



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA18/06091

Date and time of decision: 23 January 2019 13:45:00

A Lindsay, 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 non-practising Shia Muslim of Faili Kurd ethnicity from Iran. The applicant arrived in Australia [in] July 2013. On 19 May 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV).
2. On 30 November 2018 a delegate of the Minister for Immigration (the delegate) refused the grant of this visa on the grounds that the applicant did not have a real chance of serious harm or a real risk of significant harm if he were to return to 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).
4. No further information has been obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He is a Faili Kurd.
 - He has experienced discrimination in Iran because of his ethnicity as a Faili Kurd in relation to his education and employment.
 - He is a non-practising Muslim.
 - He is opposed to the Iranian regime and Islam and is pro-Kurdish rights and independence. He is at risk of serious and significant harm if he were to return to Iran and attempted to assert these rights in accordance with his beliefs.
 - He would face harm if he were to return to Iran because he is a failed asylum seeker.
 - He has attended a Christian church in Australia but did not participate in the service. He has been present when a Christian priest attended at his home to speak with his two Christian house mates and has listened to what they have spoken about. He has not converted to Christianity but believes it is a better religion than Islam.

Factual findings

6. On the basis of the documents provided by the applicant I accept his identity and nationality as an Iranian citizen as claimed. Iran is the receiving country for the purpose of this review.
7. In his arrival interview the applicant said he belonged to the Kurdish ethnic group and that his ancestry originates from Iraq. The applicant said his preferred Language is Kurdish (Faili) and his SHEV interview was conducted using this language. When Saddam Hussein was in power in Iraq, the applicant's maternal grandmother was expelled from that country. The applicant said his parents were both born in Iran and whilst his father was born stateless he received an Iranian birth certificate and citizenship when the applicant was approximately [age] years of age. I accept that the applicant is a Faili Kurd.

8. In his arrival interview, the applicant said he left Iran because of problems in his country with employment and accessing higher education because he is Kurdish. He said that he is not accepted because of his Kurdish ethnicity. When asked what would happen if he were to return to Iran the applicant said, "Problems will become ten times bigger for me. I will go to prison for example and because we are not accepted it intensifies the situation for me. I would not be accepted as an employee, the reason I came to Australia was to improve my higher education". The applicant confirmed that he completed his compulsory military service in [a specified] section doing [certain work] and with [another] section as an [Occupation 1], both located within Ilam from 2011 to 2013. The applicant said that the police, security and intelligence organisations did not impact on his day-to-day life. The applicant said he completed school and attended university where he was able to complete a [Degree] after he completed an Associate [Degree]. Whilst doing military service and studying at university, the applicant said he worked with his brother and some other people in the villages [doing] [work]. The applicant said he left Iran to travel to Australia [in] May 2013 within a few months of finishing his military service. The applicant said that neither he nor his family were ever involved in any activities or protests against the government and that he had never been arrested or detained by Iranian authorities.
9. In his SHEV application the applicant said, "I completed university, but I had no future, I was not going to be employed. I had skills and knowledge in [certain field] but because of my ethnic background I would not be employed at my level of training or qualification, I was only going to be exploited, made to work a lower level with lower wages." The applicant gave an example of a national level [competition] in 2007-2008 which was open to those who performed well and got first level grades meaning they could proceed on to university without any further examination. The applicant said he applied for this competition and participated in it, coming first in his region however he was not taken seriously and was prevented from going further. The applicant said he was told this was because he is a Kurd from Ilam. The applicant claimed Kurds face serious discrimination including in all areas of employment including in government and public sector and are prevented from accessing employment in the private sector. He claimed Kurds were paid much lower than other non-Kurds.
10. In his SHEV interview, the applicant was asked a number of times to give examples of discrimination he had experienced in Iran on the grounds that he is of Kurdish ethnicity. The applicant said if you wear Kurdish clothing you experience attitude from authorities. The applicant said his role during his military service held a rank at officer level because he possessed a [degree] qualification. The applicant was not clear on what this rank was called but thinks the correct translation is '[a certain rank]'. His role with the [specified] group involved him [doing certain job]. The applicant said that as an educated person he was discriminated against because he was forced to stay up all night and perform guard duty. In his role as an [Occupation 1] he [assisted someone] who had been shot and their life was able to be saved and that he did not receive any privilege or recognition after this, and felt that this was discriminatory. The applicant said he had to keep his personal beliefs to himself in Iran because if he were to express them he and his family would get into trouble and end up in jail. The applicant said he believes the Kurds are entitled to have their own country. The applicant confirmed that neither he, nor members of his family, had ever been imprisoned or summoned or taken for interrogation by authorities.
11. I am willing to accept that the applicant felt he experienced discrimination in his participation in the pre-university competition in 2007-2008. I note the applicant was still able to attend university and that he successfully completed a [Degree]. I am also willing to accept that the applicant felt he experienced discrimination whilst performing his military service by having

to perform guard duty at night and not receiving any privileges or recognition for his role as an [Occupation 1] in [helping] a person who had been shot [but] do note he held an officer ranking. In relation to the applicant's claim that he has experienced discrimination in accessing employment, he has not provided any evidence which shows that he applied for a job and was denied this job because he is of Kurdish ethnicity. I find the applicant was able to work [from] the time he commenced his tertiary studies until he left the country to travel to Australia which I note is his chosen field of employment. I am not satisfied that the discriminatory treatment he experienced in the past on account of his Kurdish ethnicity was other than low level in nature.

12. In his arrival interview, the applicant said his religion was 'Shia' and in his SHEV application he listed his religion as 'Muslim' but further explained in his Statement of Claim that he is Muslim but he is not religious.
13. In his SHEV interview when asked his religion, the applicant said, "I am Muslim but really I don't believe in Islam so I am not a practising Muslim. I don't do my prayers. I don't do anything about it. It's just something in name." Whilst completing his military service, the applicant said he did not attend the compulsory prayer session one day and as a punishment he was detained in a dark room for one day. The applicant said this was a punishment based on not complying with the compulsory religious prayer requirements and not related to him being a Kurd.
14. As previously mentioned, the applicant confirmed in his arrival interview that he had never been arrested or detained by authorities and that his day-to-day life had not been impacted by them.
15. I accept that the applicant is a non-practising Muslim. I do not accept that he was detained for one day as punishment for not praying whilst he completed his compulsory military service. He clearly stated in his arrival interview that he had never been detained or arrested and did not discuss this when giving details of his military service. I have had regard to the Court's observations in *MZZJO v Minister for Immigration and Border Protection*¹ concerning the circumstances in which entry interviews are conducted and the caution required by decision-makers in relation to omissions by applicants of matters at entry interview. I base this finding on more than then applicant omitting to provide information in the arrival interview because in this instance, he has provided conflicting information in relation to whether he had ever been detained by authorities.
16. In the SHEV interview the applicant said he believes Kurdish people are entitled to have their own country but he cannot express this view in Iran because he is afraid that he or his family will be punished and taken to jail. The applicant confirmed he had never asserted his Kurdish cultural or political rights in Iran. The applicant said it doesn't matter whether you do anything "it is just what is inside you" that might cause you problems. The applicant confirmed that neither he nor his family were ever questioned, threatened or imprisoned by authorities in Iran on the basis of their Kurdish ethnicity and that he had not been politically active whilst in Australia. When asked if he was associated with any Kurdish groups in Australia the applicant said he had "attended ceremonies and parties but that is dangerous. They would hurt me or they would hurt my brother so I am concerned about my family and my brothers". He reiterated that because he was concerned for his brother's safety he had not been associated in any groups. The applicant said he has one brother living in Iran and one in Australia and that nothing has happened to the one living in Iran since the applicant

¹ [2014]FCAFC 80.

fled the country. The applicant said if he were to put something on [social media] here in Australia it might harm his brother back in Iran and this brother will be taken for interrogation. He fears returning to Iran because if he were to go back and talk to other people about what he believes he will be taken away and that will be problematic for himself and his family. This claim was not raised during the arrival interview, in the SHEV application or Statement of Claim.

17. I accept that the applicant has views which are opposed to the Iranian regime and supports Kurdish rights and independence. I do not accept the applicant's claim that his reason for not publicly asserting his political and cultural beliefs previously was because it would be problematic or dangerous for either himself or his brother in Iran if he were to do so. The applicant has not suggested he even attempted to engage in political activism in an anonymised way or in a less public arena during the five year period he has lived in Australia. He provided very little evidence that would convince me that he has a genuine desire to express these opinions but has been prevented from doing so because of a fear. I accept that the applicant has engaged in social contact within the Kurdish community on a couple of occasions whilst in Australia but do not accept that this gave rise to any adverse consequences. He confirmed during the SHEV interview that his family has not experienced any adverse attention from authorities as at that time. I conclude that the applicant holds sympathies for the Kurdish cause rather than a desire to publicly assert any political and cultural rights on return. He has not engaged in less public or anonymous forms of activism whilst in Australia, he did not raise this claim until a very late stage in the protection visa application process, and the applicant himself has only provided very scant evidence.
18. The applicant said his Iranian passport which was legally issued in his own name, which he used to leave the country, was taken from him by the people smuggler whilst in [Country 1]. The applicant has now been living in Australia for five years.
19. I accept that the applicant departed Iran on a valid passport in his own name and that he no longer possesses a valid passport. If the applicant were to return to Iran I accept that he would need to do so using temporary travel documents which may lead to authorities concluding that he is a returning asylum seeker.
20. During the SHEV interview, when speaking about the fact that he is a non-practising Muslim was asked if he had converted to any other religions. The applicant said that he hadn't but whilst living in Australia every Wednesday people from the church visit at the home he shares with two other people who are Christians and he listens to what they talk about and thinks that it makes sense. The applicant claims he read their books, "just to study". He said he had not participated in a church service but had gone with his friends on a few occasions to observe what they do. The applicant said he thinks about what the people from the church talk about when he is going to sleep. The applicant said he believes Christianity is better than Islam.
21. I accept that the applicant has an interest in the Christian faith, been present during discussions with Christian people and attended a small number of functions associated with a Christian Church whilst living in Australia but has not converted to Christianity. The applicant has not claimed a fear of harm on this basis to the delegate, if he were to return to Iran, and I am satisfied that none arises in this case.

Refugee assessment

22. 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

23. 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.
24. Country information indicates that ethnic minorities in Iran, including Kurds, are subject to discrimination in their access to education, employment, adequate housing, water and sanitation, political office and their exercise of cultural, civil and political rights.² Department of Foreign Affairs and Trade (DFAT) reports that Kurds and other ethnic minorities face a moderate risk of official and societal discrimination³ which can lead to unfair day-to-day treatment but is rarely coupled with community-level violence.⁴ More recently, Kurdish separatist activity in Iran is reported as being mostly at a lower level when compared with the activities of Kurdish people in surrounding countries which is considered to be partly due to the fact that their living standards in Iran tend to be higher and also there is disagreement between different groups in Iran’s Kurdish community about the degree of autonomy being sought and how to better strengthen their rights as citizens.⁵ Most Iranian Kurds either do not come to the attention of authorities or are subject to only low levels of adverse attention, however those who seek to publicly exercise freedom of expression and association and to undermine the Islamic regime are likely to be targeted by authorities and may face imprisonment if prosecuted.⁶ DFAT is not aware of specific instances where Faili Kurds have been singled out for mistreatment, as a distinct sub-group of Kurdish people.⁷

² Amnesty International, "Amnesty International Report 2016-2017", 2017, NG2A465F54.

³ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report: Iran", 7 June 2018, CIS7B839411226.

⁴ DFAT, "DFAT Country Information Report Iran", 21 April 2016, CIS38A8012677.

⁵ DFAT, "DFAT Country Information Report: Iran", 7 June 2018, CIS7B839411226.

⁶ DFAT, "DFAT Country Information Report: Iran", 7 June 2018, CIS7B839411226; Danish Immigration Service and the Danish Refugee Council, 'Iran: Issues concerning persons of ethnic minorities, Kurds and Ahwazi Arabs', February 2018, CIS7B83941872; Ceasefire Centre for Civilian Rights, Minority Rights Group International, Centre for Supporters of Human

25. I have accepted that the applicant is a Faili Kurd and has experienced some low level discrimination on this basis whilst living in Iran in relation to accessing educational opportunities and during his military service. Nevertheless he was able to complete tertiary education and obtain employment in his area of qualification. There is no indication he was denied housing or other services on the basis of his ethnicity. If the applicant were to return to Iran, based on the country information before me,⁸ I accept he may experience some discrimination in relation to accessing employment opportunities, such as not being able to obtain positions with the government but he would be able to obtain work in his area of qualification as he had done previously, and I am not satisfied his capacity to subsist would be threatened, or that such treatment amounts to serious harm.
26. I have accepted that the applicant holds anti-government views, and is supportive of Kurdish independence and that he has not engaged in political activity or demonstrations in Iran or whilst living in Australia which leads me to find that he does not currently have a political profile in Iran. I do not accept the applicant has a desire to engage in activism or publicly assert his views either here in Australia or back in Iran and I am not satisfied the applicant faces a real chance of harm on this basis if he were to return to Iran.
27. I am not satisfied the applicant faces a real chance of serious harm on account of his ethnicity or his views.
28. I have accepted that the applicant is a non-practising Muslim. Country information indicates that abstaining from Muslim rituals, such as not attending mosque or Friday prayers, is not usually monitored by Iranian authorities and a large proportion of Iranians do not regularly attend mosques.⁹ DFAT considers it is highly unlikely that authorities would monitor religious observance by Iranians and as a result it would generally be unlikely that it would become known that a person was no longer faithful to Shia Islam.¹⁰ People who do not practise the Muslim faith form a large part of the population of Iran's cities and they lead normal daily lives.¹¹ DFAT reports that people who are critical of Islam and the Koran in a public forum, like on social media, can face the death penalty or imprisonment.¹²
29. There is no evidence before me that indicates the applicant has any intention or desire to publicly criticise Islam if he were to return to Iran. By the applicant's own admissions, he said that he is Muslim but he doesn't believe in Islam or do anything about it. The only evidence provided by the applicant about him experiencing adverse attention for being a non-practising Muslim is that he was detained for one day for not praying whilst completing his military service, which I have not accepted actually happened.

Rights, "Rights Denied: Violations against ethnic and religious minorities in Iran", 13 March 2018, CIS7B83941441; *Iran News Update*, "Iran Falsely Accuses Human Rights Activists of Undermining National Security", 30 March 2018, CXBB8A1DA25442; *Center for Human Rights in Iran (United States)*, "43 People Charged in Iran's Kermanshah Province For Protesting Against the State", 30 March 2018, CXBB8A1DA25444.

⁷ DFAT, "DFAT Country Information Report: Iran", 7 June 2018, CIS7B839411226.

⁸ Amnesty International, 'Amnesty International Report 2016-2017', 23 February 2017, NG2A465F54; Amnesty International, 'Amnesty International Annual Report 2014/15 – Iran', NG5A1E6BC57; Department of Foreign Affairs and Trade, 'DFAT Country Information Report Iran April 2016', 21 April 2016, CIS38A8012677; 'Human Rights Watch WorldReport 2017', Human Rights Watch, 13 January 2017, NG2A465F52; United Nations General Assembly, 'Situation of human rights in the Islamic Republic of Iran: Report of the Secretary-General', 6 September 2016, CIS38A80122219; US Department of State, 'Iran – Country Reports on Human Rights Practices 2016', 3 March 2017, OGD95BE926964.

⁹ LSE Middle East Centre (United Kingdom), "The Revival of Nationalism and Secularism in Modern Iran", November 2015, CISEC96CF14725.

¹⁰ DFAT, "DFAT Country Information Report Iran", 21 April 2016, CIS38A8012677.

¹¹ Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), "Iran: Freedom of Religion; Treatment of Religious and Ethnic Minorities COI Compilation September 2015", 1 September 2016, CISEC96CF13622.

¹² DFAT, "DFAT Country Information Report: Iran", 7 June 2018, CIS7B839411226.

30. I am not satisfied that the applicant faces a real chance of any harm on the basis of being a non-practising Muslim if he were to return to Iran.
31. I accept that if the applicant were to return to Iran, Iranian authorities would conclude that he would be a returning asylum seeker. The applicant claimed he is likely to experience harm as a failed asylum seeker upon returning to Iran because he will be seen as a traitor and supporter of the West and as being against the Iranian government. The country information before me does not support the applicant's claim.
32. In June 2018 DFAT reported that Iranian authorities pay little attention to failed asylum seekers on their return to Iran and have little interest in prosecuting failed asylum seekers for activities conducted outside Iran, including the making of protection claims.¹³ According to DFAT, an Iranian who no longer possesses a valid passport can obtain temporary travel documents through a program run by the International Organisation for Migration (IOM) to assist voluntary returnees to Iran. Authorities usually question a voluntary returnee, only if they have already come to official attention.¹⁴
33. Prior to a Memorandum of Understanding (MOU) being signed on 19 March 2018 between Australia and Iran, Iran refused to issue travel documents to allow involuntary returnees to be returned to the country. That MOU however only covers returnees who arrived in Australia after it was signed. The applicant is not able to be returned to Iran involuntarily at this time due to him arriving in Australia prior to the date this MOU was signed.¹⁵ If he is to return to Iran, I consider it would be on a voluntary basis.
34. The country information before me does not support a finding that persons who have sought asylum in Western countries, such as Australia and resided there for a significant period, are imputed to hold an anti-Iranian government political opinion or that they are suspected of being a spy or face a real chance of harm on that basis. The country information indicates the applicant may face some brief questioning at the airport on return but I am not satisfied this amounts to serious harm.
35. I am not satisfied the applicant faces a real chance of serious harm as a returning asylum seeker.
36. Overall, I am not satisfied the applicant has a well-founded fear of persecution.

Refugee: conclusion

37. 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

38. 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.

¹³ DFAT, "DFAT Country Information Report: Iran", 7 June 2018, CIS7B839411226.

¹⁴ DFAT, "DFAT Country Information Report: Iran", 7 June 2018, CIS7B839411226.

¹⁵ DFAT, "DFAT Country Information Report: Iran", 7 June 2018, CIS7B839411226.

Real risk of significant harm

39. 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.
40. A Federal Circuit Court decision, *BBS16 v Minister for Immigration & Anor*,¹⁶ is referred to in the submission from the migration agent, submitted after the SHEV interview but prior to the delegate's decision being made. The agent provided a verbatim quote from the decision at paragraph 75 which, in summary, states that when giving consideration to an applicant's claim for complementary protection where they felt they would be subjected to significant harm if they asserted political, economic and cultural rights the IAA needed to consider whether the denial of such rights by the Iranian state involved a relevant breach of the International Covenant on Civil and Political Rights (ICCPR). I have had regard to the agent's submission but note that the stated requirement for the IAA to consider whether the denial of the applicant's political, economic and cultural rights involved a relevant breach of the ICCPR in this judgment was overturned on appeal.¹⁷
41. I accept that if the applicant were to return to Iran, he may face some brief questioning at the airport and may face some low level discrimination in relation to employment opportunities but I am not satisfied that he will be denied employment or that this conduct amounts to significant harm as defined in s.5. I have otherwise concluded that the applicant does not face a real chance of any harm for the reasons claimed. As 'real chance' and 'real risk' are of same threshold, I am therefore satisfied that the applicant does not face a real risk of harm, including significant harm for any reason.

Complementary protection: conclusion

42. 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.

¹⁶ *BBS16 v Minister for Immigration & Anor* [2017] FCCA 4 (1 February 2017).

¹⁷ *Minister for Immigration and Border Protection v BBS16 and Another* [2017] FCAFC 176 (10 November 2017), [44].

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.