



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

**Decision and Reasons**

**Referred application**

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IRAN

IAA reference: IAA19/07204

Date and time of decision: 31 October 2019 10:41:00

I Sheck, Reviewer

**Decision**

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The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

*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 and raised in Iran. He left Iran [in] July 2012 and arrived in Australia [in] August 2012. On 21 December 2016 he lodged an application for a protection visa (PV).
2. On 19 September 2019 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 not that he was stateless. The delegate concluded that the applicant was an Iranian citizen who had departed Iran legally. The applicant did not accept that the applicant was homosexual. The delegate accepted that the applicant was an atheist and found that he did not face a real chance of persecution or a real risk of significant harm for any 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 officers of the then Department of Immigration and Border Protection (now the Department of Home Affairs) on 6 October 2012 and 9 November 2012. He underwent an age assessment, during which he was interviewed by two Departmental officers, on 20 November 2012. On or about 25 October 2013 the applicant made a claim for a permanent protection visa Class XA. Together with this application he provided a statement of claims and submissions from his then [representative]. Due to changes in the legislation the applicant was later informed that this application was invalid. He lodged a further application for a temporary protection visa on 21 December 2016, together with a statutory declaration dated 7 December 2016. On 18 May 2017 he attended an interview ("the PV interview") with a Departmental officer at which his then representative, Ms [A], was present. Further submissions and a document were provided to the Department on 3 June 2017.
5. The applicant claims:
  - His parents are Kurds. They were born in Iraq and were stateless. They were expelled from Iraq in the early 1980s by the Saddam regime. They settled in Iran, where the applicant was born. He is also stateless and suffered from persecution and grave poverty all of his life;
  - At around the age of [age] he realised that he was not attracted to girls. He subsequently entered into a sexual relationship with a school friend [Mr B]. On one occasion he and [Mr B] were discovered engaging in intimate activity by one of [Mr B]'s brothers. If he returns [Mr B]'s family will harm him;
  - After being discovered by [Mr B]'s brother the applicant went to stay with an uncle, while a false passport was organised for him. He then fled the country. If returned to Iran he will be arrested for illegal departure;

- Since living in Australia he has been free to explore his sexuality and has realised that he is homosexual. If he returns to Iran he will be executed by the Iranian authorities because of his sexuality;
- He has joined two political groups who are against the Iranian regime and posts material on-line against the Iranian authorities. The Iranian government monitors on-line activity and will be aware of this.

## Factual findings

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6. Based on the information consistently provided in his visa applications and oral evidence, I accept that the applicant's background is as follows: he was born on [date] in Ilam, Iran. He has [number of siblings]. He completed primary and some secondary education, ceasing studies at the age of [age]. His parents and siblings remain in Iran.
7. The applicant has given his ethnicity as a Kurd and as a Faili Kurd. 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 stripped of their Iraqi citizenship and expelled to Iran, including during the Iran-Iraq war, where they were accepted as refugees but subject to strict registration.<sup>1</sup> The applicant claims that his family are Shia Muslim, which is consistent with the profile of Faili Kurds.<sup>2</sup> He claimed that his parents had been born in Iraq and had been stateless there: "they say you are not Arab you are Kurd". At the PV interview in 2017, the interviewing officer put to the applicant that most Faili Kurds deported from Iraq had been Iraqi citizens. The applicant responded that he did not know, his parents never talked about it. This response does not sit well with his positive assertion that they had never been Iraqi citizens.
8. In his statements of claims the applicant focusses mainly on the restrictions he was subject to as a stateless Faili Kurd. He claims that Faili Kurds cannot obtain legal employment or health care. In his 2016 statutory declaration he asserted that the Iranian government does not recognise Kurds as citizens of Iran. These statements are simply false. Around 10% of Iran's population of 82 million are Kurds.<sup>3</sup> Further to this, registered refugees in Iran receive access to healthcare, education and state benefits and can apply for work permits.<sup>4</sup> In his 2017 interview the applicant contended that because he was a Faili Kurd he did not have any identity documents. Again, such a claim is completely unfounded and may lead to a conclusion that the applicant has little knowledge on the actual status of Kurds or Faili Kurds in Iran.
9. Although the applicant claims to have never been issued with identity documents, he asserts that the man of each stateless household is issued a "green card". His father had the card for their household. The card to which the applicant refers is the Special Identity Card for Foreign Nationals, which is issued by the Iranian Bureau for Aliens and Foreign Immigrants' Affairs (BAFIA) to refugees from Iraq and Afghanistan. Country information indicates that green cards were issued to Iraqi refugees in Iran (whether Arab, Kurd or Faili Kurd) from the 1980s to the end of 2001.<sup>5</sup> They were then replaced by the "Amayesh" system, which used white

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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; 2.8

<sup>3</sup> DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 2.4

<sup>4</sup> DFAT, "DFAT Thematic Report – Faili Kurds in Iraq and Iran", 3 December 2014, CIS2F827D91722; 3.8 and 3.63

<sup>5</sup> Ibid; 3.37

cards. The applicant stated in his 2017 interview that his father had to replace his green card with a “white card” around 2008, which is inconsistent with the country information. The interviewing officer asked the applicant what the white cards were otherwise known as and he responded “white cards”. The applicant stated that his father’s white card was 10cm x 5cm in size, “like a paper” and did not contain a photo. Despite this document purportedly being issued to only the head of each household, the applicant claimed that it only contained that person’s details and not any information on the remainder of the family members. These statements are not supported by the country information, which states that all registered refugees are issued with Amayesh, including the children of Amayesh holders.<sup>6</sup>

10. On 3 June 2017 the applicant tendered a document that he claims is the “green card” of his father. It states that it is valid for a period of one year from [September] 2004. As the country information clearly indicates that the green cards were replaced by the white Amayesh cards from 2002 onwards<sup>7</sup> I conclude that this document is not legitimate. Provision of such a document, together with the applicant’s other incorrect assertions regarding the citizenship status and entitlements of Faili Kurds in Iran, significantly undermines the applicant’s credibility. During his 2017 interview the applicant stated that he had been told on the boat to Australia that “it is enough” to tell the Australian authorities that he was a stateless Faili Kurd; he would not need to make any other claims for protection. I conclude that the applicant fabricated such a claim on the basis of this information. I am not satisfied that the applicant is stateless but conclude that he is an Iranian citizen. As he speaks Kurdish – and his 2012 interviews were conducted with the assistance of Kurdish interpreters – I accept that he is of Kurdish ethnicity.
11. The applicant has further claimed that he is homosexual and would face persecution and even death due to this, if he returned to Iran. He did not mention any issues relating to his sexuality in the interviews conducted in October 2012 or November 2012. He has said that this is because he was embarrassed to do so. I note that the applicant was [age] years of age when he undertook these three interviews and accept that due to his age and cultural background such a reason is plausible.
12. The applicant stated in his 2013 statement of claims that since the age of [age] he realised he had no interest in the opposite sex. “I knew I was gay but I didn’t know the name”. He told his close school friend, [Mr B], “that I didn’t have attractions to girls”. The applicant and [Mr B] developed closer feelings for each other but they were children and they knew that “under Islamic rules this is a sin”. The applicant used to visit [Mr B]’s house regularly. On one occasion when they were [age] [Mr B] produced a pornographic CD that he had stolen from his brother. It included a sexual encounter between two men. [Mr B] said to the applicant “in some other places this is not a sin”. After watching the CD they had sex. At the PV interview the interviewing officer asked who made the first move and the applicant responded that [Mr B] did. She asked whether the applicant knew (before watching the CD) that [Mr B] liked him. The applicant responded that they had never dared to talk about it. He had never talked about it to anyone else. They continued to have a sexual relationship until 2012. The applicant did not have sexual relations with anyone else. The relationship was generally conducted at [Mr B]’s house, which was often empty.
13. There were some elements of implausibility in the applicant’s description of his relationship with [Mr B], given at the PV interview. The applicant stated that they were afraid of being discovered however when asked what precautions they took to avoid discovery he replied

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<sup>6</sup> DIBP Tehran, ‘Feyli Kurds—obtaining identity travel documents’, 17 September 2015, CISEC96CF13392

<sup>7</sup> DFAT, “DFAT Thematic Report – Faili Kurds in Iraq and Iran”, 3 December 2014, CIS2F827D91722; 3.37

not talking about the relationship to other people. Conversely, some aspects of the narrative were entirely consistent with a budding relationship between two immature boys. When asked whether he recalled any significant events in the relationship the applicant spoke of a particularly exciting sexual encounter that had occurred in [a specified place]. When asked how he and [Mr B] supported each other emotionally the applicant responded “in our sexual relationship [Mr B] had the role of male”. When asked whether he had been in love with [Mr B] the applicant responded “I was happy with him but it wasn’t love”. Overall, and taking into account my concerns about his credibility, I accept that during his teens the applicant had a close relationship with one of his male school friends and they occasionally engaged in sexual activities together. There does not appear to have been any significant emotional depth to the relationship, which is to be expected given their age.

14. The applicant then claims that he and [Mr B] were discovered by one of [Mr B]’s brothers. This is one point of the narrative to which the delegate paid particular attention. In the applicant’s 2013 statement of claims he states that he and [Mr B] were in the bed and “having sex together”. The applicant’s 2017 statutory declaration reads that the brother “caught us cuddling and watching porn”. I am not of the view that these versions are of themselves inconsistent. The term “having sex” can encompass a number of activities and the word “cuddling” may have been a euphemism used when the statement was translated into English. I do however consider that, given the potential consequences of their activities being discovered and their claimed fears, the applicant and [Mr B] would likely have taken some precautions to avoid discovery. In the PV interview the applicant claimed that he and [Mr B] were “on the bed making a lot of noise”, which again seems inconsistent with any desire to keep their relationship or illicit sexual activities hidden.
15. In his arrival interview in November 2012 the applicant stated that he began making plans to depart Iran four to five months prior to his departure (which would be February/March 2012). His father arranged it. The cost was \$US [amount]. In his 2013 statement the applicant stated that he and [Mr B] were discovered almost three months before his departure (April 2012) and a month later (May 2012) he went to Ilam to stay with a friend of his uncle. In his 2016 statutory declaration the applicant claims that he and [Mr B] were discovered three to four months before his departure (March/April 2012) and his uncle took him to Ilam. At the PV interview in 2017 the applicant stated that after the discovery he went to his uncle’s house and from there to Ilam for two months (so from May 2012). His uncle [organised] the fake passport. The passport and cost of travel to Australia was \$[amount]. These inconsistencies cause further concerns regarding the applicant’s credibility.
16. In considering first the applicant’s claim to have departed Iran on a false passport, numerous sources of country information report that it would be difficult or impossible to pass through Imam Khomeini International Airport with a fraudulent passport. A report broadly contemporaneous with the applicant’s departure indicates that one source did not consider it possible to exit the Imam Khomeini International Airport with a forged passport, but would not rule out the possibility of a person being able to bribe his way out of the airport - though the price would probably be high. The source indicated that the price could be as high as 8-10,000 Euros.<sup>8</sup> The applicant stated that he had no problems departing Imam Khomeini International Airport and did not bribe any officials. I do not accept that this occurred and conclude that the applicant departed Imam Khomeini International Airport on his own legally issued Iranian passport. The applicant has further contended that his year of birth was

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<sup>8</sup> Danish Refugee Council, Landinfo (Norway) 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

altered to [year], as in Iran “they do not issue passports for people under 18”. Again, this assertion is contradicted by the country information, which indicates that any person under 18 years must have the consent of his or her guardian to leave the country and thereby be issued a passport.<sup>9</sup>

17. I do not accept that the applicant went into hiding in Ilam while a false passport was being prepared as he did not exit Iran with a false passport. Due to the variation in the timeframes I do not accept that the applicant went to Ilam prior to his departure but instead conclude that he remained in the family home. As a consequence of this finding, I do not accept that he fled Tehran in fear of [Mr B]’s family. I do not accept that he and [Mr B] were discovered in bed or having sex by [Mr B]’s brother. I conclude that this part of the applicant’s narrative is an embellishment made solely to further his protection claims. I conclude that the applicant’s departure from Iran was planned and that his father and/or uncles organised and contributed financially to the cost of his travel.
18. In his 2013 statement of claims the applicant discussed his relationship with [Mr B] but does not claim to have had any other relationships. In the 2016 statutory declaration the applicant notes that since arriving in Australia he has been able to talk with friends about his sexuality. He states that he has had multiple sexual partners. In the PV interview in 2017 the applicant said that when he arrived in Australia “I was certain that this is what I wanted to be”. He was however still very scared given the views on homosexuality in his home country. After 1½ years in Australia “I felt I found my true self”. He was living freely with all of his senses and feelings. He was “free to practise”. The downside to this is his relationship with his family. While his relationship with his father was never warm, in 2015 the applicant told his father that he was gay. Since then he has not spoken to either of his parents. This has caused him great distress and he was prescribed anti-depressant medication. He still speaks to his brother but “he just tries to ignore this and not talk about it”. The applicant told the interviewing officer that he was presently in a relationship. He enjoys going to [gay] clubs with friends. He has met men on the [websites].
19. As noted above, I have concluded that the applicant has fabricated claims to have been a stateless Faili Kurd, to have fled Tehran fearing harms from his lover’s family and to have departed Iran by way of a false passport. In her submissions to the delegate of 3 June 2017 Ms [A] points out “the UNHCR’s publication ‘Beyond Proof: Credibility Assessment in EU Asylum Systems’ (“Beyond Proof”), which reminds that decision-makers should not automatically draw the assumption that if an asylum seeker has lied about one element of his claims, then this indicates he has lied with regards to other issues.”<sup>10</sup> Despite my significant reservations about the applicant’s credibility, I have decided to accept his claim that he is homosexual.
20. I accept as plausible that the applicant did not raise this claim in his initial interviews due to cultural stigma and embarrassment. I am also mindful that at the time of his arrival in Australia at age [age], the applicant’s views regarding his sexuality overall may still have been crystallising. Aside from his relationship with [Mr B] the applicant was not sexually experienced. I note in particular the observations of the Departmental officer at the age assessment interview in November 2012, as follows: “When asked if he has or has had a girlfriend the client rubbed the side of his nose saying he doesn’t have an “official” girlfriend, although he has added a girl he knows into his [social media] page as a friend. He said he did

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<sup>9</sup> Danish Refugee Council, Landinfo (Norway) 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.71

<sup>10</sup> UN High Commissioner for Refugees (UNHCR), ‘Beyond Proof, Credibility Assessment in EU Asylum Systems’, May 2013; p.214

not have a girlfriend in Iran. His reaction on this topic was more one of bemusement than coyness, indicating to me that he would be quite comfortable associating with adolescent girls". I accept that with increasing maturity the applicant has accepted his sexuality, to the point where he decided to "come out" to his father in or about 2015. Unfortunately, this was not well received and he is no longer in contact with his parents.

21. While the applicant indicates that his activities in Iran (as a child) were clandestine in nature, he states that he is now able to be free to be himself and to practise (as gay). This includes being active on the gay scene, attending LGBTI clubs and men's saunas and having both short and long term relationships. It is submitted that he would not be able to be true to himself in Iran without exposing himself to certain danger and I accept that this is the case.
22. The applicant has further stated that he has no religion and considers himself an atheist. There is no further information before me regarding the applicant's religious practice in Australia or prior to leaving Iran. He has not claimed to fear harm on this basis. The applicant has also stated that he has joined a number of political groups and has posted material on-line that is adverse to the Iranian state. There is no corroborative evidence before me relating to the applicant's on-line activities, including any [social media] or other name that he uses for the purpose. I am not satisfied on the evidence before me that the Iranian authorities are aware of the applicant's on-line activities. The applicant has not claimed that he would be or would have any desire to be politically active on return to Iran and I conclude he would not.

### **Refugee assessment**

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23. 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**

24. 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.

25. I have not accepted that the applicant is stateless but found that he is an Iranian national. It follows that Iran is his receiving country. I have accepted that the applicant is homosexual and has had sexual relations with a male friend in Iran as well as multiple partners in Australia. I have concluded that when in Iran he did not divulge his sexual orientation publicly, or to any members of his family, but has now come out to his family. In considering whether the applicant is a member of a particular social group, he is an LGBTI individual, his sexual orientation is an innate characteristic which is fundamental to his identity. This characteristic distinguishes the group from society. He is therefore a member of a particular social group as defined at s.5L of the Act.
26. Chapter Two of the Iranian Penal Code explicitly criminalises same-sex relations for both men and women. Punishments for male homosexual acts are more severe than those given to women: men can be executed on the first conviction.<sup>11</sup> DFAT also assesses that LGBTI individuals face a high risk of societal discrimination, with ongoing traditional views about sexuality and gender restricting their participation in the community and workforce. High profile or highly visible LGBTI individuals of either sex face a high risk of violence, including from within their family, from the public or from authorities.<sup>12</sup> International observers report that homosexual and bisexual persons who do not openly reveal their sexual orientation and keep a low profile are able to move freely within society, particularly in larger cities that offer greater anonymity.<sup>13</sup> The applicant managed to avoid any harm due to his sexual orientation prior to his departure from Iran, however he was a child at the time and had only one partner, who was also a child. He has been active in the LGBTI social scene in Australia and I am satisfied that he would continue to engage in behaviours on return which are not consistent with keeping a low profile. I conclude that he would face a real chance of being the victim of violence from individuals or of coming to the attention of the authorities.
27. Should the applicant come to the attention of the authorities due to high profile homosexual activities, there is a high risk that he would be subject to violence. There is also more than a remote chance that he would be charged with any of a number of crimes including sodomy. Country information notes that prosecution of homosexual acts is relatively rare as these types of conduct are difficult to prove as they require several eyewitnesses, but courts have convicted defendants of sodomy charges based solely on 'knowledge of the judge' despite the existence of exculpatory evidence and a lack of inculpatory evidence.<sup>14</sup> In the words of Mr. Mohamad Javad Larijani, the top advisor to Iran's head of Judiciary, in the view of the Iranian government, the "right to life" is not applicable to homosexuals. Further to this, Article 237 of the 2013 Penal Code of the Islamic Republic of Iran officially declares being homosexual in and of itself a crime, punishable by 31 to 74 lashes.<sup>15</sup> Notwithstanding the uncertainty over how often executions occur and in which circumstances, legal provision for the use of the death penalty for consensual same-sex acts creates significant risk to those who engage in such acts.<sup>16</sup>
28. I have concluded that the applicant faces a real chance of harm comprising violence from individuals or the authorities if suspected of being homosexual or being subject to the death penalty if charged with sodomy. I am satisfied that the harm the applicant may face is serious harm. I am also satisfied that the essential and significant reason for the harm is his

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<sup>11</sup> DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 3.90

<sup>12</sup> Ibid; 3.100

<sup>13</sup> Ibid; 3.96

<sup>14</sup> Ibid; 3.93

<sup>15</sup> The International Gay and Lesbian Human Rights Commission (IGLHRC), "The LGBT rights situation in the Islamic Republic of Iran", 27 February 2015

<sup>16</sup> DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 3.100



membership of a particular social group (LGBTI individual), and that it involves systematic and discriminatory conduct.

29. The harm that the applicant fears emanates from the Iranian authorities operating under laws which apply throughout Iran. As such, I find that the real chance of persecution relates to all areas of Iran. I am satisfied he has a well-founded fear of persecution for the purposes of s.5J(1).
30. As the Iranian government is the agent of harm and maintains control throughout the country, I am satisfied that protection against the persecution could not be provided by the relevant state as relevantly required by s.5LA(1). As such, effective protection measures are not available to the applicant in Iran and s.5J(2) does not apply.
31. The applicant can avoid a real chance of persecution by not practising homosexual relations or concealing his sexual orientation. Such actions would however involve an impermissible modification of behaviour. I find that s.5J(3) does not apply. I consider that requiring the applicant to modify his behaviour, either by concealing or denying his sexual orientation or ceasing to have sexual relations with men falls within a kind of modification that an applicant cannot be required to make in s.5J(3)(c)(vi).
32. Accordingly I am satisfied the applicant has a well-founded fear of persecution in Iran for reason of his sexual orientation. I have therefore found it unnecessary to assess whether he faces a real chance of harm in relation to his other claims.

#### **Refugee: conclusion**

33. The applicant meets the requirements of the definition of refugee in s.5H(1).

#### **Decision**

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The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

## 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.