



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAQ

IAA reference: IAA21/09094

Date and time of decision: 22 June 2021 12:06:00

S Ryan, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a stateless Faili Kurd who was born and raised in Iran and arrived in Australia [in] May 2013. On 1 September 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV) and participated in an interview conducted by a delegate of the Minister for Immigration (the delegate) held on 9 February 2021.
2. On 26 April 2021 the delegate refused to grant the visa, concluding that he did not accept that the applicant was a Faili Kurd or that he was stateless. He found the applicant is an Iranian citizen and that he did not face a real chance of persecution or a real risk of significant harm in Iran. The matter was referred to the Immigration Assessment Authority (IAA) on 29 April 2021.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the Migration Act 1958 (the Act). No further information has been obtained or received.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He was born in [year] in Yazd, Iran. He is of Faili Kurdish ethnicity and is a follower of the Shia sect of Islam.
 - His parents are Faili Kurds born in Al Amara (also known as Amarah) in Iraq and in the early 1980s they and many members of their family were deported by the Iraqi regime on account of their Kurdish ethnicity and fled to Iran, where they were eventually settled in the city of Yazd.
 - He and his family tried for many years to become Iranian citizens but were not successful. They are not recognised as citizens by either Iraq or Iran.
 - He lived with his family in Yazd up until his departure from Iran in 2013 and faced discrimination, harassment and abuse from Iranian authorities on account of being a stateless Faili Kurd.
 - He cannot return to Iran as he is not a citizen and he will be imprisoned by Iranian authorities as a spy.
 - He cannot return to Iraq as he is not a citizen, it is a dangerous country and he fears being kidnapped.

Factual findings

Identity and Background

5. I am prepared to accept the basic details of the applicant's biographical circumstances, noting he has consistently provided his name, date and place of birth in his interactions with the department. I accept the applicant was born in Yazd, Iran in [year], that he is a Shia Muslim and that his parents originate from Iraq.

6. The applicant's assertion that he is a stateless Faili Kurd is at the core of his claims for protection and is a matter on which I consider he has provided limited and unpersuasive evidence.
7. The Australian Department of Foreign Affairs and Trade (DFAT) 2014 report "*Faili Kurds in Iraq and Iran*" indicates that Faili Kurds originate from what is now known as the Kermanshah region of Iran and at the beginning of the 20th century many Faili Kurds migrated to Baghdad and other areas of present-day Iraq. From the late 1970s, up to 300,000 Faili Kurds were stripped of their Iraqi citizenship and were expelled from Iraq, most ending up in Iran. The same report indicates that many Faili Kurds live in border areas such as Kermanshah and Ilam, as well as in major cities such as Tehran and Yazd, where the applicant was born. The applicant is a Shia Muslim which is also consistent with the profile of Faili Kurds.
8. The International Crisis Group (ICG) report "*Shiite Politics in Iraq*" describes successive Iraqi regimes undertaking mass expulsions of Shias in Iraq whom they deemed to be Iranians fostering sectarian division. The two main groups targeted were Faili Kurds and a broader group of Arabic speaking Shia people whose identity cards classified them as being "*of Persian origin*".
9. The applicant's claim to be an Arabic speaking Shia Muslim whose parents originate from the city of Amarah in the Shia majority Maysan (also referred to as Missan) governate in south-east Iraq is broadly consistent with the profile of people targeted by successive Iraqi regimes during the 1970s and 1980s, including the former Hussein regime. I note however this profile included but was not limited to Shia Faili Kurds. The applicant's apparent fluency in the Farsi and Arabic languages and the copies of Iranian identity cards listing him and his family members as Iraqi nationals living in Yazd supports his claims to have Iraqi origins and to have lived in Iran.
10. Notwithstanding the above considerations, I have serious concerns with the evidence given by the applicant concerning his claim to be of Kurdish ethnicity. During the 2013 Entry Interview and 2017 SHEV application the applicant claimed to speak, read and write Farsi, Arabic and also indicated that he spoke a little bit of English. He did not claim to speak, read or write any Kurdish language. During the SHEV interview the delegate raised this issue, indicating he thought that, if it were true the applicant and his family are Kurds, that they would speak Kurdish at home and that the applicant would speak Kurdish. The applicant responded that he speaks a little bit of Kurdish but did not give any reason as to why he had not mentioned this before. He claimed that, while his parents speak Faili Kurd and he has relatives who speak Kurdish and who live in other parts of Iran, he was born in Iran and speaks Arabic as that is the language that is spoken in his community in Yazd, and that Kurdish was not spoken there. He indicated during the SHEV interview that he has had no involvement with the Kurdish community in Australia.
11. The evidence given by the applicant during the SHEV interview did not reveal any meaningful information on the history, culture, religious practices or traditions of Faili Kurds. He stated that he describes himself as '*Kurdish Faili*' because Iran and Iraq have denied him citizenship, and later stated that '*Faili Kurd*' is not a country or language and is a term made up by countries [like Iran and Iraq] to avoid taking responsibility for people like him. This is contradicted by the country information before me. While I take into account the applicant's circumstances as the child of Iraqi migrants who was born and raised in Yazd may have some impact on the depth of his knowledge of his ancestral links and cultural background, I do not consider this can persuasively explain the paucity of his evidence.
12. I accept the applicant is the child of parents who formerly resided in Iraq, however on the evidence before me I have serious concerns with the applicant's claim to be of Kurdish ethnicity and I am not satisfied this is the case. He has consistently stated that he and his family speak

Arabic and he responded to the delegate's first question on his ethnicity during the SHEV interview with an assertion that he is an Arab Muslim. I find he is of Arab ethnicity.

13. The applicant's account of the expulsion of his parents from Iraq is consistent with the country information sources noted above and I accept his claim that his parents were expelled from south-east Iraq in the early 1980s and that they left to live in Iran. I accept that his parents and two brothers continue to live in Iran. However, having regard to his evidence regarding his family's background, the documents he has provided and the circumstances of his departure from Iran, I have serious concerns with his claim that he remained stateless in Iran, and that he was stateless at the time he departed Iran.
14. Iraqi refugees living in Iran were and continue to be required to register with the Department of Foreign Residents and Immigrants and are provided refugee identification documentation. This refugee identification documentation (amayesh cards) provided the holder with access to certain benefits, including health care, education and limited work rights.
15. The applicant has claimed he was never issued with a birth certificate in Iran, but that he and his family were living as registered refugees in Iran. The only evidence of his identity he has provided is a copy of an Iranian identity document issued in 2012 which declares he is an Iraqi national issued a temporary residence permit in Iran. I note that neither this nor any other documentation provided by the applicant expressly indicates that he or his family were refugees in Iran.
16. DFAT's observe in the '*Country Information Report – Iran*' published in 2020 that it is not aware of the existence of a '*Foreign National Identity Card*', and that an '*Amayesh*' card is the sole form of identification issued to registered refugees in Iran. On the information provided I am not satisfied that the copies of the identity cards provided to the department by the applicant for himself (in 2013) and for his family (in 2013 and 2021) are evidence that his family are stateless refugees.
17. The delegate found that the poor-quality copies of Iranian identity cards provided by the applicant for him and his family were not credible evidence of his claim to be stateless, and concluded the applicant was not a stateless person. The applicant has not provided any submission to the IAA responding to the delegate's findings in this matter or any other aspect of the delegate's decision.
18. The applicant has given very limited evidence concerning his parents' ancestry, their circumstances prior to being forced out of Iraq in the 1980s, and the circumstances of family members who had remained in Iraq or have returned from Iran to live in Iraq after the fall of the Hussein regime. During the SHEV interview he was asked many questions on this topic and stated that he believed the Saddam regime may have deported his parents due to a perception his family had an Iranian ancestral link, but did not directly respond to the delegate's question about whether his parents were citizens in Iraq prior to being deported.
19. The applicant has indicated that many generations of his family had lived in Iraq prior to 1980, and he has provided no cogent reasons as to why his parents would have been undocumented and stateless at the time they were expelled from Iraq. I am not satisfied that they were. I accept his parents were born in Iraq and, noting they are Arab Shias whose grandparents had been born in what is now known as Iraq, I consider they were Iraqi citizens at that time. I am prepared to accept they were stripped of their Iraqi citizenship when they were expelled in the 1980s.

20. The applicant has given conflicting and incomplete information concerning his family's present circumstances and status. When asked by the delegate whether he has any family members who are Iraqi citizens he initially responded 'no'. The delegate then asked him about his maternal aunt in Iraq and he stated she is an Iraqi citizen living in Amarah. He later claimed that he did not know the citizenship status of two paternal uncles who have returned to Iraq and are residing there
21. I have had regard to information in DFAT's 2014 report concerning changes to Iraq's constitution and legislative amendments in 2005 and 2006 which provided the right for anyone who had their Iraqi citizenship withdrawn to demand its restoration. DFAT advise that many of the Iraqis expelled in the manner described by the applicant have been subsequently able to reinstate their Iraqi citizenship. DFAT's 2014 Thematic report focuses on Faili Kurds, although it also refers to Arab Shias and other refugees in explaining the situation for stateless Iraqis in Iran and the circumstances in which they can re-avail themselves of, or obtain, Iraqi citizenship.
22. DFAT confirms that the process to obtain Iraqi citizenship requires an Iraqi identification card, including one from the time of the previous regime and a Certificate of Residency confirming residency in Iraq and the applicant generally needs to apply in person. It is not clear from the applicant's evidence whether his parents hold Iraqi documentation or what that documentation may be. I have serious concerns with the completeness and veracity of his account of his parents' circumstances in Iraq and their status in Iran. Regardless DFAT advise that former Iraqi nationals without Iraqi identification or other local records could rely on credible local witnesses to attest to the applicant's provenance, and that necessary documentation to restore Iraqi citizenship could be obtained on that basis.
23. The applicant has aunts and uncles on both sides of his family who are living in their former home area of Amarah. The applicant has stated that his maternal aunt is living as an Iraqi national and claimed he did not know the status of his paternal uncles. As noted by the delegate, the applicant also has two cousins who are resident in Australia, one of whom has claimed to be an Iraqi citizen, and the other claimed to be stateless Faili Kurds but was found by the department not to be a stateless or a Kurd and to be a citizen of Iraq. When this information was put to him during the SHEV interview, he responded that this was impossible, but did not further elaborate on the reasons why. It appears likely that his paternal uncles are also Iraqi nationals.
24. DFAT note that the Iraqi Nationality Law, adopted in 2006, repealed Decree No. 666 and stipulated that all persons denaturalised by the former government have their Iraqi citizenship restored. DFAT also note that Article 18 of the 2005 Iraqi Constitution provides that anyone born to an Iraqi father or Iraqi mother shall be considered an Iraqi. I accept that not all Iraqis expelled to Iran in the 1980s have availed themselves of the opportunity to have their Iraqi citizenship reinstated, whether by choice or due to lack of access to necessary resources or documents. Notwithstanding the existence of bureaucratic hurdles for some individuals, the reporting before me indicates that since 2006, the Iraqi Government in Iraq has actively encouraged expelled Iraqis to return and reclaim their citizenship and has provided a legal framework in place to assist them restore their citizenship.
25. DFAT's 2014 report observes that, since the fall of the Hussein regime, a large majority of Feyli Kurds and Shia Arabs expelled during the Iran-Iraq conflict have reclaimed their Iraqi citizenship and have returned to Iraq, or have remained legally in Iran living as Iraqi citizens. DFAT advise it is not possible to provide precise numbers in this regard but cite a credible 2013 NGO report indicating this figure may be as high as 97 per cent of 'denaturalised' Faili Kurds.

26. The applicant also claims his mother returned to visit Iraq in 2018 and claims she did so for the purpose of attending Muharram and as the holder of temporary identity papers issued by the Iranian authorities. He did not provide any evidence of his mother's documents and I have serious concerns with respect to the veracity of his account of her visit, and suspect that she, like her siblings, had returned to Iraq as an Iraqi citizen.
27. In considering his claimed statelessness I have also had regard to the claims the applicant has made regarding his departure from Iran. He has consistently stated that a people smuggler assisted him to obtain a falsely issued [Country 1] passport that he then used to depart Iran through Imam Khomeini International Airport. The applicant gave evidence in the 2013 Entry Interview that he passed through Imam Khomeini International Airport without difficulty and without assistance. The applicant was asked at the SHEV interview about these arrangements and indicated he had paid the equivalent of \$8000 for the fraudulent [Country 1] passport and confirmed he did not encounter any difficulty at the airport.
28. The delegate pointed out that the DFAT advise that the Iranian border control, particularly at the airport in Tehran is rigorous and that he considered it was unlikely the applicant could have left on a false passport. The applicant agreed that it would be difficult for Iranian citizens, but that his situation was different because he was not an Iranian and he left on a false identity and on a foreign passport.
29. The applicant is not claiming to have been travelling on an Iranian passport or to have been a person of interest to the Iranian authorities at the time of his departure. However I also take into account the assessment of DFAT and other sources before me that Iranian Immigration officials are considered highly competent and are skilled in detecting document fraud. DFAT assess that the likelihood of an individual exiting Imam Khomeini International Airport with a fraudulent passport is extremely low, and I note this assessment is not limited only to Iranians travelling on Iranian documents.
30. Other sources cited by the delegate (Danish Refugee Council, Landinfo and Danish Immigration Service) confirm airport controls in Iran are rigorous and, while such a departure is not impossible, indicate that any person attempting to leave on a fraudulent document would need to pay large bribes to multiple airport officials in order to pass checkpoints. In light of the above information I find the applicant's claim to have departed Iran on a fraudulent [Country 1] passport without any difficulties or assistance at the airport to be so unlikely as to be implausible, and I am not satisfied that this occurred.
31. The evidence before me strongly points to the applicant having left Iran as the holder of a legitimately issued passport. The only identity documents he has provided indicates he and his family are recognised by Iran to be Iraqi nationals and are not Iranian. The country information discussed above indicates that the great majority of the Iraqis (including Arab Shias and Faili Kurds) who were expelled from Iraq have since had their citizenship restored, and I note that a number of the applicant's family members are living in Iraq as Iraqi nationals.
32. Considered all of the information before me I am not satisfied the applicant is a stateless person. I accept he may have been stateless at the time of his birth in Iran in [year], as his parents were stateless at that time, however I consider it most likely that one or both of the applicant's parents have had regained their Iraqi citizenship sometime after 2006 and that the applicant has become a citizen of Iraq through his parents. I am not satisfied that the applicant was stateless at the time he left Iran and I find that he is an Iraqi national and that he departed Iran on a legally issued Iraqi passport.

Area to Which He Would Return

33. The applicant has indicated that both of his parents originate from the city of Amarah in the Maysan governate in Iraq and that this is also the area in which his maternal aunt currently resides. I find that this is the area of Iraq to which he would return.

Refugee assessment

34. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

35. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:

- the person fears persecution and there is a real chance that the person would be persecuted
- the real chance of persecution relates to all areas of the receiving country
- the persecution involves serious harm and systematic and discriminatory conduct
- the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
- the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
- the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

36. I have found that the applicant is a national of Iraq and it follows that Iraq is the receiving country for the purpose of this assessment. I have found that the applicant would be returning to live in the governate of Maysan as an Arab Shia.

37. During the SHEV interview the applicant was asked about what he feared would occur were he to be returned to Iraq and he responded that *"Iraq is a dangerous country, I would be kidnapped and its very risky"*. The country information does indicate that the security situation in Iraq varies according to the area and the circumstances of an individual, and that it can be highly unstable and fluid. For the reasons that follow I consider the country information does not support a conclusion that the applicant faces a real chance of harm as an Arab Shia Muslim who was born in Iran, who has lived in Australia and who would be returning to live in Amarah.

38. The recent reports on Iraq prepared by European Asylum Support Office (EASO) and DFAT describe how the Iraqi government (supported by international coalition forces and various militia groups) is involved in ongoing armed conflict against the Islamic State militant group (also referred to as ISIL and Daesh). This situation in Iraq has been further complicated by a series of violent exchanges in Iraq between the United States and Iran-backed Iraqi Shia militias.

39. Islamic State forces were comprehensively defeated in Iraq at the end of 2017 however EASO cite analysts describing how the increased pressure on Iraqi government forces has created a vacuum which has allowed Islamic State to regroup and Islamic State is expected to be seeking to re-establish territorial governance in northern and western Iraq. DFAT's report confirms Islamic State is aiming to exploit the confrontation between the US and Iran, attempting more complex attacks against security forces and infrastructure in central and northern Iraq.
40. EASO assess that Islamic State do not have capability to return to its former practices of carrying out urban mass attacks, and has not taken back any territorial control, but rather has shifted to small scale insurgency tactics in areas it previously controlled and where it takes advantage of ungoverned spaces and the disputed areas between Iraqi and Kurdish security forces. It is clear that Islamic State will continue to represent a security threat within Iraq, however the EASO and DFAT reports do not suggest that the Iraq Federal government or the autonomous Kurdistan Regional Government are at any significant risk of losing control of their respective territories in the foreseeable future. Nor do these reports suggest there is any likelihood of a return to the widespread sectarian violence between Sunni and Shi'a communities that was prevalent in the mid to late-2000s.
41. EASO describe Amarah as the capital of the Maysan governorate, which is located in south-east of Iraq, and borders with Iran to the east. Arab Shia Muslims make up the large majority of the population of Maysan and, as noted by the applicant during the SHEV interview, Maysan also hosts other religious minority communities, including Sunnis, Christians, and Mandaeans. I note that EASO and DFAT both observe that the Shia majority southern governorates including Maysan, were largely untouched during the period in which large parts of Iraq were controlled by Islamic State (2014-2017).
42. The UN Mission for Iraq report for the period 1 January 2019 – 31 July 2020 recorded no civilian deaths or casualties as a result of armed conflict related incidents in the Maysan governorate. It is also apparent from the EASO and DFAT reports that security incidents have occurred in Maysan in recent years as the result of (intra-) tribal disputes, criminal activity, and violence during and stemming from the series of large public protests in Amarah. These protests were part of a wave of nationwide series protests that commenced at the beginning of October 2019 and that were concerned with a range of grievances, including government corruption and the influence of Iran. Protesters were subjected to regular violence by various parts of the security forces, and masked men who were widely assumed to be from Iran-backed militia groups. EASO cite reports of 25 protester deaths and 243 injuries were reported in Maysan in 2019. Local tribal leaders have blamed government forces and pro-Iran militia groups for the violence.
43. Throughout 2019 and 2020 there have been a series of violent incidents, including targeted attacks and criminal destruction that are characterised by EASO as intra-Shia violence. I accept that violent incidents involving Shia activists/supporters of rival Shia militant groups are likely to continue to occur in Maysan, although I note that these do not appear to be escalating into more widespread forms of communal violence and do not involve significant civilian casualties.
44. I accept there may be some risk to ordinary civilians of being caught up in intra-Shia violence, although I note DFAT's assessment that this risk is predominantly borne by those persons active in the militia or tribal groups. The evidence given by the applicant does not suggest he has previously had any interest or involvement in political, religious or tribal groups of any nature, or that he would likely become involved in any such activities on return to Iraq.
45. DFAT observe that the practice of seeking asylum and then returning to Iraq is common and well accepted among Iraqis, as evidenced by the large numbers of dual nationals from the US,

Western Europe and Australia who return to Iraq. Neither DFAT nor EASO suggest that returnees from Iran or from Western countries face discrimination or harm for this reason and I am not satisfied that this is the case.

46. Having regard to information about the nature and frequency of the security incidents in Maysan and in the south more broadly, the low level of influence or capability of Islamic State and/or Sunni insurgent groups in the south, the dominance of the Shia Arab population, and the general security situation in Iraq, I am not satisfied that the risk of harm to a person in the applicant's circumstances as a result of criminal activity or the general security environment rises to a real chance.
47. I accept that the applicant may face significant challenges in settling in Maysan. While, for reasons given earlier, I have doubts as to the veracity and completeness of the applicant's account of his circumstances prior to his journey to Australia, I am prepared to accept that he may have little or no prior experience of living in Iraq. DFAT assesses that returnees may face difficulties in returning to Iraq, particularly when seeking to integrate within new communities, and that the influence of patronage and nepotism impacts on many aspects of life.
48. The applicant has a maternal aunt and two paternal uncles living in the area, and I note that he has indicated that his maternal aunt provided him with a relatively large amount of money to fund his journey from Iran to Australia in 2013. During the SHEV interview the applicant described his aunt as '*well off*' and '*very kind and generous*' and when asked by the delegate whether he could return to live with his aunt in Amarah the applicant reiterated that Iraq was a dangerous place but did not suggest that his aunt would be unable or unwilling to provide him with support.
49. The applicant speaks, reads and writes Arabic and some English and would be living in Maysan as a member of the Arab Shia majority population. He has considerable experience working as a baker in Iran and indicated in the 2017 SHEV application that he was living with his adult cousins in Melbourne and had been working at a [specified] business. I consider that these circumstances indicate a level of resourcefulness, independence and resilience that, while not directly equivalent to the challenges he may face in Iraq, are relevant to an assessment of his capacity to subsist and integrate into the community on return to Iraq.
50. I have found that the applicant would be returning as an Iraqi national and I am satisfied he would, on return to Iraq, be able to enjoy the same rights and access to basic services like other Iraqi citizens. I accept that, for the applicant, settling in Maysan will involve real and significant challenges, and that he may find that his wages, access to services and overall living standards are lower than he has experienced in Australia. However I am not satisfied that the applicant faces a real chance of being denied in Maysan a capacity to earn a livelihood of any kind, or that he would be unable to find accommodation or any form of work to support himself, or that he would face economic hardship such that he faces a real chance of any harm on these bases upon return.
51. For all of these reasons I am not satisfied that the applicant faces a real chance of harm as an Arab Shia Muslim who was born in Iran and has lived in Australia, and who would be returning to live in Maysan.

Refugee: conclusion

52. I am not satisfied the applicant has a well-founded fear of persecution. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

53. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.
54. I have concluded above that the applicant does not face a real chance of any harm on any of the bases claimed. As 'real risk' and 'real chance' involve the application of the same standard, I am also not satisfied that the applicant would face a real risk of significant harm for the purposes of s.36(2)(aa) on these grounds.

Complementary protection: conclusion

55. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) 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 non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of 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, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the 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.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.