



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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IRAN

IAA reference: IAA21/09807

IRAN

IAA reference: IAA21/09808

IRAN

IAA reference: IAA21/09809

IRAN

IAA reference: IAA21/09810

Date and time of decision: 28 October 2021 10:08:00

S Kamandi, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

*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

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### Visa application

1. The referred applicants (the applicants) are a family consisting of a husband (the applicant), his wife (the applicant wife) and their two children. The applicants arrived in Australia in June 2013 and lodged a combined application for Temporary Protection Visa (TPV).
2. On 30 August 2021, a delegate of the Minister for Immigration (the delegate) refused to grant them visas on the basis that the applicants were not persons in respect of whom Australia owed protection obligations.

### Information before the IAA

3. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. Included among that material is a recording of the applicant wife's arrival interview conducted in 2013. There are no references to the applicant wife's arrival interview in the delegate's decision. It is not apparent whether the applicant wife's arrival interview was before the delegate or not. In the event that the applicant wife's arrival interview was not before the delegate and is new information, I am satisfied that there are exceptional circumstances to justify considering the new information. The information provided by the applicant wife in her arrival interview includes information that informs the determination of her nationality and assessment of her application.
5. On 23 September 2021, the Immigration Assessment Authority (IAA) received an email from Refugee Legal attaching a statement by the applicant wife. In her statement, the applicant wife states that Refugee Legal advised her that the family's combined TPV application indicates that she did not wish to raise her own claims for protection. She states that she was unaware of what was written in their TPV application organised by her husband and father in law and that she did not realise that she should have raised her own claims. The applicant wife claims that some of the information in the TPV application relating to her and her family was not correct. In line with her husband's evidence at the TPV interview, the applicant wife claims that she was born in Iraq, is an Iraqi citizen and that her parents and siblings are all residing in Iraq and are Iraqi citizens. Also as claimed by her husband at the TPV interview, the applicant wife claims that she went to Iran in 2004 to get married and although her husband and father in law made an application to obtain her Iranian citizenship, her application was refused and she is unaware of the reasons for refusal of her application. While this information has been provided to the IAA by the applicant wife, these factual assertions were before the delegate and I do not consider these aspects of the applicant wife's statement to be new information.
6. On 12 October 2021, the IAA wrote the applicant wife (the invitation) inviting her to provide new information and comment on information that was provided by her and her husband, at their arrival interviews held on 29 June 2013 regarding her nationality and family and educational background which appeared to contradict information later provided by herself and her husband. The applicant wife was also invited to provide new information in relation to her husband's evidence at the TPV interview, that he did not face any persecution or harm for reasons of his Faili Kurd ethnicity.

7. The applicant wife did not provide new information or comments in response to the invitation. On 22 October 2021, the IAA contacted the applicant wife to determine whether she was intending to provide any further information. The applicant wife advised the IAA that she was unwell and stated that she had already provided everything that she could and didn't have anything further to add.
8. In her statement to the IAA, the applicant wife has put forward the following claims regarding her experiences in Iran:
  - for the 15 years that she resided in Iran, she could not get a job, couldn't have an identity or a bank account and that even shopping caused her problems.
  - When she was giving birth to her children, she was unable to go to the hospital and that her husband paid for an obstetric nurse to come to their house and deliver the babies.
  - As woman she had no rights and was mistreated daily as an Iraqi Kurd woman with no documents.
  - Her father in law used to take her through mountain passes to Iraq to visit her family, as she was unable to cross the border to Iraq via normal channels.
  - Her husband's friends kept telling her husband to divorce her because the government did not like Iraqis.
  - She does not want her children to be mistreated because they have an Iraqi mother or denied education and face mistreatment because they are Kurds.
9. These claims were not made before the delegate and are new information. While the applicant wife asserts that she was unaware of what was written in their TPV application organised by her husband and father in law, the TPV application, prepared with the assistance of a registered migration agent, includes the applicant wife's declaration confirming that the information had been read and explained to her. I also note that the information regarding her background, family and nationality presented in the TPV application is consistent with the information she presented at her arrival interview. I do not accept the applicant wife was unaware of the information in the family's combined TPV application or was not aware that she could make claims. The claims made to the IAA relate to events claimed to have occurred some years ago in Iran. I am not satisfied that this information could not have been provided to the delegate.
10. Apart from the quite brief assertions made, there is no real evidence presented to support the new claims. The applicant wife was invited to provide further details and explain the contradictory nature of the evidence regarding her nationality and aspects of her claimed experiences in Iran, but she has advised she had nothing further to add. I am mindful that in assessing new information under s.473DD(b)(ii) of the Act, the test is not to determine whether the information is true or not, but to assess whether the new information is capable of being believed. Given that the applicant wife was invited to provide further information and put on notice that on the information before the IAA, the IAA may determine her to be a national of Iran, considered together with the conflicting nature of the information regarding the applicant wife's background, including her family and educational background, and her experiences in Iran, I am not satisfied that the new information is capable of being believed. I am not satisfied that the requirements under s.473DD(b) are met, nor am I satisfied that there are exceptional circumstances to justify considering the new information.
11. In her statement to the IAA, the applicant wife also requested an interview and an opportunity to explain her evidence in her statement. While I appreciate that she was not interviewed by

the delegate, given that the applicants' TPV application indicated that she was not making any claims of her own, I am not satisfied that she was unaware of what was presented in the TPV application. In addition, the applicant wife was invited to provide further information, including information about matters raised in her statement, to the IAA. When contacted to determine whether she intended to provide anything further, while the applicant wife stated that she was unwell, she confirmed that she had nothing further to add. The applicant wife's statement to the IAA is brief. Although it was prepared over the phone which prevented her from signing the statement, it was prepared with assistance of the Refugee Legal and an interpreter, and it is not apparent why she did not include any further explanation of her claims that she wished to be considered. I am not satisfied that further explanation of her claims could not have been provided in writing in the statement to the IAA or in response to the IAA's invitation to provide further information. In the circumstances, I have decided to undertake this review on the material that is before me and not to exercise my discretion to invite the applicant to provide further information.

### **Applicants' claims for protection**

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12. The family's combined TPV application indicates that the applicant is raising his own claims and that the applicant wife and their children do not raise claims of their own. The combined TPV application includes a statement made by the applicant outlining his claims for protection.
13. The applicant's claims set out in his TPV statement can be summarised as follows:
  - The applicant's family fled Iraq in 1979 and went to Iran. He was born in Kermanshah in Iran.
  - The applicant attended five years of school in Kermanshah. He could not continue to go to school due to lack of an Iranian birth certificate.
  - The applicant's family were subjected to discrimination and sometimes called "Arabs". They were treated as second class citizens.
  - The applicant's father would regularly travel to the border to purchase [Products] for his business. The neighbours and other business owners would complain to the authorities that the applicant's father was crossing the border and travelling to Iraq. This resulted in the family's loss of White Cards, which meant that they were living in "limbo", had no right to maintain bank accounts or conduct a business.
  - The applicant's White Card was revoked in 2011. The family had copies of their White Cards which allowed them to get by in the two years until their departure in 2013.
  - The applicant and his wife were not issued a formal marriage certificate.
  - The applicant travelled to [Country] with his wife, two children and his parents. The applicant's father purchased fraudulent passports which they used to depart Iran.
  - If returned to Iran, the applicant and his family will be sent to Iraq. He has no family or friends in Iraq and fears for the safety of his wife and children.
  - The applicant fears that on return to Iran, they will be questioned by the authorities about how they departed Iran illegally and will be persecuted/punished for this reason.
  - If forced to return to Iran, they will not be able to survive without any documentation.
14. The applicant was interviewed by the delegate on 26 May 2021. The applicant's evidence at the interview can be summarised as follows:

- The applicant and his children are nationals of Iran. His name on his official Iranian documents is [the applicant] and his children's surname is also [Surname].
- The applicant wife was born in Baghdad, Iraq and is a citizen of Iraq. The applicant's parents brought her from Iraq to marry the applicant when she was [Age] years old. A clergy came to the house to conduct their marriage ceremony. Their marriage was not officially registered.
- The applicant started working after five years of primary school to help his father and uncle. He was not harmed for reasons of his Faili Kurdish ethnicity. He was not involved in any political activities while in Iran.
- The applicant tried to obtain Iranian documents for his wife, but their application was refused. They were told by the authorities that they had to go back to Iraq to make an application.
- The applicant used his own Iranian passport and the applicant wife used her own Iraqi passport to depart Iran.
- The main reason the applicant and his family departed Iran was due to his wife's inability to obtain Iranian documents and their children's future.
- The applicant has not been active on social media nor involved in any Kurdish associations or organisation while living in Australia.
- If returned to Iran, they will be questioned about why they left Iran and his wife's Iraqi' background.

## **Factual findings**

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### *Credibility*

15. The applicant and applicant wife have presenting conflicting evidence regarding their nationality since their arrival in Australia in 2013. The applicant maintained his evidence that he and his wife were born in Iran and did not hold Iranian citizenship until his TPV interview held in May 2021, almost eight years since their arrival in Australia. In his TPV statement, attached to the family's combined TPV application, the applicant claimed that he was unable to continue going to school past grade five due to lack of having an Iranian birth certificate, that his family faced persecution as Faili Kurds residing in Iran and that their White Cards were revoked in 2011 following complaints made by neighbours and other business owners to the authorities accusing his father of passing the border to Iraq to obtain vehicle parts for his business. He painted a picture of his family having faced hardship as Faili Kurds, treated like second class citizens and that due to lack of any Iranian documentation, they were unable to have bank accounts, conduct their business had to purchase fraudulent Iranian passports to depart the country. At the TPV interview, the applicant presented his and his children's Iranian identity documents to the delegate and repudiated his claims that he resided in Iran as a stateless Faili Kurd and was persecuted due to his ethnicity and lack of Iranian nationality. I find the applicant's deliberate non-disclosure of his Iranian nationality and fabrication of having faced discrimination and hardship due to lack of citizenship while in Iran at his arrival interview in 2013, and in his TPV statement, which he signed and declared to be true in every particular, to severely detract from his credibility.
16. Similarly, I find the applicant wife not to be a credible witness and (as discussed below) to have intentionally provided false and inconsistent information regarding her nationality, family and

educational background and her experiences in Iran, all in attempt to bolster her claims for protection.

### *Identity and Nationality*

17. The applicant and his wife have consistently claimed that they were married in Iran and that both of their children were born in Iran. I accept their evidence in this regard.
18. As noted in the delegate's decision, the applicant's Iranian birth certificate and National Identity Card, and his two son's Iranian birth certificates were sighted by the delegate. At the TPV interview, the applicant confirmed that his name on his official Iranian documents is [the applicant] and that his children's family name is also [Surname] as noted on their birth certificates.
19. The delegate took copies of the originals of these documents after the interview and requested for the applicant to provide him with translated copies of the documents. The applicant did not provide translated copies of his or his children's Iranian identity documents.
20. The delegate's decision indicates that the applicant and his children's Iranian identity documents were translated by a Persian speaking officer at the Department and that the applicant and his children's names were confirmed as claimed at the TPV interview.
21. The applicant has not provided the IAA with translated copies of his or his children's Iranian identity documents nor any submissions in response to the delegate's findings of his and his children's identity and nationality. I accept the applicant's evidence at the TPV interview that he and his children are Iranian nationals.
22. During her arrival interview held on 29 June 2013, the applicant wife stated that she was born in Kermanshah province of Iran, and that she was not a citizen of any country and was stateless. This information was confirmed in the applicants' combined TPV application, prepared with the assistance of a migration agent. At the TPV interview, the applicant after divulging his and his children's Iranian citizenship, stated that applicant wife was born in Iraq and was a citizen of Iraq. The applicant was asked to provide documentary evidence in support of his wife's Iraqi nationality. On 30 May 2021, the applicant provided the delegate with photographs of an untranslated document claimed to be the applicant wife's Iraqi birth certificate. As noted in the delegate's decision, the applicant did not respond to the delegate's requests, at the interview and also post-interview by way of a s.56 request for further information, to provide translation of their identity documents.
23. On 12 October 2021, the IAA invited the applicant wife to provide new information and comment on the evidence she and the applicant had provided regarding her nationality. The invitation indicated that after their arrival in Australia, the applicant's and applicant wife's evidence was that she was born in Iran and did not hold citizenship of any country; that she was uneducated and never went to school; that she departed Iran using a fake Iranian passport; that her family were residing in Iran; and that she resided in Kermanshah from birth until her departure from Iran. The invitation indicated that this information was contrary to the applicant's evidence at the TPV interview and the information in the applicant wife's statement to the IAA that she was born in Iraq, is a national of Iraq; went to school in Iraq; her family remains in Iraq; and that she used her own Iraqi passport to depart Iran. The invitation specified that this may lead the IAA to find that the applicant wife had not been forthcoming and truthful about her background and nationality, that the untranslated document claimed to

be her Iraqi birth certificate is not reliable corroborative evidence of her claimed Iraqi nationality and that like her husband and children, she is also a national of Iran.

24. The applicant wife did not respond to nor provided any further information to support her claimed Iraqi nationality. She confirmed with the IAA that she had nothing further to provide or add to what she had already provided. On the evidence provided, I am not satisfied of the credibility of the applicant wife's claims that she was born in Iraq or is a national of Iraq. I do not consider the documentary evidence, which is an untranslated handwritten document with a photo of a child and a logo with a number attached to it, to be reliable evidence of applicant wife's Iraqi nationality. In the circumstances, I prefer the applicant's and applicant wife's evidence provided at their arrival interviews, held shortly after their arrival in Australia, and confirmed in their combined TPV application, that the applicant wife was born in and resided in Iran from birth. Considering this together with lack of any reliable supporting evidence and my concerns regarding the applicant and applicant wife's overall credibility, I am not satisfied that the applicant wife is a national of Iraq and find that like her husband and children, she is also a national of Iran.
25. I find the applicants to be nationals of Iran. Iran is the is the receiving country for the purposes of this review.

#### *Ethnicity*

26. The applicant and his wife have consistently claimed, and I accept that they are of Faili Kurd ethnicity.
27. While the applicant, in his TPV statement, put forward claims of discrimination and persecution as a stateless Faili Kurd in Iran, at the TPV interview, he confirmed that he was not harmed due to his ethnicity. When asked about whether he had any trouble working in Iran, the applicant referred to the economic situation in Iran and that work was difficult to obtain. He further stated that his father helped him in Iran and assisted him to travel to Australia. The applicant stated that while in Australia, his father lost his parents, and that his parents decided to go back to Iran and were residing in Kermanshah. Regarding his education, the applicant stated that he left school after grade five to work and help his father and uncle. He did not claim that he was discriminated against in education or employment or that he faced harsh treatment or persecution due to his ethnicity. When asked if he was harmed due to his ethnicity, the applicant responded in the negative. While he referred to coming to Australia for the future of his children, his evidence did not suggest that his children would face discrimination or persecution due to their ethnicity. I note that the applicant's claims in his TPV statement related to his claimed stateless status in Iran, which he repudiated at the TPV interview.
28. I am not satisfied that the applicants faced any harm due to their ethnicity while in Iran.

#### *Passports and returned asylum seekers*

29. Given their initial claims that they were stateless, the applicant and his wife originally claimed that they departed Iran using fraudulent Iranian passports in different names. While this was maintained when they lodged their TPV application in 2017, at the TPV interview the applicant confirmed that he and his children travelled using their own Iranian passports. While he claimed that his wife used her Iraqi passport to depart Iran, given my findings about the applicant wife's nationality and their overall credibility, I do not accept that the applicant wife's claims regarding her Iraqi nationality or that she departed Iran using an Iraqi passport

and find that like her other family members, she also departed Iran using her own Iranian passport.

30. The applicant and his wife have consistently claimed that their passports were taken by the smuggler in [Country]. I accept that they are not in possession of valid Iranian passports. I also accept that having resided in Australia for eight years, if returned to Iran, they may be considered as returned asylum seekers.

## **Refugee assessment**

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31. 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**

32. 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.

33. I accept that the applicants are of Faili Kurd ethnicity. I do not accept that the applicant wife is an Iraqi citizen and find that the applicants are nationals of Iran and were born and resided in the Kermanshah province of Iran. At the TPV interview, the applicant stated that his parents who travelled with his family to Australia in 2013, returned to Iran and are residing in Kermanshah.

34. While the country information before me indicates that the experiences of minority groups differ in Iran, on the information before me, I am not satisfied that Faili Kurds with Iranian citizenship face a real chance of harm in Iran. DFAT<sup>1</sup> reports that it is not aware of cases where Faili Kurds who are Iranian citizens have faced adverse attention specifically because of their ethnicity. Faili Kurds of Iranian citizenship can access services, including access to employment, on the same basis as other Iranians and appear to face little to no discrimination in access to services on the basis of their ethnicity or religion. DFAT is not aware of specific instances

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<sup>1</sup> Department of Foreign and Trade, “DFAT Thematic Report: Faili Kurds in Iraq and Iran”, 3 December 2014, CIS2F827D91722; DFAT, “DFAT Country Information Report – Iran”, 14 April 2020, 20200414083132.



whereby authorities have singled out Faili Kurds for mistreatment and indicates that Faili Kurds of Iranian citizenship have access to state protection on the same basis as other Iranian citizens. It is also noted that Shia Kurds, like the applicants, face fewer challenges in interacting with government authorities compared with Sunni Kurds. Although there are reports of the authorities targeting ethnic minority activists, such as Kurds attempting to assert cultural or political rights, at the TPV interview, the applicant confirmed that he did not engage in such activities in Iran and had not engaged with any Kurdish organisation in Australia. The applicants' evidence does not indicate that they had engaged in any activities or associated with anyone in Australia that would be of concern to the Iranian authorities, or that he has any intention or desire to engage in such activities if returned to Iran.

35. I accept that the applicants are not in possession of a valid Iranian passport.
36. DFAT reports that Iran does not permit the involuntary return of Iranians from Australia unless they arrived in Australia after 19 March 2018, the date on which Iran and Australia signed a Memorandum of Understanding that includes an agreement by Iran to facilitate the return of Iranians who arrived after this date and who have no legal right to stay in Australia.<sup>2</sup> As the applicants arrived in Australia prior to 19 March 2018, I find that if they were to return to Iran, it would necessarily be on voluntary basis. DFAT<sup>3</sup> also reports that persons, such as the applicants, who do not have a valid Iranian passport require temporary travel documents issued by Iranian diplomatic representatives overseas to facilitate their return and that the authorities at the airport will be forewarned about such persons' return.<sup>4</sup> As the applicants return will necessarily be on voluntary basis, they may be able to obtain passports. If the applicants' return to Iran on temporary travel documents, the 2020 DFAT report<sup>5</sup> indicates that they may be questioned by immigration police about the circumstances of their departure and why they are travelling on temporary travel documents. I consider that this may lead the authorities to infer or become aware, that the applicants have sought asylum while in Australia. The DFAT report<sup>6</sup> indicates that the questioning is usually for a short period of between 30 minutes to an hour but may take longer where returnees is considered evasive in their answers or have a suspected criminal history. Arrest and mistreatment are not common during this process.
37. Other than the possible questioning on arrival, DFAT advises that voluntary returnees do not attract much interest amongst the large regular international movements of Iranians and that they will generally move quickly through airports. International observers have reported that the Iranian authorities pay little attention to returned asylum seekers on their return to Iran and have little interest in prosecuting for activities conducted outside of Iran, including in relation to protection claims. Unless returnees have an existing profile or were the subject of adverse official attention prior to departing Iran, they are unlikely to attract attention from the authorities. Apart from his evidence relating to his family's lack of documentation which he retracted at the TPV interview, the applicant's evidence does not indicate that he had any adverse profile with the authorities prior to his departure from Iran or that either he or his wife had any criminal history. At the TPV interview, the applicant stated that he was not politically active in Iran and has not engaged with any Kurdish organisations while in Australia. While the applicant claims that he will be questioned about his departure if returned to Iran, the country

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<sup>2</sup> DFAT, "DFAT Country Information Report Iran", 7 June 2018, CIS7B839411226; DFAT, "DFAT Country Information Report – Iran", 14 April 2020, 20200414083132.

<sup>3</sup> DFAT, "DFAT Country Information Report – Iran", 14 April 2020, 20200414083132.

<sup>4</sup> DFAT, "DFAT Country Information Report Iran April 2016", 21 April 2016, CIS38A8012677; DFAT, "DFAT Country Information Report – Iran", 14 April 2020, 20200414083132.

<sup>5</sup> DFAT, "DFAT Country Information Report – Iran", 14 April 2020, 20200414083132.

<sup>6</sup> DFAT, "DFAT Country Information Report – Iran", 14 April 2020, 20200414083132.

information cited above confirms that voluntary returnees may be questioned about the circumstances of their departure, but that the questioning for persons such as the applicants, will be for a short time and there is no indication that they would be subjected to anything further for reasons of their ethnicity or claim for protection in Australia. I also note that the applicant's parents have returned to Iran, and there is no information to suggest that they faced and difficulties or harmed as a consequence of their journey to or stay in Australia.

38. Given the applicants' lack of any adverse profile with the Iranian authorities or criminal history, I do not consider that apart from being questioned on arrival as voluntary returnees, that they would attract any form of adverse attention from the authorities. I do not consider that being questioned on arrival for a short period of time amounts to harm nor am I satisfied that they would otherwise face a real chance of any harm during questioning.
39. Having considered the applicant's circumstances as a whole and in light of what I have accepted of their claims, I am not satisfied that they face a real chance of persecution in the foreseeable future. I am not satisfied that the applicants have a well-founded fear of persecution within the meaning of s.5J of the Act.

#### **Refugee: conclusion**

40. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

#### **Complementary protection assessment**

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41. Under s.36(2)(aa) of the Act, 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.

#### **Real risk of significant harm**

42. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
  - the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.
43. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.

44. I have found above that there is no real chance of the applicants facing any harm. The Federal Court<sup>7</sup> has held that 'real risk' imposes the same standards as the 'real chance' test. Having regard to my findings and reasoning above I am also satisfied that the applicants do not face a real risk of significant harm.

45. I am not satisfied that there is a real risk that the applicants will suffer significant harm in Iran.

#### **Complementary protection: conclusion**

46. There 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 applicants will suffer significant harm. The applicants do not meet s.36(2)(aa).

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

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47. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include spouse and children.

48. As none of the applicants meets the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

#### **Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

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<sup>7</sup> *MIAC v SZQRB (2013) 210 FCR 505.*

## Applicable law

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### **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.