



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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IRAN

IAA reference: IAA18/04986

Date and time of decision: 2 October 2018 16:25:00

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 an 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 stateless Faili Kurd from Iran. On 21 February 2017 he lodged an application for a Temporary Protection Visa (application for protection). On 15 May 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).
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, 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, and relied upon, by 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 stateless Shi'a Faili Kurd from Iran and lived in Ahwaz, Khuzestan Province with his parents and siblings.
  - Neither he nor his family were ever issued any identity documents in Iran.
  - He left Iran because he was stateless and was given no rights as a citizen and was severely discriminated against and harassed for this reason. He could not attend a formal school, could not get a driver's licence and worked on the street selling goods during which he would be harassed by the council authorities for working without a permit.
  - He departed Iran in February 2013 on a fake passport. He fears he will be arrested on return for departing unlawfully.

### Factual findings

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5. During the protection visa interview the applicant demonstrated some awareness of the history of Faili Kurds in Iran and claimed to speak Farsi, Arabic and Kurdish, although he only demonstrated his knowledge of Farsi in his interviews with the Department. He also demonstrated a familiarity with Iran consistent with someone who had been living there for a significant period of time. Given this I am willing to accept that he is of Faili Kurd ethnicity and was born and raised in Iran.
6. In relation to the remainder of his claims in respect of his alleged statelessness, I am not satisfied the applicant is a credible witness as I have found his evidence in this regard to be implausible and contradictory.

7. The applicant claims that his paternal grandfather and grandmother were Faili Kurds. At some point, his paternal grandfather moved from Ilam Province in Iran to Kurdistan in Iraq to live and work there where he married. He claims his parents were both born in Kurdistan and were eventually expelled back to Iran when his father was a young child as they were considered Iranian. In his statement he claims that he cannot say whether his paternal grandparents were Iranian citizens or not. I find this statement odd given he claims that his family are stateless and he would be well aware if his paternal grandfather was an Iranian citizen as, had he been one, his father and the applicant himself would have obtained Iranian citizenship as citizenship derives from the father.<sup>1</sup>
8. The applicant has not provided any documentary evidence from Iran to support his identity or claimed statelessness. He claims he does not have a birth certificate as he was born at home and did not attend a formal school and could not obtain a driver's licence as he did not have any identity documents. The applicant further claims that his parents and relatives were never issued with any "Green Card" or "White Card" or any Iranian identity documentation. He claimed that his grandfather made two attempts to obtain identity documentation from Iran but got frightened after that. His father made one attempt which was not successful and he did not bother trying as he knew they would not issue him with any documents. When the delegate asked the applicant why his parents did not try to get a Green card he said they were advised that, because they were Iraqi, no documents were issued to them. I find this claim to be in contradiction to country information before me which indicates refugees of Iraqi origin were issued identity cards (Green cards then subsequently white cards from 2001/2002) from the Iranian authorities, even prior to 1979, which allowed them permission to reside in Iran and that the vast majority of Faili Kurd refugees from Iraq hold valid identity cards. Country information does suggest that some Faili Kurds never obtained official refugee documentation because they failed to register with the Iranian authorities or 'slipped through the cracks' in registration exercises, or they failed to renew their Amayesh cards in time or comply with the terms of their prior registration, or exited and then returned to Iran. However, the applicant has claimed that his father attempted to obtain such documentation but was refused as they were "Iraqi" and did not claim the other circumstances applied.<sup>2</sup>
9. During the protection visa interview the applicant claimed that, after arriving from Iraq, his paternal grandfather purchased land in Ahwaz and build three houses on that land for his family which is where the applicant grew up. However, country information before me indicates that refugees (either registered or undocumented) in Iran are not legally permitted to own property in Iran and only an Iranian national can purchase property.<sup>3</sup> When asked by the delegate how his grandfather was able to purchase property without documentation, the applicant said that his grandfather could claim land as there was no legal owner in that area. He further claimed, when they started selling land in that area later, nobody said anything to his father and noted the area is not very crowded. As it is a low socio-economic area no one bothered to inquire about the ownership of the land. However the applicant has claimed that he resided in "Ahwaz City" and he has not provided any other evidence in support of his claim that the area was "not crowded" or that it was a low socio-economic area. I find his claim that his grandfather was able to claim land and build on it years ago without documentation and has been able to reside in Ahwaz City without question for decades difficult to believe.

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<sup>1</sup> DIBP Tehran, "Feyli Kurds - obtaining identity travel documents", 17 September 2015, CISEC96CF13392

<sup>2</sup> Independent Protection Assessment Office Country Advice Support and Liaison Section (IPAO), "IPAO Faili Kurds - Briefing Paper", May 2012, CR670483630; DIBP Tehran, "Feyli Kurds - obtaining identity travel documents", 17 September 2015, CISEC96CF13392

<sup>3</sup> IPAO, "IPAO Faili Kurds - Briefing Paper", May 2012, CR670483630

10. The Department also had information before it that indicated the applicant had sent money to immediate family members in Iran. During the protection visa interview he denied this and said they did not have bank accounts but that he sent money to his neighbour, “[name]”, who gave the money to his family. The information before the delegate does indicate that the applicant had sent money to someone by the name of “[name]” residing in Ahwaz on a number of occasions but it also indicates that he had sent money to people who had very similar names to that of his mother and brother. The delegate indicated to him that for his family to be able to collect such money they would need identification documents to which the applicant confirmed. The information before the Department confirms he has sent money to his immediate relatives in Iran which is strongly indicative of the fact that they do hold Iranian documentation.
11. In his statement, the applicant claims that he left Iran on a false passport which he paid approximately US\$[amount] for and the people smuggler had contacts at the airport who assisted him in getting through customs. However, the weight of country information before me indicates that it is unlikely that a person could convince an Iranian airport official to allow someone without a valid passport to board an international flight and local authorities are generally adept at identifying false passports. Other sources suggest it may be possible to bribe an airport personal but that would involve bribing many staff members at several checkpoints and the price would be as high as 8-10,000 Euros and there are easier ways to leave Iran legally such as over the land border with Turkey.<sup>4</sup> The applicant’s vague description of the security checks that he went through on his departure during the protection visa interview and the fact he only paid US\$[amount] for his fraudulent passport and did not suggest that he paid additional bribes at the airport, also raises further doubt about his claim to have departed on a false passport due to his alleged statelessness.
12. In DFAT’s latest report, it refers to reports which suggest that many Faili Kurds of Iraqi origin have applied for Iranian citizenship but the actual number of those who have succeeded in obtaining Iranian nationality is believed to be low due to the lengthy and complicated process and the high costs involved. Others have not applied for naturalisation because they do not have the required family members in Iran to prove their Iranian nationality.<sup>5</sup> Nonetheless, I have given weight to the applicant’s claim that his paternal grandfather was living in Iran prior to his move to Iraq. He also claimed that his paternal grandfather had been living a nomadic life and country information before me indicates that, when Iraq was established in 1921, most Failis had been living a semi-nomadic life along the border with Iran and preferred to demand the citizenship of Iran. Many Failis have lived in Iran for generations and may have little to no connections to Iraq.<sup>6</sup> As already noted, I have serious concerns about the applicant’s claim to be uncertain about his paternal grandfather’s citizenship in Iran. Given my other concerns in relation to his credibility, I consider it more likely that the applicant’s paternal grandfather was born in Iran and had Iranian citizenship at birth. This leads me to further doubt the applicant’s claim that his grandfather moved to Iraq and was subsequently deported back to Iran. In making this assessment, I have also given weight to the applicant’s inconsistent evidence about where his parents met where, in his statement, he claimed that his parents met in Ahwaz but during the protection visa interview he claimed that they had been cousins and had been deported together from Iraq.
13. Having considered the evidence before me, I do not accept that the applicant is stateless and I am satisfied the applicant is an Iranian citizen. I am satisfied the applicant has failed to provide

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<sup>4</sup> IPAO, “IPAO Faili Kurds - Briefing Paper”, May 2012, CR670483630

<sup>5</sup> DFAT, “DFAT Country Information Report – Iran”, 7 June 2018, CIS7B839411226

<sup>6</sup> “Fayli Kurds' Election Leader Talks To RFI About Participation In Elections”, Undefined, 24 January 2005, CX112558; IPAO< “IPAO Faili Kurds - Briefing Paper”, May 2012, CR670483630

any documentary evidence of his identity from Iran to deliberately conceal his Iranian citizenship. Given my findings, I also reject the remainder of his claims in their entirety in relation to his experiences of discrimination, lack of education, selling goods on the street and harassment from the authorities.

14. As a result of my findings above I also do not accept that the applicant departed Iran on a fraudulent passport and I am satisfied he departed Iran on his genuine Iranian passport. The applicant claims that his passport was confiscated by the people smuggler on route to Australia which I accept as plausible.

## **Refugee assessment**

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15. 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**

16. 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.
17. As I have rejected the applicant’s claim to be stateless and have found him to be a citizen of Iran and I have rejected his claim to have departed on a fake passport, I am not satisfied he has a well-founded fear of persecution in Iran from the Iranian authorities or any other group or person in relation to those claims.
18. As I am satisfied that the applicant is a citizen of Iran, I am satisfied that Iran is the receiving country for the purpose of this assessment.
19. I have accepted the applicant is of Faili Kurdish ethnicity. A number of country information sources before me allege that Kurds in Iran have long suffered deep-rooted discrimination. Their social, political and cultural rights have been repressed, as have their economic aspirations. Kurdish human rights defenders, community activists and journalists face arbitrary

arrest and prosecution.<sup>7</sup> While sources suggest that the Kurdish (Sunni) population in Iran is at risk of discrimination and arbitrary arrest due to allegations of separatist activities, Kurdish activism in Iran appears to occur largely separately from the Faili Kurd community.<sup>8</sup>

20. 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. Ethnic minorities report political and socioeconomic discrimination, particularly in relation to economic aid, business licences, university admissions, job opportunities, permission to publish books, and housing and land rights and the application of the death penalty (see Death Penalty) disproportionately affects ethnic minorities. 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>9</sup>
21. The applicant denied being involved in political activities and I am not satisfied on the evidence that he has been denied access to employment or housing and other services, or otherwise seriously harmed, on the basis of his ethnicity. I am not satisfied that he has been, or 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.
22. 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>10</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>11</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.
23. Country 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>12</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.

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<sup>7</sup> Amnesty International, “Human Rights Abuses Against the Kurdish Minority”, 1 January 2008, CIS16293,

<sup>8</sup> IPAO, “IPAO Faili Kurds - Briefing Paper”, May 2012, CR670483630

<sup>9</sup> DFAT, “DFAT Country Information Report – Iran”, 7 June 2018, CIS7B839411226

<sup>10</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>11</sup> DFAT, “DFAT Country Information Report – Iran”, 7 June 2018, CIS7B839411226

<sup>12</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

24. In its 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>13</sup> There are few recent reports before me that allege mistreatment of failed asylum seekers on return to Iran. I am not satisfied the applicant has a profile such that there is a real chance he will attract the adverse attention of the Iranian authorities on his return for any reason. I am not satisfied there is a real chance he will be subject to questioning by the Iranian authorities. 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 from Australia.

### **Refugee: conclusion**

25. 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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26. 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**

27. 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.

28. As I have rejected the applicant's claim to be stateless and have found him to be a citizen of Iran and I have rejected his claim to have departed on a fake passport, I am not satisfied he faces a real risk of significant harm in Iran from the Iranian authorities or any other group or person in relation to those claims.

29. Having considered the applicant's circumstances and the country information before me, I am not satisfied there is a real risk that he would be subject to discrimination or any other harm, 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.

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<sup>13</sup> DFAT, "DFAT Country Information Report – Iran", 7 June 2018, CIS7B839411226

30. For reasons already stated I have not found the applicant will face a real chance of harm in Iran as a Faili Kurd/failed asylum seeker from Australia from the Iranian authorities or any other group or person. As real chance equals real risk<sup>14</sup> I am also not satisfied the applicant will face a real risk of significant harm in Iran for this reason.

**Complementary protection: conclusion**

31. 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>14</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.