



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

**Decision and Reasons**

**Referred application**

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IRAN

IAA reference: IAA18/06089

Date and time of decision: 18 February 2019 12:41:00

I Sheck, Reviewer

**Decision**

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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

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### Visa application

1. The referred applicant claims to be a stateless Faili Kurd, born in [Village 1] (or [Village 1's alternate spelling]), Ilam province, Iran. He left Iran on [date] December 2012 and arrived in Australia on [date] August 2013. On 19 May 2017 he lodged an application for a protection visa (PV).
2. On 30 November 2018 a delegate of the Minister for Immigration (the delegate) refused to grant the visa. The delegate accepted that the applicant was a Faili Kurd but concluded that he held Iranian citizenship. The delegate found that the applicant did not face a real chance of persecution or a real risk of significant harm due to his ethnicity or for any other reasons in Iran.

### 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

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4. After his arrival in Australia the applicant was interviewed by an officer of the then Department of Immigration and Border Protection (now the Department of Home Affairs) on 26 September 2013. Together with his PV application he provided a statement of claims dated 15 May 2017. On 27 August 2018 he attended an interview ("the PV interview") with the delegate at which his then representative was present. Additional submissions and supporting documents were provided to the delegate on 11 September 2018.
5. The applicant claims:
  - He is a stateless and undocumented Faili Kurd. His parents were deported from Iraq to Iran by the Saddam regime around 1982. They were not documented or registered in any system. Neither the applicant nor his siblings are registered on any system and there is no record of their births. He is subject to discrimination on the basis of his ethnicity and is perceived to be an Iraqi;
  - He lived in a small farming village for all of his life. As he was undocumented he had no right to attend school, to access public hospitals or medical treatment, to buy or rent property or to obtain employment. He obtained a fake passport, which he used to depart from Iran. He has no legal right to reside in Iran;
  - He was born a Shia Muslim but does not follow any faith. On return to Iran he will be considered to be an apostate and/or be forced to comply with the practice of Islam;
  - He holds opinions opposed to the Iranian regime;
  - He would be at risk of serious return on return to Iran due to his extended period abroad and the fact that he would be returning as a failed asylum seeker. The Iranian authorities are aware that he has claimed asylum due to the release of his personal details onto the internet by the Department.

## Factual findings

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6. The applicant claims to be a Faili Kurd with no Iranian identity documents whatsoever. The applicant asserts that his parents were from Iraq as were their parents, although he does not know which part of Iraq they were from. He lists their birth years as [year] (father) and [year] (mother). He has stated that they were deported from Iraq around 1982, however when listing his family composition he states that he and all of his siblings were born in [Village 1], during the period 1979 to 1993. Country information indicates that Faili Kurds originate from the Zagros Mountains in what is now the Kermanshah region of Iran. Many migrated to Baghdad and other areas of what is now Iraq at the beginning of the 20th century but were later expelled to Iran, including during the Iran-Iraq war (1980 to 1988), where they were accepted as refugees but subject to strict registration.<sup>1</sup> The Iranian Bureau for Aliens and Foreign Immigrants' Affairs (BAFIA) oversees the registration of refugees in Iran (both from Iraq and Afghanistan) and refugees are issued with a "Special Identity Card for Foreign Nationals".<sup>2</sup> In the 1980s these cards were known as "green cards". Since 2002 the cards have been issued annually in varying colours and are known as Amayesh. DFAT is of the view that the majority of Faili Kurd refugees in Iran are registered and have amayesh cards.<sup>3</sup> These cards entitle the holders to a number of benefits including healthcare, education, state benefits and the right to apply for work permits.<sup>4</sup> The applicant denies that he or his parents have ever held Iranian refugee cards.
7. At the PV interview the applicant was asked why his parents did not register as refugees at the time that they were deported from Iraq, given the benefits associated with registration. He responded that "they asked us to do things which were not humane and we didn't want to do those things". Although the applicant did not elaborate on what his parents had been asked to do, he also indicated at the PV interview that he had spoken to a member of his village council regarding obtaining Iranian citizenship. The councillor told him that in order to obtain citizenship he had to become an informant and "give information about people". The applicant claims to be an unschooled farmhand of limited literacy, living in a rural hamlet of 30 to 50 households. I consider this claim to be entirely implausible. There is no indication in the review material that Iranian citizenship or nationality may be granted on this basis, particularly to a person who claims to have no Iranian ancestry.<sup>5</sup> This claim undermines the applicant's credibility.
8. The review material also does not support the applicant's claim that Iraqis deported by the Saddam regime in the 1970s and 1980s were required to undertake "inhumane" activities in order to be registered as refugees. I do not accept the claim. Taking into account the paucity of details the applicant has provided about his ancestry, his poor credibility and the lack of credible evidence as to why his parents would not have registered as refugees when they were expelled from Iraq, I conclude that they were not in fact expelled from Iraq as claimed. I conclude that the applicant's parents were born in Iran and are Iranian nationals, as are the applicant and his siblings. I reject the applicant's central claim that he is stateless. The applicant has provided a number of claims related to his statelessness and/or lack of documentation, including that he was denied education, health care and legal employment and was regularly stopped by the police, who he had to bribe in order to avoid being

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Thematic Report – Faili Kurds in Iraq and Iran", 3 December 2014, CIS2F827D91722; 2.2-2.4

<sup>2</sup> Ibid; 3.36 to 3.39

<sup>3</sup> Ibid; 3.35

<sup>4</sup> Ibid; 3.8 and 3.63

<sup>5</sup> Ibid; 3.21 to 3.30

imprisoned, on numerous occasions. As I have not accepted that he was stateless or undocumented, I do not accept any of these claims.

9. The applicant claims that he departed Iran on a fake passport. He explained that the passport was “a genuine one but with my photo and name in it”. The people smuggler had provided the document; the applicant had provided the smuggler with 12 copies of a passport photo and his personal details. All Iranian passports have been biometric since February 2011. Iranian passports include the following data: holder’s signature, country of residence, place of issue, name and position of issuing authority, passport type, country code, passport number, national ID number, holder’s name, father’s name, date and place of birth, sex, date of issue, and date of expiry.<sup>6</sup> Country information indicates that due to the security features in both Iranian passports and the security measures employed at Imam Khomeini International Airport, it would be extremely difficult to exit with a false passport. “On whether it would be possible to exit the airport with a forged passport, it was considered that this would have to be a very good forgery, if it at all happens”<sup>7</sup>. In her submissions to the delegate, the applicant’s then representative [Ms A] of [an organisation] refers to a 2013 report which states in part: “Concerning the issue of bribery in Imam Khomeini International Airport, a Western embassy stated that there are easier ways to leave Iran illegally and pointed to the land border with Turkey. The source explained that security measures are efficient and air lines are strict on control of documents, but added that anything is possible in Iran. The embassy would not rule out that a person could bribe his way out of the airport in Iran”.<sup>8</sup> The applicant has not indicated that he bribed any of the officials at Imam Khomeini International Airport or that there were any queries regarding the authenticity of his passport. I conclude that this is because it was his legally issued Iranian passport and not a forgery as claimed. I find that the applicant did not depart Iran illegally.
10. [Ms A]’s submissions to the delegate addressed a number of issues raised at the PV interview which go to consideration of the applicant’s credibility. Among these issues was the applicant’s ability to make international money transfers of a little under \$49,000 to recipients in Iran during the period August 2017 to January 2018. The applicant indicated that he had been employed in Australia from around 12 months prior to the PV interview, which would be around August 2017. [Ms A] has tendered the applicant’s PAYG summary for the 2017-18 tax year, which “shows that [the applicant] was able to provide the amount of money contested and that it was legitimate and taxable income. We submit that this should allay any concerns regarding the Applicant’s credibility regarding reported income”. Unfortunately the PAYG summary indicates that the applicant’s total net (after tax) income in the 2017-18 tax year was only \$46,876, which instead leads to the opposite conclusion. At the PV interview the applicant denied making the payments listed by the delegate, however it appears from [Ms A]’s submissions that he now agrees that he did. Although the applicant’s income is of itself not a determinative factor in assessing his protection claims, I find that this is a further indicator that he is not a witness of truth.
11. The applicant also claims to be of Faili Kurd ethnicity. While he has consistently claimed to speak the Faili or Southern Kurdish dialect, and [Ms A] contends that he “utilised the assistance of a Faili Kurdish interpreter to complete his protection visa application”, both of his

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<sup>6</sup> DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 5.31

<sup>7</sup> Danish Refugee Council, Landinfo and Danish Immigration Service, “Iran: On Conversion to Christianity, Issues concerning Kurds and Post-2009 Election Protestors as well as Legal Issues and Exit Procedures”, February 2013, CIS25114; p.67

<sup>8</sup> Research Directorate, Immigration and Refugee Board of Canada, “Iran: Exit and entry procedures at airports and land borders, particularly at the Imam Khomeini International airport; whether authorities alert border officials of individuals they are looking for; incidence of bribery of Iranian border officials to facilitate departure; the punishment for border officers caught taking such bribes (2009-October 2013)”, IRN104624.E, 21 October 2013

Departmental interviews (in 2013 and in 2018) were conducted in Farsi and in his PV application he indicates that he requires a Farsi interpreter. The applicant stated at the PV interview that around 30% of the inhabitants of [Village 1], where he claims to have spent the first [years] of his life, were Faili Kurds and the remainder Kurdish. In that situation, I do not accept that the applicant's primary language would be Farsi, rather than a Kurdish dialect. The delegate asked the applicant whether he had suffered discrimination due to his ethnicity and he said that he did: working for low wages, "and walking with fear on the streets of my village". Given the ethnic composition of the village that the applicant claims, I do not consider the latter statement to be plausible. In terms of his "low wages", the applicant claimed that his family lived and worked on a farm and were entitled to payment of 10% of the farming profits from crops plus four or five cattle (or possibly sheep) a year. There is no indication that their payments were in any way affected by their ethnicity. The review material provides little information on the specific differences between Faili and other Kurds, other than they are mostly Shia and have a distinctive dialect.<sup>9</sup> The delegate asked the applicant whether most of the inhabitants of [Village 1] were Sunni Muslims and the applicant responded that he did not know.

12. Given my findings on the applicant's credibility, his primary language, his inability to give any credible examples of discrimination, and his apparent ignorance of the differences between Faili and other Kurds, I am not satisfied that the applicant is a Faili Kurd as claimed. [Ms A] notes that Ilam province has a large Kurdish population,<sup>10</sup> which may explain the applicant's ability to speak a Kurdish dialect or dialects, if he does so. [Ms A] further contends that the applicant fears persecution on the basis of his "perceived nationality (Iraqi)." I have found that neither the applicant nor his parents are Iraqi. The applicant has not given any evidence indicating that he has been discriminated against on the basis of being perceived to be Iraqi and I find he has not. On the basis of the evidence before me I do not accept that the applicant has been perceived to be Iraqi.
13. The applicant has also recently claimed to fear harm on return to Iran because of his religious views. In his arrival interview he indicated that he was of Shia Muslim religion but did not practise. In his statement of claims he notes that "I do not subscribe to any faith." In the PV interview the applicant claimed that he had never practised Islam. The delegate asked whether he used to go to masjid (mosque) and he stated that he did not, no-one did that. The delegate asked where other families in the village celebrated Muharram or Ashura (Moslem festivals) or Nowruz (Persian New Year) and the applicant responded that he did not know as he had no interest in these things. The delegate asked whether his brothers or any other members of his family celebrated any religious festivals and the applicant again responded that he did not know because he had no interest in these things. I consider it entirely implausible that the applicant would not know whether members of his immediate family, living in the same house, practised Islam. [Ms A] contends that the applicant has renounced Islam however there is no credible evidence before me to support this claim. Despite my conclusions as to his credibility I do however accept that the applicant does not practise Islam and this has been the case since before his departure from Iran.
14. It is contended that the applicant holds opinions opposed to the Iranian regime. While this may be the case the applicant has not indicated that he has publicly expressed these opinions at any point or that he has any desire to do so. Country information indicates that Iranians are able to criticise the government of the day robustly, both in public conversation and online in

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<sup>9</sup> DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 3.13

<sup>10</sup> Miloon Kothari, UN GAOR, "Addendum to the Report on Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to the Islamic Republic of Iran (19-31 July 2005)", 21 March 2006

social media.<sup>11</sup> The applicant has not claimed to have ever come to the attention of the Iranian authorities because of his political views or opinions and I find he has not.

15. The applicant claims to fear harm due to the release of a report on the Department of Immigration's website in February 2014, which enabled access to certain personal information about people who were in Immigration Detention on 31 January 2014. As the applicant was in detention on that day, his personal information (name, date of birth, nationality, gender, detention details and details of any other family members in detention) may have been included in the data breach. The applicant contends that because of the data breach the Iranian authorities "will be suspicious of my history and the information I may have provided to the Australian authorities". Details of the applicant's claims for protection were not part of the report that was released. There is nothing before me to indicate that this information was accessed by the Iranian authorities during the eight days that it remained on-line.

### **Refugee assessment**

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16. 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**

17. 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.
18. I have not accepted the applicant's claim that he is stateless. I have found that the applicant is an Iranian national; accordingly, Iran is his receiving country. I have not accepted that he is a Faili Kurd. I have accepted that the applicant may hold opinions adverse to the Iranian government but he has not publicly expressed these opinions and has no desire to do so. He has not claimed to have undertaken any activities that could be considered political activism in Iran or Australia. I am not satisfied that he faces a real chance of harm due to any political opinion that he holds.

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<sup>11</sup> DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 3.48

19. I have accepted that the applicant no longer practises Islam. It is contended that the applicant will be considered an apostate and harmed on return to Iran because of this. Country information suggests that perhaps only 16-17 per cent of people in Iran practise Islam, most others are secular, or even agnostic.<sup>12</sup> According to a survey conducted among the Persian diaspora in Europe in June 2015, half of the interviewees between the ages of 20 and 40 said they were not Muslim. They primarily identified with the options 'atheist', 'agnostic' or 'other religion'. Meanwhile, 35 per cent of those who claimed to be Muslim said they were essentially non-practising.<sup>13</sup> The review material does not support the claim that the applicant "would be forced to comply with the practise of Islam or face persecution" and I reject this claim. DFAT assessed in 2016 that it is unlikely that the government would monitor religious observance, such as attendance at mosque.<sup>14</sup> More recent country information does not indicate any changes to this.
20. Abandonment of Islam whether for another religion or for any other reason is viewed as apostasy, and is formally punishable by death. Reporting in 2016, DFAT advised that the last known application of the death penalty for apostasy occurred in 1990.<sup>15</sup> DFAT also considered it "unlikely that individuals will be prosecuted on charges of apostasy".<sup>16</sup> More recently however, in March 2017, the Supreme Court upheld the decision of a criminal court in Arak to sentence a 21 year old man to death for apostasy. Authorities had arrested the man after he made social media posts considered critical of Islam and the Koran.<sup>17</sup> The applicant has not claimed at any point that he has made public statements critical of Islam, online or otherwise, or has any interest in doing so. I find that the applicant would not publicly declare that he no longer practised Islam or otherwise denounce Islam on return to Iran. Overall I am not satisfied the applicant faces a real chance of any harm for reason of religion.
21. The applicant claims that he would face harm on return to Iran due to his seeking asylum in Australia. There is country information predating the applicant's departure which indicates that known asylum seekers are interrogated on return, whether or not they have been political activists in Iran or abroad.<sup>18</sup> Recent reports however indicate that Iranian authorities pay little attention to failed asylum seekers on their return to Iran. Iranians have left the country in large numbers since the 1979 revolution, and authorities accept that many will seek to live and work overseas for economic reasons. International observers report that Iranian authorities have little interest in prosecuting failed asylum seekers for activities conducted outside Iran, including in relation to protection claims.<sup>19</sup> The country information before me does not support the assertion that his seeking asylum will be considered suspicious to the Iranian regime. The applicant claims that he will be identified at the airport, detained, arrested, and tortured, however I have found that he is of no interest to the Iranian authorities on the basis of his privately held political views. I am not satisfied that the applicant faces a real chance of harm on return to Iran because he has lived in Australia for several years or has sought asylum overseas.
22. I am not satisfied the applicant has a well-founded fear of persecution.

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<sup>12</sup> Asia News IT, "Young Iranians affected by the embargo, tired of political Islam", 1 April 2015, CXBD6A0DE4714

<sup>13</sup> LSE Middle East Centre (United Kingdom), "The Revival of Nationalism and Secularism in Modern Iran", November 2015, CISEC96CF14725; p.10

<sup>14</sup> DFAT, "DFAT Country Information Report Iran", 21 April 2016, CIS38A8012677; 3.55, 3.57

<sup>15</sup> Ibid; 3.54

<sup>16</sup> Ibid; 3.55

<sup>17</sup> DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 3.44

<sup>18</sup> Amnesty International, Iran: 'We are ordered to crush you': Expanding repression of dissent in Iran, 28 February 2012

<sup>19</sup> DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 5.25

### **Refugee: conclusion**

23. 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**

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24. 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**

25. 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.

26. I have concluded above that the applicant does not otherwise face a real chance of harm on the basis of his political views, because he is a non-practising Muslim, due to the Department's data-breach or because he sought asylum in Australia. As 'real risk' and 'real chance' involve the application of the same standard,<sup>20</sup> I am equally not satisfied that the applicant faces a real risk of significant harm on return for the purposes of s.36(2)(aa) for these reasons, including when considered cumulatively.

### **Complementary protection: conclusion**

27. 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**

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

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<sup>20</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.

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***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.