

**1002091 [2010] RRTA 469 (7 June 2010)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1002091

**DIAC REFERENCE(S):** CLF2009/152311

**COUNTRY OF REFERENCE:** Iraq

**TRIBUNAL MEMBER:** Patricia Leehy

**DATE:** 7 June 2010

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the other named applicants satisfy s.36(2)(b)(i) of the Migration Act, being members of the same family unit as the first named applicant.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of Iraq, arrived in Australia [in] October 2009 and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas [in] November 2009. The delegate decided to refuse to grant the visas [in] March 2010 and notified the applicants of the decision and their review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal [in] March 2010 for review of the delegate's decisions.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicants have made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Migration Regulations 1994 for the purposes of the definition.
9. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

## Definition of 'refugee'

10. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
11. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
12. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve "serious harm" to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression "serious harm" includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
15. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
16. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase "for reasons of" serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

17. Fourth, an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
18. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.
19. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

#### **CLAIMS AND EVIDENCE**

20. 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.
21. The first-named applicant appeared before the Tribunal [in] May 2010 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.
22. The applicants were represented in relation to the review by their registered migration agent. In this matter, the first-named applicant is the only person to put forward her own claims for protection, the other applicants having applied as members of the family unit of the first-named applicant. A further applicant was nominated by the first-named applicant with the application for review. This child is the daughter of the first-named applicant, but had not been included in the Protection Visa application, because it had been assumed by the first-named applicant that her daughter was an Australian citizen by descent, her alleged father being an Australian citizen. The applicant through her adviser had requested by letter dated [in] March 2010 that the child be added to the Protection Visa application and a Form D was submitted on the child's behalf. A receipt stamp dated [in] March 2010 appears on the letter, while the decision refusing the application was made [in] March 2010.
23. The Department was contacted [in] May 2010 for advice on why the daughter had not been included in the Department's decision, and what its intended process was in relation to the applicant daughter on whom a decision had not been made. The response from the Department received [in] May 2010 is:

The Form D which sought to include the child [Miss A] was receipted on [date] March 2010 the day after the primary decision had been made - hence why there was no computer record of [Miss A] being part of the application. She is deemed not to have been an applicant.

**The process now:**

Should the RRT decide to remit the applicant's review along with the secondary applicants, it will have the effect of voiding the original decision as if it had never been made. This enables the Dept to make a fresh decision, but this time with the benefit of having [Miss A]'s Form D for inclusion in that decision.

24. In this decision, the first-named applicant will generally be referred to as the applicant.

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25. According to her Protection Visa application, the applicant is a woman who was born on [date of birth deleted: s.431(2)] in [Province A], Iraq. She says she is Muslim and that she married [in] 2008. From September 1993 to April 2004 she lived in [Province A]. From April 2004 until October 2009 she lived in [Country 1]. She says she was educated in [Province A] until [year deleted: s.431(2)]. She gives no information about previous employment. The applicant says that she came to Australia to join her husband, from whom she has now separated.
26. Included in the application are the applicant's children, [names and dates of birth deleted: s.431] These all have the family name of [name deleted: s.431(2)], the applicant's first husband. The applicant also says she has a daughter born in [Country 1] in [date of birth deleted: s.431(2)] who is an Australian citizen because her father is an Australian citizen. The applicant says that her parents and [number deleted: s.431(2)] brothers are resident in Iraq. Iraqi personal identity cards were submitted in respect of the applicant and the children included in the application. Certified copies of the applicant's Iraq passport and that of her children, and a copy of the Australian passport of her youngest child, not included in the application, were also submitted.
27. The applicant also submitted a statement with her Protection Visa application. Information in the statement is summarised as follows:
- The applicant is Sunni;
  - Before the collapse of Saddam's regime in 2003, she was living in [location deleted: s.431(2)], [Province A], which is dominated by Shi'a; her husband at that time was working in [Country 1];
  - In August 2003, the applicant received threatening messages requesting them to leave the area because she is Sunni; she contacted her husband and he arranged for the applicant and their children to go to [Country 1] in April 2004;
  - In [Country 1], the applicant divorced her husband and she left for Iraq with her children in 2007;
  - While at her parents' home in [Province A], she received threats over her mobile phone and letters were thrown inside the house warning her to go back; her father advised her to pay no attention to these threats, but one night while they were sleeping at her father's house, an armed militia raided the house and shot at the windows, though no one was injured; her father reported the incident to the police;

- The applicant with her children went to her second husband's family house in [location deleted: s.431(2)];
- The applicant contacted her ex-husband in [Country 1] ; he was concerned about the children and asked the applicant to return to [Country 1]; she went there and lived with her children;
- The applicant met her second husband in December 2007; she had known him previously and the relationship developed until they married in [Country 1]; her father agreed to the marriage, though her brothers were opposed to it;
- The applicant has one daughter from her second marriage to an Australian citizen; she was born on [date of birth deleted: s.431(2)];
- The applicant applied to migrate to Australia as a spouse, and was granted a visa [in] 2009;
- When the applicant arrived in Australia to live with her second husband, her son disliked his stepfather and did not want him living with them; after much debate, the second husband told the applicant that he would withdraw his sponsorship, which will compel her to return to Iraq;
- When their relationship ceased, the applicant's husband left Australia to tell her family in Iraq about the relationship;
- The applicant fears that she will have to return to Iraq where she will be persecuted for being Sunni and because she is a woman without male protection; as a Sunni she will be targeted by Shiite militia who control southern Iraq;
- The Iraqi authorities cannot protect her because the violence there has not ceased.

28. Also on the applicant's Department file is information relating to her application for a spouse visa. This information includes the following:

- The applicant married her first husband [in] 1991 and they had [number deleted: s.431(2)] children; they had a bad relationship; her husband was in [Country 1] from 1999;
- Thieves came to the applicant in Iraq wanting to kidnap one of the children or get money from the applicant as they heard that her husband was in [Country 1]; they shot at the house and demanded \$US30,000; her family called her husband and asked them to take the children; the applicant and the children went to [Country 1] with her first husband in 2004;
- The applicant divorced her first husband (verbally, not officially) in October 2007;
- The applicant went to Iraq in January 2008; [Mr A] (second husband) came to see her parents to arrange to marry her; the parents agreed, but she had not been officially divorced;

- The applicant and [Mr A] went together to [Country 1] [in] February 2008; they obtained the divorce order [in] April 2008; [Mr A] returned to Australia and came back to [Country 1] [in] June 2008; they married [in] June 2008;
  - [Personal details about the applicant deleted: s.431(2)]
  - The applicant last saw her husband in July 2008.
29. [In] February 2010, the applicant's adviser wrote to the Department stating that when the applicant was living [Country 1], she supported [an anti terrorism campaign, details of which have been deleted: s.431(2)], The adviser also reiterates the risk to the applicant for reason of her religion and her gender.
  30. The applicant was interviewed by the Department [in] February 2010. The applicant's Iraqi passport which she apparently brought to the interview indicates that she travelled between [Country 1] and Iraq on several occasions between 2004 and 2008.
  31. There were a number of inconsistencies between the applicant's evidence at interview and the claims put forward in her written evidence to the Department. These related in particular to the timing of threats she claimed to have received in Iraq, and her subsequent departure for [Country 1]. The applicant, when questioned at interview about her reasons for returning from [Country 1], where she was safe, to Iraq, in 2007 stated that she had left [Country 1] because of ongoing domestic problems with her first husband, and wanted to obtain her parents' permission to remarry. Inconsistent information was also given at interview in relation to the development of her relationship with her second husband. She also stated at interview that she did not return to Iraq after her marriage, although her passport indicates that she returned to Iraq on at least two occasions subsequently. [Information deleted: s.431(2)].
  32. On the Department file is a certificate in respect of the applicant's youngest child indicating that the Australian Consulate-General in [Country 1] certified that the child born on [date of birth deleted: s.431(2)] became an Australian citizen by Descent [in] 2009.
  33. At her interview, the applicant was requested to submit pages of her ex-husband's passport, together with country information relevant to the security situation in [Province A] and other [regions] in Iraq. The passport pages were subsequently submitted and indicated that indicated that the ex-husband had travelled to [Country 1] and Iraq in 2008 and 2009. The Department's movements records indicated that he had left Australia [in] January 2008, returning [in] February 2008; that he left again [in] June 2008 and returned [in] June 2008 and that he had left Australia most recently [in] October 2009, returning [in] November 2009. Country information was also submitted including a [newspaper] article dated [in] March 2008 [details deleted: s.431(2)], and a UNICEF report [details deleted: s.431(2)].
  34. The adviser also submitted [further material in support of the applicant's claims, details of which have been deleted: s.431(2)]
  35. An Email sent by an officer of the Department to other Departmental officers [in] March 2010 states that the applicant's husband and the alleged father of the applicant's youngest child came to the [suburb deleted: s.431(2)] office to state that he would not

proceed with DNA testing as suggested in a letter from the Department dated [in] February 2010. He stated that he did not calculate the dates, so was unaware that the child was not his daughter, and that he was ashamed of the situation.

36. [In] March 2010, the applicant's adviser wrote to the Department stating the citizenship of the applicant's youngest child was withdrawn [in] February 2010. The child is therefore stateless. He requests that she be included in the Protection Visa application, and he includes a Part D Protection Visa application form duly completed.

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37. The applicant submitted no additional information with her review application to the Tribunal.
38. [In] April 2010 the Tribunal was advised by the applicant's adviser that the citizenship of [Miss A], the applicant's youngest child, had been withdrawn, and that a Part D application had been lodged for her with the Department, on the basis that she was a member of the family of the applicant in this matter.
39. [In] May 2010, the applicant's adviser lodged a submission on the applicant's behalf in which he provided the following additional information:
- The applicant is a Sunni and a moderate Muslim woman who does to wish to abide by the Islamic strict rules against women; she lived in an area dominated by Shi'a; she was threatened because she was a Sunni when the political system changed in 2003, and fled with her children to her first husband who was employed in [Country 1] ;
  - She has a political opinion against terrorism [details deleted: s.431(2)];
  - She returned to [Country 1] when her marriage broke down, and she married her second husband in [Country 1] ; she was granted a spouse visa and her youngest child was born in [Country 1] and registered as an Australian citizen by descent;
  - The Department informed the applicant that her youngest child is not an Australian citizen by descent, and the child is therefore stateless;
  - The applicant gave inconsistent evidence because of her psychological condition; she was highly embarrassed at her interview when it was indicated that her child was not the child of her second husband;
  - The adviser states that the applicant fears persecution not only for reason of her religion as a Sunni, but because she belongs to a particular social group, namely "woman, woman who has no male to protect her in Iraq" and a "returnee from a Western country";
  - The applicant has been forced by social disapproval and religious and civil law to conceal the biological father of her youngest child; she fears being killed by her brother in Iraq for having an illegitimate child; this action is considered to be a cultural shame, whose consequence is honour killing;



- The applicant's children are at risk [details relating to the applicant's concerns for her children deleted: s.431(2)];
  - The applicant if not harmed by her relatives would be forced to live discreetly or live in an openly moderate manner which would provoke societal disapproval;
  - The applicant could not avoid harm by relocating.
40. With the submission was a report from the [health centre deleted: s.431(2)] dated [in] May 2010 and signed by [Ms B] (MACA-Clinical) in which [Ms B] states that she has been counselling the applicant since [a date in] March 2010 and continues to do so on a fortnightly basis. She says that the applicant was referred to her as a woman recently separated from her husband soon after her arrival in Australia, suffering stress and depression and struggling to cope as a single mother of [number deleted: s.431(2)] children. It is [Ms B]'s opinion that the applicant "is suffering from anxiety, stress and low mood due to her unforeseen circumstances and experiences since arriving in Australia".
  41. The applicant attended a hearing with her current adviser [in] May 2010. She brought her current Iraqi passport with her to the hearing.
  42. The applicant said at the start of the hearing that she wished to apologise for saying misleading or incorrect things at her interview with the Department. She said that she felt very panicky and intimidated, and was aware that she had done something wrong in relation to her claims that her youngest child was the daughter of her second husband. She said that her brothers and parents did not know that her child was illegitimate until recently, when the Department wrote to her husband requesting a DNA test. He had then contacted the family about the fact that the child was not his. The applicant said that her family had no reason to suspect that the timing of the birth was such that it could not have been her husband's child, but her family were not aware of this because she and her husband had been living in [Country 1] and not in Iraq where her parents were.
  43. It was put to the applicant that even if her family was not aware that the child was illegitimate, her husband would have been aware. She said that he was not. He had not counted the time and he was not aware that the child was not his until long after its birth. The applicant was asked about her husband's trip out of Australia in October-November 2009. She said that she and her husband separated in December 2009, and he had not told her what the purpose of his trip to Iraq was at that time. She said that there were problems with the marriage mainly because her eldest son did not like him in the house, but at this stage, he was not aware that her youngest child was not his. She said she believed that he only knew that the child was not his when the Department approached him to ask questions about having a DNA test. When asked whether her husband saw her parents in Iraq she said that he did, and that he talked about problems with the marriage, but not about the child.
  44. The applicant said that when her husband returned to Australia, he started asking questions about the youngest child, but the main reason for the separation was the attitude of her son towards him.

45. When asked what she feared if she returned to Iraq, the applicant said that her mother spoke to her after they had heard that the visa was not going ahead. Her mother told her not to come back to Iraq because her brothers would behead her because of the dishonour. The applicant said she could not speak to her father because of her shame. She said she did not know where her brothers were living at present, but they usually lived in [Province A], as did her parents and [sisters]. The applicant said that she last spoke to her brothers when she was still in [Country 1]. They had objected to her second marriage, though her parents had agreed to it. The relationship with the brothers had not been good.
46. The applicant confirmed that she is a Sunni Muslim, and that her family home is in an area where Shia are dominant. She was asked why her parents and the children living with them had not been harmed, and she said it was because the local Shi'a have decided to protect them. She was asked why the local Shi'a had not protected her and her children. She said that as soon as the militia started shooting at them and threatening her children she wanted to leave, and was able to do so because her first husband worked in [Country 1]. After that she lived away from Iraq most of the time. The applicant said that she also felt under threat in Iraq because she considers herself a modern woman. She wears makeup and does not wear the veil as required. This was strongly disapproved of.
47. The applicant was asked about the threats to her children. [Details relating to the applicant's concerns for her children deleted: s.431(2)].
48. The applicant said that when she went back to Iraq in 2007 for her divorce, she was warned that she should leave [information deleted: s.431(2)]. She said she left Iraq in 2007 with her second husband-to-be and returned to [Country 1] where they married.
49. It was put to the applicant that according to the stamps in an earlier passport, a copy of which was on her Departmental file, she seemed to have returned to Iraq from [Country 1] on several occasions between 2004 and 2008. She said that when she returned she did not go to her parents' place in the Shi'a area of [Province A], but to her fiancé's family's place which was in a Sunni area. She did not take her children with her on any occasion. She said that she had to return to Iraq for some official things, such as obtaining a police clearance for her spouse visa application, and for her divorce. It was also the case that she had to leave [Country 1] and return to get a renewed residence permit there, but she never returned to her family's place. The stamps in the passport appear to show that the applicant exited Iraq [in] October 2004, and then entered on a further five occasion in 2006, 2007 (two occasions) and 2008 (two occasions). Exit stamps indicate that these stays were of quite limited duration, from a week, to less than four weeks.
50. The applicant was asked whether she had ever been involved in any political activity in Iraq, and she said that she had not been. She did not know whether her father or her brothers were ever involved in political activities.
51. The applicant was asked whether any family member or friend she had been in contact with recently from [Province A] had spoken about the current situation there. She said that her mother had told her that there had recently been a resurgence of the Mahdi army. They were very aggressive and seemed to have taken over the streets in [location deleted: s.431(2)].

52. The applicant was asked again when she thought her husband first knew that her youngest child was not his. She said that it was not until the Department asked him to take a DNA test. She said that he told her family about it when he got the letter from the Department.
53. The applicant said that she was not in contact with her second husband on a regular basis. She saw him after the DNA request had been made and on one or two other occasions. She was asked whether he was angry, and she said that he was very angry. She was asked whether his family in Iraq were angry with her. She said she did not know whether he had told them about it.
54. The applicant was asked whether she was in contact with the father of her youngest child. She said that she was not. He does not know about the birth of the child.

### *Country Information*

#### *General security and human rights situation in Iraq*

55. According to Human Rights Watch in its World Report 2010,

Human rights conditions in Iraq remain extremely poor, especially for displaced persons, religious and ethnic minorities, and vulnerable groups such as women and girls, and men suspected of homosexual conduct. Iraq marked the June 30, 2009 withdrawal of United States combat forces from its towns and cities with parades and a national holiday. In the subsequent weeks, violence shook the country as extremists launched multiple attacks in several locations...

Civilians remained the targets of attacks across the country. In the first six weeks following the June 30 withdrawal of US forces from cities to their bases, coordinated bombings and other violence killed more than 700 Iraqis, mainly Shia. On August 19, coordinated truck bombs outside the foreign and finance ministries in Baghdad killed nearly 100 people and wounded more than 600. On October 25, two vehicle bombs, driven by suicide bombers, destroyed three major government buildings, including the Ministry of Justice. That attack, the country's deadliest in more than two years, killed more than 155 people and wounded over 500.

Sunni Arab insurgents appeared to have been responsible for these and other attacks, such as the January and April 2009 bombings of Baghdad's Kadhimiyya mosque, a major Shia place of worship, killing more than 100 people. The perpetrators also targeted groups of Shia refugees waiting for food rations, children gathering for handouts of candy, religious pilgrimages, weddings, funerals, mosques, and hospitals in Shia areas. Sunni leaders forcefully condemned such attacks, and Shia militias refrained from engaging in widespread reprisal attacks.

Displacement caused by sectarian violence continued, but economic pressures and difficulties maintaining legal status in Syria, Jordan, and Egypt induced some refugees to return.

#### *Current situation in [Province A]*

56. [Information on the current situation in [Province A] deleted: s.431(2)]
57. [Information on the current situation in [Province A] deleted: s.431(2)]

58. [Information on the current situation in [Province A] deleted: s.431(2)]

### *Situation of women in Iraq*

59. Human Rights Watch in its 2010 World Report for events in 2009 states:

Violence against women and girls continues to be a serious problem, with members of insurgent groups and militias, soldiers, and police among the perpetrators. Even in high-profile cases involving police or security forces, prosecutions are rare. Insurgent groups have targeted women who are politicians, civil servants, journalists, and women's rights activists. They have also attacked women on the street for what they consider "immoral" or "un-Islamic" behavior or dress. "Honor" killings by family members remain a threat to women and girls in Kurdish areas, as well as elsewhere in Iraq.

60. The US State Department in its Country Report on Human Rights Practices 2009 (published March 2010) states:

The general lack of security in the country and increasingly conservative societal tendencies had a serious negative impact on women ... Honor killings remained a serious problem. Legislation in force permits honor considerations to mitigate sentences.

According to the UNHCR in April, honor killings were prevalent in all parts of the country. For the first nine months of the year, the domestic NGO Human Rights Data Bank recorded 314 burn victims (125 instances of self-immolation and 189 cases of burning), compared with 234 burn victim during the same period in 2008...

Although the constitution forbids discrimination on the basis of gender, in practice conservative societal standards impeded women's abilities to exercise their rights. Throughout the country women reported pressure to wear veils. Islamic extremists targeted women for undertaking normal activities, such as driving a car and wearing trousers, in an effort to force them to remain at home, wear veils, and adhere to a conservative interpretation of Islam. Islamic extremists also reportedly continued to target women in a number of cities, demanding they stop wearing Western-style clothing and cover their heads while in public.

The Ministry of State for Women's Affairs, with an approximately 18-person professional staff, functioned primarily as a policy office without an independent budget or the ability to hire more employees. On February 3, the minister of state for women's affairs, Dr. Nawal Al'Samara'e, resigned, citing insufficient resources and limited authority to implement programs and policies to improve conditions for women.

### *Situation of Sunnis in Iraq*

61. The US State Department in its 2009 Report states:

There was virtual impunity for officials tried for extrajudicial killings. In 2007 several high-ranking Ministry of Health (MOH) officials who were JAM members--including deputy minister Hakim al-Zamili--were arrested and charged with organizing the killing of hundreds of Sunnis in Baghdad's hospitals...

Sunnis also continued to claim general discrimination during the year, alleging an ongoing campaign of revenge by the Shia majority for the abuses of Shia under the former regime, and also because of a widespread perception that the insurgency was composed primarily of Sunni extremists and former regime supporters with whom the majority of Sunnis sympathized.

Shia in Sunni-dominated neighborhoods, Sunnis in Shia-dominated neighborhoods, and religious minorities in both Sunni- and Shia-dominated neighborhoods reported receiving death threat letters demanding that they leave their homes, and in many cases individuals either complied or were killed. These incidents occurred less frequently than in the previous year, partially due to the increasing capabilities of the ISF and displacement of persons from mixed neighborhoods in previous years.

## **FINDINGS AND REASONS**

62. On the evidence before it, including evidence of sighting of a certified copy of an earlier Iraqi passport, and the sighting of her current passport, the Tribunal accepts that the applicant is a national of Iraq.
63. In making findings on the applicant's claims, the Tribunal has taken into account that the applicant's psychological condition is not good, as attested by the report submitted from her counsellor. The Tribunal also formed the impression that the applicant was in an anxious condition, and in particular that she was shamed by the fact that she had conceived a child by a man other than her husband. She appeared to be seriously concerned about her family's reaction to this information, and also extremely remorseful about the effect that this had had on her estranged husband. It is the Tribunal's view that the applicant had attempted to conceal this information for some considerable time from both her husband and her family because of the shame attached to it in her culture and her fear of the consequences. The Tribunal is of the view that the apparent unreliability of the applicant's evidence is due in large part to her own anxiety and confusion, and her apprehension about the reaction of her family in Iraq to her situation as the mother of a baby who is not the child of her husband. The Tribunal also finds, however, that the applicant has given untrue information about the timing and seriousness of the incidents she has experienced. Despite this, the Tribunal has found, mainly on the basis of the country information before it as well as objective and documented facts about the applicant's circumstances, that she is at risk of serious harm if she returns to Iraq in the foreseeable future.
64. The applicant has claimed and the Tribunal accepts that she is a Sunni woman who lived in a Shia-dominated area of [Province A] until 2004 when she went with her children to join her husband in [Country 1] where he was working. Whether or not specific threats were made against the applicant and her family prior to her departure, the country information indicates that the Sunnis are a minority in Iraq and are blamed by the majority Shia for the former regime of Saddam Hussein (para 59). In these circumstances it is highly likely that the applicant was harassed by her neighbours as she has claimed. The fact that she did not dress in what was considered an appropriate manner for women is likely to have exacerbated her situation. The Tribunal accepts on the evidence before it, including the applicant's oral and written evidence and the independent country information, that the applicant has suffered harassment in Iraq in the past because of her religion as a Sunni, and her membership of a particular social group, namely "Iraqi women" It does not accept that this harassment was sufficiently serious as to amount to persecution in a Convention sense.
65. [Information relating to some aspects of the applicant's claims deleted: s.431(2)].
66. The Tribunal accepts that the applicant gave birth to a child in [Country 1] who was not the child of her husband. It further accepts, after careful consideration of the evidence,

including the evidence of a note on the applicant's Departmental file about the reaction of the applicant's husband when he was made aware that the applicant's youngest child was not his, that the applicant's husband and family were not aware of the child's paternity until early in 2010. The Tribunal accepts the applicant's oral evidence that her youngest child is the daughter of a person in [Country 1] who does not know of the child's birth, and with whom she is no longer in contact. It further accepts her evidence that her mother has told her not to return to Iraq because of the shame she has brought on her family, and that she has been threatened by her brothers for dishonouring the family.

67. On the evidence before it, the Tribunal is not satisfied that the applicant has been persecuted in the past within the meaning of the Convention, although it has accepted that she has been subjected to harassment as a Sunni and as a woman who does not conform to traditional expectations in relation to her dress and demeanour. While the applicant returned to Iraq on some five occasions after she left for [Country 1] in 2004, the Tribunal finds that her periods of stay in Iraq were quite short, and accepts her evidence that she was afraid of what might happen to her in Iraq if she stayed longer, especially if she stayed in the area of her family home, where Sunnis are dominant. It accepts that she returned to Iraq only as a matter of perceived necessity, and that when she began a relationship with her second husband, she stayed in his family area, which was Sunni-dominated and therefore less risky for her. The Tribunal does not accept that the fact that the applicant returned to Iraq on several occasions is evidence that she does not have a subjective fear of returning there.
68. The Tribunal has considered whether there is a real chance that the applicant will be persecuted within the meaning of the Convention if she returns to Iraq in the foreseeable future. In making its findings on this issue, the Tribunal has given substantial weight to the independent evidence about the current situation in Iraq, and in [Province A] in particular, particularly for Sunnis and women (paras 55 to 61, above).
69. In relation to the applicant's situation as a member of a particular social group, definable as Iraqi women, the Tribunal has been guided by the High Court on this matter. The meaning of the expression 'for reasons of ... membership of a particular social group' was considered by the High Court in *Applicant A's* case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...
70. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The

persecution must be feared for reasons of the person's membership of the particular social group.

71. The Tribunal is satisfied on the evidence before it that women in Iraq are cognisable as a particular social group, since women are recognised not only as a distinguishable group in Iraqi society, for whom certain dress and behaviour is prescribed (see para 57, for example), but they are also recognised in official government institutions, such as, for example the Iraqi Ministry of State for Women's Affairs (para 58, above).
72. The applicant has claimed that she will be persecuted as a woman in Iraq for reason of her dress and manner as a woman who has lived relatively free of extremely conservative norms outside Iraq. The Tribunal accepts on the basis of the US State Department information set out in para 58 above that there is a real chance that the applicant will experience harassment by Islamic extremists because of her dress and demeanour. The Tribunal considers that such harassment may be more serious because the applicant is without protection as a single woman who has been told by her family that, at the very least, they do not wish her to return to Iraq. However, the Tribunal on the evidence before it, does not accept that any such harassment would be sufficiently serious as to amount to persecution in a Convention sense.
73. Of much greater concern, in the Tribunal's view, is the applicant's claim that she is at risk of serious harm from her family because she has brought dishonour to them by giving birth to a child by a man not her husband. The documentary evidence as well as that given by the applicant indicates that she has in fact given birth to a child outside her marriage, and that she has therefore been in a relationship considered to be "adulterous". It is also undisputed fact that the applicant's husband is aware that he is not the child's father. The Tribunal accepts as plausible the applicant's evidence that her family has been made aware of the child's paternity, and that she has been threatened by her family because of bringing dishonour on it. The independent country information from authoritative sources indicates that honour killings remain prevalent in Iraq, and that legislation permits honour considerations to mitigate sentences (para 58), giving rise, in the Tribunal's view, to a climate of near impunity for perpetrators of such killings. On the evidence before it, the Tribunal is satisfied that there is a real chance that the applicant will be subjected to harm serious enough to amount to persecution in a Convention sense by family members if she returns to Iraq.
74. While any such harm may be done to the applicant for personal reasons, for bringing shame on her family, there is authority for finding that such harm may fall within the Convention in particular circumstances. In the case of *MIMA v Khawar* ((2002) 210 CLR 1) the applicant feared harm from her violent husband. The Tribunal found that he was not motivated to harm her for a Convention reason; rather, his reasons for being violent towards her were personal. The applicant had also claimed that the police refused to provide her with protection against her husband's violence. A majority of the High Court (*MIMA v Khawar* (2002) 210 CLR 1 per Gleeson CJ, McHugh, Gummow and Kirby JJ, with Callinan J not deciding the issue) agreed with the primary judge (*Khawar v MIMA* (1999) 168 ALR 190, per Branson J) and Full Federal Court (*MIMA v Khawar* (2000) 101 FCR 501) that the Convention test may be satisfied by the selective and discriminatory withholding of state protection for a Convention reason from serious harm that is not Convention related.

75. The country information set out at paras 57-58 above would appear to indicate that police are among those responsible for inflicting violence against women and girls, that there has been a rise in the number of honour killings, and that there has been a failure by the authorities to deter Islamic extremists from targeting women thought to deviate from expected codes of dress and behaviour. Furthermore, legislation permits consideration of honour to mitigate sentences for perpetrators of crimes against women. While there is clearly a general failure of security in many areas of Iraq, leading to a general failure to punish perpetrators of crimes, a fair reading of the country information would also appear to indicate that there is a climate of tolerance for crimes against women in Iraq, particularly honour crimes, and a consequent unwillingness by the authorities to intervene in violence against women, especially in matters of family honour. A lack of commitment by the authorities to the improvement in conditions for women in Iraq appears to be the reason for the resignation of the Minister of State for Women's Affairs (para 58). The Tribunal is satisfied on the evidence before it that state protection would not be available to the applicant against serious harm and that such protection would be withheld for the Convention reason of membership of a particular social group, namely women in Iraq, or Iraqi women.
76. The Tribunal, having found the applicant to have a well-founded fear of persecution for reason of her membership of a particular social group, has not proceeded to make a finding in relation to the well-foundedness of her fear of persecution for reason of her religion as a Sunni. It does however note that the attitude of the authorities towards providing protection to the application is likely to be adversely affected by her religion.
77. The Tribunal is satisfied that the applicant has a well founded fear of persecution in Iraq, within the meaning of the Convention.

## **CONCLUSIONS**

78. The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. 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 she satisfies the remaining criteria for the visa.

## **DECISION**

79. The Tribunal remits the matter for reconsideration with the following directions:
- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
  - (ii) that the other named applicants satisfy s.36(2)(b)(i) of the Migration Act, being members of the same family unit as the first named applicant.