

**0801550 [2008] RRTA 214 (12 June 2008)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0801550

**DIAC REFERENCE(S):** CLF2007/182127 CLF2007/182920 CLF2007/183055  
CLF2008/30098

**COUNTRY OF REFERENCE:** Iraq

**TRIBUNAL MEMBER:** Patricia Leehy

**DATE DECISION SIGNED:** 12 June 2008

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

## **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 s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Iraq, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by fax.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

### **Definition of 'refugee'**

9. 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.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. 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.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. 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.
17. 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.

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

### **CLAIMS AND EVIDENCE**

19. The Tribunal has before it the Department's file 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.
20. The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic (Standard) and English languages.
21. The applicant was represented in relation to the review by his registered migration agent who attended the hearing with him.

*Department files CLF2007/182127 and CLF2007/182920*

22. These files contain documents relating to the applicant's arrival in Australia on a false passport. He was also in possession of a genuine Iraqi passport in his own name, two national identification cards and other documents, as well as a letter written in English seeking protection.
23. The applicant was interviewed by a Departmental officer when he gave his name (applicant name), date and country of birth, occupation, and details of his family. He said that he has some siblings, living in Iraq, and a sibling, and mother living in country A. At interview, his responses included, relevantly:
  - He left Iraq about a year ago,;
  - He has friends but no relatives in Australia, but does not know any details of the friends' addresses;
  - He used his Iraqi passport to get to country A, then obtained another passport on which he went to country B, city Z and country C; he subsequently bought an Australian passport;
  - He left Iraq because he was under threat of being killed by political groups who abducted his father and killed him because of his and his brothers' co-operation with the American forces;
  - Some members of these groups came to his father's house in city Y and abducted him while he and his siblings were working; they took their mobile numbers and rang them saying that if they came and gave themselves up, they would return their father;
  - They decided not to surrender and rang a friend to collect other family members from where they were living; they could not enter that area again;

- They tried to hide in their sibling's house for the first two days; they were contacted on their mobiles again, and then they kept hiding; they were rung regularly asking them to give themselves up and then these people said that they would kill their father, which they did; the applicant and his siblings have been in hiding since then;
  - The applicant fears being killed if he returns to Iraq because members of some political parties want to kill him because he worked for the Americans;
  - His siblings are all married with children; one fled to country A with family and the mother; the others fled to northern Iraq.
24. A note by a Departmental officer on the applicant's file states that investigations indicate that the applicant arrived having used an invalid Australian passport. The original holder of the passport (person A) is reported to have changed his name, obtained another Australian passport and travelled on the same flight to Australia as the applicant. Printouts from the Department's records indicate that person A, became an Australian citizen, He left and re-entered Australia on numerous occasions after his first entry, including a re-entry, the same date of the applicant's arrival. On the file is an extract from person A's file, showing a form on which the family members are listed.
25. A further note on the applicant's file indicates that a search of the applicant's baggage was conducted and revealed a number of documents including his passport, his national identity card, his birth certificate, his driver's licence, and assorted employment identity cards indicating that he worked with the US armed forces in Iraq. These are all in the name of the applicant. There was also a letter of recommendation from the American Army, and copies of several other folios, apparently pages of a notebook on which are written the names and addresses of some Americans, a warranty document for a phone, a business card and the name and contact details of "[person C]".

*Department files CLF2007/183055, CLF2008/30098*

26. There is an exchange of Emails by Departmental officers on the first file, stating that intelligence enquiries into the circumstances of the applicant's arrival in Australia have indicated that the applicant may have a family member in Australia, and may have lived in country E. Reference is made to the business card found in the applicant's baggage.
27. According to his Protection Visa application, the applicant is a single male who was born in City X. He says he is Muslim. He says he lived from the mid 1980's to the mid 2000s in city X, and later lived at another address. The applicant says that he was educated, and that he studied at the College. He worked in various jobs. He did military service. The applicant gives information about family members, indicating that his father is deceased, that his mother lives in country A, that one sibling lives in country D, and that a number of siblings live in Iraq.
28. The applicant submitted a statement with his Protection Visa application. His statement includes the following relevant information:
- He and his family worked for the American forces after they arrived in Iraq in 2003 for some years; the applicant has a trade and he did a variety of jobs for the American forces;

- They made friends with many American soldiers and some came to visit them at their home; they worked a lot inside the American compound and sometimes stayed over night;
- It was well known in the applicant's community that he and his family worked for the Americans; many rebel groups target people who work for the Americans;
- Friends of the applicant's were kidnapped and killed by rebels because they worked for the Americans; the applicant had also met other people who were kidnapped and killed because they worked for the Americans;
- The applicant and his brothers became much more cautious after these deaths and stopped sleeping at home;
- Their father was kidnapped by a rebel group; his parents were at home when an armed group broke down the front door, ransacked the house, beat his father and asked where his children were; his father did not tell them, and was kidnapped;
- At the time of the kidnapping, the applicant and his siblings were hiding at his sibling's house; the kidnappers called the same evening and told them that they would kill their father unless the children surrendered to them;
- The kidnappers were from a political group which has connections with Al Qaeda;
- The applicant and his family have been threatened by both Sunni and Shi'a because they do not take either side;
- *[Details deleted in accordance with s431 as it may identify the applicant]* The applicant and others moved from the family home to northern Iraq for their safety;
- The applicant stayed in city X for about two months and then joined his family elsewhere;
- His mother moved between northern Iraq and country A to receive medical treatment; after their last trip to country A, his mother and sibling stayed in country A and rented a small unit outside the capital;
- The applicant stayed in northern Iraq for over a year, visiting his mother once when she was sick and leaving a second time to catch a flight to Australia;
- A sibling moved to country D; a sibling stayed in northern Iraq but is still very concerned about rebel groups; those in city X have contacts and networks throughout Iraq and could locate the family;
- The applicant's siblings are married but he is single and wanted to flee Iraq; he started planning to come to Australia when he first went into hiding; in northern Iraq he started communicating with people in country A to whom he had been introduced by friends; these would get him a passport, visa and plane ticket at a cost;

- The applicant's family do not have the right to own a house in northern Iraq; they are not permitted to live there for more than three years because it is a special Kurdish area; even though northern Iraq is the safest place in Iraq, it has been widely penetrated by rebel groups in spite of systems in place;
- Iraq is unstable and unsafe, even in the north, and the government cannot control the fighting;
- Some of the applicant's friends in city X knew he was staying in the north; some people in the north know that he is from city X and worked for the Americans; people from city X come to the north to visit and know the applicant worked for the Americans; a sibling moved to country D because he felt Iraq was not safe;
- The applicant has heard that the political group who killed his father operate in northern Iraq, and he had to move very carefully while he was there;
- He fears that if he returns to Iraq he will be found by the political group or another rebel group opposed to the Americans; he will be killed because of the work he did for the Americans;
- Country A does not provide protection for people who worked for the Americans; country A's security system is widely infiltrated and the rebel groups in Iraq have many contacts in country A; the government does not provide protection against them.

29. A substantial amount of country information was submitted with the Protection Visa application. Photos of the applicant with US Army personnel were also submitted.

30. The applicant's adviser also submitted that the applicant's employment with the American forces put him at risk of serious harm, as noted in a number of sources, including the United Nations Assistance Mission for Iraq's *Human Rights Report* 1 April to 30 June 2007, a reported speech by the American ambassador in Baghdad of July 2007, and a report by the Washington Post. All these sources refer to persons working for the Americans in Iraq as being targeted for violence, including kidnapping and murder. The UNHCR in its Report of 23 November 2007 advises caution against returning people to Iraq, stating:

The UNHCR does not believe that the time has come to promote, organise or encourage returns. That would only be possible when proper return conditions are in place... Presently, there is no sign of any large-scale return to Iraq as the security situation in many parts of the country remains volatile and unpredictable.

31. An officer of the Department wrote to the applicant's adviser stating that information before the Department indicated that the applicant had spent some time in Country E. The Departmental officer asked whether the applicant could confirm this information, and explain the purpose of the visit and the length of his stay. The officer also stated that information before the Department linked the applicant with person A. The applicant was asked whether he could confirm the nature of this relationship.

32. The applicant's adviser wrote to the Department enclosing a Statutory Declaration from the applicant. In the Declaration, the applicant provides the following information:

- The applicant spent some time in country E prior to his arrival in Australia; he forgot to mention this because he was very stressed;
  - The applicant flew from country A to city Z and another location before he arrived in country E. His destination was always Australia, and he never intended to stay there for any length of time;
  - He arrived in country E in the company of one of the country A smugglers and he was passed on to another smuggler, who was an Iraqi living in country E; the applicant was told that there was a delay in providing his documents;
  - The applicant was taken by the smuggler to a hotel and shared a room with another Iraqi; he did not have a visa for country E; the smugglers confiscated his Iraqi passport and returned it to him at the airport before he left for Australia;
  - The applicant is unable to remember how long he stayed in country E, because he was very stressed; he says it would have been a few months; he was told by the smugglers that there was a problem with his documents and they kept saying the documents would be available “next month”;
  - After staying at the hotel, the applicant was moved to a flat but cannot recall where this was; during the whole time he was in country E he mostly stayed inside his room because he was warned that he would be returned to Iraq if he were caught by the authorities;
  - The applicant said that he had never heard of the names used by person A, and has no relationship with such a person.
33. A Departmental officer wrote again to the applicant, asking whether he had effective protection in country E. He was asked to sign a form which was an “Authority to seek personal information in relation to effective (prior) protection”.
34. A Departmental Email on the applicant’s file states that checks had been done with country E authorities about the status of the applicant, given earlier information that he had a connection with country E. The authorities had confirmed that someone with the applicant’s name (with the addition of another surname), date of birth and citizenship held a country E Passport. . The image of the person with the surname of person A is described as matching the image of the applicant.
35. The applicant’s adviser wrote to the Department saying that the applicant had refused to sign the Authority. The adviser said that she had been instructed by the applicant that he received death threats in country E and fears for his safety there.
36. An officer of the Department again wrote to the applicant stating that information before the Department indicated that the applicant holds a current country E passport which was valid for several years. He was asked to explain how he obtained the passport and why he had withheld this information. He was asked to confirm his true identity, and to explain why he had not disclosed his full name to the Department. He was asked to provide his country E address history. He was asked why, if he claimed to have received death threats in country E, he had not made any claims in relation to this previously, including in his Statutory Declaration.



37. The applicant's adviser wrote to the Department, stating that the applicant does not hold a current country E passport. He has disclosed his full name to the Department. He cannot provide his address history as he does not know the address of places he stayed in country E. He did not realise he had to include the threats in country E in the claims in his Statutory Declarations. The applicant did not think the country E authorities would provide him with protection from the group that threatened him. He states that "he does not know the name of the group, but that he was told by his contact in [country E] that this group hate all people who worked with the Americans in Iraq." The adviser says that the applicant states that his "mental state is bad and it worsens everyday".

38. On the applicant's file is a Departmental Minute to the Manager of the NSW Identity Verification Team from an officer in that team. The most relevant content of the Minute is as follows:

[Applicant name]'s Iraqi passport number [number] has been examined by the Document Examination Unit at [city] Airport. The Forensic Document Examination Report states that Iraq passport number [number] "exhibits the features of a genuine Republic of Iraq passport. I can find no evidence of alteration/tampering". A face to photo match with the client in has been completed ...

[Applicant name] has not claimed to be anyone else. In light of the documents that we are currently able to access ... I am satisfied that the client [.....] is [applicant name] DOB: [date]"

39. The Tribunal also had before it independent information relevant to the applicant's claims.

*Tribunal file 0801550*

40. The applicant enclosed a statement with his review application to the Tribunal. The statement includes the following relevant information:

- The applicant escaped city X because he was threatened with death and his aim was to escape to Australia for protection;
- The smugglers he used took him to country E and once there delayed his travel to Australia;
- In country E the applicant was put in a unit with other people; once he went to a restaurant and while he was there the people in the unit went through his bag and looked at all the documents;
- Person B, a friend of the smugglers, informed him that a group of people were threatening to kill him; some of them used to work for the former government and a political party; these people had seen the applicant's documents and were threatening to kill him;
- Person B told the applicant to move very quickly or travel to Australia as he was at risk;
- The applicant spoke to the smugglers saying that he was at risk and afraid for his life and that the other group had seen all his documents;

- The smugglers said they had no other accommodation for him; they said he had no other option but to go to country E Immigration to get temporary accommodation and they would complete the travel arrangements for Australia;
- The applicant had no more money so was forced to hand himself in to Immigration to get accommodation and because of the threats he had received and the risks from “that group of people”;
- The applicant went to the Department of Immigration in country E, told them he was a refugee and asked for refugee status; they gave him accommodation with others in a unit; he was again threatened by people who had been informants for the former Iraqi government and people who had been in the former Iraqi Army;
- The applicant feared for his life in the unit and called the smugglers to speed up the procedure for travel to Australia;
- The applicant claims that many supporters and informants of the former regime in Iraq went to country E and were granted refugee status; these groups are still practising killings and threatening to kill people; they particularly target those who cooperated with the USA, UK and Australian coalition, and he would be first in line because of working for the US;
- The applicant says that his real name is the same as his applicant name with an additional surname, which is the name he used in country E; the passport he brought with him in the name of the applicant without the additional surname is a genuine passport in his name;
- The applicant says he does not know the person,- the name on the Australian passport with which he travelled to Australia;
- The applicant says that he did not tell everything about his time in country E because he was afraid; everything he said about his life in Iraq is true;
- The applicant says that many Saddam Hussein supporters who travelled to country E and applied for refugee status know about him and what he did in Iraq cooperating with the US army;
- The applicant says that his aim when he left Iraq was to travel to Australia, not country E, but he went there because of the smugglers;
- The applicant says that he has not hidden anything; the only reason he did not mention the period in country E was that he was afraid;
- The country E authorities cannot protect him.

41. The applicant attended a Tribunal hearing. His adviser was also present at the hearing. The applicant brought a number of documents in Arabic to the Tribunal hearing. They had been submitted previously with translations, except for one which the applicant said was a driver’s license.

42. It was put to the applicant that in his most recent statement submitted to the Tribunal he had said that he had applied for refugee status in country E. He said that he had a country E passport, but he did not have it with him. It had been taken by the smugglers. It was put to the applicant that while he had said in his statement that he had asked for refugee status, he did not say whether he had been granted it. It was the Tribunal's understanding that his passport had in fact been granted to him because the authorities had granted him refugee status. He agreed that it was the case that they had granted him refugee status.
43. It was put to the applicant that the passport granted to the applicant gave him the rights of country E citizens, and that he was granted these rights for the life of the passport. It was further put to the applicant that it was the Tribunal's understanding from information available to it that the country E police and justice system was fully functional, and that it would be able to provide him with protection. The most recent US State Department *Country Report on Human Rights* for country E had not identified any problems with human rights indicating an incapacity to protect people's human rights. In fact the Report on country E was probably more positive than that for Australia. In these circumstances, the Tribunal found it difficult to accept that the applicant's human rights would not be protected in country E against anyone threatening them.
44. It was put to the applicant that he had had particular difficulties with his application in the past because it seemed that he had not been truthful. The applicant said that he had been afraid. The Tribunal said that nevertheless it had taken him some time to admit that he had even been in country E at all. The applicant said that as soon as he arrived in Australia he began being afraid.
45. The Tribunal said that the issue of the passport and effective protection in country E were threshold issues, and asked the applicant through his adviser whether he would prefer to have the hearing adjourned in order to put forward arguments on this issue. The adviser asked what other options there were. The Tribunal said that the hearing could proceed with the discussion of other unresolved matters of concern. For example, the applicant had continued to deny any knowledge of person A. The information before the Tribunal would appear to indicate that this person is the brother of the applicant. There were also a number of other inconsistencies in the information given by the applicant to the Department.
46. The applicant was asked whether he still had his Iraqi passport. He said that he had it. It was put to the applicant that there were a number of documents which had been found by a Departmental officer at his interview when he arrived and which had not been translated. Some of these would be discussed with the applicant after the adjournment.
47. The hearing was adjourned for a short period in order for the adviser to discuss the matter with the applicant.
48. The adviser stated that she had no particular submissions to make about country E, although the applicant had some articles which he might wish to submit to the Tribunal. The applicant wished to proceed with the hearing.
49. The applicant was asked about his knowledge of the person named as person A. This person is an Australian citizen who apparently entered Australia on the same flight as the applicant. The applicant entered Australia on a passport he carried, in the name of person A. It was put to the applicant that he had said in the past that he did not know this person. He was asked whether this was still the case. He said that he did not know this person.

50. The applicant was asked what his concerns were in relation to living in country E. He said that he joined groups of Iraqis in country E. He was asked which month he arrived in country E. He said that he could not remember the exact month. He was asked how he got to country E. He said he flew from country A to country E. He said that the smugglers said that they had some things to do in country E. He was asked whether he knew anybody in country E. He said he did not. He was asked about the business card with an address, which he had been carrying when he arrived. He said that it was the name of a restaurant in country E. On the back in handwriting is the phone number of the restaurant in Arabic. The applicant was asked whether there was a particular reason for keeping this card. He said that there was no particular reason. He was asked whether he had a sibling who travels regularly to country E. He said that he did not.
51. The applicant was asked about the group of Iraqis with whom he lived in country E. He said that the smugglers put him with a group of Iraqis. One was named person B. The applicant said that he was not familiar with the country or the language, so he followed their instructions. He was asked how long he did this. He said that after the Iraqis saw all his documents, and his photos, person B told him that he would be at risk because of them. They would even kill him. The applicant then told the smugglers about this, and asked them whether they could find other accommodation. They said that they could not do this. They said he should go to the Immigration department to arrange other accommodation. He went to the Immigration department and said that he was a Iraqi refugee who was seeking asylum. They put him in other accommodation where the situation was the same. The applicant was asked whether he had told the authorities that he was afraid of being killed by other Iraqis in country E. He said he did not. He thinks that they would not have done anything for him. They took him to a unit, and there was the same thing, a group of Iraqis in two rooms.
52. The applicant was asked whether he told the authorities his experiences in Iraq. He said he did not tell them specific difficulties but just a summary. He was very tired. It was put to the applicant that he would not have been given asylum unless the authorities were satisfied he was a refugee. He was asked whether the authorities had asked about the smugglers. He said that he told them that they had flown him from country A to country E. He was asked how long he was staying in the accommodation provided by the authorities. He appeared to have difficulty in remembering this. It was put to him that since he was given asylum in the middle of the year and arrived in Australia some months later, it would appear that he had been living for that period in this accommodation. He said that he thought this was right. He was asked whether he was living in this accommodation for a number of months. He said it was less than this. He said it was a shorter period. He was asked whether he stayed in this accommodation for this period, even though he was at risk from the other Iraqis. He appeared to be confused by this. It was put to him that he had said that in his second accommodation in country E, the same thing happened as in the first accommodation. He said that in the second accommodation, the other Iraqis did not have a chance to look at his documents, unlike in the first accommodation. He said that after living with them for a couple of months, he knew to whom they belonged. He was asked who this was. He said that he knew from their conversations what their inner feelings were. He said that they were talking about jihad and such things, so he knew he was at risk. He was asked whether anybody ever threatened him in country E. He asked whether the Tribunal meant a direct threat. He was asked to comment on any threat. He said that there was no direct threat, even though the danger was there and the risk was there.

53. It was put to the applicant that after he was given a passport, he could live anywhere in country E. He said that he could not live anywhere else than where he was staying. He was not familiar with the country or the language, and had no money. He said that when they provide you with accommodation they prevent you from living anywhere else. It was put to the applicant that this was difficult to believe. He said that he knew this was the case, because person B told him this when he said he wanted to move. Person B lived a long time in country E and was a citizen, and the applicant met him through the smugglers. A refugee cannot move anywhere in country E but must stay in the accommodation provided.
54. The applicant was asked about his interview with DIAC. He said he remembered it. It was put to him that he was asked how he left Iraq. He said that because of the threats he received he went to north Iraq and then to country A. He was asked how he travelled from Iraq to country A. He said he did this on his Iraqi passport. He said that they drove in a car. It was put to the applicant that in his Iraqi passport stamps appeared to indicate that he flew from city X airport to country A. He said that there were two trips, one driving and one flying. He was asked to explain this. He said that he got to country A and the smugglers said that they were not ready, so he went back to Iraq. It was put to the applicant that it did not seem to make sense that having left Iraq in fear of his life, he would go back there. The applicant then said he was confused because it was a very long story. He was asked again what happened when he left Iraq after being there for two years. He said that they drove through Iraq to country A. He was asked why he returned to Iraq. He said that the smugglers were not ready to help him to go elsewhere. He returned to Iraq by car. He was with people who lived in Iraq who said they had friends in country A who helped him to travel. He was asked how he left by city X airport. He said that he sneaked through with the help of friends, who booked a flight. He was asked how long after the first trip to country A he made the second trip. He said that he could not remember.
55. The applicant was asked about the documents he had brought relating to events in country E. He said he had some reports and articles on the subject. He was asked whether any of them were in English. He said that they were all in Arabic. He was asked about their content. He said that there were reports and articles, one person who has lived in country E said that country E had become a refuge for a particular political party. It was put to the applicant that if he thought any or all of the documents were important for his case, he should discuss with his adviser getting them translated and submitting them. He said that in newspapers published in Australia in Arabic they say things about country E.
56. The Tribunal explained to the applicant that it would write to him setting out issues of concern, that is, issues which, if unresolved, might cause the applicant to be refused a Protection Visa. The most important of these issues was that the applicant held a country E passport, and though he might have worries about dangerous Iraqis in country E, the information before the Tribunal indicated that if he sought protection from the country E authorities he would receive it. Other issues which were unresolved related to the applicant apparently not having been truthful in putting his claims to refugee status in Australia. The applicant said because of his treatment in Australia he began to be afraid, so he hid some information. He was asked why he hid the fact of his stay in country E. He said he was afraid that if the Australian authorities knew about his country E passport, they would send him back there and he was afraid he would be killed there.
57. The applicant was asked why he chose to come to Australia. He said that he had heard Australia had a good human rights record, and was multicultural. He was asked whether he knew anyone in Australia. He said that he once had two friends in Australia a long time ago.

58. The applicant asked that if he was to be sent out of Australia, he would rather die in Iraq, his own country, than in country E.
59. The Tribunal sent the applicant a letter pursuant to Section 424A of the Act, setting out matters which might cause the Tribunal to refuse him a Protection Visa. They included, relevantly, the information from the country E authorities given to the Department that the applicant was the holder of a passport; information that the applicant appeared to have a sibling who was an Australian citizen, and that he had travelled to Australia using an expired Australian passport in the name of another person; inconsistencies in evidence submitted by the applicant regarding his name, his refugee status in country E and his departure from Iraq to country A; the applicant's failure to mention circumstances in country E which led to his claim to fear persecution there. He was invited to respond.
60. The applicant's adviser responded to the Tribunal's letter, stating that the applicant had instructed that he is very depressed and anxious because the Tribunal in referring to his country E passport and its implications for his application in Australia is "closing all the doors in my face". The applicant says that if he is not given protection he must go back to Iraq and surrender to the militias who threatened him, or go back and surrender to the people who threatened him in country E, and that this is a death sentence. He says that he is very confused and that he did not mention things because of his fear, of what he went through in Iraq. He says he did not mention his sibling because of his fear. He was scared for his sibling and for himself. He says in effect that he was traumatised by events in Iraq which he witnessed, which included many killings. He says that he was scared and denied that he had a country E passport. Because he was scared, he did not give his full name, but the name he gave is true. The applicant says that he has a report from the Internet about American soldiers who were in the war in Iraq, which says that 300,000 American soldiers are severely depressed and are being treated in hospitals. He says that he on the other hand was born in Iraq and has witnessed all the threats and the killing, and that no-one who has been through his experiences could be stable. The applicant says that he forgot or was mistaken or failed to mention some details because of his psychological state. He says that he made two trips from Iraq, by land and by air. Had he wanted to conceal what he had done, he could have disposed of his Iraqi passport.
61. The applicant says in relation to country E that he initially hid everything because of fear. He says that he did not find a peaceful place in country E because of the group of people he lived with. They saw his photos and documents and other papers and because country E is a small country, rumour and news spread quickly through the Iraqi and Arab communities. He says that country E is a haven for people from a particular political party. He says that person B told him about the relationship between the Iraqis in country E and the militants or insurgents living in Iraq. For this reason it was not safe for the applicant to continue to live in country E. He says that anyone could kill him while he was walking in the streets or the market in country E, because so many people hate the coalition forces, and people who liaise with the Americans or British or Australian troops are subject to killing. His life is in danger in country E.
62. The applicant's adviser enclosed a download of the article referred to by the applicant relating to depression suffered by Iraq and Afghanistan veterans in the US ("One in Five Iraq and Afghanistan Veterans Suffer from PTSD or Major Depression" 17 April 2008 <http://rand.org/news/press/2008/04/17/>). She also submitted two other articles: [*country information regarding country E deleted under s431 as it may identify the applicant*]

63. The Tribunal sought advice from the country E Embassy about whether there were any conditions attached to the passport which might prevent a holder of this passport from entering and residing in country E after traveling to another country or for any other reason. The Country E Embassy responded that a passport granted to a person because he is a Convention refugee gives the holder the right of return to country E provided that his permanent residence has not been revoked. Permanent residence is not revoked unless the resident stays outside country E for a period when the revocation process begins automatically. In cases where the passport is lost, a new passport may be applied for, and the holder will be asked to provide an explanation of how the previous passport was lost and obtain a new one.
64. The Tribunal wrote to the applicant setting out this advice pursuant to s424A of the Act. It was explained to the applicant that the information was relevant because it may indicate that he has a current and legally enforceable right to enter and reside in country E, and that therefore Australia may be taken not to have protection obligations to him, meaning that his application might be refused.
65. The applicant responded to the Tribunal's letter through his adviser. He says that he is not threatened by the government of country E but he was exposed to threats of death by Iraqi groups residing in country E after they examined photos and documents in his possession. He says that the groups are political party members, and that some were involved in Intelligence sections and security sections, and that some were with connections to armed groups in Iraq. He says that he was detained and beaten by these political groups and that his life came under threat from them in country E. He says he could not carry on with a normal natural life. He says that his life was threatened twice, once in Iraq and once in country E, where the people who threatened him have connections with those who threatened his family in Iraq. The applicant says that what he had endured in Iraq was repeated in country E. The applicant asks the Tribunal to take into consideration his psychological condition, and that he sits in his room every day "crying all the time and not knowing what to do". He says that "most Iraqi refugees present in country E are of this political party, from Intelligence, the security forces, army, officers in the previous regime". He says that these people knew him, beat him and threatened him, and that on two occasions he was subjected to beatings, abuse, threats, swearing. He says that he was reluctant to say these things before but now he has to say everything. He says that he will die either in Iraq or in country E.
66. The adviser attached an Internet download - [information deleted under s.431 as it may identify the applicant].

#### *Country Information*

67. [information deleted under s.431 as it may identify the applicant].

#### **FINDINGS AND REASONS**

68. On the evidence before it, including an Iraqi passport in the applicant's name, an Identity card, and the written and oral evidence given by the applicant, the Tribunal finds that he is an Iraqi national. While the nationality of the applicant has not been in dispute, there has been discussion about the applicant's name. The Tribunal accepts on the basis of the applicant's written statements, as well as the evidence of an Iraqi Identity card and information from the country E authorities about his passport from that country, that his real full name is [*the applicant's name with the additional surname*]

69. Since his arrival in Australia on a false passport, the applicant has repeatedly given false and misleading information about his circumstances. He has claimed that this is due to a pervading sense of fear and anxiety which is the result of his traumatic experiences in Iraq. There is no medical or psychological expert report before the Tribunal which might support the applicant's claims in this regard, but the Tribunal has proceeded, for the most part, on the basis of the facts which have been elicited from the applicant up to the time of this decision, without drawing adverse conclusions about discrepancies and inconsistencies in his evidence. The exception is the claims relating to his experiences in country E. They were explored in some detail at the Tribunal hearing and were the subject of a subsequent 424A invitation to comment. The Tribunal rejects any claims that the applicant was directly threatened, or otherwise seriously harmed by Iraqis in country E. He had the opportunity at the Tribunal hearing to put forward all his claims relating to his experiences in country E. He did not appear to have been inhibited by fear on this occasion, and spoke in some detail of his experiences. At the hearing, he said that he had never received a direct threat from anyone in country E, though he "knew" he was in danger because other Iraqis had seen the photos and documents he had with him, and he had been warned by another Iraqi, person B, that he would be killed by other Iraqis. The applicant's response to the Tribunal's 424A letter refers generally to hiding information because of fear. The Tribunal does not accept that at the Tribunal hearing the applicant in fact hid anything about his experiences of harm in country E, or that it is plausible that he would hide information about his experiences of harm in country E because of fear.
70. The key issue in this case is whether Australia has protection obligations towards the applicant, given that country E authorities issued him with a passport which is valid until a future date.
71. The relevant section of the *Migration Act* states:

### **Section 36**

- (3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.
- (5) Also, if the non-citizen has a well-founded fear that:
- (a) a country will return the non-citizen to another country; and
  - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;
- subsection (3) does not apply in relation to the first-mentioned country.
72. Although the law in the area of "protection obligations" under Section 36(3) of the Act is still developing, some aspects are relatively settled. Taking this guidance into account, the Tribunal has considered, in the case under review, whether (1) there is a right to enter and



reside in country E; whether (2) it is a legally enforceable right; whether (3) it is a presently existing right; and whether (4) the applicant has taken all possible steps to avail himself of that right.

73. The applicant has stated to the Tribunal that he has been given refugee status in country E, and has therefore been issued with a passport of that country. Country information indicates that country E is a signatory to the Refugees Convention and that it does in fact provide protection to refugees. This information confirms that obtained by the Department from the country E authorities and put to the applicant that the passport gives the applicant a right to return to country E and reside there. Information obtained by the Tribunal from the Embassy indicates that a passport of this kind is valid for re-entry to country E, unless his residence permit is revoked under very limited conditions. There is no evidence that the applicant's residence has been revoked, and he has not claimed that this is the case. The applicant is registered as having been issued with a passport. The process of revocation of the passport does not begin for some period of time after the holder has been absent from country E.
74. The applicant has stated that his country E passport was taken by smugglers. A response to enquiries made by the Tribunal to the Country E's Embassy indicates that a new passport may be applied for, with the only requirement being that an explanation for its loss is given at the time of application. The Tribunal finds that since the country E authorities have confirmed that the applicant has been issued with a passport valid for several more years, application for a passport to replace that taken by smugglers is a mere formality.
75. The Tribunal therefore finds that the applicant has a right to enter and reside in country E, and that this right has been acquired by the applicant pursuant to a process of assessment under country E law which has found him to be a refugee. The Tribunal therefore finds that the right of re-entry and residence is a legally enforceable right under country E law, and since his passport is valid, that this is a presently existing right. The Tribunal finds that the applicant has not taken all possible steps to avail himself of his right to enter and reside in country E, and in fact attempted to conceal this right from authorities in Australia from the time of his arrival up to the time of his Tribunal hearing.
76. Section 36(4) of the Act states that where an applicant has a well-founded fear of Convention-based persecution in a third country, subsection (3) will not apply. The applicant has claimed that he has a well-founded fear of persecution in country E, the country which the Tribunal has found he has a right to enter and reside in
77. The applicant has claimed that while he was living in country E he was threatened with serious harm by other Iraqis. The Tribunal as indicated above does not accept this claim.
78. The applicant for the first time acknowledged in a statement to the Department that he had lived in country E, but he did not state that he had suffered any harm there. It was only later that a claim was made about suffering death threats in country E, though no information was given beyond this.
79. In the applicant's statement to the Tribunal, he said that in country E the Iraqis with whom he first lived went through his bag and looked at his documents. He said that subsequently he was told by person B, a friend of the smugglers, that a group of people were threatening to kill him. After he received refugee status and was given accommodation by country E authorities, he claimed that Iraqis again threatened him and he feared for his life. At the Tribunal hearing, the applicant repeated his account of staying with Iraqis who saw his

documents, and of being warned by person B that he was at risk because of this. In the accommodation arranged by country E authorities after they granted him asylum the applicant said that the other Iraqis did not see his documents, but that he suspected them of holding to radical Islamic views and so knew that he was at risk. When asked explicitly at the Tribunal hearing whether he had ever received a direct threat while he was living in country E, he said that there was no direct threat, but he was at risk. Also at the Tribunal hearing the applicant stated that he had never indicated to country E authorities that he feared harm from other Iraqis. The applicant made subsequent claims in a letter that Iraqi groups composed of political party members had seriously harmed him in Iraq and that these terrorists or their connections threatened him with death in country E.

80. The Tribunal has reasoned that once the applicant admitted that he had lived in country E, it was no advantage to him to conceal any adverse treatment he received there. He did not make this claim of harm, however, at the time he disclosed his residence in country E. The applicant did not claim to have suffered harm from anyone in country E, nor to have been subjected to any direct threats of harm. He did not raise the matter with country E authorities. When this was put to him at the Tribunal hearing, he simply said that he did not believe that country E authorities could protect him. The Tribunal does not accept this explanation as plausible, if in fact the applicant were in fear for his life, as he claims. The applicant was resident in country E without incurring serious harm from anyone. On the evidence before it, the Tribunal finds that the applicant was not threatened nor seriously harmed for any reason in country E.
81. While the Tribunal has found that the applicant has not suffered Convention-based persecution in country E in the past, it has considered whether there is a real chance that he will be persecuted for a Convention reason if he returns to country E, as he claims. The applicant at his Tribunal hearing made general reference to articles which state that country E has become a refuge for a particular political party. However, though he was advised to discuss such material with his adviser and submit it to the Tribunal, the articles submitted following the hearing do not support the applicant's claims that Iraqis in country E are at risk from a particular group. The articles submitted to the Tribunal are described in detail above and refer to country E policy towards Iraqi asylum seekers, and the deleterious effects of the Iraqi war on Iraqis and American military. The applicant also submitted a document stating that the Iraqis who have been granted residence in country E have set up criminal networks. *[Details deleted]*
82. The Tribunal has found no mention in any of the authoritative human rights reports by such agencies as Amnesty International and the US State Department that Iraqis associated with the former regime have come into conflict with other Iraqis in country E. On the basis that the applicant has not been seriously harmed in country E in the past, and that there is no authoritative information that there is a real chance that he will face Convention-based persecution in country E in the foreseeable future, the Tribunal is not satisfied that the applicant has a well-founded fear of persecution in country E. The Tribunal finds that his case does not therefore come within the parameters of Section 36(4) of the Act.
83. The Tribunal has considered whether the applicant will be returned by country E authorities to a country in which he will be persecuted for a Convention reason, thus engaging Section 36(5) of the Act. The US State Department in its most recent report says that country E has laws which provide for the granting of asylum in accordance with the United Nations Convention and Protocol on refugees which prohibit refoulement. The Tribunal is not satisfied on the evidence before it that the applicant has a well-founded fear of refoulement to

Iraq or another country by country E authorities. The Tribunal therefore finds that the applicant's case does not come within the parameters of Section 36(5) of the Act.

84. On the evidence before it, the Tribunal is not satisfied that Australia has protection obligations to the applicant.

### **CONCLUSIONS**

85. Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

### **DECISION**

86. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

<p>I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the <i>Migration Act 1958</i>. Sealing Officer's I.D. PRDRSC</p>
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