



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

**Decision and Reasons**

---

**Referred application**

IRAN

IAA reference: IAA17/02050

Date and time of decision: 15 November 2017 18:09:00

Patricia Tyson, Reviewer

---

**Decision**

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 an referred applicant, or their relative or other dependant.*

## **Background to the review**

---

### **Visa application**

1. The referred applicant (the applicant) claims to be a national of Iran, of Feili Kurd ethnicity. [In] October 2016 he lodged an application for a Safe Haven Enterprise visa (protection visa), claiming to fear harm on account of his involvement with a Kurdish political party, Feili Kurd ethnicity and conversion to Christianity in Australia. [In] February 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the grant of the visa, finding the applicant's claims about his experiences in Iran and conversion to Christianity not credible.

### **Information before the IAA**

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. The IAA received submissions from the applicant's representative on 13 March 2017. The submissions primarily consist of legal argument but refer to new information in support, specifically media reports regarding harm to Christian converts in Iran. The reports either post-date the delegate's decision or pre-date it by a matter of days, and I accept they could not have been provided prior to the decision being made. However, the key issue in this case is whether the applicant is in fact a Christian (or would be imputed as such) and this information does not assist in addressing that claim. While the examples in the new information are recent, in my view they do not significantly add to the material before the delegate which contains information regarding harm to Christian converts, including under the current president. I am not satisfied there are exceptional circumstances to justify considering the new information.
4. The representative also submitted a letter from [Mr A], [a religious official] of [the] Church of Jesus Christ of the Latterday Saints, dated [March] 2017. The letter submitted to the IAA briefly reiterates the applicant's involvement with the church, and then goes on to express [Mr A]'s view, with reference to biblical teachings, on the growth of faith, stating that the applicant's faith and understanding is growing, developing and being nourished through his church attendance, duties and lessons. It expresses doubt over the possibility of judging another's belief and conversion and refers to the relativity of faith and knowledge, and the applicant's added challenge of learning English.
5. While the letter itself post-dates the decision, I do not accept the submission that the information in the letter could not have been provided earlier because the reasons for refusing to accept the applicant was a genuine Christian convert were not known to [Mr A]. The delegate's concerns regarding the credibility of the applicant's conversion were put to the applicant at the protection visa interview with the delegate on [date] January 2017, in [Mr A]'s presence. [Mr A] provided both comments at the interview and, following the interview, a statutory declaration in the applicant's support. I consider the information provided in the letter to be very general. It does not significantly add to what was provided to the delegate. I am not satisfied that it may have affected consideration of the claims. I accept that, as it post-dates the decision, this particular letter could not have been provided to the delegate prior to the decision being made. However, I am not satisfied this is an exceptional circumstance justifying its consideration in circumstances where the information therein could have been provided earlier. Further, having regard to its generality, and in the absence of any other

apparent circumstances which would justify consideration of the information, I am not satisfied there are exceptional circumstances to justify its consideration.

### **Applicant's claims for protection**

---

6. The applicant's claims can be summarised as follows:

- The applicant is an Iranian citizen of Faili Kurd ethnicity from [City 1]. He was born into a Shia Muslim family but has converted to Christianity.
- The applicant experienced discrimination as a Faili Kurd. He was not allowed to wear traditional clothing, read or write in his own language, or be employed in government positions. Faili Kurds were widely harmed and killed by the authorities.
- The applicant was arrested, detained for [a number of] days and tortured on [a number of] occasions for his appearance and wearing traditional Kurdish clothing.
- The applicant supported the Komla Political Party. Around September 2012, he handed out pamphlets and newsletters in their support to neighbours, friends and relatives.
- In [2012] the applicant's [Relative 1] asked him to pick up [Mr B]. The applicant presumed that [Mr B] was involved with the Komla party. He did as his [Relative 1] requested. [A number of] days after they arrived in [City 1], the applicant read that [Mr B] was arrested and sentenced to execution on charges of being anti-regime, as an active member of the Komla party. The applicant believes that [Mr B] would have been forced to disclose names of people who are supporters of him and the Komla party, and would have given Iranian intelligence authorities the applicant's name.
- [A number of] days after [Mr B]'s arrest, Sepah attended the applicant's [relative's] house with an arrest warrant for the applicant, charging him with being anti-regime. The applicant's [Relative 1] advised him of this and [soon after] the applicant made arrangements to depart Iran on a fraudulent passport.
- After questioning his faith, researching religions and speaking to a friend who was in contact with a Mormon missionary, the applicant decided this religion best aligned with his thoughts and beliefs. He was baptised on [in] 2013 at the Church of Jesus Christ of the Latter Day Saints.
- The applicant fears being arrested, imprisoned and killed by the Iranian authorities on the basis of his ethnicity, political opinion and religion. He is a dissident of the regime and has received a summons to respond to charges of being anti-regime. If he were to be returned he would be identified at the airport, arrested and then punished or killed. He is of interest to the authorities and they will go to all ends to find and punish him. He cannot modify his behaviour to avoid persecution. Denouncing Islam and converting is punishable by death and as the applicant cannot go back to practising as a Muslim, his conversion would be quickly revealed if he were to return to Iran. Somebody he knew in Australia went back to Iran and informed his family and the authorities that he has converted. He would be at risk of death. The applicant would be subjected to systematic and discriminatory conduct as a Faili Kurd. His ethnicity is seen as being inferior to the Farsi majority and he would be discriminated against. The applicant also fears harm as a member of a particular social group, as if forced to return to Iran he will be considered a failed asylum seeker from a Western country.

## **Refugee assessment**

---

7. 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**

8. 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.
9. With the exception of a written record of a biodata interview conducted on [date] February 2013 which indicates the applicant is stateless, the applicant has otherwise made consistent claims regarding his identity and nationality and I place little weight on the biodata interview as there is no recording to verify the applicant’s evidence. The applicant has submitted an Iranian birth certificate, national identity card and drivers licence and translations. I accept that his identity is as claimed and that he is a national of Iran. Iran is the receiving country for the purpose of this assessment. There is no information before me to indicate he has a right to enter and reside in any other country and I find he does not: s.36(3).
10. Regarding the events the applicant claims to have triggered his departure from Iran, I note that there are a number of significant discrepancies between the evidence given by the applicant in his statement of claims and at the protection visa interview, and his evidence at an entry interview conducted on [date] February 2013. Curiously, the statement is consistent with a written record of the entry interview, but inconsistencies arise from the applicant’s responses captured on the audio recording of the interview but not the written record. The discrepancies go to whether or not the applicant himself was involved with the Komala party, whether he was aware that his [Relative 1]’s friend was involved with the party, why he needed to obtain a fraudulent passport, and the omission of any reference to an arrest warrant. The entry interview took place over a week after the applicant’s arrival in Australia and the information he provided was otherwise broadly consistent with that given at the earlier biodata interview, and in the current application. I am not persuaded by his explanation that is evidence at the entry interview was impacted by the effects of his boat journey or any lack of awareness of the

purpose of the interview. However, in light of the findings below it is unnecessary for me to make findings on the claimed events in Iran or the applicant's other remaining claims.

11. The applicant claims to have converted to Christianity in Australia. The delegate did not accept that the applicant's claimed conversion was genuine. The finding was based on the applicant's inability to name formal Christian prayers, lack of understanding of the principle of 'Godhead', lack of convincing explanation as to why he decided to convert, inability to point to a significant spiritual event which led to such a life-changing event, and the delegate's view that the applicant's other evidence was not credible, which he considered inconsistent with the applicant's claim to be a genuine Christian convert.
12. The applicant's evidence at the protection visa interview was that he began attending the Church of Jesus Christ of the Latter Day Saints (LDS Church) around three or four months after being released from immigration detention in April 2013. He claims to attend weekly, unless busy or sick. He said he had information through a missionary and was interested in Christianity so decided to be baptised in [2013]. Submitted with his visa application was a baptismal program containing his name.
13. The applicant indicated he was sick of Islam because of the injustice in the Islamic world, and found Christianity to be better and more true. This claim finds some support in his statement at the entry interview that he was born Shia Muslim but now believed only in God, suggesting he was not a practising Muslim at the time of his arrival in Australia. At the protection visa interview, he stated he had chosen the Mormon denomination because he believed in God and Jesus, and that the law and instruction in the religion was excellent and beneficial for humanity. He was asked how his Christian beliefs had impacted his daily life and said that it made him happy, provided him with what he needed in his daily life, and that the religion helped and guided to improve his life and treat others with humanity.
14. The delegate questioned the applicant about what had lead him to make the life-changing decision to convert within only two months of attending church, and he referred to the information he had learnt about the religion from missionaries. He said that he found that the religion did not have too much difference from Islam, but was more humanitarian and more applicable than Islam and other religions and that is why he chose it. He was asked whether there as any single event or moment which led to his conversion and said it was his knowledge and his interest in the religion which pushed him to choose it.
15. The applicant was questioned about prayer, and said that he prayed at church but also twice a day himself and, when asked, gave an indication of what he prayed for. He was asked whether he knew any established formal prayers and stated that generally it was once a week, someone read from the prayer book and the others listened and said 'amen'. It seems to me that the applicant understood the delegate's question to refer to formal prayer in Church, and I note he was not asked again about whether he was able to recite prayers. [Mr A] indicates in his statutory declaration that personal prayers in the LDS church are not set prayers.
16. The applicant was asked for his understanding of 'Godhead' and the applicant replied 'god he is only one god, he has his son Jesus, ask more and I will answer the question'. The delegate asked him about whether Mormons refer to god the father, the son and the holy ghost as three separate beings or one. The applicant asked for the question to be repeated, and the delegate asked whether they referred to three separate physical beings or one being, and responded it was only one. Following a break in the interview in which he was able to consult with [Mr A], the applicant indicated he had misunderstood the question, and that the three are physically separate entities but have one purpose. In his statutory declaration, [Mr A] states

that the LDS Church believes in the Godhead being three separate beings who all have one purpose (the salvation of mankind). The ambiguity in the question and the applicant's request for it to be repeated may indicate he did not understand it or it did not translate easily. In my view, the fact that the applicant answered incorrectly does not necessarily indicate he was not aware of the concept, given that his earlier answer demonstrated an understanding that god was distinguished from his son.

17. While I accept the unexpected absence of his migration agent (due to the telephone call dropping out) may have unsettled the applicant, I am not persuaded that it had the impact on his evidence that the representative submits. I do not accept that the fact the interviewer acknowledged the interview was stressful indicates any change in the applicant's demeanour and I note that the applicant's evidence at the interview was largely consistent with that in his statement of claims. However, overall there was nothing in the applicant's evidence regarding his conversion which clearly casts doubt on the claim. It would have been helpful if the delegate had probed for more information about how the applicant had encountered the LDS church, any religious exploration conducted by the applicant before his decision to convert, the particular aspects of the LDS church that attracted him to the religion, how he engages with that church's particular practices, any biblical teachings that had particular importance to him, any significant changes to his life following his conversion, and the impact an inability to practise the religion would have on his life. In my view, while the applicant's answers were not particularly detailed, to the extent he was questioned on such matters he was able to identify how Christianity impacted his daily life, indicated he prays on a daily basis and could articulate what he prayed for, provided a reasonable explanation of how his involvement in the church progressed and demonstrated at least some knowledge of Mormon concepts.
18. I place particular weight on the information provided by [Mr A]. At the protection visa interview, [Mr A] indicated that he has known the applicant since he joined the church, has [worked] closely with him during that time. He indicated that communication has been a challenge and as a result some of the teachings were lost in translation, and made similar comments in his statutory declaration. He said that the applicant was a son of the heavenly father and was loved by many in the congregation. In his statutory declaration, [Mr A] states that he met the applicant some weeks prior to his baptism and has been in constant contact with him since. He recalls that at the time of his baptism, the applicant was concerned about who would know about it, and did not want the information getting back to family and friends in Iran. [Mr A] indicates that it is not uncommon in the LDS Church for people to be baptised without a full or complete knowledge of all aspects of the church, as they exercise faith based on spiritual experiences.
19. [Mr A] states that many other members of the congregation know and converse with the applicant on a weekly basis. According to [Mr A], the applicant was ordained to the [a particular priesthood] in [2013] and periodically assists in [tasks assisting the] congregation. The applicant attends Sunday school for an hour, and then a further hour of Priesthood meeting, learning about the responsibilities and duties of priesthood. [Mr A] indicates that from time to time, the applicant has had to work in remote locations for extended periods, and they stay in contact via phone during those times. [Mr A] concludes by indicating that the applicant has expressed gratitude for the blessing of freedom and to practise and workshop in a religion of his choice.
20. I note that [Mr A] has not indicated whether he personally believes the applicant to be genuine, but nor was he asked to do so, and it is evident from his attendance at the interview and provision of the statutory declaration that he supports the applicant. Considering the evidence as a whole, I accept that the applicant was baptised into the LDS Church in 2013 and

has regularly attended since that time, or kept in contact with [Mr A] when unable to do so. I accept he attends Sunday school and Priesthood meetings. On the basis of the applicant's oral evidence and that of [Mr A], I accept that while the applicant is still learning about the LDS faith and his progress has been hampered by language barriers, he is committed to its practise. I accept that there are aspects of Christianity that hold importance to him, that he genuinely believes himself to be a Christian, and that his religious knowledge, belief and practise will continue to develop over time. The applicant was asked whether and how he would practise Christianity if returned to Iran and said that he would attend house churches, although it is dangerous if they are informed on, because it is a matter of belief and he believes in Christianity. As I accept the applicant's faith to be genuine, I accept that were he to return to Iran, he would continue to seek out ways to practise his faith. Given these findings, I am satisfied that the applicant's conduct in Australia is other than for the purpose of strengthening his claim to be a refugee.

21. The applicant claimed at the protection visa interview that a person had returned to Iran and informed the applicant's family and the Iranian government (and the families of other converts) that the applicant had converted to Christianity. The applicant claims to have become aware of this via social media [a number of] months prior to the January 2017 interview, yet makes no such claim in his October 2016 statement submitted with the protection visa interview. I do not accept that such a significant event would have been omitted from the statement if it had occurred and if the applicant had told his representative of it, as he claims. I find this aspect of his evidence not credible.
22. I note also that there are parts of the submission to the delegate that appear to relate to a different applicant. The submission refers to the discovery of the applicant's connection to arrested Christian teacher [name], which does not appear to form part of his claims. It also states that the applicant's immediate family resides in Tehran, and refers to the possibility of devout aunties and uncles discovering his religious affiliations and reporting him to the authorities, whereas the applicant has claimed his family resides in [City 1], has made no mention of devout aunts and uncles, and has claimed that the authorities are already aware of his conversion. I am not satisfied the applicant is at risk for any of these reasons.
23. Turning to the real chance of the applicant being harmed as a Christian convert in Iran, the Department of Foreign Affairs and Trade (DFAT) reports that under Iranian law, a Muslim who converts to another religion can be charged with apostasy, although such cases are rare.<sup>1</sup> Although Christians are a recognised religious minority in Iran, recognised churches are not allowed to accept new members.<sup>2</sup> Most evangelical churches are not recognised and cannot openly worship, and so some form illegal 'house churches'. The only means by which a Muslim convert to Christianity can attend communal worship in Iran is via attendance of one of these underground or house churches. The majority of members of these churches are converts and are likely to be considered apostates.<sup>3</sup>
24. DFAT observes that many house churches come under surveillance by the authorities, there are regular reports of harassment and monitoring of evangelical Christians, and arrests are made for proselytization and conducting sermons in house churches.<sup>4</sup> However, DFAT concludes that given their relatively substantial numbers (estimated at up to 150,000), members of non-recognised churches are generally able to live their lives largely free from the

<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Iran ", 21 April 2016, CIS38A8012677, 3.52-3.54.

<sup>2</sup> Ibid, 3.33, 3.43

<sup>3</sup> Ibid, 3.47.

<sup>4</sup> Ibid, 3.48.

risk of government interest.<sup>5</sup> While worshippers may face low-level harassment for merely attending a house church, additional activities such as proselytising or conducting sermons are generally required to attract the interest of the government.<sup>6</sup>

25. Other sources cited in the delegate's decision and representative's submission to the delegate similarly indicate that converts baptised abroad may return to Iran quietly and not encounter problems, but if the convert wished to practice their faith they would face serious risk.<sup>7</sup> Christian converts face physical attacks, harassment, surveillance, arrest and detention.<sup>8</sup> There have been reports of arrest and imprisonment of dozens of Christian converts and members of other religious minorities over 2015 and 2016.<sup>9</sup> The authorities monitor those who gather in house churches and such persons may be at risk of arrest and detention.<sup>10</sup> Although it is usually the leaders of house churches who are targeted, regular members may also be threatened, monitored and detained during raids, and forced to recant their faith or make false confessions against other members.<sup>11</sup> Apostasy charges are rare but converts can be charged with offences such as disturbing the public order or national security offences.<sup>12</sup> Most cases which go to trial involve high profile converts, but country information suggests it is highly likely that individuals with a lower profile are arrested and detained but then released without the case going to court.<sup>13</sup> There is a substantial risk of ill-treatment or torture for converts in incarceration while waiting trial or release.<sup>14</sup> DFAT says that there is a significant volume of claims and witness statements concerning the use of torture and abuse during detention in Iran and that torture is more likely to be used against political prisoners, which include religious minorities.<sup>15</sup>
26. On the above information, I find that while a Christian convert may limit the risk of adverse attention by attending an underground house church and not engaging in proselytization or public manifestation of their faith, they would face a real chance of arrest if they engaged in open Christian worship, as I have accepted the applicant does in Australia. Even for those who attend underground churches, there remains a risk of monitoring, arrest or detention. Requiring the applicant to worship secretly and behave discreetly or to conceal his beliefs so as to avoid this harm would constitute an impermissible modification of behaviour and as such, s.5J(3) does not apply.
27. I am satisfied there is a real chance of the applicant being arrested, detained and subjected to ill-treatment in the reasonably foreseeable future. This amounts to serious harm within the meaning of s.5J(4)(b). I am satisfied that the essential and significant reason for the persecution is the applicant's religion, and that the persecution would involve systematic and discriminatory conduct carried out by the Iranian authorities: ss.5J(4) and 5J(1)(a).

---

<sup>5</sup> Ibid.

<sup>6</sup> Ibid, 3.48 and 3.49.

<sup>7</sup> Danish Immigration Service, "Update on the Situation for Christian Converts in Iran", June 2014, p.16.

<sup>8</sup> UK Home Office, "Country Information and Guidance - Iran: Christians and Christian Converts", 1 December 2015, OG8F59D8D32, 2.2.2.

<sup>9</sup> Amnesty International, "Amnesty International Report 2015-16 - Iran", NGE43874C95; UK Home Office, "Country Information and Guidance - Iran: Christians and Christian Converts", 1 December 2015, OG8F59D8D32.

<sup>10</sup> Danish Immigration Service, "Update on the Situation for Christian Converts in Iran", June 2014, p.25.

<sup>11</sup> Ibid, p.27; UK Home Office, "Country Information and Guidance - Iran: Christians and Christian Converts", 1 December 2015, OG8F59D8D32.

<sup>12</sup> Danish Immigration Service, "Update on the Situation for Christian Converts in Iran", June 2014, p.7-8.

<sup>13</sup> Ibid, p.10, 30; UK Home Office, "Country Information and Guidance - Iran: Christians and Christian Converts", 1 December 2015, OG8F59D8D32.

<sup>14</sup> Danish Immigration Service, "Update on the Situation for Christian Converts in Iran", June 2014, p.10.

<sup>15</sup> DFAT, "DFAT Country Information Report Iran ", 21 April 2016, CIS38A8012677, 4.14.

28. As the harm would be inflicted by the Iranian authorities which operate throughout the country, effective protection measures are not available, and the real chance of persecution relates to all areas of the country. Sections 5J(1)(c) and 5J(2) do not apply.

29. I am satisfied the applicant has a well-founded fear of persecution within the meaning of s.5J.

**Refugee: conclusion**

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

**Decision**

---

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**

---

### **Migration Act 1958**

#### **5 (1) Interpretation**

...

**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.