



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA17/03829

Date and time of decision: 4 July 2018 14:17:00

B Mericourt, Reviewer

Decision

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be an Iranian national. On 20 December 2012 he lodged an application for a Temporary Protection Visa (TPV). In a decision dated 30 October 2017 the delegate of the Minister of Immigration and Border Protection (the delegate) refused to grant the visa.
2. The delegate was satisfied the applicant is a non-practising Shia Muslim of Kurdish ethnicity who has citizenship in Iran. He accepted the applicant had been reprimanded and verbally harassed for discussing treatment of Kurds and wearing Kurdish clothes and that he had suffered discrimination in seeking employment in his chosen field. However, he was not satisfied that there was a real chance or real risk the applicant would suffer serious or significant harm for reasons of his Kurdish ethnicity, his actual or imputed political opinion or for any other reason if he were to be returned to Iran now or in the reasonably foreseeable future.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 3 November 2017 the applicant provided the IAA with a copy of a baptismal certificate from [a] Church dated [November] 2013. It names the applicant and therefore could be considered to be credible (as in able to be believed) personal information. However, the applicant has not satisfied me that there are exceptional circumstances to justify considering this new information. He told the delegate at his protection interview in October 2017 that he is a non-practising Muslim and does not follow any religion and he did not make any claims relating to conversion to Christianity. He has not claimed to have converted to Christianity in any submission to the IAA. Furthermore, the applicant did not provide any explanation about why this information could not have been provided to the delegate prior to his decision. I therefore find this new information does not meet s.473DD(a).

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - The applicant fears persecution for reasons of his Kurdish ethnicity and support for Kurdish rights in Iran (actual political opinion);
 - He claims he has been discriminated against for reasons of his Kurdish ethnicity in gaining access to employment, education and health services;
 - He has been verbally harassed and reprimanded for expressing his opinions about Kurdish rights and wearing Kurdish clothing in Iran;
 - He is a member of '[Kurdish Association 1]' in Australia and been actively involved in the association's activities. He fears he would come to the adverse attention of authorities in Iran as a consequence.

Factual findings

6. The applicant's claims as to his identity and nationality have been consistent since his arrival in Australia. He conducted interviews in Farsi Kurdish and has submitted originals and translations of his national birth certificate booklet (shenasnameh), Iranian military service completion card and Iranian driver's licence. I accept the applicant's nationality and identity are as claimed and find Iran to be the receiving country for the purpose of the application. There is no evidence before me to suggest that the applicant has a right to enter and reside in any country other than Iran and I am satisfied he does not: s.36(3).
7. I am satisfied the applicant departed Iran legally as the holder of a genuine valid passport and that he was instructed to dispose of his passport by the people smuggler in Indonesia.

Refugee assessment

8. 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

9. 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.
10. Real chance is a substantial chance as distinct from a remote or far-fetched possibility.¹

Claims related to fear of persecution for reasons of the applicant's religion (non-practising Shia Muslim)

11. The applicant has provided consistent evidence that he was born a Shia Muslim but did not practice Islam in Iran prior to his departure.

¹ *Chan v MIEA*, (1989) 169 CLR 379 at 389.

12. At his protection interview the applicant stated that he had no choice about his religion in Iran as he was born a Shia Muslim, but he did not like Islam as a religion. He only attended mosque for funerals and the like but otherwise did not attend. If he had to choose any religion it would be Christianity. However, at the moment he does not have any religion.
13. I am satisfied the applicant is a non-practicing Muslim, and that he identifies as a non-religious person.
14. The Department of Foreign Affairs and Trade (DFAT) advises that the official religion of Iran is Shia Islam and legislation and Government policy favours the Muslim majority.² Under Iranian law, a Muslim who leaves his or her faith or converts to another religion or atheism can be charged with apostasy. The punishment for apostasy is subject to judicial discretion, however, there is no provision in Iran's Penal Code criminalising the act. Whilst a Muslim person who leaves his or her faith and is openly atheist can be potentially charged with apostasy, DFAT considers it unlikely that individuals will be prosecuted on charges of apostasy³.
15. DFAT considers it highly unlikely that the government would monitor religious observance by Iranians – for example, whether or not a person regularly attends mosque or participates in religious occasions such as Ashura or Muharram – and thus it would generally be unlikely that it would become known that a person was no longer faithful to Shia Islam. Perceived apostates are only likely to come to the attention of Iranian authorities through public manifestations of their new faith, attempts at proselytization, attendance at a house church or via informants.⁴ Other sources indicate that many people in Iran do not regularly attend mosque with many young people identifying themselves as secular, agnostic or atheist.⁵
16. I am satisfied the applicant has never suffered serious or significant harm as a consequence of his failure to practice Islam. There is no information before me to suggest the applicant intends to promote his religious views if he returns to Iran. Based on the above country information I am satisfied there is no real chance the applicant will face serious harm, having regard to the extensive examples of serious harm in s.5J(5) of the Act, if he returns to Iran now or in the reasonably foreseeable future, for reasons of his religion or religious opinions.

Claims related to fear of persecution for reasons of the applicant's Kurdish ethnicity and actual or imputed political opinion

17. It is estimated there are about 12 million Kurds living in Iran, largely in Iranian Kurdistan. The province of Ilam where the applicant lives, is predominantly Faili Kurdish who are Shia Muslims.⁶
18. The applicant has consistently stated that he is of Faili Kurdish ethnicity and he holds citizenship in Iran. His primary concern at his entry interview, in his written application for protection and at his protection interview was the discrimination he experienced when seeking government employment relevant to his qualifications. At his entry interview he

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Iran", 21 April 2016, p.11, CIS38A8012677

³ Ibid, p.14

⁴ Ibid

⁵ Gunes Murat Tezcur, Taghi Azadarmaki and Mehri Bahar, "Religious Participation among Muslims: Iranian Exceptionalism", in *Critique: Critical Middle Eastern Studies*, Vol.15, No 3, 1 January 2006, CIS21784

⁶ Reuters, Bozorgmehr Sharafedin, "Iran executes Kurdish activist, wary of Kurdish gains in Middle East", 27 August 2015, CXBD6A0DE12731

stated he was ‘mistreated as a third or second class citizen’ and he does not like the lifestyle in Iran.

19. In his written application the applicant stated “his family did not accept the Iranian government”. He they took pride in their ethnicity and did not agree with government policies that continued to persecute our (Kurdish) nation. He did not take part in elections and as a result did not get the necessary stamps to show he had voted and subsequently lost many privileges in employment or getting a business permit. His father was arrested when the applicant was [age] or [age] years old following comments he had made to [someone in public] who then doxxed him in. He was interrogated and beaten and then released after two days. He was accused of supporting and helping the Mujahidin. The applicant also described an incident in 2010 when he was walking in his area wearing Kurdish clothes and warned he would be arrested if he was caught wearing them again. During his compulsory military service he was twice detained because he talked to other conscripts about his persecution as a Faili Kurd. He was made to give an undertaking to refrain from speaking about the persecution of Kurds. The applicant claimed to have been restricted in movement and every time he went to a new city he would be investigated even if it was to visit a friend or relative.
20. At his protection interview, the applicant discussed several times how Kurdish people were suppressed in Iran, life is very difficult because the government is dictatorial and there are no career options for Kurdish people. He reiterated the incidents of his father’s arrest when he was [age] or [age] years old, his own detention overnight on two occasions during his military service for promoting his Kurdish ethnicity and the times he was reprimanded for wearing Kurdish clothing. He said that the Basij and Ettela’at authorities do not want Kurds to promote their own culture and suppress the Kurdish people who can never obtain high positions.
21. Article 19 of the Iranian Constitution provides that “[all] people of Iran, whatever the ethnic group or tribe to which they belong, enjoy equal rights; and colour, race, language and the like, do not bestow any privilege.”⁷ However, a great deal of country information indicates that ethnic and religious minorities in Iran do not enjoy equal rights and are subject to discrimination in accessing education, housing, employment, political office and their exercise of cultural civil and political rights.⁸
22. The DFAT 2016 Iran country report states:

“Despite some Constitutional protections, ethnic and religious minorities face discrimination in their day-to-day lives in Iran. Structural discrimination flows from the Iranian legal framework, which is generally geared to favour Shia Muslims (see ‘Religion’, below). This is compounded by a number of government policies of discrimination (i.e. ‘official’ discrimination).

Throughout Iran, there is also prejudice in the community (i.e. ‘societal’ discrimination) against some minorities, in particular ethnic minorities. Patronage, nepotism and favouritism can limit employment opportunities (including in the public service) and affect

⁷ Alavi and Associates Legal Counsels and Attorneys at Law, ‘Iran – Constitution’, n.d, CIS22595

⁸ Amnesty International, “Amnesty International Annual Report 2016-17 – Iran”, 23 February 2017, NG2A465F54; Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report Iran”, 21 April 2016, CIS38A8012677; Minority Rights Group International, “World Directory of Minorities and Indigenous Peoples – Iran Overview”, 1 July 2014, CX324703; Human Rights Watch, “Human Rights Watch World Report 2017 - Iran”, 13 January 2018, NG2A465F52

access to services. Even in the absence of official discrimination, societal discrimination can lead to unfair treatment at the hands of Iranian officials, tolerated by the state.

*Kurds can face considerable societal discrimination, leading to unfair day-to-day treatment. DFAT considers that such discrimination is not usually the result of official or state-directed policies. Discrimination is rarely coupled with community-level violence”.*⁹

23. The applicant stated that he was reprimanded at his university and during his military service for wearing Kurdish clothing and that on occasion he was verbally harassed. However, he was never detained, arrested or physically mistreated for reasons of his Kurdish ethnicity. I am satisfied that, although he was verbally harassed, he was never seriously harmed by the Iranian authorities or any other person, for being identified as Kurdish or wearing Kurdish clothing in Iran.
24. Various media outlets report that Kurds face discrimination in obtaining government jobs.¹⁰ I accept the applicant experienced discrimination when seeking work for which he was qualified, particularly when applying for government positions.
25. Discrimination in employment does not meet the standard of serious harm in s.5J(5) of the Act. The applicant has not claimed that he has been denied a capacity to earn a livelihood of any kind, where the denial threatens his capacity to subsist. Since he graduated with a degree in [a certain discipline] he worked in [a certain industry] until he departed Iran. Whilst I accept he experienced significant discrimination when applying for positions in his own field, I am not satisfied that he suffered serious harm, having regard to the extensive examples of serious harm in s.5J(5) of the Act.
26. DFAT reports that those Kurds who have links to Kurdish political parties or who are perceived to be lobbying for cultural or political rights may come to the adverse attention of the authorities:

“There are credible reports of Kurds being targeted by authorities for perceived links (or having family members with perceived links) to Kurdish political groups such as the Party for a Free Life in Kurdistan, Komala or the Democratic Party of Iranian Kurdistan. There are a number of Kurdish Iranians currently imprisoned—some on death row—for affiliation with these groups.

DFAT considers that most Iranian Kurds either do not come to the attention of authorities or are subject to only low levels of adverse attention by the state. Those who attempt to publicly assert cultural or political rights that are perceived to threaten the constitutional foundations or the territorial integrity of the Islamic Republic have an increased risk of coming to the attention of the state.

DFAT assesses that Kurds who become known to Iranian authorities are likely to face harassment on account of their activities. Largely depending on the profile or activities of the person (as well as the prevailing political environment and sometimes the

⁹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Iran", 21 April 2016, p.10, CIS38A8012677

¹⁰ Reuters, Bozorgmehr Sharafedin, "Iran executes Kurdish activist, wary of Kurdish gains in Middle East", 27 August 2015, CXBD6A0DE12731

personalities of individual security officials), this harassment could include monitoring, summons for questioning, closure of offices or organisations or arrest.”¹¹

27. The US Department of State reported in 2016 that the Iranian government disproportionately targeted minority groups including Kurds for arbitrary arrest, prolonged detention and physical abuse. *“The estimated eight million ethnic Kurds in the country frequently campaigned for greater regional autonomy. The government continued to use security law, media law, and other legislation to arrest and prosecute Kurds for exercising their rights to freedom of expression and association.”¹²*
28. The applicant has not claimed to have been involved in any political groups including Kurdish separatist groups or political parties or to have been involved in any Kurdish separatist activities in Iran. He has not claimed to have been identified as a political dissident or activist prior to his departure from Iran. However, he claims that he now faces persecution for reasons of his actual or imputed political opinion as a result of joining ‘[Kurdish Association 1]’ and to have been an active participant in its activities in Australia. In his written statement of claims he also stated he was a member of the ‘Faili Kurdish Community’. However, at his protection interview he stated that he no longer belongs to this group as he believes they are not sufficiently proud of their Kurdish identity.
29. At his protection interview, the delegate questioned the applicant about the kinds of activities in which he had been involved in [Kurdish Association 1]. Initially, he described his involvement in social and cultural events. On further questioning the applicant claimed that these would be seen as political events as the flags of the Kurdistan republic and the Kurdish political party were on display at the events. He attended a ceremony after the death of the Kurdish Iraqi President Jalal Talabani at which Kurdish flags were evident. He also attended talks given by various people about events in Kurdistan and an event which expressed support for [deleted]. The applicant’s photograph has appeared on the [Kurdish Association 1 Social media page]. He also believes that there are spies within the group who would have informed Iranian authorities about the identities of members of the group. The applicant did not claim to have any formal role in the group, or to be an organiser of any activities.
30. The applicant provided eight photographs to the Department. Four were of a ceremony at which Kurdish flags are identifiable but the applicant is not readily identifiable. Two photographs are of a small meeting at which the applicant is clearly present and two photographs are of a social activity involving dancing [in] October 2016. All photographs were from the [Kurdish Association 1 Social media page] and were dated between October 2016 and February 2017. Apart from the photographs, the applicant has provided no other supporting evidence of his participation or activities within [Kurdish Association 1].
31. The delegate did not ask the applicant when, how or the reasons why he joined [Kurdish Association 1]. As a result I am unable to make a finding about whether the applicant undertook this activity solely for the purpose of strengthening his application for protection. I have therefore given the applicant the benefit of the doubt and accept he joined [Kurdish Association 1] for reasons related to his pride in his Kurdish ethnicity and his own interest in promoting Kurdish culture and rights in Australia.

¹¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Iran", 21 April 2016, p.10, CIS38A8012677

¹² US Department of State, "Iran 2016 Human Rights Report", 3 March 2017, p.42, OGD95BE926964

32. I accept the applicant attends meetings and social events at [Kurdish Association 1]. I am satisfied that he does not hold any formal positions within [Kurdish Association 1], and is not a leader, organiser or office bearer. There is no information before me to suggest that he has been involved in any political demonstrations or political activities associated with Kurdish separatism other than attending social events, discussions and meetings. On [Social media page Kurdish Association 1] states it “[deleted]”. It appears to be primarily a cultural organisation although it contains some elements that could be perceived as somewhat political in nature such as the use of the Kurdish flag. The group is small with less than [number] members.
33. The applicant stated that he also had a [social media page] of his own. He provided the Department with a screenshot of his [personal social media page] on which he uses his own family name but a different given name. He did not provide any evidence of postings or any other material on his [social media page]. Consequently there is no information before me that indicates his [social media page] identifies that he has any particular political opinions, or even that he is of Kurdish ethnicity.
34. Given I am satisfied the applicant had no profile at all as a Kurdish separatist, political activist or dissident in Iran prior to his departure, and the nature of his low-level participation in the [Kurdish Association 1] which is predominantly a social and cultural organisation, I consider there is only an extremely remote possibility that the Iranian authorities would have any awareness of his membership or participation in [Kurdish Association 1]. Even if there were informers in the group, given the level of his involvement and the nature of the activities in which he has been involved, I consider there is no real chance he would be imputed with having a political profile such that would attract the Iranian authorities’ adverse attention.
35. Based on relevant country information above and the applicant’s own evidence, I am satisfied there is no real chance the applicant will suffer serious harm for reasons of his Kurdish ethnicity and/or actual or imputed political opinion if he is returned to Iran now or in the reasonably foreseeable future.

Cumulative consideration of the applicant’s claims

36. I am satisfied the applicant is of Kurdish ethnicity and is a non-practicing Shia Muslim. As discussed above I accept that he may suffer some discrimination and harassment for reasons of his Kurdish ethnicity, however, I find the level of discrimination and harassment described (if it were to occur to the applicant) would not amount to serious harm having regard to the instances of serious harm provided in s.5J(5).
37. I am satisfied the applicant did not engage in any Kurdish separatist or political activities in Iran. I accept the applicant has been a participant in social activities and political discussions in [Kurdish Association 1] and that his photograph but not any details of his identity including his name were published on [Kurdish Association 1 Social media page] site in 2016 and February 2017. I am satisfied he is not a leader or organiser within [Kurdish Association 1] and that overall he is a low-level participant at social and cultural occasions and at discussions about Kurdish culture and rights. I am not satisfied that there is a real chance that the applicant has attracted the adverse attention of Iranian authorities as a result of his participation in [Kurdish Association 1] in Australia. Consequently I am not satisfied that there is a real chance that the applicant will suffer serious harm for reasons of his imputed or actual political opinion and/or identity as a Faili Kurd.

38. Having regard to all the applicant's specific circumstances in the context of the country information about the current situation in Iran, I am not satisfied that there is a real chance of the applicant being seriously harmed by the Iranian authorities or by any other group or person for any reason. I am not satisfied that any of the treatment I accept he may experience will amount to serious harm when considered cumulatively.

Refugee: conclusion

39. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

40. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

41. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
42. Real chance and real risk involve the same standard.¹³
43. As discussed above I accept the applicant was a non-practicing Muslim in Iran and that he did not suffer any significant harm as a consequence. I am satisfied that since coming to Australia he identifies as having no religion. There is no information before me to suggest he intends to promote agnosticism or atheism in Iran. Based on relevant country information as discussed above, I am satisfied that if he continues not to practice Islam in Iran on his return there is no real risk he will suffer significant harm having regard to the definition of significant harm in s.36(2A).
44. I am satisfied the applicant is an Iranian citizen who is identified as a Faili Kurd. I accept that he has suffered some discrimination particularly in the area of employment, and that he has suffered some verbal harassment and reprimands as a consequence of wearing identifiably Kurdish clothing. However, I do not consider the discrimination and verbal harassment he has experienced and may continue to experience meet the definition of degrading treatment as defined in s.5(1) of the Act. I am therefore satisfied that there is no real risk the applicant will suffer significant harm as defined in s.36(2A) for reasons related to his Kurdish ethnicity.

¹³ *MIAC v SZQRB* (2013) 210 FCR 505

45. I am satisfied the applicant was not involved in any Kurdish separatist or political activities in Iran prior to his departure, and that he was not identified by Iranian authorities as a political dissident or activist prior to his departure from Iran. I accept the applicant has been involved in social events and meetings of [Kurdish Association 1] in Australia. I am satisfied is not a leader, organiser or office bearer within [Kurdish Association 1]. I accept that his photograph has appeared on [Kurdish Association 1 Social media page] in late 2016 and early 2017, however, I am not satisfied that as a consequence of his participation in [Kurdish Association 1] activities, he has attracted or will attract the adverse attention of Iranian authorities for reasons of his imputed or actual political opinions or for any other reason. I am therefore satisfied that there is no real risk the applicant will suffer significant harm for reasons related to his involvement in [Kurdish Association 1] in Australia, or for reasons related to his actual or imputed political opinion, or for any other reason.

Complementary protection: conclusion

46. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.