

**060662741 [2006] RRTA 181 (8 November 2006)**

**DECISION RECORD**

**RRT CASE NUMBER:** 060662741

**COUNTRY OF REFERENCE:** Iraq

**TRIBUNAL MEMBER:** Paul Fisher

**DATE DECISION RECORD SIGNED:** 8 November 2006

**PLACE OF DECISION:** Melbourne

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

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

The applicants, who claim to be citizens of Iraq, arrived in Australia and applied to the Department of Immigration and Multicultural Affairs 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 which was posted to them on the same day.

The delegate refused the visa application as the applicants are not persons to whom Australia has protection obligations under the Refugees Convention.

The applicants 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 applicants have 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, in this case 24 April 2006, although some statutory qualifications enacted since then may also be relevant.

Section 36(2) of the Act relevantly provides that a criterion for a Protection (Class XA) visa is that the applicant for the visa is either:

(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol

or

(b) a non-citizen in Australia who is the spouse or a dependent of a non-citizen (i) to whom Australia has protection obligations under the Refugees Convention and (ii) who holds a protection visa.

'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. 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 the Refugees Protocol and generally speaking, has protection obligations to people who are refugees as defined in them. Article 1A(2) of the Convention 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) 205 ALR 487 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act now 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 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 including the DIMA file relating to the visa application which resulted in the grant of the visa which enabled the applicants to first enter Australia.

The first-named applicant made the following statutory declaration in support of his protection visa application:

[information about the applicant's statutory declaration amended in accordance with s.431 as it may identify the applicant].

1. *My name is Person A. I was born in Village F, Region M, Northern Iraq. I am married to Person B. We have a number of children. We belong to the Chaldean Christian minority.*
2. *As I used to own property and agricultural land in the area, I worked as a farmer. Part of my property was in the Christian village of Village F and part of it was located in the area of the nearby Muslim village of Village F. I still hold the title of the land in that part of the area. During the campaigns carried out by the successive Iraqi governments against the Kurdish rebellion in the north of Iraq, we, the Christians, were caught between the two opposing sides of the conflict, that is, the government and the rebel Kurds. Each side accused us of collaboration with the opposing side. In the late 1970s, we were forced out of Village F which was then destroyed by the Iraqi army. My family has no option but to relocate to another place. Thus we settled in the nearby town of City M ever since. We were deprived of and prohibited from exploiting and/or farming our property until the early 1990s.*
3. *In the aftermath of the Gulf war and the failed uprising of the Kurds in the north of Iraq, the Iraqi army was forced by the coalition countries and the United Nation to withdraw from the area which became under the control of the Kurdistan Democratic Party (KDP) in the early 1990s when we were able to start using only small portion of the land for many reasons. It was too hazardous to farm the land as it was used as a mine field by the Iraqi army. It was also covered by high grass and it was very difficult to recognize the boundaries and separate it from the adjoining fields. Another reason was that because of the*

*raids by armed men from the Kurdistan Workers Party (PKK) in the area. It was not until the mid 1990s when we were able to fully utilize the land.*

- 4. As the land was now at a distance from our place of residence City M, and having a business to manage in City M, it was not practical for us to cultivate and farm the land. Thus, I authorized a man from the Muslim village of Village F called (Person C) to manage it in return for a share of its product. This man is from an influential tribe in the area and a KDP member who had fled the area and was living abroad until he returned to the area when the KDP took control in the early 1990s. He has property adjoining to ours. However, he exploited the land to his own advantage and did not provide me with any real return during the last several years he managed the land. Knowing that he was a very influential man in the Kurdish faction ruling the area, I did not dare to complain to him or to the authorities in the area. However, he did offer to buy the land for a very cheap price but I declined to sell. In the late mid 2000s, I sold my property in the area of the Muslim village of Village F to a man called (Person D) prior to my trip to Australia.*
- 5. While in Australia, my child and my sibling informed me that while they were carrying out the survey of the land with this new owner to determine the boundaries between the land and the adjoining land which belongs to Person C, there erupted a dispute involving the boundaries between them and Person C who wanted to annex part of the sold land to his. There was a fight as result to the dispute between members of Person C's tribe and Person D's tribe which ended in the killing of Person C's relative. Person C and members of his tribe blamed my child, my sibling and me for the killing of their relative. They threatened to kill a member of our family in return. They want to apply the unwritten Tribal law to members of my family and avenge the death of their relative. Fearing for their lives, my child and my sibling fled the house to another place. They are now making arrangements to flee the country altogether.*
- 6. Therefore, my wife and I are too frightened to return to City M because this man Person C is an influential member in the KDP as well as he has a big tribe behind him. We have decided not to return to Iraq although we would be risking a financial penalty but also risking penalties imposed on my child.*
- 7. We are applying for a refugee status in Australia. We cannot return to Iraq where our lives will be in danger. We will be subject to the harassment of the Kurdish fanatics and constantly living in fear and threats. There is no authority in the country to protect us. The Kurdish tribes are the real authorities in the area. We have no other place in the world to go to. We are seeking the protection of the Australian government. We are looking forward to your assistance in approving our application to remain permanently in Australia where we have family.*

The protection visa application was also accompanied by supporting statement which reproduced the statutory declaration in the third person, and also included the following:

***APPLICATION OF THE ELEMENTS OF THE DEFINITION TO THE CLAIMS OF THE APPLICANT.***

*First, an applicant must be outside his or her country. In this matter the applicant is an Iraqi national and she has made claims against no other country and she is in Australia.*

*Second, an applicant must fear persecution. The term persecution is not defined in the convention. Not every threat of harm or interference with a person's rights for a Convention reason constitutes 'being persecuted'. However, judges in the "Chan case" made the following comments about persecution to include:*

*'Some serious punishment or penalty or some significant detriment or disadvantage' (Mason CJ).*

*'To constitute "persecution" the harm threatened need not be that of loss of life or liberty ... Measures "in disregard" of human dignity may, in appropriate cases, constitute persecution.'* (McHugh J).

*'The notion of persecution involves selective harassment. A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is "being persecuted" for the purposes of the Convention. The threat need not be the product of any policy of the government of the person's country of nationality. It may be enough, depending on the circumstances, that the government has failed, or is Unable to protect the person in question from persecution.'* (McHugh J).

*James Hathaway, the internationally recognised expert on refugee law, defines persecution in his textbook, The Law of Refugee Status, as:*

*The sustained and systematic violation of basic human rights demonstrative of a failure of state protection'.*

*In amendments to the Migration Act (2001), the matter of persecution was further defined. The Refugees Convention as amended by the Protocol does not apply unless:*

- (a) the reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and*
- (b) the persecution involves serious harm to the person; and*
- (c) the persecution involves systematic and discriminatory conduct.*

*The amendments include descriptors of what may constitute serious harm. While the list is not exclusive of sorts of harm, the following circumstances are instanced:*

- (a) a threat to the person's life or liberty;*
- (b) significant physical harassment of the person;*
- (c) significant physical ill-treatment of the person;*
- (d) significant economic hardship that threatens the person's capacity to subsist;*
- (e) denial of access to basic services, where the denial threatens the person's capacity to subsist*

- (f) *denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to exist.*

*Further, Australian courts have observed that 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.*

*Third, the reason for the persecution must be found in the singling out of one or more of the Convention reasons - race, religion, nationality, and 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. However, the persecution feared need not be solely attributable to a Convention reason. It is enough if race, religion, nationality, membership of a particular social group or political opinion, is but one of several reasons for the persecution feared. In this particular matter, the applicant has claimed to fear persecution for reasons of a particular social group i.e. member of a family whose life is in danger because of the death caused by land dispute to the relative of an influential Kurd who is a member of the KDP which rules the area. As well, he fears persecution for being a Christian.*

*There have been reports that tribal networks in Iraq were involved in extortion and organised crime. The police were reportedly reluctant to intervene for fear of reprisals from other tribe members and victims may have been reluctant to report crime for the same reason. In addition the applicants are helpless Christians facing unwritten tribal laws that prevail not only in the area but in the whole country. We quote from an article, (Who will save Iraq's Christians?) that appeared in the Canadian National Post on Tuesday, March 20, 2006 by Lawrence P. Kaplan, a senior editor at The New Republic:*

*"With the remnant of Iraq's Jewish population having long since fled the country, Christians have become today's victims of choice. Sunni, Shia and Kurd may agree on little else, but all have made sport of brutalizing their Christian neighbours, hundreds of whom have been slaughtered since the U.S. invasion. [Emphasis added].*

*... According to Iraqi estimates, between 40,000 and 100,000 have fled since 2004... while many more have been displaced within Iraq...*

*But however much of the clergy may deny it, Iraqi Christians suffer for their faith. Along with kidnappings and assassinations, church bombings have become a staple of Christian life in Iraq...*

*The blame accrues, in part, because of real and imagined ties to the West and to the Western power occupying Iraq. There is, in truth, a cultural affinity between Iraqi Christians, many of whom speak English (and, as such, account for a large percentage of the U.S. military's interpreters), and the mostly Christian soldiers occupying their country..."*

*Fourth, an applicant's fear of persecution for a Convention reason must be a 'wellfounded 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 if it is 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. The object of the Convention is to provide refuge for those who, having lost the de jure or de facto protection of their governments, are unwilling to return to the countries of their nationality. It follows that whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.*

*The applicants are unable and unwilling to return to her home country Iraq where they will be denied protection. There is no real authority that can provide effective protection to the applicant. UNHCR Return Advisory Regarding Iraqi Asylum Seekers and Refugees, September 2004, reports:*

*"... The Iraqi security bodies as well as foreign troops remain unable to provide adequate physical protection. The general lack of law and order is exacerbated by the absence of a properly functioning judicial system. As a result, many crimes are never reported to the police and disputes are often settled through tribal justice mechanisms or by persons who decide to take the law directly into their own hands..."*

*"... It should be noted that persecution related to Convention grounds continues to take place in Iraq in addition to the widespread civil strife. This is particularly so as the authorities are, in a climate of increasing violence, currently unable to provide effective national protection and because certain groups are targeted on the basis of real or perceived political affiliation, ethnic or religious differences..."*

*The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (January 1992 edition, Geneva) states:*

*'Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular or where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities or, if the authorities refuse, or prove unable, to offer effective protection.'*

*The applicants are outside their country of nationality. They are unable and unwilling to go back to their home country because it is too dangerous to go back. Threats to the lives of members of their family have been made. There is no real authority in the country to prevent such acts and provide for the protection of the applicants. Judges in Chan's case stated:*



*~... The threat need not be the product of any policy of the government of the person's country of nationality. It may be enough, depending on the circumstances, that the government has failed, or is Unable to protect the person in question from persecution.' (McHugh J).*

*We note the further advice of James Hathaway regarding the nature of political change, particularly as to how such a change should be assessed:*

*'First, the change must be of substantial political significance, in the sense that the power structure under which persecution was deemed a real possibility no longer exists. The collapse of the persecutory regime, coupled with the holding of genuinely free and democratic elections, the assumption of power by a government committed to human rights, and a guarantee of fair treatment for enemies of the predecessor regime by way of amnesty or otherwise, is the appropriate indicator of a meaningful change of circumstances. It would, in contrast, be premature to consider cessation simply because relative calm has been restored in a country still governed by an oppressive political structure....*

*Secondly, there must be reason to believe that the substantial political change is 'truly effective... in other words, the refugees right to protection ought not to be compromised simply because progress is being made toward real respect for human rights, even when international scrutiny of that transition is possible.'*

*Whether an applicant satisfies the Convention definition 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.*

#### **CONCLUSION.**

*As detailed above, we submit that the applicants meet the definition of the refugee. They indeed have substantive reasons for their sustained fear of persecution should they be forced to return to Iraq. We refer to the commutative notion of persecution as defined in the UNHCR Handbook:*

*'Very frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained. Taking isolated incidents out of context may be misleading. The cumulative effect of the applicant's experience must be taken into account. Where no single incident may be "the last straw"; and although a single incident may be sufficient, all the incidents related by the applicant taken together, could make his fear well-founded' [2011*

*'In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds". Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give*

*rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.'* [531]

*'It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect. It is evident that the reasons for persecution under these various headings will frequently overlap. Usually there will more than one element combined in one person, e.g. a political opponent who belongs to a religious or national group, or both, and the combination of such reasons in this person may be relevant in evaluating his wellfounded fear.'* [671]

*We submit therefore that the claims put forward by the applicants are compelling and credible. They cannot return to Iraq without enduring constant persecution and discrimination. We refer to those remarks within the UNHCR Handbook concerning the principle of evidentially burden:*

*'It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statement by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently without personal documents. Thus, while the burden of proof in principle rests with the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, be successful and there may also be statements that are not susceptible to proof. In such cases, if the applicant's account appears credible, he should unless there are good reasons to the contrary, be given the benefit of the doubt.'* [1961]

*We trust that when the delegate of the Minister for Immigration assesses this application with regard to the principles of the UNHCR Handbook, Chan's Case and the evidence provided, Person A and his wife Person B will accordingly be granted the protection of the Australian government as they are persons to whom Australia has protection obligations under the Refugees Convention.*

The applicants were invited to attend a hearing and also to provide further supporting information.

#### *Written Submissions to the Tribunal*

A submission in support of the review application was received by the Tribunal setting out legal arguments as to why the case came within the scope of the Convention, referring to country information said to support the applicant's claims, and correcting a misunderstanding by the delegate of one aspect of the applicant's claims, namely that his Convention claim was based on membership of a particular social group, namely his family.

The Tribunal received a fax from the applicant's adviser relying on and enclosing a copy of another applicant's Tribunal decision which was said to be factually similar to the present case.

### *The Tribunal Hearing*

The first-named applicant (hereafter "the applicant") appeared before the Tribunal to give evidence and present arguments. Also present were one of his children and also a relative who was available to give evidence, if required, about events in Iraq. The applicant was represented by his registered migration agent and the Tribunal was assisted by an interpreter in the Chaldean language.

The Tribunal inspected the passports of the first and second-named applicants, as only extracts had previously been provided to the Immigration Department. The passports confirmed the details of the dates of issue and the various travel undertaken by the primary applicant and his wife before they arrived in Australia. The applicant was asked why he had applied for the passport, which was issued in the mid 2000s, and he indicated, consistent with the reasons given in his first visa application, that he simply wanted to come to Australia. He confirmed that at that stage he had no particular reason to leave Iraq, but merely that he wished to visit his numerous relatives in Australia.

The applicant was asked to clarify details of his business activities and property ownership in Iraq, as the information on the protection visa application and supporting documentation was not entirely clear. He explained that prior to coming to Australia he had operated a business in City M and that these premises were rented. He went on to explain the nature of his ownership of various pieces of real estate referred to in the various documents submitted to the Immigration Department, including in support of his first visa application. He explained that originally he had held separate pieces of land in or around the twin villages of Village F. He explained that there were two villages, the Muslim Village F and a Christian village, and that they were a number of minutes walk apart. He had pieces of land in the Christian area, and one in the Muslim area.

The applicant was also asked about the other properties referred to in his first visa application. He explained that one of the titles did not accurately describe the ownership. He indicated that he owned a block of land on the outskirts of City M, on which a building had been built, but that he had not actually built the building. He indicated that a man called Person E had built the building, and had on occasions paid him a little rent, but that as he was a Muslim he was in control and he could pretty much do what he wanted.

The other block of land, copy of title of which was attached to the first visa application form, was the house where the applicant lived, and he confirmed that he owned both the house and the land. This was also on the outskirts of City M. He indicated that before he came to Australia he had passed control of the house, and what control could be exerted in respect of the building, to his sibling, and told his sibling that if his sibling could get anything out of the building owner his sibling was welcome to keep it and that his sibling could use the house. He confirmed that that house is the address referred to at one point in the first visa application as Address S, City M.

As for the parcels of land, he indicated that he had disposed of one, clarifying it in an uncertain aspect of his statement in the protection visa application by making it quite clear that it was the parcel of land in the Muslim area that he had disposed of. He pointed out that

the other parcels of land in the Christian area had been laying idle and had not been able to be used since the Iraqi forces destroyed that village and took over the area back in the 1980s, a long time ago; he could not remember exactly when. He confirmed that he technically retained ownership of that land, but that it was of no practical use to him. He also confirmed that there were documents evidencing the transfer of the block of land in the Muslim village of Village F, but that all of that documentation was back in City M and he can now no longer obtain it.

The applicant was then asked about the circumstances under which the property dispute, which ultimately led to his application for a protection visa, arose. He confirmed that he sold this land to a man called Person D, having previously been pressured by the owner of the neighbouring land, Person C. He clarified that part of the statement in the protection visa application was not strictly correct; in fact, Person C had never offered him any money for the land, he had simply threatened to take it by force. He indicated that he had in fact sold the land to Person D even though it was worth more than he sold it for. He couldn't recall exactly when that transaction occurred, but he said it was several months before he came to Australia. He confirmed that it was before winter.

He explained that nothing had happened until the end of winter or the beginning of spring, which is when the new purchaser set about making use of the land as the crops he intended to plant are generally planted in spring.

It was at this time that the applicant's sibling and child had accompanied the new owner in order to show him the boundaries to the property. It was at this point that the neighbour, with whom the applicant had long been in dispute, confronted the other parties and a dispute arose which ended up in the relative of the neighbour being killed. The applicant said that, in fact, it was one of the new owner's relatives, Person F, who had killed Person C's relative. However, the problem was that the new owner had never been advised about the dispute between the applicant and the neighbour, and therefore he also blamed the applicant and his family for the situation which developed. Similarly, the tribe of Person C also blamed the applicant and his family for the death of Person C's relative. It may be that other factors played a part in this. Person F also was a Muslim and had a strong tribe to support him, and Person C was not just a Muslim but was also involved in one of the Kurdish parties that formed part of the Kurdistan regional government, and furthermore, he was actually a member of the Pishmarga, the Kurdish militia. For these complex reasons, no consequences befell Person D or his relatives, and the adverse attention of the bereaved tribe was focused directly at the applicant and his family. Those involved were essentially his remaining relatives in Iraq, his sibling, and his child.

After this incident, the applicant's sibling and child had to go into hiding, and they hid for a number of days in a village in City N, before fleeing across the border. He indicated that they already had passports and so were able to cross the border legally. They are currently living in a church in City O. The applicant was asked about providing evidence of this, and he agreed to try to obtain copies of the sibling and child's passports, showing their entry into Country H, as well as a letter from the priest of the church where they are residing.

The applicant was also asked about his religion and relevant background information. He confirmed that he is a Chaldean, and that he was born and baptised in the village of Village F – the Christian Village F, of course – before it had been destroyed. He indicated that at that time it had a number of churches, but it and they had all been destroyed. He named the churches and indicated which one he had attended, namely Church K. The other church was

Church L, which he said was named after a martyr. He confirmed that the village and the churches had been destroyed many years ago. He said that he subsequently had attended Church M in City M. He also indicated that as well as that Chaldean church there are other churches in City M.

He was asked about the baptism certificate, suggesting he had been baptised at Church M in City M, and he reiterated that he was definitely baptised in Village F, and that the certificate was probably issued or named City M on account of the fact that the church in Village F had been destroyed.

The applicant was asked about how he obtained his Australian visa and the circumstances of his departure from Iraq. He indicated that the forms had been sent to him and that he had simply signed a mark where indicated. He explained that he and his wife had never been to school and were both illiterate. He said that he can make a mark with a pen, but cannot actually write, and that he sometimes will simply use his fingerprint as a signature, as he did on the protection visa application forms.

He had learned that the visa would be ready to collect when his child called him from Australia and said that he had to go to Country I to collect it. At that stage he was still in City M.

He and his wife drove to the border and travelled into Country H in a hired car. He then travelled from there to City P in Country I in order to collect the visa before returning to Country H. The visas for entry into Country I and Country H were simply obtained through the mechanism of a stamp at the border.

They then flew to Australia.

The applicant was also asked about the motivation for visiting Australia. He confirmed that they had not had any problems in Iraq prior to coming to Australia; at least not of a sufficient magnitude to justify them fleeing that country. He said the purpose of coming to Australia was to be with his family here. He has family and relatives living in Australia. He came here to see them. The applicant was reminded that one of the reasons given in the first visa application was in fact to attend the baptisms of his relatives. He agreed that this was so, but pointed out that the visas weren't granted in time for that, and that the baptisms had occurred about a month before he arrived. He named the two relatives who were baptised. The applicant was asked to provide evidence of the fact of those baptisms having occurred at the time they were said to have occurred, and he agreed to do so.

The applicant was asked about his fear of persecution in the event that he is forced to return to Iraq. He reiterated that he no reason to leave Iraq prior to this dispute arising. He said he had some small problems with the Kurds, but nothing big like the current problem. He is fearful that he will be killed in retribution by Person C or members of his tribe. He explained that this is because they blame him because he sold the land to Person D, and that it was that transaction which triggered the events which led to the death of Person C's relative.

The applicant was asked whether religion was a factor in their motivation for wanting to harm him. He indicated that it was not a motivating factor in his view. However, he said it was relevant to the question of his ability to access protection. He said that if he were a Muslim he could get protection from other Muslims. However, as he is a Christian he could not get other Christians to protect him, not least because in City M they were very much in

the minority. He was asked whether the authorities in Kurdistan could protect him. He gave two reasons why they would not, in his view, do so, even if they had the capacity to. As far as capacity is concerned, he did not consider that they had sufficient power to protect the citizenry, and pointed to the fact that Kurds are frequently killing one another, with nothing being done about it. However, he said that even if the government were in a position to offer him protection in the ordinary course of events, they would decline to do so, partly because he is a Christian and partly because the person who has a vendetta against him is associated with the Pishmarga, the armed wing of the KDP.

He was asked whether there were not some Christians actually in the Kurdistan regional government. He agreed that there were, but said that they were only very few in number and he noted that the Christians in the area still have many problems.

The applicant was asked whether it would not be reasonably open or possible for him to relocate to another part of Kurdistan, where he could possibly find another Christian village to settle in. He indicated that this would be very difficult, as he believed that the people who wanted to kill him would be able to find him and kill him anywhere in Kurdistan. However, he also noted that he has no resources with which to relocate and no-one with whom he would be able to stay and resettle elsewhere in Kurdistan. He did not consider it would be safe for him to relocate anywhere else in Iraq either. He indicated that he would rather die here than go back to City M, where he felt he faced certain death. He said he had nothing more to add, other than that he wanted to live here with his family members.

After hearing and accepting the applicant's evidence, more or less in its entirety, the Tribunal decided that it would not be necessary to hear from the witness who had come along to give evidence if required.

The Tribunal did, however, request that documentation be provided if possible, to confirm one or two aspects of the applicant's evidence. The adviser agreed to organise this, and also made brief submissions in respect of the Convention nexus, drawing the Tribunal's attention again to an earlier decision of the Tribunal which involved some similarities in its factional scenario, and where the applicant was found to be a refugee on account of his imputed political opinion, the Convention nexus lying with the refusal by the State to provide protection and the fact that this was motivated by political considerations.

#### *Post-hearing Submission*

The Tribunal received additional supporting information from the applicants' advisers as foreshadowed at the hearing. This comprised:

- extract copies of the Iraqi passports of the review applicant's sibling and child, and those of their respective spouses, and also that of the applicant's child, issued in City N, Iraq, and bearing Country H entry stamps;
- a letter from Church N, City O, Country H, with authorised translation, confirming that the applicant's aforementioned sibling and child had been residing at the church's accommodation; and
- certificates from Church O, Suburb F, in an Australian State indicating that Relative G and Relative H were baptised there.

#### *Country Information*

The Tribunal has also had regard to the following country information:

The US Department of State's 2005 Country Reports on Human Rights Practices released on the 8<sup>th</sup> of March 2006, includes the following information on Iraq:

*Kurdish authorities retained regional control over police forces and internal security, which effectively empowered the two militias of Kurdish political parties to continue to provide police and security forces in Kurdistan. Police officers, who also were militia members, abused their official powers to pursue personal and party agendas (see section 1.d.). Many of the extralegal killings appeared based on sectarian animus, although some were reportedly for profit.*

*Kurdish security forces committed abuses against non-Kurdish minorities in the North, including Christians, Shabak, Turcomen, and Arabs. Abuse ranged from threats and intimidation to detention in undisclosed locations without due process (see section 1.d.). Verification or assessment of credibility of claimed torture and abuses by KRG officials was extremely difficult.*

*More than a dozen militias have been documented in the country. Militia members integrated into the Iraqi Security Forces (ISF) typically remained within preexisting organizational structures and retained their original loyalties or affiliations. Of these integrated militias only the Badr Organization and the pesh merga of the Kurdistan Democratic Party (KDP) and Patriotic Union of Kurdistan (PUK) remained significant, cohesive entities at the end of the year, although they were nominally integrated. Pesh merga units were embedded in the MOD but were rarely used outside the KRG. Six sponsor organizations either disbanded their militias or assigned them to personal security duties for political leadership. The Mahdi Army remained a separate and freestanding militia.*

The US Department of State - International Religious Freedom Report 2006, released on September 15, 2006, includes the following information on Iraq:

*During the reporting period, unsettled conditions prevented effective governance in parts of the country, and the Government's ability to protect religious freedoms was handicapped by insurgency, terrorism, and sectarian violence.*

*The Law for the Administration of the State of Iraq for the Transitional Period (TAL) was adopted on March 8, 2004, and was the operative law in the country until May 20, 2006 when the constitution came into effect. The TAL and the constitution established a republican, federal, democratic, and pluralistic system with powers shared among the federal and regional governments, including eighteen governorates. The TAL and constitution also guarantee freedom of thought, conscience, religious belief and practice.*

*Both the TAL and the constitution recognize Islam as the official religion and state that no law may be enacted that contradicts the established provisions of Islam. While the Government generally endorsed these rights, its efforts to prevent or remedy violations were hampered by substantial political and religious violence between Sunni and Shi'a Muslims and by harassment of non-Muslims.*

#### *Abuses of Religious Freedom*

*The Government does not officially engage in or tolerate abuses of an individual's right to religious freedom. However, the Government focused most of its resources and attention on the ongoing insurgency and reconstruction efforts during the*

*reporting period; thus, it did not have the capacity to address issues relating to abuses of freedom of religion.*

*There were allegations that the Kurdistan Regional Government (KRG) engaged in discriminatory behavior against religious minorities. Christians living north of Mosul claimed that the KRG confiscated their property without compensation and began building settlements on their land. Assyrian Christians also alleged that the Kurdistan Democratic Party (KDP)-dominated judiciary routinely discriminated against non-Muslims and failed to enforce judgments in their favor.*

The Amnesty International Report for 2006, dated 25 May 2006, includes the following information about the situation in Iraq:

#### *Northern Iraq*

*Human rights abuses were also reported from areas of northern Iraq controlled since 1991 by the Kurdistan Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK).*

*On 7 September, security forces in Kalar, a town in the PUK-controlled area, killed one person and injured some 30 others when they fired on protesters demonstrating outside the governor's office against fuel shortages and poor public services.*

*Kamal Sayid Qadir, a Kurdish writer with Austrian citizenship, was arrested in October in Arbil by members of Parastin, the KDP's intelligence service. In December, he was sentenced to 30 years' imprisonment for defamation after an unfair trial. He had published articles on the Internet which were critical of the KDP leadership.*

*Recently, the situation appears to have been deteriorating. Amnesty International issued a public statement on 10 August 2006, in response to the situation there, which included the following:*

*Amnesty International is greatly concerned about the continuing killings of civilians in Iraq, and the continuing failure of the Iraqi authorities to end the killings and bring the perpetrators to justice. In recent months hundreds of people were reportedly killed every week, as a result of bomb and suicide attacks and in the ever increasing sectarian violence, in Baghdad as well as in other towns and cities.*

*According to a recent UN report, 5818 civilians were killed and at least 5762 wounded in May and June 2006. Today 35 people were reportedly killed in a suicide bomb attack in the southern city of Najaf. Further, scores of people, mostly young or adult men, have been abducted and murdered; often, their hands had been tied and they appear to have been tortured before death.*

*The killings are continuing despite a security operation involving thousands of Iraqi government troops and the recent deployment of nearly 4,000 US troops in Baghdad. Amnesty International has repeatedly condemned the deliberate killings of civilians by armed groups opposed to the Iraqi government and the presence of foreign troops. Such killings and other abuses by armed groups amount to war crimes and crimes against humanity.*

#### *Discriminatory motives*

*Many of the victims appear to have been targeted for sectarian reasons, because of their religious affiliation as members of the Sunni or Shi'a communities as well as*



*membership of religious minorities – including the Christian and Mandaean communities.*

The Assyrian International News Agency (AINA) has also recently reported on the problems being experienced by Assyrian Christians in Iraq, and following is from an article published on the 9<sup>th</sup> of June 2006 entitled *Continuing Persecution Renews Calls for Assyrian Safe-Haven in Iraq*, <http://www.aina.org/releases/2006069115922.htm> :

*Assyrian Christians (also known as Chaldeans and Syriacs) continue to be targeted within Iraq. Recent attacks have highlighted the varied groups perpetrating the attacks. On March 17, 2006, Kurdistan Democratic Party (KDP) paramilitaries broke into Mr. Slewo David Simon's home in Batnaya, a Christian town in Northern Iraq. **Mr. Simon had recently emigrated to the US after a series of altercations and incidents with KDP militants.** As the armed assailants broke into the home, Mr. Simon's neighbors Mr. Nabil Jaro and his brother Mr. Faris Jaro interceded to prevent the break-in and looting. [Emphasis added]*

*Later that afternoon at 5 pm, KDP personnel dressed as Iraqi National Guards forcibly entered Mr. Nabil Jaro's home. The KDP paramilitaries ransacked Mr. Jaro's home, broke his furniture, and confiscated his gun. Mr. Jaro was then roughed up and arrested as his terrorized family looked on. Mr. Jaro was then taken to the KDP occupation center in Tel-Kaif in the Nineveh Plain on trumped up charges of terrorism. KDP officers then served Mr. Faris Jaro with an arrest warrant and indicated that his brother, Mr. Nabil Jaro, would not be released until he turned himself in as well. The next day, Mr. Faris Jaro turned himself in, accompanied by his terrified elderly mother and another brother. Two KDP officers along with two other KDP personnel proceeded to severely beat both brothers for several hours while shouting derogatory anti-Christian and anti-Assyrian insults.*

*Fearing that her sons may be killed, the mother pleaded with her sons to apologize to their attackers in order to be released. Following an apology under duress, the brothers were released. Their neighbor's home has since been expropriated as the new KDP party office in Batnaya in the Nineveh Plain. The establishment of a KDP party office in an area without any Kurds is widely believed to be intended to "bring Christians in line" and dampen enthusiasm for any independent political expression.*

*Assyrians in other parts of Iraq have not fared much better due to a steadily deteriorating security situation (AINA 4-28-2006).*

*According to Voices of Iraq, the director of operations for the Nineveh governorate police stated during his briefing on June 5th, 2006, that another Assyrian has been murdered by armed gunmen in the city of Mosul. According to nearby shop owners, the director said, the unidentified gunmen entered Ms. Rahima Elias' shop, one of many in the commercial part of town, and opened fire immediately killing her. Mr. Elias owned a beauty supplies store in the Drakzliya District located west of the city of Mosul. The 33 year old was a native of Karimles, a ChaldoAssyrian town approximately 18 miles east of Mosul.*

*On April 6, Mr. Samson Awisha was walking home in Baghdad when five men came out of a car and shot him dead. Earlier, presumably the same group of assailants had kidnapped Mr. Awisha's two children for ransom. After paying the ransom, Mr. Awisha's children were released and then quietly sent out of Iraq to Syria along with their mother for safety. The kidnappers had demanded that Mr. Awisha not take his children out of the country. After the murder, Mr. Awisha's family was threatened not*

*to hold a funeral service lest the entire family be targeted. Mr. Awisha was laid to rest secretly and quietly, without a funeral.*

*On May 30th, 2006, Ankawa.com and Nirgalgate.com reported that Ra'ad Joseph, born in 1976, was found murdered in the Industrial quarters of Mosul. Mr. Joseph was from Bartella in Northern Iraq. Mr. Joseph was married with one child and was an owner of a bodybuilding gym. Reports from Mosul indicate that the murder is suspected to be an act of revenge as the decision of ownership of the gym was awarded him after public bidding for the gym. He was threatened by the Kurds to withdraw his bid but he refused.*

*On June 2nd, 2006, Ankawa.com and Nirgalgate.com also reported that The Evangelical Church of Ascension was attacked by a rocket bomb the night before. The bomb caused damage to the church building and caused a gaping hole in the church dome. No injuries were reported because the attack happened during the night.*

*On June 3, 2006, Ankawa.com and Iraq4allnews.dk reported that armed men murdered a Christian engineer in front of his home in Basra the previous night. The Christian engineer, whose name has not yet been released, worked at the al-Najeebiyya Electrical Circuit Station in al-Ma'aqal. The murder seems to be due to religious reasons since the engineer was a Christian and there have been many killings against Christians in Basra and much effort made to force them to leave the city.*

*Assyrians are now in an untenable position, being targeted by many sides of an increasingly violent conflict in Iraq. Assyrians are targeted in northern Iraq as well as other areas. As one activist noted, "Christians are now targets of Islamic groups, gangs who accuse them (Assyrians) of links to the West, and the Ba'athists and nationalists who view them as traitors."*

*In their October 2005 report, the United Nations High Commissioner for Refugees (UNHCR) noted what Assyrians had already known, namely, "While much of the hardship and harassment they (Assyrians) report that they face is symptomatic of the situation of general insecurity faced by all Iraqis in present-day Iraq, members of the Christian minority nevertheless appear to be particularly targeted. Iraqi Christians feel especially apprehensive about the overwhelming presence of extremist Islamic groups and armed militias, whose display of intolerance towards non-Muslims has become a nearly daily feature in Iraq."*

## **FINDINGS AND REASONS**

Both applicants claim to be Iraqi citizens. They have produced evidence of their background in Iraq, and entered Australia on valid Iraqi passports issued in Iraq. The Tribunal finds on this basis that they are nationals of Iraq.

The Tribunal found the applicant to be a credible witness. He gave evidence in a frank and forthright manner, provided additional detail or explanation as required without hesitation, did not obviously seek to overstate his case, and resolved some minor inconsistencies to the Tribunal's satisfaction.

Furthermore, at least some aspects of the applicant's claims are supported, both in general terms and specifically, by country information and/or independent evidence. For example, the country information referred to above tends to support the proposition that Chaldeans, and

indeed Christians generally, face persecution in Iraq, including in the Kurdish-controlled region. It also discloses human rights abuses by the KDP party, a member of whom the applicant claims to be in dispute with, including in circumstances where the victim has had a dispute with KDP militants.

The documentary evidence requested by the Tribunal at the hearing and provided by the applicant also tends to confirm some peripheral aspects of his claims, namely the fact that he came to Australia for a reason unrelated to any problems in Iraq, namely to visit relatives and attend the baptism of his relatives, and that subsequently when the problems arose, his sibling and child have had to flee Iraq and are sheltering in a Church in Country H. This evidence, while not proving the applicant's core claims, is nevertheless relevant to the establishment of his credibility generally.

In light of this evidence, the Tribunal accepts that the applicant's family are Chaldean Christians, and that they were targeted because he is held responsible for the dispute which arose over the boundary of the land he sold, which dispute led to the death of a person whose family now seek revenge against the applicant's family.

The Tribunal accepts that the applicant faces a real chance of serious harm capable of amounting to persecution in his region of Iraq. However, the Tribunal does not accept that the essential and significant reason for the harm feared by the applicant would come within the scope of any of the Convention grounds. This is because the dispute which arose was a property dispute, wherein one Muslim killed his neighbour, and revenge is now being sought from the applicant who sold the property without warning the purchaser about the underlying dispute. There is no evidence before the Tribunal to suggest that the vendetta would not equally be pursued against the applicant if he were a Muslim.

The issue then arises as to whether state protection is available to the applicant in such circumstances. The applicant seems not to have been willing to seek the protection of the Iraqi authorities, and the relevant question for the Tribunal, then, is whether this unwillingness to seek the protection of his country of nationality is justifiable.

The country information referred to above seems to suggest that it is. Firstly, the person the applicant is in dispute with is a KDP militant and is therefore, in a sense, a part of the government apparatus in the Kurdish controlled region, such as it is. The risk such people demonstrate is documented above.

Secondly, the applicant's reluctance to approach those authorities can be understood in light of the country information. The extract from US Department of State's 2005 Country Reports reproduced above suggests that the Kurdish security forces - both in general and in pursuit of their personal agendas - have been responsible for human rights abuses against non-Kurdish minorities including Christians, and also that those authorities discriminate against them when disputes arise:

*Kurdish authorities retained regional control over police forces and internal security, which effectively empowered the two militias of Kurdish political parties to continue to provide police and security forces in Kurdistan. Police officers, who also were militia members, abused their official powers to pursue personal and party agendas (see section 1.d.). Many of the extralegal killings appeared based on sectarian animus, although some were reportedly for profit.*

*Kurdish security forces committed abuses against non-Kurdish minorities in the North, including Christians, Shabak, Turcomen, and Arabs. Abuse ranged from threats and intimidation to detention in undisclosed locations without due process...*

*There were allegations that the Kurdistan Regional Government (KRG) engaged in discriminatory behavior against religious minorities. Christians living north of Mosul claimed that the KRG confiscated their property without compensation and began building settlements on their land. Assyrian Christians also alleged that the Kurdistan Democratic Party (KDP)-dominated judiciary routinely discriminated against non-Muslims and failed to enforce judgments in their favor*

The country information also tends to show that Christians face persecution in Iraq on account of their religion (see generally the AINA report reproduced above), and from the US Department of State - International Religious Freedom Report reproduced above it would appear that the authorities are unable to prevent this:

*During the reporting period, unsettled conditions prevented effective governance in parts of the country, and the Government's ability to protect religious freedoms was handicapped by insurgency, terrorism, and sectarian violence.....*

*The Government does not officially engage in or tolerate abuses of an individual's right to religious freedom. However, the Government focused most of its resources and attention on the ongoing insurgency and reconstruction efforts during the reporting period; thus, it did not have the capacity to address issues relating to abuses of freedom of religion.*

In light of this information, the Tribunal finds that the applicant's unwillingness to avail himself of state protection is justified in the circumstances.

The requisite Convention nexus can arise from either the actions of the persecutor or from the unwillingness or inability of the state to afford protection. The Tribunal accepts that the person who has a vendetta against the applicant has links to the authorities, and that in light of these links, even though his primary motivation may not be Convention based, he could rely on his political influence and or the applicant's Christianity to act against the applicant with impunity, and that the authorities' would be unwilling to provide protection to the applicant for reason of his Christianity and/or his imputed anti-KDP political opinion. The Tribunal finds that the applicant would face a real chance of persecution in the reasonably foreseeable future in the Kurdish-controlled region for those reasons.

Based on the country information set out above, particularly the AINA report, the Tribunal also finds that elsewhere in Iraq the applicant would face a real chance of persecution in the reasonably foreseeable future from extremist Islamic groups or armed militias on the basis of his Christianity.

Finally, the Tribunal notes that the applicants passed briefly through Country H and Country I *en route* to Australia. However, their passports bear no valid current visas for those countries, and there is no other evidence before the Tribunal which might suggest that they have a presently existing, legally enforceable right to enter either of those countries. Accordingly, the Tribunal finds that the Australia's protection obligations are not excluded under s 36(3) of the *Migration Act* 1958.

## CONCLUSIONS

The Tribunal is therefore satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided he satisfies the remaining criteria.

No specific claims were made by or on behalf of the second-named applicant. The fate of the other applicant's application therefore depends upon the outcome of the first named applicant's application. The other applicant will be entitled to a protection visa provided she satisfies the criterion set out in s.36(2)(b) of the Act and the remaining criteria for the visa.

## DECISION

The Tribunal remits the matter for reconsideration with the direction that the first named applicant is 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. lward