



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

**Decision and Reasons**

**Referred application**

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IRAQ

IAA reference: IAA17/02302

Date and time of decision: 1 August 2017 09:21:00

Inge 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 an 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, who left Iran [in] 2011 and arrived in Australia [in] 2012. [In] August 2015 he lodged an application for a protection visa (PV).
2. [In] March 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate accepted that the applicant was a Shia Muslim and a Faili Kurd but concluded that it was more likely than not that the applicant was a national of Iraq whose majority of family members resided in Iran as registered Iraqi Faili Kurdish refugees rather than residing in Iran as stateless Faili Kurds. The delegate found that the applicant did not face a real chance of persecution or a real risk of significant harm for any reasons in Iraq.

### Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act). On 6 June 2017 the IAA received a submission on behalf of the applicant from his representative, [Mr A].
4. Section 473DD of the Act provides that the IAA must not consider any new information from an applicant unless satisfied there are exceptional circumstances which justify considering the new information and the new information was not and could not have been provided to the Minister, or is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims. The representative's submission addresses the delegate's decision and findings. To that extent, the document may be referred to as argument rather than information and I have had regard to it.
5. In support of his submissions, [Mr A] refers to a number of media articles and country information. Considering the media articles, these were not before the delegate and are new information. They comprise the articles "Iranian pilgrims break through Iraq border point", "700 Pakistani pilgrims return with regret, without visiting Karbala" and "Ashura procession: Mourners remember Imam Hussain's martyrdom" from the Express Tribune and "Some two million Iranian pilgrims in Iraq" from the Islamic Republic News Agency. All of these articles were published in November/December 2015 and there is nothing to indicate why they could not have been provided to the delegate. The events described in these articles are in any event the subject of two articles from different news sources, already included in the referred information.<sup>1</sup> I am not satisfied that exceptional circumstances warrant their consideration.
6. [Mr A] also refers to various items of country information, which are described as follows:
  - Country guidance notice, Iran 2011
  - The 2008 Joint Assessment Mission (JAM) of UNHCR, WFP and Iran's BAFIA
  - The UK Foreign and Commonwealth Office stated in 2011
  - The USCRI reported in 2009
  - UNHCR, in July 2009

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<sup>1</sup> "Iran pilgrims stampede at Iraq border point", Daily Mail (Australia), 01 December 2015, CXBD6A0DE19236;

"Iraq blames Iran after thousands of pilgrims storm border crossing", Reuters, 30 November 2015, CXBD6A0DE19238

- in 2003, Human Rights Watch
  - Iran Human Rights Voice reported in 2009
  - In November 2009, the Australian Embassy in Baghdad
  - a 2008 article published by the UNHCR
  - April 2009, UNHCR stated
  - Embassy in Baghdad reported in March 2010
  - October 2010, Associated Press reported
7. Without specific references I am unable to establish precisely which reports are quoted in the submission, or whether any of them are the same as those that were before the delegate. As can however be seen from the dates listed, each of these reports significantly predates the delegate's decision. There is no explanation as to why the information, to the extent that it is new information, could not have been provided earlier. I am not satisfied, on the minimal information provided, that either ss.473DD(b)(i) or 473DD(b)(ii) are met.
8. I have obtained new information, specifically information regarding refugees in Iran and their ability to obtain Iranian citizenship or nationality.<sup>2</sup> The delegate made a finding that the applicant was not stateless because there were legal avenues open to him to regain his citizenship in Iraq. The delegate did not assess the applicant against Iran; whether or not he was a citizen of Iran or the he had the right to Iranian nationality. As such, there was very limited country information about this issue in the referred material. I consider there are exceptional circumstances to justify considering this information.
9. I have also obtained new information regarding the treatment and conditions of unregistered Faili Kurd refugees in Iran and laws relating to refugee rights, entitlements and the implementation of such laws.<sup>3</sup> The impact on being an unregistered refugee in Iran and whether it amounted to persecution was not considered by the delegate. I am satisfied there are exceptional circumstances to justify considering this new information.

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

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10. The applicant's background and claims for protection are contained in the information referred to the IAA. They can be summarised as follows:
- He was born in [City 1], Iran, on [birth date]. He has resided in several different addresses in [City 1]. He has [details of siblings]. He completed twelve years of schooling and was awarded his high school diploma but was unable to enrol in tertiary education due to his lack of documentation. He has worked as a [Occupation 1], in [Occupation 2] and from 2005 until his departure from Iran, [Occupation 3];
  - His parents were born in Iraq but had been deported to Iran in 1980 because they were Faili Kurds. The Iraqi authorities confiscated all of their identity documents when they were deported. Their [details of children] were born in Baghdad, the applicant and the remainder of his siblings in Iran. His parents speak Kurdish and Arabic. The applicant

<sup>2</sup> Tucker J, 'Exploring Statelessness in Iran', Tilburg University, 2012, CIS2F827D9154; Country of Origin Information Section (COIS), Iran: CI160517164055782 – Iranian Citizenship – Foreign Nationals 22 May 2015, "Report on fact-finding mission to Iran 9 – 17 September 2000", Undefined, 5 November 2002, CX79530.

<sup>3</sup> Shirin Ebadi, 'Refugee Rights in Iran', SAQI Books and UNHCR, 1 September 2008, CIS20591; "Country Guidance Note Iran", Department of Immigration and Citizenship, 11 July 2011, CISD9559B12412; "World Refugee Survey Iran 2009", United States Committee for Refugees and Immigrants (USCRI), 17 June 2009, CX241042; "World Refugee Survey 2008", USCRI, 19 June 2008, CX203209;

can understand Kurdish but not speak it. He speaks Arabic but his preferred language is Farsi. His father passed away in 2015;

- The applicant has never been issued a birth certificate. He had his “white card” renewed annually but this card was of little use. Holders are supposed to have many entitlements, but this is not what happens. He could not get a proper job, only heavy manual labour or cash in hand jobs, he could not go to University, get a marriage licence, buy a house, many other rights. The government and people do not accept them in Iran. He was never arrested or ill-treated but there were these social problems. They are harassed and told that they should go to Iraq. When he went to renew his white card in 2012 it was refused. The white card only states that his nationality is Iraqi because it is based on what his parents said when they arrived in Iran. They have applied for Iranian citizenship a number of times but it has always been refused;
- His parents and siblings also had their applications for renewal of their white cards refused in 2012. They have not been deported, they have nowhere to go. His [relative] is working;
- He left Iran in November 2011 and stayed in [Country 1] for about a year.
- There was no specific incident that made him decide to leave Iran. He was detained once for a few hours, because he had no identity documents on him. He told the officer he was an Arab, as he did not think he would be believed if he said he was a Faili Kurd. They sold a house that had been purchased in the name of his [associate] and some [personal belongings], to raise the \$[amount] for he and [Relative A] to leave. Also his [Relative B] in [City 2] provided some money. He and [Relative A] obtained false Iraqi passports. The smugglers took his passport or made him throw it in the sea. He cannot return to Iran, he has no papers, plus he may be arrested for leaving the country illegally. He could be prosecuted, and his family;
- He cannot be returned to Iraq, he has never been there. He has no documentation. The Iraqi authorities may think he is coming there for terrorism or to fight for ISIS or as a spy. Anything could happen. All of his family live in Iran except for [Relative A] and his [Relative B], who has [citizenship details] and lives in [City 2]. His [Relative C] has Iranian citizenship because [they] married an Iranian, but his [Relative D] does not, even though [their spouse] is Iranian.

## Factual findings

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11. The applicant has consistently claimed to be of Faili Kurdish ethnicity. The referred information indicates that Faili Kurds are Shia Muslim Kurds who originally inhabited the Iran-Iraq border region along the Zagros mountain range. During the Ottoman period, Faili Kurds who had been living in Iran had the choice of registering as Ottoman or Persian/Iranian subjects. Many chose to align themselves with Iran both to avoid military service and in line with familial ties with Failis living in Iran, while continuing to live in Iraq. In the 1970s and 1980s, the Sunni-dominated Baath regime expelled those it viewed as Iranian and opposed to the Government, and forced several hundred thousands of Faili Kurds across the border into Iran. They were stripped of their Iraqi nationality, and had their citizenship documents, property and assets confiscated.<sup>4</sup>

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<sup>4</sup> Department of Foreign Affairs and Trade (DFAT), “DFAT Thematic Information Report – Faili Kurds in Iraq and Iran”, 3 December 2014, CIS2F827D91722; 2.1 to 2.3

12. At the PV interview the applicant was unable to explain how Faili Kurds differed from members of other ethnic groups and claimed to be unaware of his family history, including the birthplace of any of his grandparents and when any of them may have moved to Iraq. He does not claim to speak Kurdish and at his arrival and PV interviews spoke Farsi (Persian). He stated that he was a Shia Muslim and described some differences between Shia and Sunni Muslims. Notwithstanding the paucity of his evidence, I am satisfied that his ethnic background is as claimed.
13. The applicant has also consistently stated that both of his parents (and his eldest two siblings) were born in Iraq and he and the remainder of his siblings in Iran. He has provided a number of identity documents to the Department, including identity cards issued to foreign nationals by the Iranian authorities for himself and several of his family members. These cards indicate that the holder is of Iraqi Nationality but the place of birth is not stated. The applicant has also provided his father's death certificate, however this also does not give details of his father's place of birth, only that he was a non-Iranian. On the basis of the applicant's consistent evidence as to the history of his immediate family, including the birthplaces of his parents and siblings, I am satisfied that these are as claimed.
14. The applicant has claimed that his parents applied for Iranian citizenship on several occasions and the whole family applied in 2005 but their applications were refused. I am satisfied that at the time the applicant left Iran that he was not an Iranian citizen. Evidence indicates that it is extremely difficult to obtain Iranian citizenship and few Faili Kurds originating from Iraq or those born in Iran to Iraqi refugees have been able to obtain it. DFAT advises only a limited number were able to secure Iranian citizenship.<sup>5</sup> Faili Kurds who can prove Iranian ancestry through the paternal line would be eligible for citizenship; however, only a very small number of Iraqi refugees would be able to establish Iranian ancestry. If their ancestors did not register with Iranian authorities at the time, establishing this ancestry would be difficult, if not impossible.<sup>6</sup> DFAT advises that Iranian citizenship may also be acquired through descent or marriage<sup>7</sup>, neither of which apply to the applicant.
15. The applicant has provided his latest *amayesh* or refugee registration card, which was issued by Iran's Bureau of Alien and Foreign Immigrant's Affairs (BAFIA) [in] 2011. This card has been assessed by the Department of Immigration and Border Protection ("the Department") as genuine and I am satisfied that it is. Country information indicates that the *amayesh* is issued to Iraqi refugees regardless of their ethnic identity;<sup>8</sup> also, that an *amayesh* card is generally issued to the child of an Iraqi refugee father.<sup>9</sup> This is consistent with the applicant's claim that his parents arrived in Iran as refugees following their deportation from Iraq in 1980 and I accept that they did. The applicant's card is stated to be valid for one year from the date of issue. The applicant claimed in his statutory declaration of 16 July 2015 that he went to renew his *amayesh* in early 2012 but his application was refused by the office for foreigner registration. He has also stated that his family members have not had their *Amayesh* renewed since this time. DFAT is not aware of Iranian authorities refusing to renew cards, provided that relevant rules have been complied with (including payment of municipal taxes and residing in a permitted area). DFAT is not aware of Faili Kurds being told they should return to Iraq.<sup>10</sup> I do not accept that the applicant's family did not have their *amayesh* renewed in 2012. In any event, as the applicant states that he departed from Iran on [in] November 2011, I do not

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<sup>5</sup> DFAT, "DFAT Thematic Information Report – Faili Kurds in Iraq and Iran", 3 December 2014, CIS2F827D91722; 2.4

<sup>6</sup> Ibid; 3.25

<sup>7</sup> Ibid; 3.24 to 3.29

<sup>8</sup> Ibid; 3.37

<sup>9</sup> Ibid; 3.39

<sup>10</sup> Ibid; 2.22

accept the claim that renewal of his amayesh was refused in 2012. I find that at the time of his departure from Iran, the applicant was a registered refugee in Iran. The applicant's amayesh expired [in] 2012. From that point, he would be considered by Iranian authorities to be an irregular migrant,<sup>11</sup> or an unregistered refugee. DFAT reports that officially, expired cards cannot be replaced, but DFAT contacts have said government officials might show some leniency in individual cases.<sup>12</sup> It has now been over five years since the applicant's amayesh expired and there is no evidence to suggest that it has been renewed on his behalf at any point. I conclude that he remains unregistered in Iran.

16. The applicant's central claim is that he is stateless and without Iranian or Iraqi nationality. I am satisfied that as a registered Iraqi refugee until his departure in 2011, the applicant is not and has never been an Iranian national. From [sometime in] 2012 he has been considered an unregistered refugee in Iran. In determining whether the applicant should be considered to be an Iraqi national, the delegate noted that his [Relative E] runs a [shop] in [name of province], Iraq, and concluded that [Relative E] was an Iraqi citizen. The applicant has denied that this is the case and the issue is addressed by his representative in submissions to the delegate dated [in] March 2017. On this point, I note that [Relative E] was born in Baghdad whereas the applicant was not. I am not satisfied that [Relative E]'s status in Iraq necessarily supports a conclusion that the applicant is also an Iraqi national or could readily be granted citizenship.
17. The Iraqi Embassy in Iran can re-confer Iraqi citizenship on Faili Kurds living in Iran but it is currently a difficult and lengthy process which only succeeds in some cases.<sup>13</sup> DFAT was told by Faili Kurd representatives that in order to reclaim Iraqi citizenship, a representative of the family (normally the father or mother) would need to travel to Iraq.<sup>14</sup> I note that the applicant's father has passed away and his mother is elderly. The security situation in Iraq is precarious and there were 3.18 million internally displaced persons in Iraq as at November 2016.<sup>15</sup> There is no indication that the applicant or his parents have at any point sought to apply for Iraqi citizenship for him. Based on the applicant's credible evidence and in the absence of any information to suggest otherwise, I am satisfied that he has never held, and does not hold Iraqi citizenship; nor does he have a current right to enter and reside in Iraq.
18. I find the applicant is stateless. The applicant lived continuously in Iran from his birth in [birth year] until his departure in 2011 at the age of [age]. I find that Iran is the applicant's country of former habitual residence, and is therefore the receiving country for the purpose of this review.
19. I accept the applicant's evidence as to the limitations imposed on him as a registered refugee in Iran, these being that he was unable to undertake tertiary education and his employment was limited. He also stated that he would be unable to buy a house or acquire a marriage licence but there is no evidence that he tried to do either of these. I accept that he departed Iran illegally on a false passport.

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<sup>11</sup> DFAT, "DFAT Thematic Information Report – Faili Kurds in Iraq and Iran", 3 December 2014, CIS2F827D91722; 3.38

<sup>12</sup> Ibid; 3.37

<sup>13</sup> Ibid; 3.18

<sup>14</sup> Ibid; 3.19

<sup>15</sup> UN High Commissioner for Refugees (UNHCR), "UNHCR Position on Returns to Iraq", 14 November 2016, CIS38A80122649

## Refugee assessment

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20. 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

21. 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.

22. I have accepted that the applicant is a stateless unregistered Faili Kurd whose former country of habitual residence is Iran. Iran is a signatory to the 1951 Convention on the Status of Refugees and 1967 Protocol. However, it has made reservations to the Convention’s provisions on employment, public relief, labour legislation and social security and freedom of movement.<sup>16</sup> Article 17 of the Refugee Convention stipulates refugees must be given the right to work. The government of Iran considers Article 17 to be a recommendation only.<sup>17</sup> Registered Faili Kurds have no automatic right to work and work permits are generally limited to a small number of work categories such as animal husbandry and brick making.<sup>18</sup> Few refugees applied for them because employers did not wish to hire employees formally and pay for required insurance and related taxes. The government has fined both employers and refugees heavily, and refugees ran the risk of being deported if found without a work permit.<sup>19</sup> Unregistered Faili Kurds have no right to work. While they have “informal” access to employment this can also leads to exploitative situations, as they are paid less and working conditions can be worse.<sup>20</sup> A 2008 joint report of the UNHCR, World Food Program and BAFIA noted life for refugees in urban and semi urban areas was considerably more expensive than for Iranians in the same areas, and there was increasing among refugees due to high cost of

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<sup>16</sup> "Country Guidance Note Iran", Department of Immigration and Citizenship, 11 July 2011, CISD9559B12412 p. 10 citing "World Refugee Survey Iran 2009", United States Committee for Refugees and Immigrants (USCRI), 17 June 2009, CX241042.

<sup>17</sup> Shirin Ebadi, 'Refugee Rights in Iran', SAQI Books and UNHCR, 1 September 2008, CIS20591, p 91-92

<sup>18</sup> DFAT, "DFAT Thematic Report: Faili Kurds in Iraq and Iran", 3 December 2014, CIS2F827D91722, 3.63; "World Refugee Survey Iran 2009", United States Committee for Refugees and Immigrants (USCRI), 17 June 2009, CX241042.

<sup>19</sup> "World Refugee Survey 2008", United States Committee for Refugees and Immigrants (USCRI), 19 June 2008, CX203209.

<sup>20</sup> DFAT, "DFAT Thematic Report: Faili Kurds in Iraq and Iran", 3 December 2014, CIS2F827D91722, 3.64-3.65.

living and lack of access to government safety net programs.<sup>21</sup> A 2010 UN report noted restrictions placed on Iraqi refugees' right to work, coupled with the duration of their displacement, significant inflation and the global economic downturn, left many Iraqis unable to meet their fundamental needs.<sup>22</sup> In 2011 UNHCR noted the removal of subsidies on basic commodities had adversely affected the socio-economic situation of vulnerable and destitute registered refugees.<sup>23</sup> Whilst the applicant has been able to find work in the past, he no longer has employment, having departed Iran. As he is now unregistered, he is unable to apply for a work permit. There is a real chance on his return he could be without work or working in an exploitative situation.

23. Registered refugees may be restricted by the authorities in exercising their rights to freedom of movement, foreign travel, emigration and repatriation.<sup>24</sup> DFAT assesses unregistered Faili Kurds would face significant difficulty relocating. Without documentation, their access to employment, accommodation and government services is likely to be restricted.<sup>25</sup> Based on DFAT's advice I find that unregistered Faili Kurds do not generally have access to services including health care and education.<sup>26</sup> Refugees cannot rent property in their own names, but can rent through an Iranian and this relationship can be exploitative.<sup>27</sup> Normally, identity documents would be required to buy a house, car, mobile phone or establish a utilities account. Without identification Failis would not normally be able to access the formal education system.<sup>28</sup> DFAT advises a non-Iranian man does not assume Iranian nationality on marriage to an Iranian woman.<sup>29</sup> The applicant confirmed that his [relative] is in this situation.
24. DFAT's contacts were not prepared to rule out that the possibility that Faili Kurds could be targeted for extortion or subject to harassment, detention or physical assault, due to their vulnerability as refugees and their Kurdish identity.<sup>30</sup> There is also the possibility of unregistered Faili Kurds being deported to Iraq.<sup>31</sup> In Tehran the police and Basij do conduct car inspections which may include checks on identity cards. The frequency of inspections fluctuates and the presence of security forces on the streets varies.<sup>32</sup> Country information indicates stateless Faili Kurds face harassment by the official security forces and the Basij.<sup>33</sup>
25. DFAT confirms generally the treatment of registered and unregistered Faili Kurd refugees in Iran is prescribed by law and that there are generally no legal remedies available in Iran for legally prescribed practices that might be discriminatory.<sup>34</sup> There is limited information regarding the Iranian legislations or policies relating to refugees. Country information indicates that the first legislation on refugees in Iran was approved in 1963.<sup>35</sup> Since then, Iran has

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<sup>21</sup> "Country Guidance Note Iran", Department of Immigration and Citizenship, 11 July 2011, CISD9559B12412 citing Joint Assessment Mission Settlement-based Refugees in Iran 8th - 19th June 2008, UNHCR, WFP and BAFIA, 2008, CIS20176.

<sup>22</sup> "Country Guidance Note Iran", Department of Immigration and Citizenship, 11 July 2011, CISD9559B12412 citing Regional Response Plan for Iraqi Refugees, UN Office for Coordination of Humanitarian Affairs, 2010, CIS20178, p. 80.

<sup>23</sup> Ibid citing Over USD 2 Million Contributions to the Project: "Life Saving Medical Assistance to Refugees in Iran", UNHCR, 1 May 2011, CX268291.

<sup>24</sup> DFAT, "DFAT Thematic Report: Faili Kurds in Iraq and Iran", 3 December 2014, CIS2F827D91722, 5.14.

<sup>25</sup> Ibid; 5.15

<sup>26</sup> Ibid; 3.57

<sup>27</sup> Ibid

<sup>28</sup> Ibid; 3.58

<sup>29</sup> Ibid; 3.20

<sup>30</sup> Ibid; 3.6 and 4.4

<sup>31</sup> Ibid; 3.38

<sup>32</sup> Ibid; 5.8 and 5.9

<sup>33</sup> Tucker J, 'Exploring Statelessness in Iran', Tilburg University, 2012, p 12.

<sup>34</sup> DFAT, "DFAT Thematic Report: Faili Kurds in Iraq and Iran", 3 December 2014, CIS2F827D91722, 5.5.

<sup>35</sup> "Country Guidance Note Iran", Department of Immigration and Citizenship, 11 July 2011, CISD9559B12412, p. 10.

passed a range of other legislations and issued decrees regarding refugee status, rights and entitlements, including on illegal entry, residency permit, marriage, birth registration, personal status, right to property, literary and artistic rights, protection of intellectual property rights, access to court, refugee employment, social security, education, naturalisation and freedom of religion.<sup>36</sup> With regards to employment, Article 120 of the Iran Labour Code stated that foreign nationals are prohibited from seeking employment unless they have obtained a work visa and obtained a work permit in accordance with the relevant legislation. Article 121 of the Labour Code sets out three conditions for issuance of work permits, which relates to whether there are qualified and job ready Iranian citizens with similar specialization; the foreign national's skills and specialisation for the job in question; and training for Iranians.<sup>37</sup>

26. Country information indicates that state practice in treating refugees can often be quite different from actual refugee laws, and that the written laws in Iran are contradictory to the practice of the laws.<sup>38</sup> DFAT reported in 2011 that sources indicated registered and unregistered refugees in Iran face practical and legal restrictions on accessing education, employment and healthcare.<sup>39</sup> Despite Government decrees local authorities continued to deny refugee children entrance of public schools or suspended education services to them to encourage repatriation and refugees were denied the right to take university examinations.<sup>40</sup> The 1963 Regulations allow refugees medical and social services on par with nationals but authorities levy higher premiums and a special tax to encourage repatriation.<sup>41</sup> More recently, the US Department of State report for 2016 advises that Iran had a mixed record in providing support for refugees; and that stateless persons are subjected to inconsistent government policies and rely on charities, principally domestic, to provide medical care and schooling. Authorities prohibited stateless persons from receiving formal government support or travel documents.<sup>42</sup>
27. Considering all the available information before me, I am satisfied that the laws with respect to refugees in Iran are a law of general application, and it is not discriminatory on its terms. However, on the evidence before me I am also satisfied that the law is selectively enforced by the Iranian authorities against Iraqi refugee and ethnic minority groups. I am also satisfied that the law is not implemented in a manner that is appropriate and adapted to achieving a legitimate object. I consider that the application of the sanctions against the applicant, being a minority Faili Kurd refugee, would effectively involve a denial of basic medical and social services, education opportunities, a denial of economic ability to subsist, serious physical mistreatment, and threat to life and liberty in the form of arbitrary arrest and detention. I am not satisfied that these are proportionate means employed to achieve legitimate objects. I find that it amounts to discriminatory and persecutory conduct.
28. I consider that the level of discrimination the applicant faces on multiple levels on his return to Iran constitutes significant economic hardship and a denial of access to basic services to the extent that his capacity to subsist would be threatened. This constitutes serious harm in accordance with s.5J(5)(d) to (f) of the Act.
29. I am satisfied that undocumented or unregistered Faili Kurdish refugees in Iran are a group which share the common characteristic of their ethnicity, and of being both undocumented or

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<sup>36</sup> Shirin Ebadi, "Refugee Rights in Iran", SAQI and UNHCR, 2008, CIS20591.

<sup>37</sup> Ibid; pp.90 to 93

<sup>38</sup> Shirin Ebadi, "Refugee Rights in Iran", SAQI and UNHCR, 2008, CIS20591; p.12

<sup>39</sup> "Country Guidance Note Iran", Department of Immigration and Citizenship, 11 July 2011, CISD9559B12412, p. 13

<sup>40</sup> Ibid; p.14

<sup>41</sup> Ibid; p.15

<sup>42</sup> US Department of State, "Iran 2016 human Rights Report", 3 March 2017, OGD95BE926964, p.27.

unregistered and refugees. Members of the group are distinguishable from society because of this. Their ethnic identity is an innate and immutable characteristic and country information indicates their unregistered status is also immutable, as once have lost their registration it appears almost impossible to regain. Their common characteristic is not a shared fear of persecution. I therefore find that the requirements for a person to be treated as a member of a particular social group prescribed in s.5L of the Act are met.

30. I am satisfied that this serious harm is directed at the applicant for the essential and significant reason of his membership of a particular social group comprised of “undocumented or unregistered Faili Kurd refugee”; the persecution involves serious harm and systematic and discriminatory conduct.

31. In these circumstances I am satisfied that the applicant has a well-founded fear of serious harm amounting to persecution on return to Iran, and that his fear relates to all areas of Iran. Because the harm emanates from the authorities I find that he could not obtain protection from the authorities(s.5J(2)). As the harm relates to his ethnicity and undocumented status, he could not avoid a real chance of persecution by modifying his behaviour (s.5J(3)).

#### **Refugee: conclusion**

32. 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**

...

***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.