



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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IRAN

IAA reference: IAA18/04134

Date and time of decision: 26 September 2018 12:04:00

R Mikhail, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a citizen of Iran of Faili Kurdish ethnicity. On 22 November 2016 he lodged an application for a Safe Haven Enterprise Visa (application for protection). On 10 January 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the grant of the visa.

### 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) (the review material).
3. I have also considered a new report by the Australian Department of Foreign Affairs and Trade (DFAT) on Iran published on 7 June 2018. This report contains updated information on the situation for returnees, Muslims who leave their faith, minority ethnic groups and Faili Kurds. These are classes of persons of which the applicant is a member. It updates and replaces the DFAT report on Iran published on 21 April 2016 which was before the delegate. I am satisfied there are exceptional circumstances to justify considering this information.

### Applicant's claims for protection

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4. The applicant's claims can be summarised as follows:
  - He is a citizen of Iran of Faili Kurdish ethnicity and lived in Ilam Province.
  - He was born into a Shia Muslim family but no longer follows Islam. He has attended church in Australia out of interest but does not follow Christianity.
  - He worked [in various occupations while] in Ilam.
  - He claims Faili Kurds suffer from many forms of discrimination and he never had freedom of speech and the right to work in a public organisation. Faili Kurds are often suspected of being members of Kurdish separatist groups. He fears being tortured and imprisoned by the Iranian authorities because of his ethnicity.
  - On one occasion he was asked to work for the Iranian authorities providing them with intelligence.
  - In approximately 2012 he purchased [equipment] to work in Tehran but it was taken by the council and he was insulted and told to go back to the mountains.
  - He also fears he will be detained, interrogated and tortured as a result of seeking asylum in a western country. Being a Faili Kurd and seeking asylum in a western country places him in a very dangerous situation and he could be considered a spy.
  - He departed Iran legally in 2013 on his own genuine passport which was lost on route to Australia.

### Refugee assessment

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5. 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**

6. 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.
7. The applicant has provided a number of identity documents from Iran that establishes his Iranian citizenship and claimed identity. There is no evidence before me that he has the right to enter and reside in any other country. I am satisfied that he is a citizen of Iran and that Iran is the receiving country for the purpose of this assessment.
8. I accept the applicant’s claim that he is of Faili Kurdish ethnicity and that he resided in Ilam Province. In accepting this claim I have given weight to the fact that the applicant speaks Faili Kurdish and comes from a Shi’a family. Country information indicates that Faili Kurds typically live in Ilam are distinguishable from other Iranian Kurds by their Shi’a religion, location, and distinctive dialect.<sup>1</sup>
9. The applicant claims that, as a result of being close to shell explosions during the war between Iran and Iraq, he has ongoing memory and concentration lapses which affect his ability to recall events clearly. He also has mental and emotional problems due to this and due to being separated from his family for so long. He claims to be taking [medication] when needed. Although the applicant has not provided any supporting medical evidence, I am willing to accept these claims and have given weight to the fact that Ilam Province sits on the border with Iraq and, therefore, he would have been in close proximity to the conflict and a young child when the conflict began.<sup>2</sup> I also consider it plausible that he is suffering from other mental health issues as a result of being separated from his family.
10. I accept that the applicant worked [in various occupations] in Ilam.

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<sup>1</sup> Australian Department of Foreign Affairs and Trade (DFAT), “DFAT Thematic Report - Faili Kurds in Iraq and Iran”, 3 December 2014 ,CIS2F827D91722; DFAT, “DFAT Country Information Report – Iran”, 7 June 2018, CIS7B839411226

<sup>2</sup> DFAT, “DFAT Country Information Report – Iran”, 7 June 2018, CIS7B839411226

11. In his statement of claims accompanying his application for protection, the applicant claimed that he has been subject to various forms of sustained and pervasive discrimination on a daily basis as a result of his ethnicity as there is systematic discrimination against Faili Kurds. He never had freedom of speech and the right to work in a public organisation.
12. Country information cited in a post-interview submission to the delegate indicates that Iran's ethnic minorities, including Kurds, are subject discrimination and the Iranian government restricts their cultural and political activities and the promotion of their culture and language. Individuals face severe penalties if they are found have real or imputed association with Kurdish parties. More recent sources of country information also claim that the Iranian government disproportionately targets minority groups for arbitrary arrest, prolonged detention physical abuse and that these groups reported political and socio-economic discrimination particularly in their access to economic aid, business licenses, university admissions, job opportunities, permission to publish books, and housing and land rights. 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.<sup>3</sup>
13. In its recent 2018 report, DFAT assesses that, although the experience of different groups is not uniform, both official and societal discrimination against ethnic minorities does occur. DFAT assessed that members of ethnic minority groups face a moderate risk of official and societal discrimination, particularly where they are in the minority in the geographic area in which they reside. According to DFAT "moderate risk" indicates awareness of sufficient incidents to suggest a pattern of behaviour. This may take the form of denial of access to employment and housing, but is unlikely in most cases to include violence on the grounds of ethnicity alone. The risk to members of ethnic minority groups who are involved (or are perceived to be involved) in activism is higher. However it also notes that it was not aware of specific instances whereby authorities have singled out Faili Kurds for mistreatment.<sup>4</sup>
14. The applicant claims that he cannot read or write Kurdish as he was not permitted to study it in school which I accept as country information confirms that the Iranian authorities prohibit most schools from teaching the Kurdish language.<sup>5</sup>
15. During the protection visa interview the applicant claimed that, a year prior to leaving Iran, he went to Tehran to work and purchased [equipment] to [undertake work]. During his Irregular Maritime Arrival and Induction Interview held in August 2013, he explained that he went to Tehran to work on this occasion as there was [drought]. During the protection visa interview he noted that this was the first time he had done such work. After a few days the council took his [equipment] and told him he was not permitted to work there and told him that he was Kurdish and should go back to the mountains and look after sheep. They told him he could go back to his home or go to jail. He returned to his village. This experience made him very angry and upset. I accept as plausible that this incident occurred but I am not satisfied on the evidence that he was not permitted to work and his [equipment] confiscated because of his ethnicity as there could have been other plausible reasons for such action, such as him not having the required permits to undertake such work, particularly given that his [equipment] was confiscated by the council and he was threatened with imprisonment strongly suggesting the council believed he had committed an offence as a result of his work. I do, however, accept that, during this incident, he was verbally insulted on the basis of his ethnicity.

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<sup>3</sup> US Department of State, "Iran 2016 Human Rights Report", 3 March 2017, OGD95BE926964; Amnesty International, "Amnesty International Report 2016-2017", NG2A465F54

<sup>4</sup> DFAT, "DFAT Country Information Report – Iran", 7 June 2018, CIS7B839411226

<sup>5</sup> US Department of State, "Iran - Country Reports on Human Rights Practices 2015 ", 13 April 2016, OGD95BE926169

16. In his statement the applicant claims that he never had the right to work in a public organisation but I note he has not claimed that he sought to do so and was denied such an opportunity on the basis of his ethnicity nor has he claimed he will seek to work in the public sector if he returns to Iran. But, rather, he has claimed that he has spent the majority of life working and supporting himself [in other various occupations] in Ilam. I also note that he claimed he did not experience any discrimination or bad treatment on the basis of his ethnicity during his military service when asked about this by the delegate. He claimed he attended school until grade [number] but has not given reasons for not pursuing his education further and I am not satisfied, on the evidence, he was denied the opportunity to continue his education on the basis of his ethnicity and I note his claim that that he has a brother who works as a [specified profession] which indicates his brother was able to continue with his education. During the protection visa interview he also indicated that he was able to see a doctor in Iran in respect of his physical and mental problems associated with the effects of the war and he was permitted a reduced term of military service for this reason.
17. In his statement, the applicant claimed that freedom of expression, association and assembly remain severely restricted for Faili Kurds and detention torture and other ill-treatment continue and Faili Kurds are often suspected of being members of Kurdish separatist groups. The continued arrest, interrogation, detention and execution of minority groups like Faili Kurds on suspicion of opposition to the government is one of the reasons he fears returning to Iran.
18. During the protection visa interview the applicant claimed that a distant relative was executed a number of months ago after being accused of killing somebody though he believes it was for political reason as his relative was clever and educated and the government was scared of him and wanted to destroy him. The applicant has not provided any supporting evidence in regards to this claim. Although it is plausible his relative may have been executed on suspicion of committing a crime, as there is no supporting evidence before me in relation to this incident or his relative's profile, I am not satisfied that he was executed for political reasons.
19. I also note that during the protection visa interview the applicant claimed that he had never been summoned for questioning or imprisoned or arrested and he does not like politics and does not have links to Kurdish political groups and was not politically active in Iran or in Australia. I am not satisfied the applicant will engage in any type of political activity in opposition to the Iranian regime if he were to return to Iran due to a lack of interest rather than a fear of persecution. Although the Iranian Government has been engaged in a low-level insurgency with Kurdish militias in border areas between Iran and Iraq, as the Kurds in Ilam are Shi'a, country information indicates they would normally face less challenges in interacting with the Government than other (Sunni) Kurds.<sup>6</sup>
20. During the protection visa interview the applicant claimed that in one instance the Army came to his village and offered him a good life and good income in order to work for them providing them with intelligence which made him fearful. I accept that this may have occurred but the applicant has not claimed that he suffered any repercussions as result of refusing to do this work or that he was imputed with a political opinion against the Iranian regime for his refusal.
21. I accept that the applicant was not permitted to learn the Kurdish language during school and has been verbally insulted on the basis of his ethnicity when he was advised that he could not work in Tehran with his [equipment] but I do not consider these experiences to, individually or cumulatively, amount to serious harm. The applicant has not articulated any other examples of other credible incidents where he has been discriminated against or otherwise seriously

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<sup>6</sup> DFAT, "DFAT Thematic Report - Faili Kurds in Iraq and Iran", 3 December 2014 ,CIS2F827D91722

harmful by the Iranian authorities or community as a result of his ethnicity and I am not satisfied this is attributable to his mental health condition. I have also taken into account country information which indicates that Faili Kurds predominate in Ilam where Kurdish dialects are widely spoken and Farsi is used less.

22. During the applicant's arrival interview he claimed that Kurds in Ilam are not allowed to leave now because "they" know that they are escaping and going to different countries but there is no country information before me to support this claim and is in contradiction to the fact that the applicant was able to depart Ilam and Iran legally. I do not accept this claim.
23. On the basis of the applicant's circumstances, I am not satisfied that there is a real chance he will be imputed with a political opinion against the Iranian regime, or a "pro-Kurdish" opinion, on the basis of his ethnicity. I am also not satisfied there is a real chance the applicant will be subject to a level of discrimination, from the community or the Iranian authorities, as a Faili Kurd, so serious as to amount to serious harm.
24. I am also not satisfied the applicant will face a real chance of harm from the Iranian authorities or any other group or person as a result of refusing the offer to work with them and provide them with intelligence or in combination with his ethnicity.
25. I accept that the applicant comes from a Shi'a Muslim family. During the protection visa interview he claimed that his family did not attend mosque and he also did not attend mosque in Australia. He claimed that Christianity is better than Islam but he does not belong to either religion. He also claimed to have attended church in Australia which he appears to have done out of interest as he considered this "normal" and claimed it did not mean anything as he explained "Mohammed said Jesus was good". I accept the applicant has attended church in Australia out of interest and I am satisfied he has done so otherwise than for the purpose of strengthening his claims to be a refugee. I accept that the applicant does not follow any religion. I note that the applicant has not raised any claims of fear of harm in respect of his religious views. There is no evidence before me that he has suffered any harm in Iran as a result of his religious views or that he has a genuine interest in promoting his religious views in Iran. I am not satisfied there is a real chance he will do so in Iran and I am not satisfied this is due to a fear of persecution. In its 2018 report, DFAT notes that in practice, government policy and legislation heavily favours the majority Shi'a population, leading to pervasive structural discrimination against non-Shi'a Muslims and religious minorities and under Iranian law, a Muslim who leaves his or her faith or converts to another religion can be charged with apostasy but this is not an everyday occurrence in Iran and death sentences for apostasy and blasphemy are rare.<sup>7</sup> Country information sources before me also indicate that many Iranians do not attend mosque regularly and do not perform their daily prayers and, for this reason, not attending mosque would not necessarily arouse any suspicion.<sup>8</sup> I am not satisfied the applicant's religious opinion will come to the adverse attention of the community or Iranian authorities in Iran because he will not engage in public manifestations of the Shi'a faith. I am not satisfied the applicant faces a real chance of harm in Iran from the Iranian authorities or any other group or person because of his religious opinion.

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<sup>7</sup> Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), "Iran: Freedom of Religion; Treatment of Religious and Ethnic Minorities COI Compilation September 2015", 1 September 2015, CISEC96CF13622; DFAT, "DFAT Country Information Report – Iran", 7 June 2018, CIS7B839411226

<sup>8</sup> Danish Immigration Service, "Update on the Situation for Christian Converts in Iran", June 2014, CIS28931; Gunes Murat Tezcur; Taghi Azadarmaki; Mehri Bahar, "Religious Participation among Muslims: Iranian Exceptionalism", Critique: Critical Middle Eastern Studies, 1 January 2006, CIS21784; "The Iranian Revolution at 30", The Middle East Institute, 1 January 2009, CIS17095; ACCORD, "Iran: Freedom of Religion; Treatment of Religious and Ethnic Minorities COI Compilation September 2015", 1 September 2015, CISEC96CF13622; ""A Tsunami of Atheism"", Qantara, 7 February 2013, CX304005

26. There is no credible evidence before me that the Iranian authorities are aware of the applicant's church attendance in Australia or that there is a real chance they will become aware in the reasonable foreseeable future. The applicant has claimed that he has not been baptised and does not belong to the Christian religion and for this reason I am not satisfied there is a real chance he will convert to Christianity or identify as a Christian or engage in Christian activities if he were to return to Iran. I am not satisfied the applicant will face a real chance of harm from the Iranian authorities or any other group or person as a result of his church attendance in Australia.
27. Although not raised by the applicant, the delegate also considered whether the applicant would be able to access mental health services in Iran. Country information before me indicates that, although there are some criticisms and areas that need improving, there are a range of adequate mental health services and relevant medication in Iran which the applicant could access and I note he has previously indicated that he saw a doctor in Iran for his mental health condition. On the evidence before me I not satisfied he would be denied such access or services for any reason, including his ethnicity, or that there is a real chance he will be harmed from the Iranian authorities or any other group or person in Iran as a result of his mental health condition.
28. In his statement, the applicant also claimed he fears he will be detained, interrogated and tortured as he sought asylum in a western country. In combination with ethnicity this could place him in a very dangerous situation and he could be considered a spy.
29. During the protection visa interview the applicant claimed that, since being in Australia, people approached his family in Iran and told them to advise him not to talk about anything in opposition to the Iranian regime as they hear everything and can access information from the internet about him in Australia. I do not accept this occurred. I am not satisfied the applicant had a profile of adverse interest to the Iranian authorities prior to his departure such that they would be concerned about his activities Australia given he claims he has not undertaken any activities on the internet nor engaged in any political activities in Australia.
30. The post-interview submission to the delegate appears to suggest that the applicant will face punishment as a result of departing Iran illegally but this is in contradiction to the applicant's claim he departed Iran legally on his own genuine passport which I accept occurred. I also accept his claim that he lost his passport on route to Australia.
31. Country information before me indicates that Iranian overseas missions will not issue travel documents to an Iranian whom a foreign government wishes to return involuntarily to Iran.<sup>9</sup> In its 2018 report, DFAT indicated that it reached an agreement with the Iranian government to facilitate the return of Iranians who arrived after 19 March 2018,<sup>10</sup> however the applicant does not fall within this category. Given this, I am not satisfied there is a real chance the applicant will be involuntarily returned to Iran from Australia. I have considered the risk to the applicant if he were to return to Iran voluntarily.
32. In a post interview written submission to the delegate it claims that there is a reasonable possibility that the authorities would know the applicant has sought asylum in Australia making him a target by the authorities and he will be perceived to be anti-government for this reason. I am not satisfied the country information before me supports this assertion. Country

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<sup>9</sup> Danish Immigration Service, "Human Rights Situation for Minorities, Women and Converts, and Entry and Exit Procedures, ID Cards, Summons and Reporting, etc.", 1 April 2009, CIS17329; DFAT, "DFAT Country Information Report – Iran", 7 June 2018, CIS7B839411226

<sup>10</sup> DFAT, "DFAT Country Information Report – Iran", 7 June 2018, CIS7B839411226

information before me indicates that it is not a criminal offence in Iran for any Iranian to ask for asylum in another country and Iranian authorities have little interest in prosecuting failed asylum seekers for activities conducted outside Iran, including in relation to protection claims.<sup>11</sup> I am also not satisfied that the Iranian authorities impute failed asylum seekers from western countries, including those of Faili Kurdish ethnicity, with a political opinion against the Iranian government or consider them to be spies.

33. The post-interview submission to the delegate also states that the combined length of time that the applicant has been outside Iran will mean he is likely to come under the scrutiny of the Iranian officials and questioned on return. It refers to various sources about the alleged mistreatment of failed asylum seekers on return to Iran published between 2010 and 2014. In its more recent 2018 report, DFAT stated that, according to international observers, Iranian authorities pay little attention to failed asylum seekers on their return to Iran. In cases where an Iranian diplomatic mission has issued temporary travel documents, authorities will be forewarned of the person's imminent return. Authorities will usually question a voluntary returnee on return only if they have already come to official attention, such as by committing a crime in Iran before departing.<sup>12</sup> There are also a relatively small number of more recent reports before me, than those cited above in the post-interview submission, about the detention of returnees. These have involved political activists, prominent artists and journalists. I am not satisfied the applicant has such a profile, or that he has committed any offence in Iran or Australia, such that there is a real chance he will attract the adverse attention of the Iranian authorities on his return. I am not satisfied there is a real chance he will be subject to questioning by the Iranian authorities on return to Iran for any reason. I am not satisfied the applicant will face a real chance of harm from the Iranian authorities or any other group or person due to being a Faili Kurd/failed asylum seeker who resided in Australia for a number of years.

#### **Refugee: conclusion**

34. 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**

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35. 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**

36. 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

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<sup>11</sup> Danish Refugee Council, Landinfo and Danish Immigration Service, "Iran: On Conversion to Christianity, Issues concerning Kurds and Post-2009 Election Protestors as well as Legal Issues and Exit Procedures", 1 February 2013, CIS25114; DFAT, "DFAT Country Information Report – Iran", 7 June 2018, CIS7B839411226

<sup>12</sup> DFAT, "DFAT Country Information Report – Iran", 7 June 2018, CIS7B839411226

- 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.

37. For reasons already stated I have not found the applicant will face a real chance of harm in Iran because of his religious opinion, as a failed asylum seeker who resided in Australia for a number of years, due to his mental health condition, because he refused to work for the government providing them intelligence, or due to his church attendance in Australia. As real chance equals real risk<sup>13</sup> I am also not satisfied the applicant will face a real risk of significant harm in Iran for these reasons or in combination with his Faili Kurd ethnicity.

38. I have accepted that the applicant was not permitted to study Kurdish in school and has been verbally insulted on one occasion on the basis of his ethnicity, but I am not satisfied these experiences, individually or cumulatively, amount to significant harm as they do not amount to an arbitrary deprivation of his life, the death penalty, torture, or the intentional infliction of cruel, inhuman or degrading treatment or punishment as defined in s.5(1) of the Act. The applicant has not articulated other credible instances of harm he experienced in Iran on the basis of his ethnicity. Having considered the applicant's circumstances, including that he lives in an area where Faili Kurds predominate, I am not satisfied there is a real risk that he would be subject to discrimination, as a Faili Kurd, that amounts to an arbitrary deprivation of his life, the death penalty, torture, or the intentional infliction of cruel, inhuman or degrading treatment or punishment as defined in s.5(1) of the Act.

#### **Complementary protection: conclusion**

39. 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**

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

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<sup>13</sup> *MIAC v SZQRB* (2013) 210 FCR 505.

## Applicable law

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### ***Migration Act 1958***

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

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

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

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

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

...

### 5J Meaning of well-founded fear of persecution

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

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

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

### 5K Membership of a particular social group consisting of family

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

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

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

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

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

#### **5L Membership of a particular social group other than family**

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

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

#### **5LA Effective protection measures**

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

...

#### **36 Protection visas – criteria provided for by this Act**

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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