in City D: in some cases those who had been absent for longer than six months can be given permission to return, but they would have to attend the Consulate to apply for another travel document and visa. This would be subject to the approval of the authorities in Country B.

The Delegate noted that the applicant had torn up his travel document. Notwithstanding this, the applicant would be granted a replacement permit if he approached the Country B's Consulate before 17 January 2007.

### **County information**

According to a Reuters news report, "Chaldeans...make up the largest of Iraq's Christian sects, and say that they have around 400,000 followers in Iraq. The total Christian

community in Iraq is estimated at around 750,000” (‘Ancient Christian sect mourns Pope in Iraq’ 2005, *Reuters News*, 3 April).

Reports focussed on Chaldean or Chaldoassyrian Christians in Iraq indicate that the situation has deteriorated sharply for the community since the collapse of the Ba’athist regime (Nichols, J. ‘Curtailling Christians in occupied Iraq’ 2004, *The Capital Times & Wisconsin State Journal, Editorial*, 21 December.) The Chaldean and broader Christian “community has been targeted by rebels since the fall of Saddam Hussein’s regime” (‘Ansar al-Sunna claims killing of Christian Iraqi general’ 2005, *Agence France Presse*, 18 March).

A number of Chaldean Churches were among over a dozen churches firebombed by insurgents in August, October, November and December 2004 (‘2 Mosul churches bombed, three people injured’ 2004, *Associated Press Newswires*, 7 December; [http://ntssyd/REFER/Research/Factiva/2 Mosul churches bombed.doc](http://ntssyd/REFER/Research/Factiva/2%20Mosul%20churches%20bombed.doc) ‘The Church in Iraq does not give in to terrorism’ 2005, AsiaNews website, 1 August <http://www.asianews.it/view.php?l=en&art=3834> – accessed 18 August 2005; Opiel, R. 2004, ‘Violence Mars Start of Ramadan: Five Christian churches targeted by Insurgents in Baghdad’, *The Houston Chronicle*, 17 October – Opiel also says “Iraq’s 800,000 Christians, who make up less than 4 per cent of the population, have come under growing threats and violence, prompting thousands to emigrate to Syria and other nations”; Iraq—Christians’ 2005, European Country of Origin Information Network website <http://www.ecoi.net/doc/en/IQ/content/7/7657-7859> - accessed 18 August 2005).

Christians have been subject to numerous incidents of violence, “ranging from individual killings to intimidate and assaults on women for not wearing a headscarf (hijab)”, since the fall of the previous regime (UK Home Office 2005 *Iraq: Country Report*; Phillips, J. E. 2005, ‘Iraqi Christians find safety in Syria: Religious violence prompted many to flee homeland’, SFGate.Com website, 19 July <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/07/19/MNGSQDQ4C21.DTL&type=printable> – accessed 18 August 2005).

In October 2004, the general secretary of the Assyrian Democratic Movement “said that more than 100 Christians had been murdered after the U.S.-led war, including 35 liquor vendors and others who worked for coalition forces sources” (Faramarzi, S. 2004, ‘Iraqi Christians fleeing latest church bombings leave more pews empty’, *The Charleston Gazette*, 17 October.)

In one among many incidents reported by *The Christian Science Monitor* in July 2004, the children of a Christian father, aged 5 and 14, were allegedly killed by four men because “[t]heir father, a Christian storekeeper, had sold alcohol”. There is a “widespread belief that Christians are wealthy” and “pro-American”, exposing them to kidnapping – “both for terrorism and financial gain”. (Ciezdlo, A. 2004, “Iraq’s Christians consider fleeing as attacks on them rise”, *The Christian Science Monitor* online edition, 13 July <http://www.csmonitor.com/2004/0713/p07s01-woiq.htm> - accessed 17 August 2005). <http://ntssyd/REFER/Research/INTERNET/MID-EAST/Iraq/irq17489.we5.doc><http://ntssyd/REFER/Research/INTERNET/UKhome/Current/IraqApr2005.doc>

In January 2005, media reports indicate that the Chaldean Bishop of Mosul was “briefly held by a terror group” (Rothwell, N. 2005, ‘Christians “safer under Saddam”’, *The Australian*, 25 January).

Reports cited by the UK Home Office in its latest Country Report on Iraq also indicate that events in Iraq since the fall of the previous regime “point towards the deterioration in the situation for Christians in practical terms”. Also, with respect to whether Christians are able to practice their religion freely, the report cites advice from the Foreign and Commonwealth Home Office, current at 20 January 2005, which states as follows:

But Iraqi Christians do face a growing sectarian threat. While we are not aware of any officially sponsored discrimination against Christian communities in Iraq, reports of attacks on them are on the increase. ... We see increasing evidence of sectarian intimidation. Recent examples include threatening notes pushed through doors, death threats to priests and church leaders, posters in the north warning Christians to convert to Islam or leave Iraq or face death and destruction of homes and Islamist websites calling for attacks on all infidels in Iraq. Iraqi Christians are feeling increasingly beleaguered. Church attendance is falling and some families are keeping their children away from school. (UK Home Office 2005 *Iraq: Country Report*)

That advice accords with a range of media reports. In addition to those cited above, there is Witter, W. 2004, ‘Iraqi Christians fear Muslim wrath; Baghdad families report murder, intimidation’, *The Washington Times*, 7 April.

On the issue of state protection, Dr Charles Tripp, an academic from the University of London, in a seminar for Tribunal members in November 2004, provided the following observations on security in

Iraq:<http://ntssyd/REFER/Research/INTERNET/UKhome/Current/IraqApr2005.doc>

One of the problems for the Iraqi security forces is that it is almost certain that they too are infiltrated by the leaders of the insurrection. There was a great drive to recruit people to the new Iraqi army, the new police force, the civil defence force, and it’s almost certain that many people who have been involved in the insurrection infiltrated those forces at the same time. So one can argue that that part of Iraq, the centre and the north, is in a condition of classic guerrilla war. In addition to that, what makes life very dangerous for many ordinary Iraqis in that whole area, is not so much the political insurrection, but the criminality. This is a terrain now of kidnapping for profit – you kidnap somebody, you hold them to ransom, their family desperately searches around for the money and they try and get the person to be returned. Kidnapping is a flourishing growth industry unfortunately, allied to protection rackets, drug rackets, and arms rackets in Iraq. All of these are highly desirable commodities and all of them are now subject to a good deal of criminality. The Iraqi police forces and security forces are completely overstretched – they can’t deal with this – and insofar as they are able to deal with anything, they try and keep their eyes on the insurrection. But in fact the criminal gangs operating in Iraq are probably just as much of a threat to ordinary Iraqis’ security as anything else. So it’s a very dire and pretty terrible picture in the north and centre of Iraq at the moment.

## **FINDINGS AND REASONS**

Based on the information on the Department’s file, the Tribunal finds that the applicant is an Iraqi national. Based on the fact that several of his sibilings have Christian first names, the Tribunal accepts that the applicant is a Chaldean Christian.

The country information cited above clearly establishes that Iraqi Christians are expressly threatened and in practice are at risk of being directly physically attacked and even killed, or being the victim of bombings of their Churches, since the fall of Saddam Hussein's regime put an end to the secular dictatorship and unleashed competing groups of fundamentalist Muslims. This is because of their minority religion, and their perceived association with the West. The insurgency, lawlessness and sectarian violence have only worsened since these reports.

Based on the country information the Tribunal finds that the applicant faces a real chance of serious harm for a Convention reason.

Based on the country information, the Tribunal finds that the Iraqi authorities are unable to protect him from such harm. The Tribunal is also satisfied that the applicant cannot reasonably or effectively avoid persecution by relocating within Iraq.

The applicant's right to enter and temporarily reside in Country B expired. It did not expire due to actions of his but due to the time taken to process his protection and review applications in Australia. He can apply for a new visa to Country B but there is no information before the Tribunal on which one make a confident finding that such an application would be successful.

The Tribunal finds that the applicant does not have effective protection as a matter of practical reality and effect in any third country or a right to enter and reside in any third country within the meaning of section 36 (3) of the Act.

The Tribunal is satisfied that the applicant has a well-founded fear of persecution within the meaning of the Convention.

## **CONCLUSIONS**

The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2) for a protection visa.

## **DECISION**

The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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. Iward

