

**1213017 [2013] RRTA 476 (19 July 2013)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1213017

**DIAC REFERENCE(S):** CLF2012/38539 H07/10/49

**COUNTRY OF REFERENCE:** Egypt

**TRIBUNAL MEMBER:** David Corrigan

**DATE:** 19 July 2013

**PLACE OF DECISION:** Melbourne

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

- (i) that the first and second named applicants satisfies s.36(2)(a) of the Migration Act; and
- (ii) that the other applicant satisfies s.36(2)(b)(i) of the Migration Act, on the basis of membership of the same family unit as the first named applicant.

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

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants who claim to be citizens of Egypt, applied to the Department of Immigration for the visas on 27 February 2012 and the delegate refused to grant the visas on 17 August 2012.
3. The applicants appeared before the Tribunal [in] May 2013 to give evidence and present arguments. The applicants were represented in relation to the review by their registered migration agent.

### **RELEVANT LAW**

4. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

#### **Refugee criterion**

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugee as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. 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.
8. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
9. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory

conduct (s.91R(1)(c)). Examples of ‘serious harm’ are set out in s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

10. 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.
11. 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.
12. Fourth, an applicant’s fear of persecution for a Convention reason must be a ‘well-founded’ fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a ‘well-founded fear’ of persecution under the Convention if they have genuine fear founded upon a ‘real chance’ of being persecuted for a Convention stipulated reason. A ‘real chance’ is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
13. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression ‘the protection of that country’ in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
14. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

### **Complementary protection criterion**

15. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) (‘the complementary protection criterion’).

16. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
17. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

### **Section 499 Ministerial Direction**

18. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – to the extent that they are relevant to the decision under consideration.

### **Member of the same family unit**

19. Subsections 36(2)(b) and (c) provide 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 mentioned in s.36(2)(a) or (aa) 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 Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include a dependent child of the family head.

### **CONSIDERATION OF 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. This material includes:
  - Application for protection visas;
  - Copies of applicants' passports;
  - Copy of the applicant father's (the applicant) certificate of [qualification] from [university] dated [April] 2007;
  - Copy of applicant's [qualification] certificate from the [university] dated [in] September 2001;

- Copy of applicant's certificate of [qualification] from [university] dated [in] September 1992;
  - Copy of applicant's [Australian] drivers licence;
  - Translated copies of applicant and applicant's wife's and applicant son's birth registrations;
  - Translated copy of Egyptian Ministry of Defence letter stating that he has not been requested for military service;
  - Translated copy of applicant and his wife's marriage contract;
  - Letter from the applicant dated 25 September 2012. The letter referred to the situation of Shias in Egypt and had attached a number of articles concerning their treatment;
  - Agent's submission dated 28 May 2013. It refers to a number of reports and attaches articles relating to the treatment of Shias in Egypt and states, inter alia, that the applicants have a genuine fear they will be unable to practise their Shia faith and attend mosque and to not be able to celebrate their rituals;
  - Agent's submissions dated 28 May 2012.
21. The applicant's claims are as follows. He is a Shia Muslim who was born in [year] in Alexandria, Egypt. He has obtained [qualifications]. He was employed as a [occupation and employer] from [year]-2008. He left Egypt because his wife obtained an Egyptian government scholarship and they both arrived here in 2008. His wife also has [qualifications] and was employed as a [occupation] at the same Institute. He has [other] siblings who reside in Alexandria and also parents who reside in Egypt. He says he calls his parents by phone but they have a different denomination so they have no problems.
22. He fears being arrested because he is a Shia and the government discriminates against them. Many Shias have been imprisoned for preaching and they are not allowed to have their own mosques or establish foundations or book shops. He fears also the Wahibists and Salafists. The applicant's wife has also become a Shia and she also fears persecution on the basis of her religion. They have a [age] son who is the third named applicant and they fear that he would have to conceal his religious identity as a Shia and that they will be targeted if he talks about the religious views of his parents. They fear that they will not be able to practise their Shia faith openly (such as attending Ashura Day commemorations and praying in the Shia style) given the changes in Egypt since the 2011 revolution and the rise of the Muslim Brotherhood and Salafists.
23. The applicants were invited to an interview with the delegate but did not attend. They later claimed that they did not receive the letter of invitation.

***Independent country information***

24. The overwhelming majority of Muslims in Egypt are Sunni. There are no official statistics on the number of Shia in Egypt. Estimates on the number of Shias in Egypt vary and, according

to *Aharm Online*,<sup>1</sup> is the source of debate. An August 2010 article by Raghda El-Halawany published in the *Daily News Egypt* notes that estimates vary between 800,000 and 2,000,000.<sup>2</sup> A report by the Jerusalem Center for Public Affairs stated that the number of Shias in Egypt has been estimated at up to 2.2 million.<sup>3</sup> The US Department of State (USDOS) *International Religious Freedom Report for 2011 (Egypt)* states that 'Shia Muslims constitute significantly less than 1 per cent of the population'.<sup>4</sup> Based on a CIA World Factbook 2013 estimate of Egypt's population (85,294,388)<sup>5</sup> the Shia population would be less than 852,294 according to the US DOS report.

Sources note growing tensions between Shias and Sunnis in Egypt demonstrated by anti-Shia protests, government discrimination and anti-Shia comments from Sunni religious leaders.<sup>6</sup> Examples were located where Shia worship was disrupted by arrests or the removal of Shias from mosques due to protests from Salafi groups.<sup>7</sup> Sources note while there are no laws expressly prohibiting the practice of the Shia faith, many Shias prefer to conceal their faith to avoid conflict with Sunnis. , Egyptian police and prosecutors have chosen from a variety of "disrespecting religion," and "disrupting the social harmony" charges that can be stretched to fit anyone who belongs to a non acceptable faith or ideology.<sup>8</sup> A *Jerusalem Center for Public Affairs* report notes that these tensions are largely political rather than religious and centred on Egyptian historic tensions with Iran.<sup>9</sup>

25. The United States Commission on International Religious Freedom (USCIRF) reported in its 2012 annual report:

As it did during the Mubarak era, the government maintains control over all Muslim religious institutions, including mosques and religious endowments, which are encouraged to promote an officially-sanctioned interpretation of Islam. According to Egyptian officials, the government regulates these Muslim institutions and activities as a necessary precaution against religious extremism and terrorism. The state

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<sup>1</sup> According to its website, Aharm Online is an English language media site published by Al-Ahram Establishment, Egypt's largest news organisation, and the publisher of the Middle East's oldest newspaper: the daily Al-Ahram, in publication since 1875.

<sup>2</sup> El-Halawany, R 2010, 'Egypt's present-day Shias live on Fatimid legacy', *Daily News Egypt*, 9 September <<http://simerg.com/literary-readings/egypts-present-day-shias-live-on-fatimid-legacy-2/>> Accessed 14 May 2013.

<sup>3</sup> Neriah, J 2012, 'Egypt's Shiite Minority: Between the Egyptian Hammer and the Iranian Anvil', *Jerusalem Center for Public Affairs*, No. 591, September-October <<http://jcpa.org/article/egypts-shiite-minority-between-the-egyptian-hammer-and-the-iranian-anvil/>> Accessed 14 May 2013.

<sup>4</sup> US Department of State 2012, *2011 Report on International Religious Freedom – Egypt*, 30 July, paragraph 1 <<http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?dliid=192881#wrapper>> Accessed 14 May 2013

<sup>5</sup> The *CIA World Factbook* estimated Egypt's population to be 85,294,388 in 2013. See <<https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html>>.

<sup>6</sup> Esposti, E.D. 2012, 'The plight of Egypt's forgotten Shia minority', *New Statesman*, 3 July <<http://www.newstatesman.com/blogs/world-affairs/2012/07/plight-egypt%E2%80%99s-forgotten-shia-minority>> Accessed 14 May 2013; McGrath, C 2013, 'Spring Brings Worse for Shias', *Inter Press Service*, 26 April <<http://www.ipsnews.net/2013/04/spring-makes-it-worse-for-egypts-shias/>> Accessed 14 May 2013; US Department of State 2012, *2011 Report on International Religious Freedom – Egypt*, 30 July, paragraph 1 <<http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?dliid=192881#wrapper>> Accessed 14 May 2013.

<sup>7</sup> McGrath, C 2013, 'Spring Brings Worse for Shias', *Inter Press Service*, 26 April <<http://www.ipsnews.net/2013/04/spring-makes-it-worse-for-egypts-shias/>> Accessed 14 May 2013.

<sup>8</sup> Ateyya, A 2013, 'Egyptian Shias keep low profile in face of defamation', *Global Post*, 18 April <<http://www.globalpost.com/dispatches/globalpost-blogs/belief/egyptian-shias-keep-low-profile-defamation-mulid-sufism>> Accessed 14 May 2013.

<sup>9</sup> Neriah, J 2012, 'Egypt's Shiite Minority: Between the Egyptian Hammer and the Iranian Anvil', *Jerusalem Center for Public Affairs*, No. 591, September-October <<http://jcpa.org/article/egypts-shiite-minority-between-the-egyptian-hammer-and-the-iranian-anvil/>> Accessed 14 May 2013.

appoints and pays the salaries of all Sunni Muslim imams, requires all mosques to be licensed by the government, and monitors sermons.

...

Over the years, the small Shi'i Muslim community has faced periodic discrimination, harassment, arrests, and imprisonment. For example, in July 2012, Mohamed Asfour, a Shi'i teacher, reportedly was sentenced to one year in prison, reduced from three years, for contempt of religion and "desecration of a place of worship," although Asfour's lawyer says he was found guilty solely for praying in a mosque according to Shi'i rituals. In January 2012, Egyptian authorities reportedly closed the Shi'i Hussein mosque in Cairo to prevent Shi'i Muslims from observing Ashura.<sup>10</sup>

26. The previously cited US DOS *International Religious Freedom Report for 2011: Egypt* stated that in December 2011, authorities detained seven Shia outside a Mosque in Cairo while they were celebrating a Shia holy day. No reason was provided for the detention.<sup>11</sup> An April 2013 *Inter Press Service* article claims that some Shia worshippers were forcibly removed from the Mosque after Salafi groups accused them of performing 'barbaric' rituals.<sup>12</sup>
27. The abovementioned USDOS report noted that Egyptian government officials made repeated statements denigrating Shia Islam.<sup>13</sup> In December 2011 a senior official at the Ministry of Islamic Endowments declared that spreading Shia thought in Sunni societies was not permitted and practicing Shia rites was not allowed.<sup>14</sup> According to Egyptian media site *Bikya News*<sup>15</sup>, the Minister added that all mosques and religious sites are 'subject to full supervision of the Ministry of Religious Endowments'.<sup>16</sup> The abovementioned USDOS report provides examples of Shias being arrested under 'government-enforced' laws against 'insulting' or 'denigrating' religion. The USDOS document states that over 100 Shias were arrested and released during 2010. The report also stated that the Shia-orientated Tahrir Party was twice refused registration on religious grounds while four Salafi-orientated parties were allowed to register.<sup>17</sup>
28. Several reports stated that many Shia conceal their faith to avoid problems. The abovementioned *Inter Press Service* article states that to avoid persecution, many Shias practise their faith under the umbrella of Sufism, an Islamic sect that shares a reverence for Ahl Al-Beyt with the Shias.<sup>18</sup> Similarly, an April 2013 article in *Global Post* quoted the editor of *The Arabic Family* newspaper as stating 'Many Shias prefer to practice their faith

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<sup>10</sup> United States Commission on International Religious Freedom, *USCIRF Annual Report 2013 - Countries of Particular Concern: Egypt*, 30 April 2013.

<sup>11</sup> US Department of State 2012, *2011 Report on International Religious Freedom – Egypt*, 30 July, Sec 2 <<http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?dliid=192881#wrapper>> Accessed 14 May 2013.

<sup>12</sup> McGrath, C 2013, 'Spring Brings Worse for Shias', *Inter Press Service*, 26 April <<http://www.ipsnews.net/2013/04/spring-makes-it-worse-for-egypts-shias/>> Accessed 14 May 2013

<sup>13</sup> US Department of State 2012, *2011 Report on International Religious Freedom – Egypt*, 30 July, paragraph 1 <<http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?dliid=192881#wrapper>> Accessed 14 May 2013.

<sup>14</sup> US Department of State 2012, *2011 Report on International Religious Freedom – Egypt*, 30 July, paragraph 1 <<http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?dliid=192881#wrapper>> Accessed 14 May 2013.

<sup>15</sup> See <<http://bikyaneews.com/about/>>

<sup>16</sup> Gordon, R 2013, 'In Egypt, it's Shia versus naked women', *Bikya News*, 13 May <<http://bikyaneews.com/88712/in-egypt-its-shia-versus-naked-women/>> Accessed 14 May 2013.

<sup>17</sup> US Department of State 2012, *2011 Report on International Religious Freedom – Egypt*, 30 July, paragraph 1 <<http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?dliid=192881#wrapper>> Accessed 14 May 2013.

<sup>18</sup> McGrath, C 2013, 'Spring Brings Worse for Shias', *Inter Press Service*, 26 April <<http://www.ipsnews.net/2013/04/spring-makes-it-worse-for-egypts-shias/>> Accessed 14 May 2013.

under the umbrella of Sufism'. The editor noted the reason for this was that most Shia did not wish to be identified as Shia.<sup>19</sup>

29. Friction between Sunnis and Shia in Egypt is exacerbated by the political rivalry between Sunni-majority Egypt and Shia-majority Iran. The April 2013 *Inter Press Service* article states that former Egyptian President Mubarak's mistrust of Iran following the 1979 Iranian revolution led to Mubarak creating a foreign policy aimed at stopping the 'Shia tide'<sup>20</sup> Ishaak Ibrahim, a religious rights researcher at the Egyptian Initiative for Personal Rights noted that Mubarak's government was 'deeply suspicious of its Shia minority [in Egypt]'<sup>21</sup> Ibrahim added that 'It was assumed that all Shia were loyal to Iran, and closely monitored their activities and prevented them from gathering. Many Shia were arrested on (spurious) charges'<sup>22</sup> Human Rights Watch have reported:

During the rule of former president Hosni Mubarak, security officials arbitrarily arrested and detained Shia under the emergency law that was in effect for decades solely because of their religious beliefs.

...

Under former president Mubarak, in June 2009, State Security Investigations (SSI) arrested 19 Shia and detained them under the Emergency Law for "spreading Shi'ism" and "defaming religion." Nine of the men were from Abu Musallim. One told Human Rights Watch that he had spent 20 months in detention and that security officials released the last of the group only in February 2011. He said that upon his return to the village "things had become difficult" for him and the other Shia. They could no longer pray in the same mosque as they used to before because the Salafi sheikhs Sayed Soliman and Hassan al-Khatib prevented them.<sup>23</sup>

30. The *Inter Press Service* article states that, according to activists, the fall of Mubarak opened a brief window of improved conditions for Shia, however, conditions have worsened since the election of the Islamist Mohamed Morsi as president.<sup>24</sup> Sources indicate that tensions between Shias and Sunnis increased after the revolution that toppled the Mubarak government. According to Geneive Abdo:<sup>25</sup>

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<sup>19</sup> Ateyya, A 2013, 'Egyptian Shias keep low profile in face of defamation', *Global Post*, 18 April <<http://www.globalpost.com/dispatches/globalpost-blogs/belief/egyptian-shias-keep-low-profile-defamation-mulid-sufism>> Accessed 14 May 2013.

<sup>20</sup> McGrath, C 2013, 'Spring Brings Worse for Shias', *Inter Press Service*, 26 April <<http://www.ipsnews.net/2013/04/spring-makes-it-worse-for-egypts-shias/>> Accessed 14 May 2013.

<sup>21</sup> McGrath, C 2013, 'Spring Brings Worse for Shias', *Inter Press Service*, 26 April <<http://www.ipsnews.net/2013/04/spring-makes-it-worse-for-egypts-shias/>> Accessed 14 May 2013.

<sup>22</sup> McGrath, C 2013, 'Spring Brings Worse for Shias', *Inter Press Service*, 26 April <<http://www.ipsnews.net/2013/04/spring-makes-it-worse-for-egypts-shias/>> Accessed 14 May 2013.

<sup>23</sup> Human Rights Watch, 2013, 'Egypt: Lynching of Shia Follows Months of Hate Speech Police Fail to Protect Muslim Minority', June 27, 2013, <http://www.hrw.org/news/2013/06/27/egypt-lynching-shia-follows-months-hate-speech> - Accessed 19 July 2013.

<sup>24</sup> McGrath, C 2013, 'Spring Brings Worse for Shias', *Inter Press Service*, 26 April <<http://www.ipsnews.net/2013/04/spring-makes-it-worse-for-egypts-shias/>> Accessed 14 May 2013.

<sup>25</sup> Iran Program Director, The Century Foundation



Since the Egyptian revolution, Sunni animosity in Egypt toward Shia Muslims has increased and gone public in a country where, in the past, doctrinal differences between the two Islamic sects were barely mentioned.<sup>26</sup>

31. Human Rights Watch recently reported on the lynching of four Shia by a mob apparently led by Salafi sheikhs in the village of Abu Musallim in Greater Cairo on June 23, 2013 which came after months of anti-Shia hate speech at times involving the ruling Muslim Brotherhood.<sup>27</sup>
32. Although no reports were located concerning the treatment of individual Shias in Alexandria, reports indicate that Shia in Alexandria have faced protests, the destruction of shrines and opposition from Sunnis. Shias reportedly face barriers in practicing their religion in Alexandria. A July 2012 article in *New Statesman* quoted the head of a 'fundamentalist' Salafi Mosque as stating 'We cannot have Shias in our mosque because of their extremist views.' The mosque leader added that he opposed the building of a mosque for Shia to pray privately.<sup>28</sup>
33. In April 2013 an *Ahlul Bayt News Agency*<sup>29</sup> report stated that 'Dozens of Salafis protested on Tuesday in the Al-Hadra district of Alexandria against the Shi'a doctrine'<sup>30</sup> According to the report the protestors distributed material warning citizens of what the protestors considered to be the dangers of Shi'ism. The report stated the protest was made up 'Members of the Al-Da'wa Al-Salafia, Al-Nour Party, and the Al-Gabha Al-Salafia'. The report quoted a member of the Political Bureau of the Al-Gabha Al-Salafia, Khaled El-Masry, as stating the protest was part of a larger campaign aimed at eliminating the Shi'a threat to Sunni Islam. El-Masry added that he believed the Shi'a doctrine is not truly Islamic. Ahmed Mawlana, head of the Al-Shaab Salafi party stated that his party condemns the spread of Shia Islam in Egypt.<sup>31</sup>
34. In April 2011 the Tehran-based *Press TV*<sup>32</sup>, citing Al-Masry Al-Youm as their source, reported on the destruction of what *Press TV* referred to as Shia shrines located in Qalyub and Alexandria in northern Egypt. According to the report, the attacks were perpetrated by groups backed by the Saudi government. The report did not provide any further details on the

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<sup>26</sup> Abdo, G 2013, 'Shia-Sunni Friction Growing In Egypt', *Huffington Post*, 14 March  
<[http://www.huffingtonpost.com/geneive-abdo/shiasunni-friction-growin\\_b\\_2859787.html](http://www.huffingtonpost.com/geneive-abdo/shiasunni-friction-growin_b_2859787.html)> Accessed 14 May 2013.

<sup>27</sup> Human Rights Watch, 2013, 'Egypt: Lynching of Shia Follows Months of Hate Speech Police Fail to Protect Muslim Minority', June 27, 2013, <http://www.hrw.org/news/2013/06/27/egypt-lynching-shia-follows-months-hate-speech> - Accessed 19 July 2013.

<sup>28</sup> Esposti, E.D. 2012, 'The plight of Egypt's forgotten Shia minority', *New Statesman*, 3 July  
<<http://www.newstatesman.com/blogs/world-affairs/2012/07/plight-egypt%E2%80%99s-forgotten-shia-minority>> Accessed 14 May 2013.

<sup>29</sup> A Shia news site publishing articles in multiple languages - See  
<<http://www.shafaqna.com/english/shafaq/item/1559-introducing-a-shia-website-ahlulbayt-news-agency-abna.html>>.

<sup>30</sup> 'Extremist Salafis Protest Against Shiite Islam in Alexandria' 2013, *Ahlul Bayt News Agency*, 11 April  
<<http://abna.ir/data.asp?lang=3&Id=408036>> Accessed 14 May 2013.

<sup>31</sup> 'Extremist Salafis Protest Against Shiite Islam in Alexandria' 2013, *Ahlul Bayt News Agency*, 11 April  
<<http://abna.ir/data.asp?lang=3&Id=408036>> Accessed 14 May 2013.

<sup>32</sup> See <<http://edition.presstv.ir/about.html>>.

attack.<sup>33</sup> An April 2011 report in *The Guardian* suggested the targets of the attack were actually Sufi shrines.<sup>34</sup>

### *The Overthrow of the Morsi Regime*

35. On 3 July 2013, Egyptian President Mohammed Morsi, the former Chairman of the Muslim Brotherhood's Freedom and Justice Party, was removed from office by the Egyptian military. The military's actions came after mass anti-government protests commenced on 30 June 2013, coinciding with Morsi's one year anniversary in office.<sup>35</sup> Millions of Egyptians participated in protests held across the country, calling on the president to resign. Protesters charged that Morsi monopolised power and failed to resolve Egypt's economic woes.<sup>36</sup> Morsi has been held in an undisclosed military facility since his removal from office.<sup>37</sup> In addition, hundreds of Muslim Brotherhood members and supporters have been arrested and scores of protesters have been killed by security officials in pro-Morsi demonstrations.<sup>38</sup>
36. On 9 July, Mansour named Hazem el-Beblawi, a liberal economist and former finance minister, interim prime minister and former UN diplomat Mohamed ElBaradei deputy president for foreign affairs.<sup>39</sup> On 16 July 2013, Mansour swore in a new 34-member cabinet dominated by liberals and technocrats.<sup>40</sup> The cabinet includes three Christians.<sup>41</sup>

### *Country of reference*

37. The applicants have claimed to be Egyptian nationals. There is substantial documentary evidence that they are including copies of their passports. I find that Egypt is their country of nationality for the purposes of the Convention.

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<sup>33</sup> 'Pro-Saudis damage Shia sites in Egypt' 2011, *Press TV*, 2 April  
<<http://edition.presstv.ir/detail/172771.html>> Accessed 14 May 2013

<sup>34</sup> Al-Alawi, I 2011, 'Egyptian extremism sees Salafis attacking Sufi mosques', *The Guardian*, 11 April  
<<http://www.guardian.co.uk/commentisfree/belief/2011/apr/11/salafis-attack-sufi-mosques>> Accessed 14 May 2013.

<sup>35</sup> 'Brotherhood Mursi sworn in as Egyptian president' 2012, *BBC News*, 30 June  
<<http://www.bbc.co.uk/news/world-middle-east-18656396>> Accessed 10 July 2012.

<sup>36</sup> Fayed, S & Saleh, Y 2013, 'Millions flood Egypt's streets to demand Mursi quit', *Reuters*, 30 June  
<<http://www.reuters.com/article/2013/06/30/us-egypt-protests-idUSBRE95Q0NO20130630>> Accessed 17 July 2013.

<sup>37</sup> 'Egypt freezes assets of top Islamists after ousting of president Mohamed Morsi' 2013, *Agence France Presse*, 15 July <<http://www.theaustralian.com.au/news/world/egypt-freezes-assets-of-top-islamists-after-ousting-of-president-mohamed-morsi/story-e6frg6so-1226679440140>> Accessed 17 July 2013; Gulhane, J & Taha, RM 2013, 'Morsi being held for his own safety: army', *Daily News Egypt*, 13 July  
<<http://www.dailynewsegypt.com/2013/07/13/morsi-being-held-for-his-own-safety-army/>> Accessed 17 July 2013

<sup>38</sup> Chulov, M & Kingsley, P 2013, 'Egypt's military arrest Muslim Brotherhood supreme leader', *The Guardian*, 5 July <<http://www.guardian.co.uk/world/2013/jul/04/egypt-military-arrest-warrants-muslim-brotherhood>> Accessed 18 July 2013.

<sup>39</sup> 'Egypt names Hazem el-Beblawi as interim prime minister as Gulf states pour in billions in aid' 2013, *Reuters/ABC News*, 10 July <<http://www.abc.net.au/news/2013-07-10/egypt-names-interim-prime-minister/4810224>> Accessed 17 July 2013; See also 'Egypt crisis: Who are the key players?' 2013, *BBC News*, 9 July <<http://www.bbc.co.uk/news/world-middle-east-23186408>> Accessed 17 July 2013

<sup>40</sup> Hauslohner, A 2013, 'Interim Egyptian Cabinet Sworn In', *The Washington Post*, 17 July  
<[http://www.washingtonpost.com/world/middle\\_east/deadly-clashes-erupt-in-cairo-after-us-diplomats-visit/2013/07/16/8fef7e1c-edff-11e2-9008-61e94a7ea20d\\_story.html](http://www.washingtonpost.com/world/middle_east/deadly-clashes-erupt-in-cairo-after-us-diplomats-visit/2013/07/16/8fef7e1c-edff-11e2-9008-61e94a7ea20d_story.html)> Accessed 17 July 2013.

<sup>41</sup> Sen, AK 2013, 'Egypt swears in new Cabinet that excludes Islamists' *The Washington Times*, 16 July  
<<http://www.washingtontimes.com/news/2013/jul/16/egypt-swears-in-new-cabinet-that-excludes-islamist/?page=all#pagebreak>> Accessed 18 July 2013.

### *Assessment of claims*

38. During a Tribunal hearing of nearly three hours of length, the applicant and his wife were extensively questioned regarding their conversion from the Sunni faith to the Shia branch of Islam. Overall, they presented as credible witnesses who gave largely consistent evidence. He was able to give rather convincing evidence concerning the reasons why he adopted the Shia faith and the manner in which he did. He displayed a solid knowledge of key aspects of the Shia faith (such as the key role of Ali, Muhammad's relative) including that of the Twelvers (or Ithna ashariyyah) branch which he claimed he was a member of. For example, he referred to the twelfth and final imam, Muhammad al-Mahdi and this branch's belief that he was currently alive and that he would reappear and fill the world with justice. He was able to describe the Shia style of praying (such as folding arms and the use of a stone to place the head on) that he undertook. He was able to recount a favourite passage from the Quran. He claimed that he did not attend mosque in Egypt and that he had few face to face meetings with other Shias and that he communicated with other Shias through the internet (such as Facebook). The applicant said he did not attend a mosque in [town] because there were no Shia ones available; my internet searching prior to the hearing indicated that this was the case.
39. The applicant's wife was also able to give a rather convincing account of her own adoption of the Shia faith, noting that it had occurred gradually and that it had arose from the influence of her husband. Asked specifically what it was that attracted her, she commented that it was the hope that al-Mahdi would soon return to rescue everybody and that everybody would follow him. She referred to what she said were signs as to this (the overthrow of governments in Iraq and Shia, the taking of power by the Muslim Brotherhood in Egypt who she thought did understand religion, the appearance of special stars in the sky. She was able to give a reasonable level of detail of the tenets and practices of the Shia branch of Islam, including citing verses of the Quran. Asked what branch of the Shia faith she belonged to, she said she was a moderate Muslim who did exactly what her husband did though she did not state that she was a Twelver. She said she did attend mosque and would go once or twice a week and attended with a number of other Shias who she contacted via a mobile phone and Facebook. She also stated that she did not attend a mosque in [town] as there was no Shia one to go to.
40. Importantly neither applicant sought to embellish their claims and neither reported any significant level of mistreatment during their period prior to coming to Australia in 2008 and in a one month visit at the start of 2010. Considering the evidence as a whole, I accept that both are of the Shia faith and substantially committed to the exercise of it.
41. The applicants prior to 2011 lived a good life. Both gave evidence that colleagues knew about their Shia faith but they were not subjected to harassment because of it. Both were able to be [employed] in high quality jobs and to obtain high level tertiary qualifications. The applicant wife was even sponsored by the Egyptian government to undertake further tertiary study in Australia. They returned in early 2010 for a month and reported no problems.
42. The Shia community is relatively small (between 800,000 to 2,200,000) and there are no laws expressly prohibiting the practice of the Shia faith in Egypt though Shias can be charged under other provisions such as "disrespecting religion" and "disrupting social harmony" The above recent country information from the USCIRF and other sources indicates that all Islamic religious institutions in Egypt are controlled by the government and that the small Shia Muslim community has faced periodic discrimination, harassment, arrests, and imprisonment. Both applicants reported that they could not pray in the Shia style at mosques

which seems consistent with this information. There are also a number of recent reports that many Shias conceal their faith to avoid problems. There are also a number of recent reports of Shias being arrested and prevented from openly practicing their faith. I note that the Morsi government has very recently been overthrown by the military and a more liberal government installed by the military. However, I note that the country information indicates that the former military backed Mubarak regime was deeply suspicious of Shias, that Shias were prevented from gathering and there were instances of arrests and long term detentions of those accused of spreading the Shia faith.

43. Persecution is not limited to actual punishment for exercising such rights, but may take the form of a threat of punishment or a prohibition on the exercise of them.<sup>42</sup> A person faced with a threat of persecution for exercising his or her rights may take steps to avoid the persecutory conduct or to mitigate harm flowing from it. The applicant may choose to conceal personal attributes (such as religion) from his/her persecutors by being discreet. In those circumstances, as the High Court has stated, 'persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action.'<sup>43</sup> It would be erroneous to require an applicant to take steps, reasonable or otherwise, to avoid offending his or her persecutors, or to modify some attribute or characteristic to avoid persecution.<sup>44</sup>
44. Requiring an applicant to live discreetly is wrong and irrelevant to the task of determining refugee status. Where an applicant has acted in the way he or she did only because of the *threat* of harm, the well-founded fear of persecution held by the applicant is the fear that unless he or she acts to avoid harmful conduct, he or she will suffer harm. In these cases, it is the *threat* of serious harm with its implications that constitutes the persecutory conduct. To determine the issue of real chance in such a case without determining whether the modified conduct was influenced by the threat of harm is to fail to consider the issue properly. To properly deal with the question of persecution a decision-maker needs to consider why an applicant has acted or will act discreetly; and what would happen to the applicant if s/he did not act discreetly. However, the mere fact that a particular right is denied is not necessarily enough to establish refugee status. Rather, it will generally also be important to ascertain the importance that the asylum-seeker places upon the exercise of that particular right.<sup>45</sup>
45. I have taken into account that the Muslim Brotherhood has been removed from government but this is very recent and it is unclear how the new military backed government will treat Shias. The experiences of Shias under the past military backed Mubarak government (and their own experiences working in government) indicate there is likely to be some improvement but that the open practice of the Shia faith by its adherents will be difficult or not permitted and that the government will continue to control all Muslim institutions. Given the applicants' commitment to the Shia faith and the country information indicating severe restrictions on the practise of this faith, I find that both the applicant and his wife would be required to act discreetly to avoid the threat of serious harm. If they did not act discreetly, by for example attending Shia celebrations or worshipping in a Shia manner at government controlled mosques, there is a real chance that both would face serious harm amounting to

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<sup>42</sup> *Chan v MIEA* (1989) 169 CLR 379 at 431, per McHugh J. See also *Woudneh v MILGEA* (unreported, Federal Court of Australia, Gray J, 16 September 1988), and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, per McHugh and Kirby JJ at [40].

<sup>43</sup> *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 per McHugh and Kirby JJ at [40].

<sup>44</sup> *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 per McHugh and Kirby JJ at [40] and per Gummow and Hayne JJ at [80].

<sup>45</sup> *Win v MIMA* [2001] FCA 132 (Madgwick J, 23 February 2001) at [15].

persecution from the state or Islamists in the reasonably foreseeable future for reasons of their religion. Such harm could be in form of a threat to their liberty given the country information indicating a significant number of worshipping Shias being arrested by both the former Morsi and Mubarak regimes. Their fears are well-founded.

46. For the reasons given above the Tribunal is satisfied that the first named and second named applicants are persons in respect of whom Australia has protection obligations. Therefore the first named and second named applicants satisfy the criterion set out in s.36(2)(a).
47. I have considered carefully the situation of the applicant's child and note that he is just [age]. Given his very young age I do not consider that being denied the right to practise his parent's religion constitutes serious harm to him and I find he does not face a real chance of persecution in the reasonably foreseeable future for reasons of religion. I further find that there are not substantial grounds for believing that as a necessary and foreseeable consequence of him being removed from Australia to Egypt that he will face a real risk of significant harm.
48. The Tribunal is not satisfied that the applicant child is a person in respect of whom Australia has protection obligations. Therefore he does not satisfy the criterion set out in s.36(2)(a) or (aa). However, the Tribunal is satisfied that he is the son and dependent child of the first named applicant and is a member of the same family unit as the first named applicant for the purposes of s.36(2)(b)(i). As such, the fate of his application depends on the outcome of the first named applicant's application. As the first named applicant satisfies the criterion set out in s.36(2)(a), it follows that the other applicant will be entitled to a protection visa provided the first named applicant meets the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa.

## **DECISION**

49. The Tribunal remits the matter for reconsideration with the following directions:
  - (i) that the first named applicant and second named applicants satisfy s.36(2)(a) of the Migration Act; and
  - (ii) that the other applicant satisfies s.36(2)(b)(i) of the Migration Act, on the basis of membership of the same family unit as the first named applicant.

David Corrigan  
Member