

**1113288 [2013] RRTA 180 (15 February 2013)**

**DECISION RECORD**

**CATCHWORDS:** Review of Protection visa refusal - Iraq - Yamani  
Shi'a Muslim - Western returnee - religion -  
imputed political opinion - relocation

**RRT CASE NUMBER:** 111 3288

**DIAC REFERENCE(S):** CLF2010/161658; CLF2011/120365

**COUNTRY OF REFERENCE:** Iraq

**TRIBUNAL MEMBER:** Danica Buljan

**DATE:** 15 February 2013

**PLACE OF DECISION:** Melbourne

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

## 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 and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under section 65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Iraq, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] June 2011 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] July 2011. The delegate decided to refuse to grant the visa [in] November 2011 and notified the applicant of the decision and his review rights by letter at the same time.
3. The delegate refused the visa application [in] November 2011 on the basis that the applicant is not a person to whom Australia has protection obligations.
4. The applicant applied to the Tribunal [in] December 2011 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under subsection 411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under section 412 of the Act.

### RELEVANT LAW

6. Under subsection 65(1) of the Act a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in section 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 subsections 36(2)(a), (aa), (b), or (c). That is, the applicant is either a person to whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under subsection 36(2) and that person holds a protection visa.

#### The Refugee Criterion

7. Subsection 36(2)(a) 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 Refugees Convention.
8. 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.

9. 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, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
10. 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.
11. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
12. Second, an applicant must fear persecution. Under subsection 91R(1) of the Act persecution must involve “serious harm” to the applicant (subsection 91R(1)(b)), and systematic and discriminatory conduct (subsection 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: subsection 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.
13. 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.
14. 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: subsection 91R(1)(a) of the Act.
15. 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.

16. 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.
17. 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.

### **The Complementary Protection Criterion**

18. If a person is found not to meet the refugee criterion in subsection 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 to 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: subsection 36(2)(aa) ('the complementary protection criterion').
19. 'Significant harm' for these purposes is exhaustively defined in subsection 36(2A): subsection 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 subsection 5(1) of the Act.
20. Torture is exhaustively defined in subsection 5(1) of the Act as an act or omission by which severe pain or suffering, whether physical or mental, is inflicted on a person. The pain or suffering must be intentionally inflicted. Furthermore, it must be inflicted for one of five purposes: for the purpose of obtaining from the person or a third person information or a confession; for the purpose of punishing the person for an act which they or a third person committed or is suspected of having committed; for the purpose of intimidating or coercing the person or a third person; for any purpose related to one of those purposes; or for any reason based on discrimination that is inconsistent with the *Articles of the International Covenant on Civil and Political Rights* (the ICCPR).
21. However, torture does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the ICCPR.
22. 'Cruel or inhuman treatment or punishment' for the purposes of subsection 36(2A)(d) is exhaustively defined in subsection 5(1) of the Act to mean an act or omission by which severe pain or suffering, whether physical or mental, is inflicted on a person, or pain or suffering, whether physical or mental, is inflicted on a person, so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature. The pain or suffering must be intentionally inflicted.

23. However, ‘cruel or inhuman treatment or punishment’ does not include an act or omission which is not inconsistent with Article 7 of the ICCPR, nor one arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the ICCPR. Article 7 of the ICCPR prohibits torture and cruel, inhuman or degrading treatment or punishment.
24. The final type of significant harm listed in subsection 36(2A) is degrading treatment or punishment: subsection 36(2A)(e). Degrading treatment or punishment is exhaustively defined in subsection 5(1) of the Act to mean an act or omission which causes, and is intended to cause, extreme humiliation which is unreasonable.
25. However, ‘degrading treatment or punishment’ does not include an act or omission which is not inconsistent with Article 7 of the ICCPR, nor one that causes, and is intended cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the ICCPR. Article 7 of the ICCPR prohibits torture and cruel, inhuman or degrading treatment or punishment.
26. 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: subsection 36(2B) of the Act.
27. Under subsection 36(2B)(b) of the Act there is taken not to be a real risk that an applicant will suffer significant harm in a country if the Tribunal is satisfied that 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. That is, the level of protection must be such that the risk of the applicant being significantly harmed is less than a ‘real risk’

## **CLAIMS AND EVIDENCE**

28. The Tribunal has before it the Departmental files<sup>1</sup> relating to the applicant. 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<sup>2</sup>.

### **The Applicant’s Migration History**

29. According to Departmental records the applicant lodged an application for a Sponsored Family Visitor subclass 679 visa [in] 2010. In his visitor visa application the applicant stated that his parents lived in [City 1], Iraq and that he had two brothers resident in Australia, and a brother living in [Country 2]. He also stated that he was employed as a taxi driver in Iraq, and that he had sufficient personal funds for his visit to Australia<sup>3</sup>.
30. The applicant’s brother from Sydney sponsored him for the subclass 679 visa to Australia<sup>4</sup>.

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<sup>1</sup> D1 - Departmental case file CLF2011/120365 and D2 - Departmental case file CLF2010/161658

<sup>2</sup> T1 - RRT case file 111 3288

<sup>3</sup> D2, f.21-26

<sup>4</sup> D2, f.16-20

31. For the purposes of the current review application, the Tribunal notes that the applicant submitted in support of his subclass 679 visa application translated copies of the ‘Certificates of Iraqi nationality’ and personal identity cards, issued to him and his brother, identifying their parents<sup>5</sup>, and a statement indicating that the applicant was the owner of a taxi<sup>6</sup>.
32. [In] 2010 the Department refused the applicant’s application for a subclass 679 visa because it was not satisfied that the applicant intended a genuine visit to Australia. In particular, the Department noted that the applicant’s brother had arrived in Australia in 2000 as an unauthorised boat arrival and that he had subsequently been granted temporary protection in 2005.
33. [In] 2010 the applicant lodged an application for review of this decision with the Migration Review Tribunal (MRT) (differently constituted). At the MRT hearing [in] February 2011 the applicant’s brother (the review applicant) gave the following oral evidence:

The Tribunal asked what would encourage the visa applicant to return to Iraq from Australia. He said that he had to care for his parents and would not leave them. His father needs 100% care. The visa applicant does everything for him.

The visa applicant has been a taxi driver for about 4-5 years; he owns the taxi. He is financially secure and provides support for his parents. His father has a retirement payment but this is not enough to live on. The visa applicant also supports his sister financially. He said that he has strong ties to his siblings in Iraq and a large extended family. He has close friends in Iraq. The visa applicant does not have any financial records; people in Iraq do not trust the banks. In Australia he will stay with the review applicant. He will bring some money with him.

[Details deleted: s.431(2)].

The Tribunal asked whether the visa applicant was affected by the situation in Iraq. He said that the situation was improving. The visa applicant was Muslim; had no political affiliation or opinions; had not lost any business or property.

The Tribunal spoke to the visa applicant. He said that he wanted to travel to Australia as a tourist. He wanted to see the review applicant and his family; he has children the visa applicant has not met.

[Income details deleted: s.431(2)].

He lives with his parents because he cares for them, especially his father. He can only leave them for 30-40 days and only plans to travel for about 30-45 days. His brother will care for them while he is away but he can only do this for a short time because he has his own family and work.<sup>7</sup>

34. [In] February 2011 the MRT set aside the decision to refuse the applicant’s application for a subclass 679 visa<sup>8</sup>.

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<sup>5</sup> D2, f.5-8 & 12-15

<sup>6</sup> D2, f.2-4

<sup>7</sup> D2, f.36

<sup>8</sup> D2, f.35-37

35. As a result, the applicant was granted a subclass 679 visa [in] March 2011 and he arrived in Australia [in] June 2011 as the holder of this visa, which was valid to [August] 2011. He has not departed Australia since his arrival<sup>9</sup>.

### **The Protection Visa Application**

36. [In] July 2011 the applicant applied for a Protection visa. According to the information set out in this application, the applicant was born in [City 1], Iraq in [year deleted: s.431(2)]. In addition, the applicant stated that he belonged to the Arab ethnic group and that he was a Shi'a. He also stated that, in the decade prior to the lodgment of his application, he had lived in [City 1] since [date deleted: s.431(2)].
37. The applicant further stated that he had never been married or in a de facto relationship. In relation to his family composition the applicant advised that his parents, three brothers and a sister lived in Iraq, one brother lived in [Country 2] and two brothers lived in Australia.
38. On the question of his education, the applicant provided little specific detail, other than to indicate that he had been educated in [City 1]; he also did not list any qualifications. The applicant further stated that he had been self-employed as a taxi driver.
39. The applicant further stated that he speaks, reads and writes Arabic (Iraqi).
40. In his Protection visa application the applicant stated that he had legally departed Iraq [in] June 2011 from Baghdad airport; he did not indicate whether he had encountered any difficulties in obtaining a travel document.
41. As regards his claims for a Protection visa, the applicant stated that he was seeking protection in Australia because, as a Yamani Shi'a, he was being threatened by the Iraqi government and its supporters in other Shi'a groups. Specifically, the applicant claimed that in the 7 months prior to his departure, plain clothes representatives of the Iraqi authorities, or from other Shi'a groups, came to his home when he was not there. The applicant stated that he feared that he would be detained, tortured and killed by the Iraqi authorities and these other Shi'a groups, given that other members of the Yamani Shi'a had been sentenced to death and tortured.
42. The applicant submitted a certified copy of the Iraqi passport issued to him in [location deleted: s.431(2)] [in] 2008, valid to [2016]. Apart from the exit and entry stamps relating to the applicant's June 2011 visit to Australia, there are no other travel stamps in this document<sup>10</sup>.
43. In a submission dated [October] 2011<sup>11</sup> the applicant's representative submitted that the applicant is a follower of Shi'ite Imam Ahmed Al Hassan, leader of the 'Saviours of Mankind'<sup>12</sup>. The representative stated that members of this group have been persecuted by other Shi'a groups, with the complicity of the Iraqi government. He added that the applicant fled Iraq after men came to his house searching for him.

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<sup>9</sup> T1, f.26

<sup>10</sup> D1, f.31-55

<sup>11</sup> D1, f.87-94

<sup>12</sup> Also known as 'Yamani Shi'a', 'Followers of Imam Mahdi' and 'Ansar of Imam Mahdi'

44. The representative submitted that fears persecution due to his real and imputed political opinion, and his religion on the basis that was likely to be attacked by Sunni extremists. In addition, the representative contended that the applicant fears persecution on the basis of his membership of a particular social group, as a follower of Imam Ahmed Al Hassan, the Yamani, and as an Iraqi returning from a significant stay in a Western country.
45. The representative stated that the applicant had witnessed severe levels of violence whilst in Iraq and that he was aware of peers, or people in similar situations, who had been killed, or otherwise seriously harmed, in Iraq.
46. In relation to Yamani Shi'a the applicant's representative noted that this religious group was established in 1999 and quickly developed a following that was both scholarly and very devout. He argued that, consequently, the growing influence of the Yamani Shi'a attracted adverse attention from other Shi'ite groups, and their allied political parties. In turn, this led to the destruction of Yamani Shi'a mosques and other places of prayer, as well as the arrest of followers, and the unfair trial and execution of many members. In particular, in April 2008 *Amnesty International*<sup>13</sup> reported the following:

Twenty-eight people have been executed in Iraq this week following what appear to have been hasty and unfair trials. Those executed were arrested in clashes that took place in the past three weeks.

Amnesty International has said that, for them to be arrested, sentenced and executed within such a short period raises serious concerns about the trial process. The organization has called on the Iraqi authorities to disclose all relevant information about these trials, including whether those executed had access to legal representation or not.

47. The applicant's representative also submitted that the Yamani Shi'a attracted adverse attention the Iraqi government, its Western supporters, and Shi'a scholars and leaders. Accordingly, he contended that the attacks that had taken place on the Yamani Shi'a had been both religiously and politically motivated.
48. After referring to the United States Department of State Country report on *Human Rights Practices 2010: Iraq* and the *2009 UNHCR Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers*, the applicant's representative submitted that the country information indicated that those who "express dissatisfaction with local parties or armed groups or who are accused of "un-Islamic" behaviour remain at risk of persecution. As a result, he submitted that the country information supported a finding that the history of the Yamani Shi'ites showed they were a group accused of "un-Islamic" behaviour.
49. On the question of political instability within Iraq the applicant's former representative referred to the following reports: the *Washington Post*<sup>14</sup>; *The Economist*<sup>15</sup>; the Danish Immigration Service<sup>16</sup>; Amnesty International; the International Crisis Group<sup>17</sup>; and Mr Anthony Cordesman<sup>18</sup> He submitted that consideration of what had happened to the applicant

<sup>13</sup> <http://www.amnesty.org/en/news-and-updates/news/Iraq-executions-follow-apparently-unfair-trials-20080418> "Iraq executions follow apparently unfair trials" 18 April 2008

<sup>14</sup> "American foreign policy shouldn't focus on elections in Iraq or elsewhere", *Washington Post*, 7 March 2010

<sup>15</sup> <http://www.economist.com/node/16889410?story>, "Iraq's uncertain future: The reckoning", 26 August 2010

<sup>16</sup> Dated September 2010

<sup>17</sup> [http://csis.org/files/publication/111024\\_Iraq\\_US\\_Strategy\\_Gulf.pdf](http://csis.org/files/publication/111024_Iraq_US_Strategy_Gulf.pdf), 24 October 2011

<sup>18</sup> <http://csis.org/expert/anthony-h-cordesman>

and others with a similar history in the past, together with current country information on Iraq, supported a finding that the applicant faced a real chance of Convention-related persecution in the reasonably foreseeable future, as it was unlikely that Iraq would have a stable leadership, or broadly effective government.

50. In relation to the issue of persistent sectarianism, the applicant's representative submitted that much of the recent violence in Iraq was related to ethno-sectarian divisions in the country and that the recent decline in sectarian violence was largely due to the fact that many mixed areas, had been "ethnically cleansed" of one group the other. The representative noted that this included:

Shia in Sunni-dominated neighborhoods, Sunnis in Shia-dominated neighborhoods, and religious minorities in both Sunni- and Shi'a-dominated neighborhoods reported receiving death threat letters deMahding that they leave their homes, and in many cases individuals either complied or were killed.

51. As regards returnees from Western countries, the applicant's representative referred the Tribunal to the Tribunal decision in *RRT 1101339*<sup>19</sup> where the Tribunal (differently constituted) concluded that Iraqis, who had spent a significant period in Western countries, including businessmen, are at risk of serious harm on return to Iraq.
52. As a result, the representative argued that the applicant, as a person who had been in Australia for a significant period, was at risk of serious harm because of political opinions that would be imputed to him and as a member of a particular social group, being Iraqis who had spent significant periods in a Western country.
53. On the question of relocation and State protection the applicant's representative noted that the UNHCR Guidelines effectively indicated that:

90. Generally, no internal flight alternative will be available because of (i) the ability of non-State agents of persecution to perpetrate acts of violence with impunity, (ii) the ongoing levels of violence in mainly the Central Governorates of Baghdad, Diyala, Kirkuk, Ninewa and Seth Al-Din giving rise to new persecution, (iii) access and residency restrictions, and (iv) the hardship faced in ensuring even the basic survival in areas of relocation.

54. The applicant's representative went on to submit that:

It is apparent that the State security apparatus is infiltrated by groups whose own interests take priority over the protection of ordinary citizens and they are consequently ineffective to the extent that they cannot make available adequate protection for ordinary citizens. In light of the recent escalation of violence, it is also likely that the situation will deteriorate.

The applicant's claims disclose a history of State complicity in attacks on his group and available information demonstrates that the State and the various political groups who comprise the government can locate their perceived enemies, such as our client, wherever they might go. In any event, he will quickly become known by his devout pursuit of his religious beliefs. We submit therefore that appropriate State protection is unavailable and that relocation in Iraq is neither a reasonable nor practical alternative for the applicant.

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<sup>19</sup> [2011] RRTA 427 (27 April 2011)

55. The following additional evidence also appears on the departmental file:
- Extracts from *Wikipedia* regarding the ‘Soldiers of Heaven’ or Jund As-Samaa and their former leader Dia Abdul Zahra Kadim<sup>20</sup>;
  - [Reference deleted: s.431(2)]<sup>21</sup>
  - [Report deleted: s.431(2)]<sup>22</sup>
  - [Report deleted: s.431(2)]<sup>23</sup>
  - [Report deleted: s.431(2)]<sup>24</sup>
  - [Report deleted: s.431(2)]<sup>25</sup>
56. The applicant was interviewed by the Department in relation to his Protection visa application [in] October 2011. A record of interview appears on the departmental file<sup>26</sup>.
57. [In] November 2011 the applicant’s representative submitted a response to the country information presented by the delegate in the following terms:

We submit that the country information supports the Applicant’s claims that members of the group he belongs to are in conflict with, being targeted and persecuted by other Shi’a groups and that he is at risk in Iraq.

We further submit that there is country information that this is taking place with the complicity of the Iraqi government.

...

We further submit that in assessing the Applicant’s claims it is important to consider the role/power of militias in Iraq in general and in Southern Iraq in particular, the power/influence of some militia groups (such as the BADR Forces) within the Iraqi Government and the Government of Iraq’s association with some militia groups (especially ones that are targeting the Applicant group).

Please see country information in our Submission dated [date] October 2011 and for example, the Council on Foreign Relations article ‘Iraq: Militia Groups’ available at <http://www.cfr.org/iraq/iraq-rni1iiialwoups/p8nOp2>

We further submit that authorities in Iraq are not willing or able to offer effective protection to the Applicant, since the Government/authorities in Iraq have a history of complicity in attacks on his group.<sup>27</sup>

58. Subsequently, the applicant’s representative provided additional video links relating to the Yamani Shi’a.

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<sup>20</sup> D1, f.113-116

<sup>21</sup> D1, f.111-112

<sup>22</sup> D1, f.127 – Source: [Information deleted: s.431(2)]

<sup>23</sup> D1, f.132-134 – Source: [Information deleted: s.431(2)]

<sup>24</sup> D1, f.128-129 – Source: [Information deleted: s.431(2)]

<sup>25</sup> D1, f.130-131 – Source: [Information deleted: s.431(2)]

<sup>26</sup> D1, f.119-123

<sup>27</sup> D1, f.138

## **The Primary Decision**

59. [In] November 2011 the delegate refused the Protection visa application. The delegate accepted the applicant's claims that Ansar El Yamani is a different group to Jund As-Samaa (or the Soldiers of Heaven).
60. However, the delegate found that, based on the CISNET articles before him, Ansar El Yamani was another messianic cult, similar to Jund Al-Sama. As a result, he found that Ansar El Yemeni was not a peaceful group as claimed by the applicant, but a group that had violently attacked the Iraqi authorities. Consequently, the delegate considered that any arrest of the members of this group constituted prosecution rather than persecution. However, the delegate did accept that if such an arrest resulted in execution, this would be persecution, as would the possibility of militia groups killing members of this particular religious group.
61. The delegate did not accept that the applicant was a member of Ansar El Yamani because his evidence on certain matters was inconsistent with the country information. For example, the applicant had claimed Ansar El Yamani had attacked the Iraqi army in [location deleted: s.431(2)] [in] 2007, whereas country information indicated that it had been Jund Al-Sama. In addition, the country information indicated that Ansar El Yamani had attacked the police in [location deleted: s.431(2)] and [City 4] [in] 2008. The delegate found that if the applicant had been a member of the Ansar El Yamani as claimed, he would have known these facts.
62. In addition, the delegate found that, in the event that the applicant was arrested for being a member of the Ansar El Yamani, he would be tried in Baghdad, where the judiciary was well-protected, and that he would therefore receive a fair trial.
63. In any event, given the applicant's evidence that he had not been involved in any serious crimes as a member of the Ansar El Yamani, the delegate found that the chance that the applicant would be arrested and executed for crimes such as murder, kidnap, rape, drug offences, and threats to national security was remote. The delegate also found that there was little in the evidence to indicate that members of the Ansar El Yamani had been assassinated by other Shi'a militia, or members of the security forces.
64. As a result, the the delegate found that the applicant's fear of persecution in Iraq was not well-founded. Accordingly, the delegate found that the applicant was not a person to whom Australia owed a protection obligation<sup>28</sup>.

## **The Review Application**

65. [In] December 2011 the applicant applied to the Tribunal for review of the delegate's decision<sup>29</sup>.
66. By letter dated [June] 2012 the Tribunal wrote to the applicant advising that it had considered all the material before it relating to his application, but it was unable to make a favourable decision on that information alone. Accordingly, the applicant was invited to appear before the Tribunal [in] July 2012 to give oral evidence and present arguments in support of his claims<sup>30</sup>.

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<sup>28</sup> D1, f.142-146

<sup>29</sup> T1, f.1-6

<sup>30</sup> T1, f.27-36

67. [In] June 2012 the applicant's representative requested that the Tribunal hearing be re-scheduled, as he would be overseas from [July] 2012 until [August] 2012. Accordingly, by letter dated [June] 2012 the Tribunal rescheduled the matter for a hearing [in] August 2012<sup>31</sup>.
68. In a submission dated [August] 2012<sup>32</sup> the applicant's representative addressed the delegate's findings in the primary decision. Specifically, the representative argued that the delegate had essentially misunderstood the nature of the applicant's claims by assessing the applicant as a member of the Mahdi Army, rather than as a Yamani Shi'a. In addition, the representative stated that the applicant acknowledged that he was a member of a Messianic sect, but that it did not follow that such sects resorted to violence to achieve their objectives. He stated:
- The applicant claims that the Yamanis' aims and activities are the subject of widespread propaganda and are otherwise misrepresented because they are a political and spiritual threat to the status quo. We submit that the delegate has relied upon some of that propaganda to conclude that the group to which our client belongs is 'extreme' and 'violent' and its members are pursued by security forces 'just as they do any terrorist group in Iraq'.
69. In relation to the delegate's findings that the applicant had been wrong about his group being attacked [in] 2007, given that country information indicated that the clash had been between the government and Jund As-Samaa, the representative advised that the applicant agreed that the Yamani Shi'a had not been involved in this particular clash. However, he added that the applicant's claim was that members of his group were killed.
70. In addition, the representative pointed out the illogicality of the delegate's finding that, if arrested due to his membership of the Yamani Shi'a, the applicant would receive a fair trial in Baghdad and that he would not be executed, whilst also citing country information that members of the applicant's group were alleged to be terrorists to whom the death penalty would be applied. In this respect, the applicant's representative also referred to the UNHCR 2012 Guidelines<sup>33</sup> regarding the extent to which perceived political opponents of the Iraqi government had been arbitrarily arrested on vague terrorism-related charges, subjected to allegedly unfair trials and extra-judicial killings.
71. The representative further noted that the UNHCR 2012 Guidelines continued to reiterate its 2009 assessment that internal flight/relocation was not a reasonable option for Iraqis from central and southern Iraq, particularly where the State was the agent of persecution.
72. Alternatively, the applicant's representative submitted that if the Tribunal found that the applicant was not a refugee, it should still find the applicant met the requirements for a Protection visa because he met the complementary protection requirements. This was on the basis that the applicant faced a real risk that he would suffer significant harm in the form of arbitrary deprivation of life, torture, cruel or inhumane treatment or degrading treatment or punishment.

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<sup>31</sup> T1, f.37-49

<sup>32</sup> See T1, f.51-53

<sup>33</sup> At page 17 of the UNHCR 2012 Guidelines<sup>33</sup>

## **The Tribunal Hearing**

73. A hearing was held [in] August 2012 and the applicant gave oral evidence. The applicant's representative also attended the Tribunal hearing. A summary of the evidence at the Tribunal hearing is as follows.

### ***The Applicant's Personal Details:***

74. The applicant confirmed his personal identity and date of birth in [City 1], the fact that he was a Shi'a Muslim and an ethnic Arab. He also informed the Tribunal that he was a citizen of Iraq and no other country, and that he did not have a right of entry to any other country. On the question of his marital status, the applicant stated that he was single and that he did not have any children.

### ***Family Composition:***

75. In relation to his family composition, the applicant confirmed the identity of his parents and informed the Tribunal that his father had died approximately [time period deleted: s.431(2)] prior to the Tribunal hearing, and that his mother was aged approximately [age deleted: s.431(2)] years. [Family details deleted: s.431(2)].
76. The applicant stated that his father had been an employee of the [government department deleted: s.431(2)], who had been retired and in receipt of a government pension prior to the applicant's departure from Iraq. He advised that he did not know if his widowed mother continued to be in receipt of this pension since his father's death.
77. However, the applicant informed the Tribunal that, whilst living in Iraq, he had provided his parents with financial support. In addition, the applicant stated that, as required, he had also provided small amounts of money to his sisters. The applicant stated that, at the time of the Tribunal hearing, his mother and sisters were receiving financial support from his brothers in Iraq.
78. As regards his extended family, the applicant stated that both his paternal and maternal grandparents were deceased.
79. The applicant gave evidence that he had not travelled overseas prior to coming to Australia, and that he had only lived in Iraq and, more recently, Australia.

### ***The Applicant's Education and Employment:***

80. The applicant gave evidence that he had completed his primary school education in Iraq. However, he added as the Iraq/Iran war had broken out during his [schooling], he had been forced to enter the army and he therefore did not complete his education. Consequently, the applicant stated that he did not have any formal qualifications.
81. In relation to his employment, the applicant gave evidence that he had owned and operated a taxi in [City 1] from [year deleted: s.431(2)] until his departure from Iraq in 2011. The applicant stated that he had also worked as a taxi driver in Baghdad whilst living there. He told the Tribunal that his income had been approximately IQD 20,000 – 30,000 per day, or approximately \$US 20.00.

*The Applicant's Visitor Visa Application:*

82. The applicant confirmed that he had applied for a visitor visa to Australia [in] 2010 because he wanted to escape the problems he was experiencing in Iraq. He also stated that this application was originally refused by the Department, although he did not know the reasons for this. Nevertheless, the applicant stated that his sponsoring brother had subsequently successfully applied for a review of that decision at the MRT.
83. The applicant confirmed that he had given oral evidence by telephone before the MRT. He also stated that that he had not been entirely truthful in his evidence before that Tribunal. The applicant explained that when he was questioned about the situation in Iraq, he told the Tribunal that it was good. The applicant explained that in February 2011 he did not feel he could tell the MRT that he was being persecuted in Iraq because he was afraid that his landline was the subjected of surveillance.
84. The applicant also told the Tribunal that his brothers had provided him with financial support since his arrival in Australia.

*The Applicant's Departure from Iraq and Passport:*

85. The applicant stated that was issued with an Iraqi passport [in] 2008 in [location deleted: s.431(2)]. He added that he had applied for his passport at that time because he wanted to leave Iraq. The applicant gave evidence that he legally departed Iraq from Baghdad airport [in] June 2011. He stated that he did not leave from [City 1] because, having fled [City 1], he could not return there. The applicant also told the Tribunal that he arrived in Australia [in] June 2011 as the holder of a visitor visa valid for 45 days.

*The Applicant's Protection Visa Application:*

86. The applicant confirmed that he had lodged his application for a Protection visa [in] July 2011. The Tribunal asked the applicant what was the trigger for him to do so. The applicant responded that he could not return to Iraq because of the problems he had encountered there.
87. The applicant gave evidence that his brother assisted him to complete his Protection visa application. As a result, he stated that he believed his Protection visa application set out his claims to be a refugee in full.
88. In addition, the applicant stated that he did not know any other Iraqi applicants who had applied for a Protection visa in Australia.

*The Applicant's Refugee Claims:*

89. On the question of religious demographics in Iraq, the applicant advised the Tribunal that approximately one-third of the Iraqi population was Sunni, and that two-thirds were Shi'a. [Population information deleted: s.431(2)].
90. The applicant stated that he is a Yamani Shi'a, whose leader was Ahmad Al-Hassan. The applicant stated that this religious group was established in 1999 and that it held different views about religion to those of traditional Shi'a Muslims. He told the Tribunal that he joined the Yamani Shi'a in 2006 because he was attracted to its ideas of justice and equality for all, regardless of religion.

91. The Tribunal asked the applicant to elaborate on the nature of relationship between Ahmad Al-Hassan and the Mahdi, as well as the attitudes of these religious groups towards other religions and foreigners in Iraq. The applicant did so in some detail, setting out accurately the beliefs held by the Yamani Shi'a.
92. On the question of the relationship between the Yamani Shi'a and Jund al-Sama, the applicant told the Tribunal that the latter was a radical group that wished to assassinate knowledgeable religious clerics, and that they had no relationship with the Yamani Shi'a. In addition, the applicant stated that the Yamani Shi'a had no connection to Moqtada al-Sadr and his followers, the Jaysh al-Mahdi, also known as the Mahdi Army. The applicant further told the Tribunal that the Yamani Shi'a did not wish to wage a violent jihad, but rather seek to promote peace.
93. In response to a question from the Tribunal, the applicant stated that he feared he would be seriously harmed by the Islamic High Council and the different religious parties in the Iraqi government, including the Mahdi army, due to his beliefs as a Yamani Shi'a.
94. The applicant stated that the senior Shi'a religious clerics disliked the Yamani Shi'a because Ahmad al Hassan promoted different ideas to those held by mainstream Shi'a followers.
95. The Tribunal invited the applicant to outline the kind of adverse treatment he had experienced in Iraq as a Yamani Shi'a. The applicant explained that he and other Yamani Shi'a would go to the mosque for prayers and after their prayers were completed they would attend lectures about the al-Yamani. The applicant gave evidence that in 2008, given his occupation as a taxi driver, he was instructed to collect [Sheikh A] and bring him to the mosque. However, when they arrived at the mosque they saw that the police and militia had detained the Yamani Shi'a present at the mosque. As a result, [Sheikh A] told the applicant to leave the mosque and to tell others not to go to the mosque.
96. The applicant stated that after he returned [Sheikh A] to his home, he went to stay with his brother in [City 3] for a few days. This was because he feared that he too would be detained by the police or militia as a Yamani Shi'a. The applicant added that when he returned to [City 1] he found the Yamani Shi'a mosque had been destroyed, and all those who had been present had been detained. The applicant stated that those members of the Yamani Shi'a who had been taken before the courts in Baghdad were eventually released from custody because they had not committed any crimes.
97. However, the applicant gave evidence that of those Yamani Shi'a who had been taken to [other cities], where the courts are under the control of the Badr Faylak and Mahdi army, 24 were executed and 15 were given a life sentence. The applicant responded that this resulted in world-wide protests in August 2011, including in Canberra. The applicant explained that he personally had not participated in the protests in Australia because he had only arrived in Australia approximately 2 months earlier. He added that he also did not have sufficient funds or know how to travel to Canberra.
98. The Tribunal noted that the applicant had claimed that he had been forced to go into hiding in Iraq. The applicant confirmed that this had been the case, once he learned that [Sheikh A], who had been released from detention by the courts in Baghdad, was assassinated by Shi'a militias. As a result, the applicant stated that he started to move around different provinces within Iraq, including spending brief periods in [other cities].

99. The applicant stated that eventually he settled in Baghdad in approximately [months deleted: s.431(2)] 2008, where he largely remained until his departure for Australia. Indeed, the applicant stated that he should have had his passport issued to him in [City 1], but as he was too afraid to return to [City 1], it was issued to him in Baghdad. He added that he could not return to [City 1] to visit his elderly parents because the militias, rather than the Iraqi government, controlled this area.
100. The Tribunal asked the applicant if anything else had happened to him in Iraq. The applicant responded that there had been no specific attack upon him by the Shi'a militia. However, the applicant stated that as a Yamani Shi'a he faced the constant threat of a death sentence in southern Iraq.
101. In terms of his family in [City 1], the applicant stated that they had not been specifically targeted by the Shi'a militia in Iraq because, apart from one of his brothers in Australia, none of his family in Iraq belonged to the Yamani Shi'a. However, the applicant stated that when he spoke to his brother in [City 1], which was approximately once every 2-3 months, the latter would report that the militia had been to his home asking the family about the applicant's whereabouts, as he was a Yamani Shi'a.
102. The Tribunal asked the applicant if he or any members of his family had been members of a political party, or involved in politics, in Iraq. The applicant responded that they had not.
103. On the matter of state protection, the applicant gave evidence that the Iraqi government could not protect him from the Shi'a militia that had effective control in [City 1]. Correspondingly, the applicant also stated that he could not relocate within Iraq, as he had no family or employment ties beyond [City 1] and [another city]. He explained that the brother who had lived in [City 3] had since returned to [City 1] when his position of government employment was transferred to [City 1].
104. The applicant also stated that, even if he did temporarily relocate within Iraq, eventually the militia would capture him wherever he went. In addition, the applicant stated that he no longer had his taxi, as this had been left with a friend in a village near [town deleted: s.431(2)] when he fled to Baghdad in 2008.

***Issues Arising from the Evidence and the Tribunal's Formal Oral Invitation to Comment:***

105. In accordance with the principles set out in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63, the Tribunal noted that there were some inconsistencies in the evidence before it that it would like him to comment upon. In addition, taking into account the requirements of section 424AA of the Act, the Tribunal also invited the applicant to respond to, or comment upon, potentially adverse information.
106. Specifically, in relation to matters arising at the Tribunal hearing and during the course of the review, the Tribunal invited the applicant to comment on, or respond to, the following issues:

***Information included with the Applicant's Visitor Visa Application:***

107. The Tribunal read out to the applicant the summary of the oral evidence that had been given at the MRT hearing held [in] February 2011. It then contrasted this evidence with the applicant's oral evidence before the Tribunal [in] August 2012.

108. Specifically the Tribunal noted that at both hearings there had been inconsistencies in the evidence regarding the length of time the applicant had worked as a taxi driver in Iraq, how much he had earned from his taxi business, the extent to which he had provided financial and other support to his parents and sister, the situation in Iraq, and where the applicant was actually living in Iraq in February 2011.
109. The Tribunal informed the applicant that this information was relevant to the review because it cast doubts upon the credibility of the applicant as a witness and his claims that he faced a real chance of serious harm in Iraq due to his religious beliefs. The Tribunal noted that if it found that the applicant did not face a real chance of persecution in Iraq, then it might find that he did not meet the requirements for the grant of a Protection visa. Consequently, the Tribunal observed that in such circumstances it would have no alternative other than to affirm the decision under review.

*Country information:*

110. The Tribunal also noted that it had been unable to open the link <http://www.the-savior.com> and that the country information indicating that the Yamani Shi'a were both peaceful, and that they were being actively targeted in Iraq, was limited. Indeed, the Tribunal noted that one source had reported that:

It is hard to know whom to believe, and hard open intelligence on these groups is extremely difficult to come by. Some Iraqi bloggers even seem to think that Jund al-Sama is an offshoot, or more violent faction, of Ansar al-Mahdi (think Hamas and Islamic Jihad).

111. The Tribunal informed the applicant that this information was relevant to the review because it cast doubts on the credibility of his claims that he was at risk of serious harm in Iraq on the basis of his religion, membership of a particular social group and imputed political opinion. As a result, the Tribunal noted that it might find that the applicant did not meet the requirements for the grant of a Protection visa and, in those circumstances it would have no alternative other than to affirm the decision under review.

*The Applicant's Response:*

112. The applicant indicated that he understood the information and its relevance to the Tribunal's decision. The applicant and his representative requested a brief adjournment of the hearing so that they could confer prior to the applicant providing his response to these matters. The Tribunal agreed to do so, and the Tribunal hearing was adjourned for approximately 35 minutes for this purpose.
113. Following the resumption of the Tribunal hearing the applicant stated that the evidence his sponsoring brother had given at the MRT hearing [in] February 2011 differed from his own evidence before the Tribunal in August 2012 because his brother was not familiar with all the details of the applicant's self-employment. The applicant stated that this was also accounted for his brother's oral evidence that the applicant was not involved in anything in Iraq that posed a risk to his safety, as his brother was not aware of such matters.
114. In relation to the oral evidence the applicant had presented to the MRT regarding his place of residence in February 2011, the applicant gave evidence that he had not been truthful about these matters at that time. The applicant told the Tribunal that he had been unable to tell the

MRT the correct information during that hearing because he feared that had he done so, his application for a visitor visa to Australia would have been refused.

115. Similarly, the applicant explained that whilst he had assumed the role of carer to his parents prior to his departure from [City 1] in 2008, he had not disclosed to the MRT that he was no longer doing so in February 2011 because of the implications this evidence might have had for his visitor visa application.
116. As regards the limited nature of the country information from authoritative sources regarding the treatment of the Yamani Shi'a, the applicant's representative undertook to provide additional country information to the Tribunal by close of business [on a certain date in] August 2012. The Tribunal also provided the applicant's representative with the details of the textbook "*Holiest Wars: Islamic Mahdis, their Jihads and Osama bin Laden*"<sup>34</sup> written by the academic, Timothy R. Furnish.

### **Post-Hearing Evidence/Submissions**

117. [In] August 2012 the Tribunal received a lengthy submission<sup>35</sup> from the applicant's representative stating, in part, the following:

[Reference deleted: s.431(2)]
118. The applicant's representative also referred to the academic work of Timothy R Furnish, which support the view that the Iraqi government, and at least Moqtada al Sadr, oppose the applicant's group.
119. Similarly, the representative referred to the work of another academic, Redar Visser, confirming that leading clerics and government officials have made a number of allegations against Al Yamani in order to cause the group "maximum trouble". In addition, the applicant's representative noted that The Jamestown Foundation supported the view that leading clerics and government officials in Iraq opposed Al Yamani and other millenarian movements:

*The top Shiite spiritual leader in Iraq, Ayatollah Ali al-Sistani, has urged the government to address those who spread defective views on religion. The Sadrists blame the Iraqi government for the emergence of "spoiling movements" like that of al-Yamani, claiming that while the national army was busy tackling al-Sadr's al-Mahdi army, more dangerous extremist groups were proliferating in southern Iraq.*

[Tribunal emphasis]

120. As a result, the applicant's representative argued that there was ample evidence from reputable and reliable sources to indicate that the Iraqi political and religious establishment feels threatened by the messianic cult to which the applicant belongs. Accordingly, the representative submitted that there was sufficient country information to conclude that members of the applicant's religious group face a real chance of persecution in Iraq.
121. The following additional evidence was submitted in support of the review application:
  - Extracts from the website [www.mahdiwatch.org](http://www.mahdiwatch.org) by Timothy R. Furnish<sup>36</sup>.

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<sup>34</sup> Timothy r. Furnish, "Holiest Wars: Islamic Mahdis, their Jihads and Osama bin Laden", Praeger Publishers, 2005

<sup>35</sup> T1, f.92-94

- [Information deleted: s.431(2)]<sup>37</sup> [Information deleted: s.431(2)]
- The *New York Times* article dated 30 January 2007, “Missteps by Iraqi Forces in Battle Raises Questions”<sup>38</sup>;
- The *Kuwait News Agency* (KUNA) article dated 25 January 2008, “Iraq bans Al-Mehdi Loyalists’ militia”<sup>39</sup>;
- [Information deleted: s.431(2)]<sup>40</sup>, [Information deleted: s.431(2)]
- [Information deleted: s.431(2)]<sup>41</sup> [Information deleted: s.431(2)]
- Extracts from the website [www.historiae.org](http://www.historiae.org) by Reidar Visser together with his curriculum vitae<sup>42</sup> setting out the books and journal articles he has written:
- [Information deleted: s.431(2)]<sup>43</sup>. [Information deleted: s.431(2)]

### **The Background of the Ahmad al-Hasan Movement**

... the group members admit that they do not support the higher clergy among the Shi’a, but at the same time they offer a theoretically grounded explanation for this. In their view, the standard Shi’a practice of total surrender to a qualified cleric ... in questions of Islamic law is misguided. “Emulating a cleric”...they say, is not ...obligatory, and the payment of religious taxes to anyone other than the infallible imams...would be wrong. According to the group...the people should read the Qu’ran for themselves in order to “find out about the truth.”...The real reason for them being targeted, in their view, is political, and they single out Abd al-Aziz al-Hakim of the Islamic Supreme Council for Iraq for having instigated the dispatch of a special force from Baghdad to the south to have them arrested.

The rhetoric of the followers of Ahmad al-Hasan clarifies why the leading Shi’a *ulama* may consider them a threat.

The very fundamental power of the Shi’a *ulama* is the dichotomy present in Usuli Shi’ism (the main orthodox branch of Shi’ism) which divides all Shi’a into two categories: a tiny elite of clerics qualified to interpret the Islamic law...and the vast majority of people unqualified in jurisprudential ...Any ideas about “people going back to the sources themselves”...are seen as a direct challenge to it; it could potentially lead to conditions such as those seen in Sunni Islam, where the established clergy lost control completely in the late 19<sup>th</sup> and 20<sup>th</sup> centuries when a similar “back to sources” trend became ascendant.

...

Information deleted: s.431(2)].<sup>44</sup>

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<sup>36</sup> T1, f.60-64

<sup>37</sup> [reference deleted: s.431(2)]

<sup>38</sup> <http://nytimes.com/2007/01/30/world/middleeast/30iraq.html?pagewanted=print>, T1, f.89-91

<sup>39</sup> <http://kuna.net.kw/ArticlePrintPage.aspx?id=1879191&language=en>, T1, f.83

<sup>40</sup> [Information deleted: s.431(2)] T1, f.84-88

<sup>41</sup> [Information deleted: s.431(2)]T1, f.80-82

<sup>42</sup> T1, f.75-79

<sup>43</sup> T1, f.66-74

<sup>44</sup> T1, f.66-68

## Additional Independent Country Information

### *Ethnicity and Religion:*

122. According to the United Kingdom *Iraq Country of Origin Report* dated 26 August 2011 the two largest ethnic groups in Iraq are Arabs and Kurds, which respectively make up approximately 75-80% and 15-20% of the population. Other ethnic groups include Turkmen and Assyrians. In addition, approximately 97% of the population are Muslims, comprising Shi'a (60-65%) and Sunni (32-37%).

### *The General Security Situation in Iraq:*

123. The United Kingdom *Iraq Country of Origin Report* dated 26 August 2011 reports the following in relation to sectarian targeting:

- 8.35 A CSIS paper entitled *Iraq and the United States Creating a Strategic Partnership*, published 24 June 2010, stated:

*“... much of the violence in Iraq still has an ethnic and sectarian character, and is designed to divide Iraqi's along ethnic and sectarian lines and to discredit government claims of having improved security via the ISF [Iraq Security Forces]. Most of the violence in Iraq remains concentrated in provinces with mixed ethno-religious demographics, particularly in the areas surrounding Baghdad and in Northern Iraq, in territories shared by both Arabs and Kurds. Shi'ites and Kurds have been the most frequent targets in these attacks, most likely carried out by Sunni insurgents or AQI-although this is partially because Shi'ites make up a large percentage of Iraqi security forces and Kurdish forces are active in the north, an indication that the Islamic State of Iraq (ISI) is shifting its target from civilian populations to government and security officers.”*[18m] (p32)

...

- 8.37 The US State Department *International Religious Freedom Report 2010* (USSD IRF Report 2010), covering the period 1 July 2009 to 30 June 2010, published 17 November 2010 noted:

*“Many individuals from various religious groups were targeted because of their religious identity or secular leanings. Acts committed against them included harassment, intimidation, kidnapping, and murder. The general lawlessness that permitted criminal gangs, terrorists, and insurgents to victimize citizens with impunity affected persons of all ethnicities and religious groups. The overall magnitude of sectarian violence declined during the reporting period. The overwhelming majority of the mass-casualty attacks targeted the Shi'a population.”*

*[Tribunal emphasis]*

124. The 2012 *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers* (the UNHCR 2012 Guidelines)<sup>45</sup>; state the following<sup>46</sup>:

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<sup>45</sup> Dated 31 May 2012, <http://www.unhcr.org/refworld/docid/4fc77d522.html>

<sup>46</sup> At pages 5-6

The current situation in Iraq can be characterized as one of ongoing uncertainty due to several factors, including:

- (i) high levels of political and sectarian violence;
- (ii) the unpredictable security situation, including significant numbers of civilian casualties as a result of attacks by armed groups;
- (iii) the full withdrawal of US forces from Iraq at the end of 2011; and
- (iv) continuing challenges with regard to establishment of the rule of law, provision of services; distribution of land, and respect for human rights.

*UNHCR considers that asylum-seekers from Iraq with the following profiles, and depending on the particular circumstances of the individual case, are likely to be in need of international refugee protection* These risk profiles are not necessarily exhaustive, nor is there any hierarchy implied in the order in which they are presented:

- (i) *individuals associated with (or perceived to be supporting) the Iraqi authorities, the Iraqi Security Forces (ISF) or the former foreign forces in Iraq (Multinational Forces in Iraq, MNF-I or US Forces in Iraq, USF-I);*
- (ii) individuals (perceived as) opposing the Iraqi authorities;
- (iii) individuals (perceived as) opposing the Kurdish Regional Government (KRG);
- (iv) certain professionals;
- (v) *individuals with religion-based claims,*
- (vi) *individuals with ethnicity-based claims;*
- (vii) women with specific profiles or in specific circumstances;
- (viii) children with specific profiles or in specific circumstances;
- (ix) victims or persons at risk of trafficking; and
- (x) lesbian, gay, bisexual, transgender and intersex (LOBTI) individuals.

In light of the ongoing non-international armed conflict, related civilian casualties, security incidents and conflict-induced displacement, in particular in central Iraq, *UNHCR recommends that international protection applications lodged by Iraqis claiming to flee high levels of and/or intense violence should each be assessed carefully, in light of the evidence presented by the applicant and other current and reliable information on their place of former residence. This will include an assessment of whether the violence in the place of former residence is of such a level and intensity that international protection is required under complementary protection regimes, even if the protection need cannot be related to a 1951 Convention ground.*

*[Tribunal emphasis]*

125. On the question of religious-based violence, the UNHCR 2012 Guidelines state:

During the period of heightened sectarian violence in 2006 and 2007, *the social and demographic make-up of many areas were altered as Sunni and Shi'ite armed groups sought to seize control and to cleanse "mixed" areas of the rival sect. This occurred principally in Baghdad, Iraq's most diverse city*, but also in the mixed towns and villages surrounding it. During that period, many members of both sects were internally displaced or fled abroad. To date, most of Baghdad's formerly mixed neighbourhoods remain largely homogenized, preventing many from returning to their former areas of residence. In only a few neighbourhoods of Baghdad do members of both sects live side by side. Most returnees have returned to areas under the control of their own community. The recent political crisis, combined with a series of attacks by Sunni armed groups targeting Shi'ite neighbourhoods and pilgrims, has deepened sectarian tensions. Anecdotal evidence from UNHCR protection monitoring activities suggests that some Sunnis are leaving mixed and predominantly Shi'ite neighbourhoods in Baghdad fearing retaliation...<sup>47</sup>

[Tribunal emphasis]

126. Correspondingly, the most recent United Kingdom Border Agency *Operational Guidance Note: Iraq*, dated December 2012, sets out the following information:

### **3.6 General security situation**

...

**3.6.2 Treatment.** The security situation in Iraq continues to affect the civilian population, who face ongoing acts of violence perpetrated by armed opposition groups and criminal gangs. *In particular, armed groups continue to employ tactics that deliberately target crowded public areas and kill and maim civilians indiscriminately. While some attacks appear to be sectarian in nature, frequently targeting religious gatherings or residential areas, others seem random, aimed at creating fear and terror in the population at large and casting doubt over the ability of the Government and Iraqi security forces to stem the violence. Assassinations also persist across the country, targeting, inter alia, Government employees, tribal and community leaders, members of the judiciary and associated persons.*

**3.6.3** Apparently making use of the political wrangling which has followed the elections for Iraq's Council of Representatives (CoR) held on 7 March 2010, *armed Sunni groups (such as Al-Qaeda in Iraq) have stepped up attacks since December 2011. These attacks have been carried out primarily against Shi'ite civilians in what appears to be an effort to stir sectarian tensions and undermine confidence in the ISF and, ultimately, the Iraqi Government* The political stalemate also comes at an uncertain period in the wider region: the repercussions of ongoing unrest and tensions in Syria and Iran, with which Iraq shares porous borders and political and economic ties, are not yet known. Iraq's political difficulties have also reportedly increased tensions with neighbouring Turkey.

**3.6.4** The US State Department Report covering 2011 stated that *violence against the government and civilian population perpetrated by terrorists and extremist groups, including religiously affiliated militias, remained a problem during the year, and bombings, executions, and killings were regular occurrences throughout all regions and sectors of society* Casualty estimates varied. For example, Agence France-Presse (AFP) reported figures compiled by the ministries of health, interior, and defence that indicated that 1,578 civilians, 609 police officers, and 458 soldiers were killed during the year in comparison to 2,505 civilians, 671 police officers, and 429 soldiers in 2010. Direct monitoring by the UN Assistance Mission for Iraq (UNAMI) indicated

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<sup>47</sup> At page 25

that a minimum of 2,771 civilians were killed in 2011. In 2010 UNAMI recorded 2,953 civilian deaths.

...

**3.6.6** UNHCR reports that Iraq continues to experience significant civilian casualties. In 2010 and 2011, media reports recorded more than 4,000 Iraqi civilians killed, on average, each year, bringing the total number of Iraqi civilians killed since 2003 to over 114,000. *From these figures, it appears that there is no noticeable downward trend in civilian casualty figures since mid 2009.* “A persistent low-level conflict” is said to have taken root in the country, which will continue to kill civilians at a similar rate for years to come (“an impassable minimum”). Iraqi Government sources provide consistently lower casualty figures than media reports by international observers. *While violence has fallen significantly since the worst period of sectarian conflict in 2006 and 2007, bombings, shootings and assassinations by armed groups continue to occur on a daily basis, taking a serious toll mainly on the civilian population, and mostly in central Iraq. Baghdad and Ninewa, especially Mosul, remain the most violent areas in Iraq, followed by Kirkuk, Al-Anbar, Babel, Diyala and Salah Al-Din Governorates.*

...

**3.6.9** In October 2012, the Centre for Security Studies reported that “*The data on trends in attacks and casualties are inconsistent and must be interpreted in terms of the larger context of violence in Iraq, but most sources show that recent levels of violence in Iraq continue to show alarming trends*”. *The report of the UN Secretary General covering the period between 29 March 2012 and 11 July 2012 notes that “the overall security situation in Iraq remained unpredictable, with a significant number of deadly attacks, especially during religious celebrations”.*

...

**3.6.11** *Almost all attacks are currently attributable to Sunni extremists and target current Iraqi Security Forces, Government of Iraq (GoI) employees, or very occasionally Shia gathering areas. Most incidents are targeted attacks against specific individuals, with only a small number of indiscriminate attacks.* UNHCR reports that “*While most attacks by armed groups are targeted against specific groups and individuals, due to the nature of the tactics employed, including large-scale bombings and attacks in public places, they inevitably have an indiscriminate effect, causing significant casualties among bystanders*”. UNAMI notes that *during 2011 “armed opposition groups continued to deliberately target civilians. Many attacks targeting Iraqi security forces also employed asymmetric and indiscriminate tactics, such as the use of Improvised Explosive Devices (IEDs) or Vehicle Borne Improvised Explosive Devices (VBIEDs) on roadsides or near police checkpoints, government buildings and installations. Such attacks were often carried out in crowded public areas such as markets, cafes or mosques and churches, revealing an intent to kill and injure a maximum number of civilians, or with indifference to the number and type of casualties”.*

**3.6.12** *Broadly speaking the threat of terrorist incident can be broken down along ethnic lines between Sunni extremists (Al Qaeda Iraq (AQI), Islamic State of Iraq) and Shia militias (Jaysh Al Mahdi (JAM), Asa’ib Ahl Al Maq (AAH), Kita’ib Hizballah (KH) (Hizballah Brigade). FCO’s interlocutors reported that at least 90% of incidents are attributable to Sunni extremists; - Sunni extremists presently have high intent to carry out attacks, but moderate capability; whereas Shia militia have low intent but high capability.*

## **Sunni Extremists**

**3.6.13** *Sunni extremists have their greatest influence in much of northern and western Iraq, though they also retain a presence in areas of Baghdad (most notably Mansour). Broadly speaking, their agenda is to promote sectarian violence and to undermine the Shia-led government...*

...

## **Shia militia**

**3.6.14** *Shia militias have predominantly been seen to operate in most areas of eastern Baghdad, generally emanating from the Sadr City area. They do also have a presence in the more ethnically mixed areas of central and western Baghdad. Shia militia tend to have a far higher capability to carry out lethal acts, though their intent is presently very low. Their agenda is far more linked to the political situation and as their leadership attempt to move into power-brokering they have far less of an inclination to use violence openly. Previously most of their attacks specifically targeted US Forces, though these started to tail off mid 2011 with the understanding that US Forces would withdraw entirely by the end of the year. In 2012 thus far it would be difficult to attribute more than a handful of incidents to Shia militia, and most of these would be down to in-fighting between different factions, or criminal disputes.*

...

**3.7.2 Treatment.** *Although the overall magnitude of sectarian violence has declined, many individuals from various religious groups are targeted because of their religious identity or secular leanings. Acts committed against them included harassment, intimidation, kidnapping, and murder. The general lawlessness that permits criminal gangs, terrorists, and insurgents to victimise people with impunity affects persons of all ethnicities and religious groups.*

**3.7.3** *The UNHCR Eligibility Guidelines of May 2012 record that according to the UN Secretary General's 28 November 2011 report, there was a marked increase in assassinations of government officials, professionals and security personnel. Attacks include instances of intimidation, abductions and assassinations, including by the use of improvised explosive devices (IEDs), (suicide) car bombs and targeted killings with firearms equipped with silencers or "sticky bombs" attached to vehicles. Many reports of intimidations and threats are made. Incidents of targeted attacks have been reported in almost all of central and southern Iraq, but particularly in Al-Anbar, Baghdad, Babel, Diyala, Kirkuk, Ninewa and Salah Al-Din Governorates.*

...

**3.7.6** *According to the October 2012 Quarterly Report to Congress by the Special Inspector General for Iraq Reconstruction (SIGI), "Lethal attacks on Iraqi Police (IP) and Iraqi Army (IA) soldiers rose this quarter" and most sharply in September, when more than 180 IP and IA personnel were killed and 230 wounded. Assassinations of government officials and tribal leaders in Iraq continued unabated this quarter. More than 100 senior government officials were targeted for assassination, with 58 killed. These attacks also killed or wounded more than 120 family members, bodyguards, or other citizens who were in the vicinity of the apparently targeted individuals. Ministry officials, judges, members of parliament, tribal sheiks, and senior ISF officials were targeted by bombs and armed attacks (including home invasion). The largest number of attacks on officials and other leaders occurred in Baghdad, with the second-largest number of attacks around Kirkuk.*

...

**3.7.8** As regards kidnapping and disappearances, the 2011 U.S. State Department report notes that *the majority of reported cases appeared to be financially motivated. Kidnappers who did not receive a ransom often killed their victims.* Police believe that the majority of these cases went unreported. The ICRC noted in February 2010 that professionals remain at risk of being targeted in Iraq, with *persons perceived to be wealthy, and their children, at risk of being kidnapped and held for ransom.*

[Tribunal emphasis]

### ***The Treatment of Religious Minorities in Iraq:***

127. According to the United States 2011 *Report on Religious Freedom – Iraq:*

Shia in Sunni-dominated neighborhoods, Sunnis in Shia-dominated neighborhoods, and *religious minorities in both Sunni- and Shia-dominated neighborhoods reported receiving anonymous death threat letters demanding that they leave their homes.* For example, there were reports that Christians living in the Mansour district of Baghdad were threatened with death if they did not leave their homes. *Religious intolerance was a motivation for some letters, but some reports from Christian and Muslim sources also noted the possibility of economic reasons for the threats, specifically from persons trying to acquire Christian-owned property.*

*Some Muslims threatened women and girls, regardless of their religious affiliation, for refusing to wear the hijab, for dressing in Western-style clothing, or for failing to adhere to strict interpretations of Islamic norms governing public behavior.*

[Tribunal emphasis]

128. On the question of the treatment of Christians and other religious minorities the most recent United Kingdom Border Agency *Operational Guidance Note: Iraq*<sup>48</sup> also states:

...

**3.10.2 Treatment** The U.S Department of State Report on International Religious Freedom reported that *during 2011 there were reports of societal abuses and discrimination based on religious affiliation, belief or practice. Sectarian violence in some parts of the country had a negative impact on the ability of all religious believers to practice their religion, although to a lesser extent in the IKR region.* No reliable statistics on religiously motivated violence were available. *The overwhelming majority of mass casualty terrorist attacks targeted Muslims. A combination of sectarian hiring practices, corruption, targeted attacks and the uneven application of rule of law had a detrimental economic effect on minority non-Muslim communities and also contributed to the departure of significant numbers of non-Muslims from the country, including Christians and Sabean-Mandaeans.* However, the government continued to call for tolerance and acceptance of all religious minorities. In the aftermath of attacks on Christian religious sites, the government supplied funds for repairs and increased the level of protection for churches and places of worship for religious minorities. *Terrorists and insurgents continued to victimize citizens of all ethnicities and religious groups. Terrorists committed acts of harassment, intimidation, robbery, kidnapping, and murder* According to the 2012 U.S Commission on International Religious Freedom report, “*While the Iraqi government has made welcome efforts to increase security, it continues to fall short in investigating attacks and bringing perpetrators to justice*”.

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<sup>48</sup> Dated December 2012

...

**3.10.5** According to a February 2011 Human Rights Watch report, armed groups have attacked members of the Christian (also known as Chaldo-Assyrian), Yazidi, and Shabak communities, labelling them ‘crusaders’, ‘devil-worshippers’, and ‘infidels’, respectively. *Attacks against minorities have had a profound effect by targeting their communities’ social infrastructure, leaving victims and others fearful to carry on with their everyday lives.* Lacking militias and tribal structures to defend themselves, a disproportionate number have fled the country. *Although the government publicly condemns violence against minority groups, it has not taken sufficient measures to bolster security in areas where minorities are particularly vulnerable to attacks, and community leaders say that attacks are almost never thoroughly investigated. Iraqi security forces rarely apprehend, prosecute, and punish perpetrators of such attacks, which has created a climate of impunity.*

...

**3.10.28 Conclusion** *Religious minorities are at risk of persecution in Iraq. The authorities in central and southern Iraq are generally unable to provide effective protection to Christians or other religious minorities* The Kurdistan Regional government currently allows Iraqi Christians from central and southern Iraq to settle into its three governorates. *In assessing whether an Iraqi Christian or other religious minorities from Central and Southern Iraq can reasonably internally relocate to the KRI, case owners should consider all the relevant personal circumstances of the claimant in order to assess whether internal relocation would not be unduly harsh, including their age, ethnicity, financial circumstances and support network, health and gender.*

[Tribunal emphasis]

### ***The Mahdi Army:***

129. According to country information before the Tribunal, the Mahdi Army (or the Jaysh Al-Mahdi – JAM) is active in Iraq, primarily in areas with high concentrations of Shi’a including Baghdad, Diwaniyah and Basra.<sup>49</sup>
130. Since its inception in 2003 by Moqtada al-Sadr and Imad Mugniyah, the Shiite Mahdi Army has undergone several restructures. Following the announcement of a ceasefire by Moqtada al-Sadr in 2007, the Mahdi Army, as such, was effectively disbanded and restructured into two sections; a social wing<sup>50</sup> and an armed wing<sup>51</sup> to continue resistance against occupying forces.<sup>52</sup>
131. Following the announcement of the ceasefire, several groups splintered from the Mahdi Army to continue fighting, including the League of the Righteous, the Guardians of Religion,

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<sup>49</sup> UK Home Office 2011, *Iraq: Country of Origin Information (COI) Report*, 30 August, p. 308 <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/coi/iraq/report-08-11.pdf?view=Binary>

<sup>50</sup> The ‘Momahidoun’, or ‘those who pave the way’

<sup>51</sup> The ‘Promised Day Brigade’

<sup>52</sup> Stanford University 2012, *Mahdi Army*, 18 February <http://www.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/57>; ‘Profile: Moqtada Sadr’ 2012, *BBC*, 19 January <http://www.bbc.co.uk/news/world-middle-east-12135160> ; Al Juburi S 2010, ‘Can Iraq’s Sadrists prove their nationalist credentials?’, *Open Democracy*, 4 January <http://www.opendemocracy.net/opensecurity/shatha-al-juburi/can-iraqs-sadrists-prove-their-nationalist-credentials#> -

and Men of the Sword.<sup>53</sup> In April 2010, Moqtada al-Sadr publically announced the restoration of the Mahdi Army and retaliatory attacks were carried out in response to attacks on Shiite communities in Baghdad.<sup>54</sup>

132. In 2012 Stanford University stated that although no longer the primary focus of the Mahdi Army, the group continues to carry out sectarian violence:

The [Mahdi Army] group focuses on attacking American forces as well as those that work with Americans, including the Iraqi police and other foreign militaries. However, sectarian violence has also been carried out by the group on multiple occasions despite it being condemned by [Moqtada al-] Sadr.<sup>55</sup>

### ***Internal Relocation:***

133. On the question of internal relocation, the December 2012 United Kingdom *Operational Guidance Note: Iraq*, sets out the following information:

#### **2.4 Internal relocation.**

...

**2.4.2** *Iraqi nationals are issued with four documents, an Iraqi Nationality Document, a ID card (Jensiya), a Residence Card and a PDS (or ration card). Iraqi nationals are required to present these documents when seeking to relocate, or for any number of other issues, such as buying a car, obtaining a passport, getting married etc. In order to relocate from one part of Iraq to another, it is necessary to produce these documents. In addition, there is a requirement to obtain permission from the council or security office in the area someone intended to relocate to. It might also be necessary to provide proof of accommodation in a new area, for instance a rental agreement or house deeds to allow an individual to relocate furniture and belongings from one area to another.*

...

**2.4.5** *There are no laws restricting the freedom of movement for Iraqi nationals, neither are there laws which restrict Iraqi nationals from changing their permanent place of residence. In addition, there are no laws relating specifically to the freedom of movement of Internally Displaced Persons (IDPs). These rights of freedom of movement are enshrined in the Iraqi Constitution. However while there are no laws governing freedom of movement, there are certain 'regulations' which are required to be met, for instance the production of certain types of Iraqi documents and, in the presentation of personal information to the local council or police.*

**2.4.6** *The US State Department report noted that security forces can restrict movement pursuant to a warrant, impose a curfew, cordon off and search an area, and take other necessary security and military measures in response to security threats and attacks. There are no KRG laws that restrict movement across the areas*

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<sup>53</sup> Stanford University 2012, *Mahdi Army*, 18 February <http://www.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/57>; Jamestown Foundation 2011, 'Muqtada al-Sadr and Iran Use 'Soft Power' to Pursue Objectives in Iraq', *Terrorism Monitor*, Volume: 9 Issue: 5, 7 February <http://www.unhcr.org/refworld/docid/4d4f99c92.html> -; Ramzi K 2011, *Mahdi Army vs League of Righteous: Fears That Fresh Violence Between Shiites Could Spread*, 14 July, Niqash Organisation website <http://www.niqash.org/articles/?id=2864>

<sup>54</sup> Stanford University, *Mahdi Army*, 18 February 2012 <http://www.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/57>

<sup>55</sup> Stanford University, *Mahdi Army*, 18 February 2012 <http://www.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/57>

*administered by the KRG, but movement was restricted due to security procedures. Citizens (of any ethnicity, including Kurds) crossing into the region from the south were obligated to stop at checkpoints and undergo personal and vehicle inspections. Officials prevented individuals from entering into the region if they were deemed a security threat. Entry for male Arabs was reportedly more difficult than for others. The officer in charge at the checkpoint was empowered to decline entry into the region.*

...

**2.4.8** The government estimated that there were approximately 2.5 million IDPs and that about 40% of them were in Baghdad. Sectarian violence that began in 2006 displaced Shia, Sunni, and Christian families. *According to the UNHCR, in December approximately 1.3 million people remained internally displaced due to sectarian violence that occurred from 2006 to 2008* Approximately 200,000 remained displaced due to violence that occurred between 2003 and 2005, and approximately one million remained displaced due to policies implemented by the former regime prior to 2003.

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**2.4.9** The UNHCR reported 67,080 Iraqi refugees and 193,610 IDPs registered returns during 2011; *these refugees and displaced persons returned to their places of origin or integrated into new communities in the country.* While the return figures for 2011 were higher than the 26,410 refugee returns and 92,480 IDP returns recorded in 2010, the number of registered IDPs remained largely the same, likely due to the government reopening the IDP registration process. The UNHCR's August Iraq Returnee Monitoring Report noted that 64% of the estimated 37,000 registered and unregistered refugee returnee families monitored by the UNHCR between August 2010 and July 2011 permanently returned to the country because of improved security and political conditions in Baghdad. Almost all received the Ministry of Migration and Displacement's (MODM) four million dinar [approximately £2,126] returnee grant. *While security gains and access to assistance attracted Iraqi refugees to return, high unemployment and an unstable political environment created significant challenges. Many displaced Iraqis reported that they remained unwilling or unable to return to their homes because they feared their religious affiliation would make them an unsafe minority in neighbourhoods segregated along lines of religious identity.*

...

**2.4.12** *The main physical barriers to internal movement across central and southern Iraq are the regular security checkpoints. However provided an individual had the necessary identity documents, there was usually no problem in passing these areas*

...

**2.4.15** In the May 2012 UNHCR Eligibility Guidelines, *UNHCR said that they generally consider that IFA/IRA [internal flight alternative/internal relocation alternative] in the Kurdistan Region is not relevant for many Iraqis due to the accessibility issues* In addition, IFA/IRA in the Kurdistan Region is not reasonable for many Iraqis due to difficulties in accessing livelihood opportunities, affordable housing, education, and food through the Public Distribution System. Persons fleeing persecution emanating from state or non-state actors from the Kurdistan Region will generally not be able to find protection in another part of the Kurdistan Region.

**2.4.16** *In considering internal flight/movement within southern and central Iraq, the May 2012 UNHCR Eligibility Guidelines - which were taken into account by the Upper Tribunal in HM and others (Article 15(c)) Iraq CG [2012] UKUT 00409(IAC), - said that UNHCR generally consider that even in cases where an IFA/IRA could be relevant because the agents of persecution are non-state agents whose reach does not extend to a proposed IFA/IRA area in southern and central Iraq, an IFA/IRA may not*

*be a reasonable option in most cases. Reports of insecurity, problematic living conditions and lack of documentation in southern and central Iraq militate against the availability of an IFA/IRA. Further, relocation to an area with a predominantly different ethnic or religious demographic is not reasonable due to latent or overt tensions between ethnic or religious groups. This can be particularly the case when considering relocation of Sunnis to predominantly Shi'ite areas or vice versa.*

[Tribunal emphasis]

## **FINDINGS AND REASONS**

### **THE REFUGEE CRITERION:**

#### **What is the Applicant's Country of Nationality and is he outside it?**

134. The applicant claims that he is a citizen of Iraq and he travelled to Australia on an Iraqi passport. He also provided a copy of his Iraqi citizenship certificate and identity card, confirming his Iraqi citizenship, as well as oral evidence of his life in Iraq.
135. Accordingly, on the evidence before it the Tribunal accepts that the applicant is a national of Iraq and, therefore, for the purposes of the Convention, has assessed his claims against Iraq as his country of nationality.

#### **Does the Applicant have a well-founded fear of persecution for a Convention related reason?**

136. The Tribunal observes that the mere fact that a person claims fear of persecution for a particular reason does not establish either, the genuineness of the asserted fear, or that it is "well-founded", or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that he satisfies all of the required statutory elements. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant him/herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is also not required to make the applicant's case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant<sup>56</sup>.
137. In determining whether an applicant is entitled to protection in Australia the Tribunal must first make findings of fact on the claims he or she has made. This may involve an assessment of the applicant's credibility and, in doing so, the Tribunal is aware of the need and importance of being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims.
138. On the other hand, as stated previously, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been established. Nor is the Tribunal obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country

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<sup>56</sup> See *MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70

of nationality.<sup>57</sup> However, if the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true<sup>58</sup>.

139. In relation to whether the applicant is entitled to protection in Australia as a refugee, the Tribunal notes that the Convention requires that a refugee must have a well-founded fear of persecution for a Convention reason, namely, for reasons of *race, religion, nationality, membership of a particular social group or political opinion*.

***The Applicant's Personal Circumstances:***

140. The Tribunal accepts that the applicant was born in [year deleted: s.431(2)] in [City 1], in Iraq, and that he had lived there since [year deleted: s.431(2)]. The Tribunal also accepts that the applicant is of Arabic ethnicity. In addition, given the country information from the *CIA World Fact Book* regarding the composition of the population in Iraq, the Tribunal accepts that the Arab Shi'a constitute the major ethnic and religious group in Iraq.
141. In relation to his family composition, the Tribunal accepts that the applicant is single and without children. Similarly, the Tribunal accepts that the applicant's father has been deceased since approximately [date deleted: s.431(2)]. In addition, the Tribunal accepts that the applicant's mother, aged approximately [age deleted: s.431(2)] years and [a number] of his siblings reside in [City 1]. The Tribunal also accepts that the applicant has a brother resident in [Country 2] and two brothers living in Australia.
142. In addition, based upon the evidence relating to the applicant's visitor visa application, the Tribunal also accepts that the applicant's brother arrived in Australia in 2000 as an unauthorised boat arrival, and that he was subsequently granted temporary protection in 2005.
143. As regards his education, the Tribunal accepts that the applicant completed his primary school education in Iraq, but that he did not complete [school] because he was conscripted into the Iraq army during the Iraq/Iran conflict. Therefore, the Tribunal accepts that the applicant does not possess any formal qualifications. The Tribunal further accepts that the applicant speaks, reads and writes Arabic (Iraqi).
144. On the question of his employment in Iraq, the Tribunal accepts that the applicant owned and operated a taxi in [City 1] from [year deleted: s.431(2)] until his departure from Iraq in 2011. The Tribunal also accepts that the applicant operated a taxi whilst working in Baghdad, and that prior to 2011 he had not travelled outside Iraq.

***The Applicant's Right to Reside in a Third Country:***

145. Under subsection 36(3) of the Act Australia's protection obligations do not arise if an applicant has not taken all possible steps to avail himself or herself of a right to enter and reside in a third country, whether or not that right arises temporarily or permanently.
146. In this case, the Tribunal notes that the delegate accepted that the applicant did not have a right of entry to a safe third country. There is no evidence before the Tribunal to suggest that the applicant has a right to reside in any third country.

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<sup>57</sup> See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547.

<sup>58</sup> See *MIMA v Rajalingam* (1999) 93 FCR 220

147. As a result, the Tribunal finds that the applicant does not have a right to enter or reside in a third country, either temporarily or permanently. Consequently, the Tribunal finds that subsection 36(3) of the Act has no application in the current matter.

***The Applicant's Persecution Claims:***

148. The applicant has not made any claims that he fears persecution on the basis of his nationality or race. However, the applicant has claimed that he fears persecution on the basis of his religion and political opinion, as a member of the al-Yamani minority Shi'a group, as well as his imputed political opinion and membership of a particular social group as a returnee from the West.

149. Specifically, on the question of imputed political opinion, the applicant's representative argued that the religious group the applicant belonged to was perceived to be "un-Islamic". Consequently, he contended that it attracted adverse attention from other Shi'ite groups and their associated political parties who, with the complicity of the Iraqi authorities, had destroyed Yamani Shi'a mosques and places of worship.

150. In addition, the representative submitted that, as an Iraqi who had spent an extended period of time in Australia, the applicant was at risk of serious harm as a member of a particular social group, being those Iraqis who had spent significant periods in a Western country.

151. As a result, it was argued that the applicant faces a real chance of serious harm from leading Shi'a clerics, their followers and associated political parties and armed militia groups, as well as the dominant Shi'a elements of the current Iraqi government, who would target him due to both his religion and his imputed political opinion.

152. The Tribunal notes that the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* states:

[The] Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right to freedom of thought, conscience and religion, which right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance.<sup>59</sup>

153. The Tribunal accepts that the harm that the applicant claims he fears involves serious harm and systematic and discriminatory conduct, and that the essential and significant reasons for the harm claimed to be feared is both religion and political opinion, which are Convention-related reasons.

***The Applicant's Knowledge of and Involvement with the Yamani Shi'a:***

154. The Courts have found that it is legitimate for decision makers to test the veracity of an applicant's religious claims by reference to knowledge or attitudes which members of the relevant religion might be expected to possess.<sup>60</sup>

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<sup>59</sup> Paragraph 71 of the United Nations High Commissioner for Refugees (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992

<sup>60</sup> See *MIAC v SZOCT* (2010) 189 FCR 577 at [6]-[10]; *Lanying Wang v MIMA* [2000] FCA 963; *WALT v MIMIA* [2007] FCAFC 2; *SZLUS v MIAC* [2008] FCA 1917 at [33]-[37], *SZONC v MIAC* [2010] FMCA 723; *SZQBM v MIAC* [2011] FMCA 807 at [67]-[73]; *SZQTB v MIAC* [2012] FMCA 32 at [87]-[90]; *SZONH v MIAC* [2012] FMCA 242 at [25-28]

155. Nevertheless, the Courts have also held that degrees of understanding will vary from person to person and it may be erroneous to ascribe to all adherents to a particular religion, for example, a required and consistent minimum understanding of its tenets<sup>61</sup>. In particular, in *Wang v MIMA*<sup>62</sup> Gray J stated:

Religion is a matter of conscientious belief, professed adherence and practice. The RRT seems to have approached the issue on the basis that the appellant had to satisfy the RRT that he was possessed of a specific level of doctrinal knowledge to justify being regarded as a Christian. It is not appropriate for the RRT to take on the role of arbiter of doctrine with respect to any religion.<sup>63</sup>

156. Consequently, there is no requirement for a person who claims persecution on the basis of religion to be a devout follower of his faith with a perfect knowledge of religious doctrine of the religious group to which he claims to belong.

157. Similarly, there is no requirement for a person who claims such persecution to necessarily be a religious leader, or other appropriate office holder, within their relevant faith in order to meet the definition of a ‘refugee’. Nor is there a requirement that the applicant must be a devout follower of his faith who attends a place of prayer and worship every week.

158. In the current review application, the Tribunal found the applicant to be a credible witness who gave frank and consistent evidence before it. In addition, after taking into account the applicant’s limited education and cultural differences, the Tribunal considers that the applicant presented a credible knowledge of the Yamani Shi’a and its teachings at the Tribunal hearing. Notably, the applicant’s oral evidence on these matters was confirmed by the country information available to the Tribunal from academics such Timothy Furnish and Reidar Visser.

159. Accordingly, based on the evidence before it, the Tribunal accepts that the applicant is a follower of Ahmad al-Hasan and a Yamani Shi’a.

#### ***The Credibility of the Applicant’s Claims:***

160. In assessing whether the applicant satisfies the definition of a ‘refugee’, the Tribunal observes that it is required to discharge its review responsibilities by assessing the facts and evidence in each case before it in accordance with the requirements of the Convention and the Act, having regard to the relevant case law. The relevant date at which an applicant’s claims for refugee status must be assessed is at the time of decision, and not when an applicant left his or her country, or when the application was lodged.<sup>64</sup>

161. In addition, the Tribunal notes that the legal test it is required to apply in this matter is *prospective* rather than *retrospective* in nature. Consequently, the applicant does not have to show past persecution in order to demonstrate a well-founded fear of persecution.<sup>65</sup> For example, an applicant who belongs to a persecuted group may well establish a well-founded fear even though the applicant has not personally suffered any harm in the past.

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<sup>61</sup> See *WALT v MIMA* [2007] FCAFC 2 at [28] and *SZOIW v MIAC* [2010] FMCA 568 at [15].

<sup>62</sup> (2000) 105 FCR 548.

<sup>63</sup> *Wang v MIMA* (2000) 105 FCR 548 at [16].

<sup>64</sup> *MIEA v Singh* (1997) 72 FCR 288.

<sup>65</sup> *Abebe v The Commonwealth* (1999) 197 CLR 510, Gummow and Hayne JJ at [192]

162. The delegate did not accept that the applicant was a person to whom Australia had protection obligations under the Refugees Convention for the following reasons:

- The presence of inconsistencies in the evidence the applicant had put forward in his visitor visa application and his application for a Protection visa;
- The applicant had claimed that the Yamani Shi'a had been attacked by the Iraqi army in [City 1] [in] 2007, and that many of its followers had been subsequently arrested and executed. However, according to the country information before the delegate, the Yamani Shi'a had attacked the police in [other locations] [in] 2008;
- As a result, the perceived gaps in the applicant's knowledge of these events was found to undermine his claim to be a member of the Yamani Shi'a;
- The Yamani Shi'a, although different from the Jund Al-Sama, was also a violent messianic cult, and not a peaceful religious group as claimed by the applicant;
- Accordingly, the arrest of any member of the Yamani Shi'a by the Iraqi authorities constituted prosecution, rather than persecution; and
- As the applicant had not personally been involved in the bloody clashes that took place [in] 2008 in [other locations], there was only a remote chance that he faced serious harm if returned to Iraq.

163. Both the applicant and his representative addressed these specific issues in their oral submissions at the Tribunal hearing, and in written submissions provided to the Tribunal following the hearing.

164. The Tribunal now turns to consider these matters:

(a) *The Applicant's Immigration History:*

165. Specifically, the Tribunal observes that the applicant's Australian immigration history suggests that he presented inconsistent evidence regarding his circumstances in Iraq in both his visitor visa and Protection visa applications. In addition, the delegate perceived there to be gaps in the applicant's knowledge of certain events involving the Yamani Shi'a in southern Iraq. The Tribunal considers both of these matters go to the question of the applicant's general credibility as a witness.
166. At the Tribunal hearing the issue of the conflicting evidence the applicant had presented with both his visitor and Protection visa applications was raised with him. The applicant acknowledged that he had not been completely truthful with the MRT. However, the applicant explained that his concerns regarding what might happen to him if he remained in Iraq had escalated to the point where he feared providing such information to the MRT would result in the refusal of his visitor visa application.
167. In considering this matter the Tribunal notes that the task before it is not whether the applicant presented "truthful" information to the Department and the MRT in relation to his visitor visa application. Rather, the issue is whether the applicant possesses certain attributes, or a profile, such that on an objective view of the country information before the Tribunal, he faces a real chance of persecution for a Convention-related reason.
168. In addition, the Tribunal has taken into account the fact that at the hearing the applicant provided further detail regarding the discrimination and harassment he had witnessed as a Yamani Shi'a in Iraq. On balance, the Tribunal found the applicant's oral evidence on these matters to be quite measured at the hearing. Notably, his evidence was presented without the type of embellishment that often accompanies a fictional account of events.
169. In the circumstances, given the country information discussed below, the Tribunal places less weight upon the perceived gaps in the applicant's knowledge at the departmental interview in considering the issues before it.
170. In this case the Tribunal does not necessarily accept all of the claims the applicant made in his visitor visa or his Protection visa application. However, this does not necessarily mean that the applicant's application cannot succeed. To meet the definition of a 'refugee' the Tribunal must be satisfied that there is a real chance that the applicant will face persecution for a Convention related reason in the *reasonably foreseeable future*.
171. Accordingly, the Tribunal has taken into account the conflicting evidence the applicant presented in his visitor visa application, and the consequential impact that this has had upon his credibility as a witness. Despite this, the Tribunal places greater weight upon the country information discussed below than it does on the inconsistencies in the evidence the applicant presented with his visitor visa and Protection visa applications.

(b) *The Country Information Regarding the Treatment of Religious Minorities in Iraq:*

172. The Tribunal notes that the current UNHCR Guidelines, dated May 2012, and the most recent United Kingdom Border Agency *Operational Guidance Note: Iraq*, dated December 2012, confirm that individuals with religious-based claims face a real risk of serious harm in Iraq. They also confirm that individuals who are perceived to be opposing the Iraqi authorities also face a real risk of serious harm on the basis of their imputed political opinion.

173. In addition, the UNHCR 2012 Guidelines state that “the line between persecution and criminality appears to be increasingly blurred” because armed groups do target individuals on the basis of their religious identity, imputed political opinion, social status or a combination of these factors.
174. Similarly, the Tribunal notes that the country information set out in sources such as the United States 2010 and 2011 *Reports on Religious Freedom – Iraq*, the Centre for Security Studies, and the United States Commission on International Religious Freedom *2012 Annual Report*, and the United Kingdom Border Agency *Operational Guidance Note: Iraq*, dated December 2012, contain similar findings.
175. Specifically, these reports variously state that individuals will be targeted in Iraq because of their religious identity and perceived opposition to government. This is because extremist groups in Iraq are motivated by a political desire to destroy Iraq’s cultural, intellectual and political diversity, as well as hinder its economic progress and development. As a result, armed militia groups such as, but not limited to, the Mahdi army and Al-Qaeda, target anyone who belongs to a different religious group, as well as anyone they perceive to hold a different political view about these matters.
176. Accordingly, the Tribunal accepts that country information supports the view that there is a religious element to, or overlap with, the imputed political opinion, that gives rise to a risk of serious harm for those who belong to minority religious groups in Iraq.

(c) *Country Information Regarding the Yamani Shi’a:*

177. In the current matter, the Tribunal observes that the delegate did not accept that there was country information to support the applicant’s claims of possible persecution as a Yamani Shi’a in Iraq. The delegate also found that the applicant appeared to have limited knowledge of the incident that had allegedly taken place in [other locations] [in] 2008.
178. However, the Tribunal notes that the country information before the delegate, together with that submitted by the applicant’s representative and arising from the Tribunal’s own research, indicates otherwise. Specifically, the country information refers to two reported events involving bloody clashes between the Iraqi authorities and members of the Yamani Shi’a in [city deleted: s.431(2)] and [city deleted: s.431(2)]. In particular, articles from *Time World*, Ross Colvin at *Reuters*, the *New York Times*, *Radio Free Europe* and the academic, Reidar Visser, all report on such an incident taking place at the time of the Ashura festival [in] 2007.
179. Similarly, the CISNET articles sourced by the delegate, and reports from the *Kuwait News Agency*, *Radio Free Europe*, the *Jamestown Foundation* and Reidar Visser, refer to a second incident taking place during the Ashura festival in 2008. The Tribunal further notes that the published work of the academic Timothy Furnish provides a great deal of detail about Mahdism, the ‘Hidden Imam’ and the particular beliefs of the Yamani Shi’a and their treatment in Iraq. The Tribunal considers Timothy Furnish to be a reliable source as he was a member of the United States armed forces in Iraq and, consequently, much of his work is based on first-hand accounts and experiences.
180. The Tribunal also observes that the academic work of Timothy Furnish, Reidar Visser and the *Jamestown Foundation*, together with the reports from CISNET and *Reuters*, the *New York Times*, *Radio Free Europe*, and the *Kuwait News Agency* confirm that Shi’a in southern Iraq cannot be viewed as a single cohesive unit, and that there are both religious and political

tensions at work driving some of the conflict that is taking place. Further, there is little in more recent country reports to indicate that this situation has improved in Iraq. In particular, the December 2012 *Operational Guidance Note: Iraq* reports that those religious minority groups that are perceived to operate outside what is considered acceptable religious norms remain at particular risk throughout Iraq.

181. This country information further indicates that, whilst the Iraqi government condemns such violence publicly, it has not taken sufficient steps to ensure that these vulnerable communities are protected from such attacks. Nor is the Iraqi government seen to have taken steps to adequately pursue or punish the perpetrators of such attacks.
182. These sources further state that the Yamani Shi'a have denied responsibility for the violence that occurred during these reported events with the Iraqi authorities. In turn, this religious group has accused the Iraqi government of deliberately seeking to defame the Yamani Shi'a for politically motivated reasons by suggesting that they were responsible for the violence. Consequently, the country information before the Tribunal suggests that it is far from clear which party actually instigated the violence that took place during the Ashura festivals in [both] 2007 and 2008.
183. Similarly, the Tribunal observes that the country information regarding whether the Yamani Shi'a constitute a violent messianic cult, like the Jund Al-Sama, rather than a peaceful religious group, as claimed by the applicant, is less than clear.
184. As mentioned by the delegate, country information regarding the Yamani Shi'a quantitatively is not extensive. However, as noted above, there is information of a qualitative nature regarding this particular religious group. Country information sources confirm that the Yamani Shi'a constitute a messianic group, in the sense that they believe in the imminent return of the Islamic Saviour, the Mahdi.
185. As noted by the academics Timothy Furnish and Reidar Visser, some of the Yamani Shi'a's beliefs regarding power in the Muslim world are perceived to be radical, since they teach followers to re-focus their attention away from the traditional religious clerics, to the Qu'ran, and they have also expressed some animosity towards the West.
186. Regardless, the country information from sources such as *Amnesty International*, *Reuters*, the *Kuwait News Agency*, the *New York Times*, and the CISNET articles cited by the delegate, and the work of the academics Timothy Furnish and Reidar Visser, confirm that a significant number of individuals were arrested and tried by the Iraqi authorities in less than favourable circumstances following the bloody clashes that took place at the Ashura festivals in 2007 and 2008.
187. In addition, the Tribunal observes that sources such as *Radio Free Europe*, the *Kuwait News Agency* and the *New York Times*, report that the actions taken by the Iraqi government to deal with messianic groups like the Yamani Shi'a may well be motivated more by a desire to silence opposition voices, rather than a desire to deal with heretical armed groups.
188. The Tribunal further notes that articles, such as those from the *Jamestown Foundation* and Reidar Visser, highlight the fact that groups such as the Yamani Shi'a are viewed as a security threat and with mistrust by the international forces present in Iraq. They explain that the international forces face significant difficulties in Iraq in their attempts to find a workable solution to the violence in Iraq, given that the various religious groups in Iraq do not form a

cohesive, single unit. Consequently, the presence of another fringe religious group such as the Yamani Shi'a is perceived to add to the volatility of the security situation in Iraq exacerbating the difficulties the international forces face in seeking to restore political stability.

189. The Tribunal observes that the country information primarily before the delegate at the time of the departmental interview was dated from early 2008. Therefore, in the absence of credible information regarding the events the applicant referred to [in] 2007, it is not surprising that the delegate drew adverse inferences about the applicant's knowledge of the events of 2008 and his association with the Yamani Shi'a.
190. In the circumstances, given the country information before it, the Tribunal places less weight upon these alleged gaps in the applicant's evidence at his departmental interview.
191. Accordingly, the Tribunal prefers and gives greater weight to the country information before it, which supports the view that members of the Yamani Shi'a in Iraq have been targeted by the authorities, and non-state actors such as the Mahdi army, for both their religious and imputed political beliefs.

*(d) The Applicant's Activities as a Member of the Yamani Shia:*

192. The Tribunal notes that the applicant has stated that his primary fear is that he will be persecuted because he belongs to a religious group that promotes ideas that are different from mainstream Shi'a teachings. The applicant also told the Tribunal that these differences would attract adverse attention from the Shi'a clergy, their associated political parties and elements of the Shi'a dominated Iraqi government.
193. The Tribunal notes that the applicant has not claimed that he was centrally involved in the violence that took place at the Ashura festival. He stated that he had merely driven [Sheikh A] to the mosque. The applicant also stated that he had followed [Sheikh A]'s subsequent instructions not to leave the mosque, and to warn others not to attend the mosque because the police and militia were present detaining those Yamani Shi'a present at the mosque. The applicant added that he then went to stay with his brother in [City 3] for a few days to avoid detention as a Yamani Shi'a.
194. As noted previously, the Tribunal found the applicant's oral evidence regarding these matters to be quite credible at the hearing. In addition, the country information confirms that those attracted to groups like Yamani Shi'a tend to come from poor socio-economic backgrounds, just like those of the current applicant. Against this backdrop it is not surprising that the applicant, who had a limited education, may not have been able to adequately persuade the delegate at his departmental interview, who was relying on material heavily supportive of the Iraqi government that he was at risk of serious harm.
195. In addition, in considering the applicant's activities within the Yamani Shi'a, the Tribunal has taken into account the applicant's personal circumstances. These include the fact that the applicant lacks a formal secondary education and that he was a person of limited financial means. Given this background, the Tribunal accepts that the applicant's involvement in what took place at the Ashura festival was limited.
196. Accordingly, and on balance, the Tribunal accepts the applicant's account of the harassment and discrimination he witnessed as a member of the Yamani Shi'a.

197. The Tribunal has also considered the delegate's findings that if members of the Yamani Shi'a had been arrested in Iraq this constituted prosecution, rather than persecution. However, this view runs counter to the country information presently before the Tribunal regarding these events. In particular, as noted previously, *Radio Free Europe*, the *Kuwait News Agency* and the *New York Times*, indicate that there is a political motive underpinning the steps taken by the Iraqi authorities to deal with these alleged "heretical armed groups" in order to silence potential critics. The country information, such as Amnesty International, also supports the view that the manner in which the judicial proceedings were conducted against members of the Yamani Shi'a was questionable from a human rights perspective.

*Summation:*

198. Accordingly, notwithstanding some discrepancies in the evidence the applicant has presented to the Department and the Tribunal since his arrival in Australia, the Tribunal gives greater weight to the country information before it. In particular, based on that country information, the Tribunal accepts that the Yamani Shi'a, which have been described as a small fringe Shi'ite group with "radical ambitions", face a real chance of serious harm from not only armed militia groups, but also the predominantly mainstream Shiite authorities in Iraq due to their religious beliefs.

199. In addition, based on the country information, the Tribunal also accepts that as a member of the minority Yamani Shi'a, the applicant would be perceived by both Shia and Sunni Muslim extremists groups as someone who held opposing political and religious ideas. In turn, the Tribunal accepts that these extremist and armed groups would impute a political opinion to the applicant that would provide a basis upon which to target him.

200. The Tribunal further considers that the time the applicant has spent outside Iraq and in Australia, exposed to western influences, will further impute to him a political opinion, such that he faces a real chance of serious harm if he returns to Iraq in the reasonably foreseeable future.

201. The Tribunal finds that, in the light of current circumstances in Iraq, as described in the independent country information set out in this decision record, there is a real chance that the applicant will be persecuted if he returns to Iraq in the foreseeable future, on the basis of his religion and political opinion.

202. Accordingly, the Tribunal accepts that the harm that the applicant fears involves serious harm and systematic and discriminatory conduct, and that the essential and significant reasons for the harm claimed to be feared are religion and political opinion, which are Convention-related reasons.

203. As a result, the Tribunal finds that there is a real chance that the applicant would face serious harm amounting to persecution at the hands of the Iraqi authorities, armed religious militias and their associated political groups, based upon his religion and political opinion.

204. The Tribunal further observes that, even if it found that the Iraqi authorities were not motivated to target the applicant on the basis of his religion and political opinion, given the advice set out in the UNHCR 2012 Guidelines and the December 2012 *Operational Guidance Note: Iraq* regarding the range and reach of armed groups in Iraq, the Tribunal accepts that the Iraqi authorities are not able to provide adequate or effective protection to

someone with the applicant's risk profile. This is because the authorities in Iraq have a limited capacity to enforce law and order.

205. Accordingly, taking into account all the country information before it, the Tribunal finds that the applicant cannot avail himself of adequate State Protection if he returns to Iraq.

***Relocation:***

206. The Tribunal has further considered the applicant's past ties to Iraq, including the fact that he had lived and worked for a period in Baghdad, and whether it is reasonable to expect the applicant to return to Iraq and relocate from [City 1] elsewhere within Iraq, such as Baghdad or the KRG. In considering the question of relocation the Tribunal has had regard to and accepts the country information from a range of sources.

207. Notably, in relation to the KRG the country information from the United States *2011 Report on Religious Freedom – Iraq*, the UNHCR 2012 Guidelines, and the December 2011 and December 2012 United Kingdom *Operational Guidance Notes* specifically indicate that, whilst the KRG has welcomed internally displaced persons, it has experienced, and still faces, a real risk of religious-based violence.

208. In addition, the UNHCR 2012 Guidelines and the December 2012 United Kingdom *Operational Guidance Notes* confirm that the security situation in the KRG remains a potential target for active Muslim militia groups. The country information also indicates that there are significant practical difficulties for internally displaced Iraqis in terms of discrimination, harassment, lack of employment opportunity, even for educated professionals, high housing costs, and the administrative burdens imposed for maintaining temporary residence in the KRG.

209. The Tribunal observes that the applicant is an Arabic male and a Yamani Shi'a, with limited financial resources and education, and a person who does not have any formal occupational qualifications.

210. As a result, the country information indicates that he is likely to find it difficult to gain entry and to remain in the northern Kurdish Regional protectorate without family, community or political ties there. Accordingly, the Tribunal considers that given his personal circumstances and limited skill set, it is unlikely that he would easily find employment to establish himself in the KRG. Consequently, the Tribunal considers that it would not be reasonable to expect the applicant to relocate to the KRG to avoid the harm he fears.

211. Correspondingly, southern Iraq is predominantly mainstream Shi'a and, therefore, the Tribunal finds that it would not be reasonable to expect the applicant to relocate there to avoid the harm he fears.

212. Similarly, given the level of sectarian violence in Baghdad, and the time that has elapsed since the applicant worked there, the Tribunal also finds that it would not be reasonable to expect the applicant to relocate to Baghdad to avoid the harm he fears.

213. Accordingly, the Tribunal finds that the applicant would not be able to reasonably relocate within Iraq to avoid the harm he fears.

214. Therefore, the Tribunal is satisfied that the applicant has a well-founded fear of persecution for a Convention related reason if he returns to Iraq now or in the reasonably foreseeable future.

### **CONCLUSION**

215. Accordingly, the Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the *Refugees Convention* as amended by the *Refugees Protocol*. Therefore the applicant satisfies the criterion set out in subsection 36(2) of the Act for a protection visa.

### **DECISION**

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