

**1212404 [2012] RRTA 956 (15 November 2012)**

**DECISION RECORD**

<b>RRT CASE NUMBER:</b>	1212404
<b>DIAC REFERENCE(S):</b>	CLF2012/97006
<b>COUNTRY OF REFERENCE:</b>	Iraq
<b>TRIBUNAL MEMBER:</b>	Amanda Goodier
<b>DATE:</b>	15 November 2012
<b>PLACE OF DECISION:</b>	Perth
<b>DECISION:</b>	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the 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 applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] May 2012.
3. The delegate refused to grant the visa [in] August 2012, and the applicant applied to the Tribunal for review of that decision.

### RELEVANT LAW

4. 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 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 in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

#### Refugee criterion

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

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. 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, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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.
11. 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.
12. 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.
13. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 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.
14. 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.

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

### **Complementary protection criterion**

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

### **CLAIMS AND EVIDENCE**

18. 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.

#### **Background and protection claims**

##### *Entry Interview*

19. The applicant stated in his entry interview that he had left Iraq as his life had been threatened by the Al-Mahdi Army because he worked for the Americans.
20. He was first threatened in 2008 and his second threat in 2011. In [early] 2012 they came to the door and took his son and told his wife that they would be back to take her as well if he did not return.
21. He worked for the Americans between 2004 and 2006.
22. The applicant stated that the Al-Mahdi Army was not as strong in 2006 as it was in 2008. He received a threatening letter from them.

### *Application for Protection*

23. The applicant was born on [date deleted: s.431(2)] and is currently aged [age deleted: s.431(2)] years. He was born in [Dhi Qar], Iraq and states that his ethnic group is Arab and religion is Shia Muslim. He is able to speak, read and write in Arabic. He has no education. He is married with [children].
24. The applicant fears returning to Iraq as the Jaysh Almahdi will kill him as he worked for the Americans. The Jaysh Almahdi have influence in the Government and the authorities cannot protect him.
25. The applicant worked on his father's farm from a young age but as it was not enough to support the whole family after his father's death, was employed as a labourer [in the 1980s]. He returned to the farm to be with his mother who passed away shortly after. In 1996, he commenced working with a [building contractor] and became proficient over the next [several] years. He was unemployed for a couple of years because of the war and in 2004 gained employment with a company called [Company 1] that was a foreign company that employed Iraqis. [Further detail regarding the applicant's work deleted: s.431(2).]
26. At the time, he was living in a community on the farm and he was warned to be careful as they said they had heard of people being killed because they worked for the Americans. He finished [in] 2006 and was given a Certificate of Appreciation. He moved with his family to [town deleted: s.431(2)], which was about 40kms from his tents. He bought a car that he used as a taxi and rented a house.
27. His passengers often told him that Jaysh Almahdi were taking people who worked for foreign companies. He became worried. One night in [early] 2008, there was knocking on the door, his son opened it and then called out saying his father was not home. He thought Jaysh Almahdi had come for him and ran away and stayed with a friend back at the tents for the next 40 days. His family told him that men wearing balaclavas entered the house looking for him and said that he had to give himself up or they will catch him dead or alive.
28. The Government started a campaign against the Jaysh Almahdi and about March 2008 announced that they were gone so he moved back home. About December 2011, his son called him on the mobile and told him there was a threat letter under the main gate that said that he was an infidel who cooperated with the Americans and he should give himself up or be killed. He had 10 days to give himself up. He went back to his friend's house but they were too scared to help but put him in touch with a people smuggler. [In early] 2012, his son was taken by people and they believe it was the same people who came looking for him. His wife told him that these people said that if he did not turn up they would take her next.

### *Delegate's decision*

29. The applicant attended an interview with the delegate who found that the applicant was not a credible witness and rejected material parts of his evidence as untrue. She did not accept that he was targeted and threatened by Jaysh Almahdi and gave no weight to the threatening letter and considered that the kidnapping of his son may have a criminal element rather than a Convention nexus.
30. The delegate found that Australia did not have protection obligations to the applicant pursuant to s36(2(a) &(aa) of the Act.

*Application for Review*

31. The applicant appeared before the Tribunal [in] October 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.
32. The applicant was represented in relation to the review by his registered migration agent.
33. Prior to the hearing the Tribunal received a further submission from the applicant's representative addressing concerns raised by the delegate in relation to the applicant's credibility, his claim to have worked for [Company 1], the threatening letter from Jaysh Almahdi, the reason for him leaving his family behind and relocation.
34. The Tribunal began by explaining to the applicant the criteria for a protection visa and in particular the definition of a Refugee as set out in the United Nations Convention and also Australia's complimentary protection obligations. The Tribunal indicated that it would focus on the applicant's credibility as if it found the applicant credible, the country information in relation to state protection and relocation were unequivocal.
35. The applicant's sworn evidence can be summarised as follows.
36. The applicant suffered a severe infection about 1981 that caused [a permanent physical impairment]. The applicant has no formal education and told the Tribunal is able to read and write only a little in Arabic.
37. The applicant is married with [a number of children]. After the return of his eldest son, the family moved back to the farming community to live as this is where they feel safest. The family are surviving by farming. He is in contact with his family about every three days by telephone and they are doing well. His wife is very worried about him returning to Iraq, as she is terrified he will be killed. They are all very concerned about him.
38. The applicant told the Tribunal that he worked in the construction industry for [several] years from [the mid-1990s]. [Specific work details deleted: s.431(2).] [In early] 2004, he was out driving and noticed a group of people waiting, stopped, and asked what they were doing. He found out that they were queuing for a job so he waited as well. The people asked him what skills he had, he explained, and the next day went back for a test that he passed. [Specific work details deleted: s.431(2).] In general, there were [a certain number of] people employed and they were all Iraqis. There were two engineers in charge and they were Iraqi. The applicant told the Tribunal that the firm was American and he could tell by the name. He worked for [Company 1], from [2004 to 2006] and has a Certificate. He did not keep in contact with anyone who worked for the firm. He does not know what, if anything has happened to any of the people employed on the site. [Personal information regarding the applicant deleted: s.431(2).]
39. The applicant told the Tribunal he was paid in cash usually on a weekly basis but sometimes fortnightly. He had to make his mark each time he received his salary. The firm had a record of his personal details.
40. The applicant told the Tribunal he was fearful for his life so he did not stay with [Company 1] past [a certain month in] 2006. He was hearing about stuff as he went around, people were going missing and he decided to leave for his safety, the project was finishing and he did not

want to stay. In response to a question, the applicant said that he did not raise his fears with others in the workplace, as everyone was scared and of the Al Mahdi Army as they targeted anyone who worked for a foreign company.

41. The applicant told the Tribunal that after working for [Company 1], he drove people around. He had a private car and operated sort of like a taxi service but with a private car. He already had his car as he drove from the farm to [Company 1] every day, a distance of about 40kms. He also moved from the farm to the city with his family, which was about 40kms away.
42. The applicant told the Tribunal that he was first approached by the Al Mahdi Army in [early] 2008. It was hot and they were asleep on the roof when there was knocking. He son went down and he heard him say that his father was not home and that his father was not there. He jumped from the roof, hurt his knee and leg, and managed to escape. He ran away and stayed with a friend on the farms for about [40 days]. The men, wearing baklavas, pushed past his wife and son looking for him. They knew it was the Al Mahdi Army. They said they were looking for him. His family stayed at the house after he left. He had left money behind and they received the Government food supplies. No-body else came looking for him.
43. In March 2008, the Government initiated a crackdown on the Al Mahdi Army called *Saulat al-Fursan*. They were not as powerful after that, so he felt safe to return to his home. In [late] 2011, a note was left on his doorstep and his son called him and told him not to come home, as there was a threatening letter so he went back to his friend on the farm. Unfortunately, his friend was too frightened to let him stay for long but helped him get a passport and leave Iraq. He returned for one night to stay with his family to say goodbye before he left.
44. The Applicant told the Tribunal that in [early] 2012, the Al Mahdi Army kidnapped his son and told his wife and family that he had to give himself up to them otherwise they will kill his son and will come for his wife. They held his son until [some months later] when his son told them that his father was in Australia. They beat his son and eventually he could not hold out and told them that his father was no longer with them. They put his son in a room with four to five other people who were also held captive but they had their own worries and there was little talk between them. The applicant told the Tribunal that they told my family that I was a traitor and they will take my son until he gives himself up to them. The Tribunal asked if his family reported the kidnapping to the authorities and the applicant said they did not as there was nothing anyone could do. The Al Mahdi Army is in the Government and authorities can do nothing about their activities. They cannot protect him and his family.
45. When his son returned, the family moved back to the farm, as they felt safer there. The farm is in a remote area but on further questioning, the Tribunal found that the farm is located about 15 minutes' drive or about 40kms from the city but it is in the desert. They also needed to survive and they can on the farm through farming. The applicant is the sole breadwinner for the family. His eldest son has the most education [details deleted: s.431(2)].
46. The Tribunal referred to the delegate's comments that if he was fearful for his family, he would have taken them with him and the applicant responded that he did not have that much money and it would be too expensive and very dangerous and difficult journey. The Tribunal asked why he did not arrange for their safety before he left and he replied that there was not time. He only went back to see them for one night before he left.
47. The Tribunal asked how he thought the Al Mahdi found him and he said he did not know. He did not know how they found him or that he worked for a foreign company. The Al Mahdi

Army targeted people who worked for foreign companies and the Americans as they were regarded as traitors or collaborators. The Tribunal asked how they could find him as he moved after he had finished with [Company 1] from the farm to the city and he replied that he did not know how they got their information but they did. When he relocated to the city, he and the family had to register with the local Muhtar.

48. The Tribunal referred to country information that said that most kidnappings were by criminals or militia seeking money to fund their activities and asked how he knew that the people who kidnapped his son were not one of these groups. The applicant responded that they took his son to get to him. He was to surrender himself to them and they would release his son. They told his family that the applicant had to turn himself in or they will kill his son and then take his wife. They did not ask for money and when his son told them that he was in Australia, they released him. Therefore, it was the Al Mahdi Army and not a criminal gang looking for money.
49. The Tribunal indicated it was having difficulty understanding why there was such a gap between when he finished work in 2006, the first approach in 2008 and the second at the end of 2011. The Al Mahdi knew where he lived and could have followed up on a more regular basis to take him if they were so concerned about him. The applicant responded that in March 2008, the Government initiated a crackdown on the Al Mahdi Army and they were weakened. They were not as powerful and the American presence was strong. The Americans then reduced their presence and the Al Mahdi Army became stronger. The Tribunal referred to country information that said the Al Mahdi Army ceased to operate in 2008 and the applicant said this is correct after the Government initiative they were weakened. The Al Mahdi became stronger again, their power increased over time, and the Americans left.
50. The applicant's representative submitted that the applicant was not a high value target on whom the Al Mahdi Army would focus their complete attention. They would come back to him and target him until they found him. They will rotate between others but will still target and try to locate him. Despite country information saying that the Al Mahdi Army no longer exists, there is evidence that it has broken up into smaller groups and still operates and targets those who worked for foreign organisations and referred the Tribunal to the UNHCR Guidelines for determining refugee status for those from Iraq in relation to those working for western companies.

## Country Information

### *Targeting of Iraqis working for Western Companies*

51. UNHCR *Eligibility Guidelines for Assessing the Protection Needs of Asylum Seekers from Iraq*<sup>1</sup> 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:

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<sup>1</sup> United Nations High Commissioner for Refugees 2012, UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Iraq*, 31 May 2012  
<http://www.unhcr.org/refworld/pdfid/4fc77d522.pdf> Accessed 8 November 2012.



(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);

....

*e) Individuals Affiliated with the USF-I, Foreign Governments, NGOs or International Companies*

Civilians (formerly) employed or otherwise affiliated with the former MNF-I/USF-I or foreign governments, NGOs or international companies, as well as their families, are at risk of being targeted by non-state actors for their (imputed) political opinion. Since 2003, both Sunni and Shi'ite armed groups are known to have threatened, kidnapped and killed interpreters, embassy workers, drivers, subcontractors and others affiliated with the MNF-I/USF-I, foreign governments, international companies or organizations, reportedly to deter others from working for them. Ahead of the full USF-I withdrawal from Iraq, achieved by mid December 2011, advocates and Iraqis (formerly) employed with the US military raised concerns about being left without protection. There are fears that employee records maintained by the USF-I may have leaked to armed groups. Perpetrators of violence against Iraqis affiliated with the MNF-I/USF-I are both Sunni and Shi'ite armed groups. It is reported that there were no contingency plans to provide emergency protection to former Iraqi employees after the USF-I withdrawal. Individuals who have worked for the MNF-I/USF-I may be unable to find new employment if their former employer becomes known. Many former USF-I employees allegedly hesitate to reveal their prior work experience to a potential new employer for fear of retribution.

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*ii. Armed Shi'ite Groups*

After 2003, a range of armed Shi'ite groups reportedly started to compete for power and religious influence in Iraq, at times resulting in violent intra-Shi'ite clashes. This was the case, in particular, between the Badr Corps, the armed wing of the Supreme Council for the Islamic Revolution in Iraq/ Islamic Supreme Council of Iraq, and the Jaysh Al-Mahdi, the armed wing of the Sadrism Movement led by cleric Muqtada Al-Sadr. Jaysh Al-Mahdi became the main Shi'ite opposition to the foreign coalition forces in Iraq after the fall of the former regime in 2003. It staged two uprisings against US forces in April and August 2004 and launched numerous attacks against mainly US military targets. Attacks on US forces peaked in mid-2007, when Jaysh Al-Mahdi was responsible for the majority of all US casualties. Both the Badr Corps and the Sadrists have integrated into the political process and the Sadrists have become a major political force and main backer of Prime Minister Al-Maliki. However, none of these groups have given up military capacity and, in the case of Jaysh Al-Mahdi/Promised Day Brigades, sporadic attacks on US targets continued into 2011. Some members of the Badr Corps, and to a lesser extent the Jaysh Al-Mahdi, have been integrated into the ISF. Armed Shi'ite groups are accused of having a major role in the sectarian cleansing that followed the February 2006 Al-Askari shrine bombing. Armed Shi'ite groups were significantly affected by the ISF-led offensives in southern Iraq and Sadr City/Baghdad in 2007–2008.

Muqtada Al-Sadr faced apparent difficulties in retaining control over Jaysh Al-Mahdi, and the group splintered into various factions with differing agendas (so-called “Special Groups”), some of them engaging in mainly criminal activities. In recent years, three main armed Shi’ite groups have been active: Jaysh Al-Mahdi /Promised Day Brigades; Asa’ib Ahl Al-Haq, which was created by former Sadrist Qays Al-Khazali; and Kata’ib Hezbollah. In 2011, these groups claimed responsibility for lethal attacks against the USF-I aimed at expediting the withdrawal of foreign forces from Iraq. Their presence is mainly reported in Baghdad, Basrah, Missan, Thi-Qar, Kerbala, Babel, Najef, Wassit and Diwaniyah. Armed Shi’ite groups have also been reported to engage in criminal activities such as kidnappings, extortion and oil smuggling.

Armed Shi’ite groups boasted that the US troop withdrawal from Iraq in mid-December 2011 was a “historic victory”. It remains to be seen how their agendas will evolve in the aftermath of this withdrawal. Reportedly, there continue to be regular rocket attacks against the US consulate in Basrah, which houses almost 1,000 US diplomatic and security personnel. At the same time, Asa’ib Ahl Al-Haq announced its decision to lay down its arms and engage in the political system as an opposition party. This decision heightened existing tensions with the Sadrists. Muqtada Al-Sadr has repeatedly warned that the Promised Day Brigades stand ready to attack any “oversize” US diplomatic presence in Iraq. There are no indications that Kata’ib Hezbollah seeks to integrate into the political system.

While armed Shi’ite groups have in the past publicly focussed on attacking the MNF-I/USF-I, there are reports that they also single out Iraqis of various profiles for kidnapping and assassination, including former Ba’athists, security and government officials, political/religious rivals, and persons considered as “collaborators” with the foreign forces, especially the US. Further, Shi’ite groups have also enforced strict Islamic rules of behaviour and dress, and are considered to be responsible, *inter alia*, for attacks on women not wearing the veil, persons engaged in selling liquor, and LGBTI persons

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#### *Availability of National Protection*

In Iraq, the main perpetrators of persecution are non-state actors. However, protection by national authorities is unlikely to be available in most cases, given that the national authorities have limited capacity to enforce law and order. The ISF, which now have around 930,000 members and are widely acknowledged as increasingly capable and united, reportedly remain vulnerable to corruption and infiltration by militants, and continue to be themselves a major target of attacks. In addition, political disunity has reportedly limited the effectiveness of the ISF. The judiciary, which remains understaffed, is reported to be prone to intimidation, infiltration, political interference and corruption. Judges often face death threats and attacks. Perpetrators of crimes and human rights violations are reportedly still not held accountable. In the Kurdistan Region, judicial independence is said to be hampered by political interference.

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#### *Relocation*

UNHCR considers that internal flight options are often not available in Iraq due to serious risks faced by Iraqis throughout the country, including threats to safety and security, accessibility problems and lack of livelihood opportunities.

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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.

Iraqi nationals are issued with four documents, a 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.

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.

Armed groups reportedly have operatives in many parts of the country and, as a result, a viable IFA/IRA will likely not exist for individuals at risk of being targeted by such groups in southern and central Iraq. As reported throughout these Guidelines, armed groups are present in many parts of the country and have demonstrated mobility in accessing areas where they do not have strongholds. The mobility and reach of armed groups should not be underestimated in determining the relevance of an IFA/IRA. Persons seeking to relocate to other areas in central and southern Iraq may be at risk of facing renewed violence given the high levels of violence prevailing in many areas. UNHCR protection monitoring shows that lack of physical safety remains a concern for both IDPs and returnees, particularly in the central governorates. Reports have been received of returnees being targeted because they do not belong to the majority sect in their area of return. In some cases, these attacks have been fatal. The presence of IDPs can at times result in tensions with host communities that consider them a destabilizing factor. Generally, protection by national authorities will not be available given that the national authorities have as yet limited capacity to enforce law and order. Members of the ISF and the judiciary are themselves a major target of attacks and are reportedly prone to corruption and infiltration.

52. The Danish Immigration Service’s February and April 2010 Fact Finding Mission to Iraq report noted that —that individuals who had cooperated with the Iraqi security force or US/multi-national forces; or those persons working for foreign companies... including

relatives to all the above-mentioned categories of persons could also be at risk of being targeted.<sup>2</sup>

53. Reports were located indicating that Iraqis who worked for American (referred to as western) companies between 2004 and 2006 were targeted by militia groups. The groups responsible for the attacks are not named in these reports. Several reports in 2010 stated that Iraqis then employed by American companies remained at risk of being targeted by militia groups.
54. A 26 March 2004 article in *The Independent* states that 'Every day now, the gunmen attack the Iraqis who work for Westerners, for the occupation powers, for the reconstruction companies, for journalists.'<sup>3</sup> The article notes the murder of a translator for *Time* in March 2004.
55. A 16 July 2004 report in the (UK) *Daily Telegraph* states that insurgents 'are increasing their attacks on Iraqis they accuse of 'collaboration', a term that includes anyone who works for...western companies.'<sup>4</sup> The report does not provide any examples of such attacks. The report does not identify the western countries these companies are associated with.
56. In October 2004, Stuart Schaar<sup>5</sup>, an academic, noted that  

Foreign non-governmental agency employees and private contractors, whose numbers have increased considerably in this war, have also come under attack. Several have been kidnapped and beheaded, mostly by foreign extremist groups.<sup>6</sup>
57. Reports located indicate that Iraqi employees working for American companies continued to be targeted after 2006. In December 2007 *CBS News* reported the fatal shooting of two Iraqi women who were employed by the American company Kellogg, Brown and Root, which provides logistical support to the Coalition military.<sup>7</sup>
58. In a December 2008 interview a *National Public Radio*<sup>8</sup> reporter stated that 'Being the target of insurgence is something Iraqis working for American companies experience on a regular basis.'<sup>9</sup>
59. Several reports in 2010 stated that Iraqis employed by American companies remained at risk of being targeted by militia groups. These reports focus on Iraqis still employed by American and foreign companies rather than past employees. A July 2010 report from the UNHCR

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<sup>2</sup> UK Border Agency Operational Guidance Note, Iraq, v8.0, December 2011 Accessed 8 November 2012.

<sup>3</sup> Fisk, R 2004, 'Slaughter of Iraqi 'collaborators' undermines US sovereignty hopes', *The Independent*, 26 March <<http://www.independent.co.uk/voices/commentators/fisk/slaughter-of-iraqi-collaborators-undermines-us-sovereignty-hopes-6172073.html>> Accessed 19 October 2012

<sup>4</sup> Harnden, T 2004, 'Iraq's insurgents wage bloody war on 'collaborators'' *The Telegraph*, 16 July <<http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1467189/Iraqs-insurgents-wage-bloody-war-on-collaborators.html>> Accessed 19 October 2012

<sup>5</sup> Stuart Schaar is Professor of Middle East and Global History at Brooklyn College, CUNY and an author.

<sup>6</sup> Schaar, S 2004, 'The War in Iraq and its aftermath', *Historians Against War*, 27 October <<http://www.historiansagainstawar.org/resources/schaar.html>> Accessed 19 October 2012

<sup>7</sup> 'Iraqi Women 'Collaborators' Killed' 2007, *CBS News*, 5 December <[http://www.cbsnews.com/2100-500257\\_162-605556.html](http://www.cbsnews.com/2100-500257_162-605556.html)> Accessed 19 October 2012

<sup>8</sup> An American government funded radio and news organisation.

<sup>9</sup> Johnson, N 2008, 'So You Think You Can Dance 'The Nutcracker'', *National Public Radio*, 24 December <<http://m.npr.org/news/front/98674104?page=2>> Accessed 19 October 2012

noted that Iraqis working for ‘foreign companies’ were ‘particularly at risk’ for targeting.<sup>10</sup> A fact-finding mission conducted by the Danish Immigration Service (cited by UK Border Agency) between February and April 2010 reported that ‘persons working for foreign companies... including relatives... could also be at risk of being targeted.’<sup>11</sup>

60. No reports from 2011 onwards were located indicating that militia groups continue to target Iraqis formerly employed by American companies.<sup>12</sup> It is noted that many of the formerly most active militia groups have disbanded or demilitarised since the withdrawal of US forces in December 2011.

## **FINDINGS AND REASONS**

61. The applicant claims to be a national of Iraq and has provided a number of identity documents in support of his claim. The Tribunal accepts he is a national of Iraq and finds that Iraq is the applicant’s country of nationality and receiving country.
62. The Tribunal finds that the applicant does not have the right to enter and reside in any other country.
63. The applicant claims that he worked for an American company between [2004 and] 2006 and as a result, members of the Mahdi Army have targeted him for working with the Americans and/or western companies. He is considered a collaborator. He claims that they first targeted him in [early] 2008 and again about December 2011 when they placed a threatening letter on his doorstep. In [early] 2012, the Mahdi Army kidnapped his son and told his wife that the applicant had to give himself up to them or they will kill his son and come back for her. His son was beaten and eventually told them that his father was no longer in Iraq and they let him go. He claims that if he returns to Iraq he remains at risk of harm from this group and will be killed. The applicant claims that while he was working for the American company, he was aware that there were threats against Iraqis like him that were working for western companies. He also claims that when he was driving around he would hear stories of people missing or dead because they had worked for western companies and had been targeted by the various militia.
64. The applicant [has a permanent physical impairment]. He has no formal education and is only able to read and write a little in Arabic. The Tribunal accepts that his disability and lack of education can affect his perception of events around him and present difficulties in his ability to express himself concisely and cohesively. Nevertheless, at the Tribunal hearing, his claims were consistent with those previously expressed since his arrival in Australia. The Tribunal found him to be a truthful and credible witness. Overall, the Tribunal accepts the applicant’s account of the circumstances that led to his departure from Iraq.
65. The applicant’s claim is consistent with country information. The UNHCR Guidelines referred to above state that individuals associated with or perceived to be supporting the Iraqi

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<sup>10</sup> UNHCR 2010, *Note on the Continued Applicability of the April 2009 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, 28 July, p.4  
<[www.unhcr.org/refworld/docid/4c4fed282.html](http://www.unhcr.org/refworld/docid/4c4fed282.html)> Accessed 19 October 2012

<sup>11</sup> UK Border Agency 2011, *COI Service Iraq Country Report*, August, Para 17.43  
<<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/coi/iraq/report-08-11.pdf?view=Binary>> Accessed 19 October 2012

<sup>12</sup> Searches conducted on internal tribunal databases, CISNET, think tanks, academic journals, open source search engines, human rights organisations, non-government organisations, and international news outlets.

authorities .... individuals affiliated with the USF-I, Foreign Governments, NGOs or International Companies and their families .... are considered likely to be at risk. The Guidelines mention that it is likely that the records of employees have been leaked to armed groups.

66. The information referred to above states that the risk is from armed Shia groups including the Mahdi Army, or its splinter groups. The Mahdi Army is reportedly present in provinces including Babel and Basra, which surround the applicant's area. While there is some argument that the Mahdi Army has disbanded, the UNHCR guidelines indicate that it exists and has splintered into different armed groups.
67. Several factors tend to indicate that any risk posed to the applicant by the Mahdi Army, arising from the circumstances claimed, is too small to give rise to a well-founded fear of persecution. Firstly, it was nearly 2 years between the applicant finishing work with the western company and the first incident with the Mahdi Army. Secondly, over 3 years before they contacted him again by leaving a threatening letter, indicating that he did not have high enough profile to warrant the Mahdi Army's full attention. They obviously had his address and were aware of where he lived, yet did not consistently follow up locating him.
68. The applicant provided that in March 2008, after the first incident, the Government initiated a crackdown on the Mahdi Army and they were weakened while the American army had a strong presence in the area. When the American presence lessened, the Mahdi Army became stronger and when the Americans left, the militia were powerful again. The applicant and his family had also moved from their tents on the farm in the desert to the city where they had to register with the local Muhtar.
69. The kidnapping of his son and his subsequent release without payment of any money, indicates to the Tribunal that this was not an act motivated by criminal intent. The kidnapping occurred after the applicant had arrived in Australia and according to the caseworker's notes in the DIAC file, caused the applicant great distress. The applicant claims that the kidnappers indicated to his wife and family that they were looking for him, as he had worked for a western company and he was to hand himself in.
70. The applicant's advisor submitted that while the applicant may only have a minor profile for working with a western company, the fact is that he did work for a western company and as such is considered to be a collaborator and perceived as a supporter of the of the Iraqi authorities. The applicant provided a Certificate of Appreciation for his work with [Company 1] and was able to provide a description of his work and the workforce.
71. The Tribunal accepts that the applicant worked for [Company 1], an American company, for the period 2004 to 2006. The Tribunal accepts that as a result of working for [Company 1], he has come to the attention of the Mahdi Army/militia. The Tribunal accepts that as a result of coming to the attention of the Mahdi Army/militia, the applicant fears he will suffer serious harm, in that he will be killed.
72. The Tribunal accepts that while the applicant does not have a high profile, there is a small but real chance that should the applicant return to Iraq, he may well come to the attention of the Mahdi Army/militia. The Tribunal accepts that risk of again coming to the attention of the Mahdi Army/militia is small based on the time that has passed since he ceased work with [Company 1] and the length of time between visits by the Mahdi Army/militia, but it is real.

73. The applicant fears being killed by the Mahdi Army/militia because of the imputed political opinion, that he is a collaborator/traitor for working with American/Western firms and is therefore a supporter of the Iraqi authorities.

*Protection*

74. The persecution feared by the applicant is from non-state agents being the Mahdi Army/militia.
75. Harm from non-state agents may amount to persecution for a Convention reason if the motivation of the non-State actors is Convention-related, and the State is unable to provide adequate protection against the harm. Where the State is complicit in the sense that it encourages, condones or tolerates the harm, the attitude of the State is consistent with the possibility that there is persecution: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [23]. Where the State is willing but not able to provide protection, the fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify an unwillingness to seek their protection: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [28]. In such cases, a person will not be a victim of persecution, unless it is concluded that the government would not or could not provide citizens in the position of the person with the level of protection which they were entitled to expect according to international standards: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [29]. Harm from non-State actors which is not motivated by a Convention reason may also amount to persecution for a Convention reason if the protection of the State is withheld or denied for a Convention reason.
76. Based on the above country information, the Tribunal finds it is sufficient for the applicant to have worked in any capacity for a western company such as [Company 1] to be perceived as a person who supports the Iraqi government and therefore to be at risk of harm by the Mahdi Army/militia.
77. The Tribunal accepts that the applicant has come to the attention of the Mahdi Army/militia and that upon his return will face harm from the Mahdi Army/militia for reason of his imputed political opinion. The Tribunal finds that the harm the applicant faces is serious harm, in that he will be killed.
78. The Tribunal has carefully considered the applicant's claims and relevant country information and accepts that if he were to return to Iraq in the reasonably foreseeable future there is a real chance that he will be harmed.

*State Protection*

79. The applicant has been unwilling to seek the protection from the authorities as he claims that they are unable to protect him.
80. Country information referred to above from the UNHCR, confirms that state protection from the Iraqi government is not available. The national authorities have limited capacity to enforce law and order. The ISF, reportedly remain vulnerable to corruption and infiltration by militants, and continue to be themselves a major target of attacks.

81. On this basis, the Tribunal finds that state protection in accordance with international standards would not be available to the applicant in Iraq.

#### *Relocation*

82. The Tribunal has considered whether the applicant could avoid the harm he fears by relocating elsewhere in Iraq.
83. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: *Randhawa v MILGEA* (1994) 52 FCR 437 per Black CJ at 440-1.
84. The UNHCR *Guidelines*<sup>13</sup> consider that internal flight options are often not available in Iraq due to serious risks faced by Iraqis throughout the country, including threats to safety and security, accessibility problems and lack of livelihood opportunities. Armed groups reportedly have operatives in many parts of the country and, as a result, a viable (relocation option) will likely not exist for individuals at risk of being targeted by such groups in southern and central Iraq. The *Guidelines* also state that armed groups are present in many parts of the country and have demonstrated mobility in accessing areas where they do not have strongholds and the mobility and reach of armed groups should not be underestimated.
85. Given the UNHCR *Guidelines* advice above about the difficulties of relocation within Iraq, the Tribunal finds that the applicant would not be able to safely relocate to another part of Iraq and that therefore relocation is not a reasonable option for the applicant.
86. The Tribunal finds that if the applicant were to return to Iraq there is a real chance that he would face harm, amounting to serious harm for the purpose of s91R(1)(b) of the Act. The Tribunal finds that the harm the applicant fears involves systemic and discriminatory conduct, as required by s91(1)(c), in that it is deliberate or intentional and involves selective harassment for a Convention reason.
87. The Tribunal finds that the applicant's imputed political opinion is the essential and significant reason for the persecution feared by him as required by paragraph 91R(1)(a) of the Act.
88. For these reasons, the Tribunal finds that the applicant's fear of persecution in his country is well founded.
89. The Tribunal finds that the applicant has a well-founded fear of persecution in Iraq for a Convention reason now and in the reasonable foreseeable future and that he satisfies the definition of refugee.

#### **CONCLUSIONS**

90. The Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

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<sup>13</sup> United Nations High Commissioner for Refugees 2012, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Iraq, 31 May 2012  
<http://www.unhcr.org/refworld/pdfid/4fc77d522.pdf> Accessed 8 November 2012.



## **DECISION**

91. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.