



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

IRAQ

IAA reference: IAA18/05782

Date and time of decision: 30 November 2018 09:39:00

I Sheck, 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 a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant claims to be an Iraqi citizen usually resident in Iran. He left Iran in August 2012 and arrived in Australia on [date] October 2012. On 13 April 2017 he lodged an application for a protection visa (PV).
2. On 26 September 2018 a delegate of the Minister for Immigration (the delegate) refused to grant the visa. The delegate accepted that the applicant has now provided proof of his name, date of birth and citizenship. The delegate found that the applicant did not face a real chance of persecution or a real risk of significant harm due to being a failed asylum seeker or for any other reasons in Iraq.

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) (the review material). Section 473DD of the Act provides that the IAA must not consider any new information from an applicant unless satisfied there are exceptional circumstances which justify considering the new information, and the new information was not and could not have been provided to the Minister or is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims. On 26 November 2018 the IAA received comprehensive submissions from the applicant's representative, [Mr A] of [Law Firm 1]. The representative's submission addresses the delegate's decision and findings. To that extent it may be regarded as argument rather than 'information' and I have had regard to it. [Mr A] also references the following, which were not before the delegate and are new information:
 - a) UNHCR Regional Office: Brian Gorlick, "New Issues In Refugee Research: Working Paper 68: 'Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status' 2002;
 - b) Department of Immigration and Border Protection, "Country Guidance Note –Iran", July 2011;
 - c) Austrian Center for Origin and Asylum Research and Documentation (ACCORD), "Query response on Iraq: Situation of the Faili Kurds: Restriction of movement, permanent residence in the Kurdish areas in Northern Iraq", July 2017;
 - d) Department of Foreign Affairs and Trade (DFAT) "DFAT Country Information Report Iraq", 9 October 2018
 - e) RUDAW, "Failis foresee bitter days for supporting Kurdistan Region independence", 4 July 2017
 - f) United States Commission on International Religious Freedom (USCIRF) "Annual Report 2012 - Countries of Particular Concern: Iraq", 20 March 2012
 - g) International Humanist and Ethical Union (IHEU), "The Freedom of Thought Report : Key Countries Edition, 2017
 - h) IHEU, The Freedom of Thought Report : Key Countries Edition, 29 October 2018
 - i) RRT Research Response, "Keywords: Iraq – Baghdad – Faili Kurds – Baath Regime – Iran – Citizenship – State protection, IRQ17315, 26 April 2005
 - j) Washington: GPO for the Library of Congress: Metz,H.C., ed. "Iraq: A Country Study", Chapter "The Iraqi Communists and Baathist Iraq", 1988

- k) The New Arab, "Iraq Communist Party HQ targeted as bombs continue to rock Baghdad", 26 May 2018
- l) Norwegian Refugee Council (NRC): Internal displacement monitoring Centre (IDMC), Sydney, C., "Nowhere to return to. Iraqis' search for durable solutions continues", November 2018.
4. [Mr A] notes that he has referred to several sources in his submissions and contends that "the majority of these post-dated the Department's Decision on 26 September 2018 and so were not able to be presented by the Applicant previously". From the list of documents set out above it is clear that only three of the twelve documents in fact postdate the decision, these being the reports at (d), (h) and (l). I am satisfied that due to their recent publication they could not have been provided to the delegate. The remainder of the reports predate the decision, some by a significant period. Although it appears that [Mr A] has only recently been engaged by the applicant, the applicant was otherwise represented by a migration agent since the time of his PV application. [Mr A] provides no explanation as to why these documents could not have been provided to the delegate by this agent. The applicant has not satisfied me that these reports, nor the media article at (k), could not have been provided to the delegate. As the reports and media article comprise general or country information they are not credible personal information in the relevant sense. Neither limb of s.473DD(b) is met in regard to the documents at (a), (b), (c), (e), (f), (g), (i), (j) or (k).
5. In considering whether exceptional circumstances justify consideration of the new information at (d), (h) and (l), [Mr A] contends that "the Applicant has throughout the SHEV application process been the victim of poor or inadequate advice. This extended to the representation received from the migration agent who assisted with his SHEV application who failed to adequately advise the Applicant of the importance to put forward relevant country information or at least present claims associated to his fear of return to Iraq once this had become the new country of reference. The Department similarly failed to undertake anything but a very superficial assessment of available reports addressing the risks faced by the Applicant on return to Iraq". I find [Mr A]'s arguments persuasive and consider that there are exceptional circumstances which justify considering the new information as set out at (d), (h) and (l) above.

Applicant's claims for protection

6. After his arrival in Australia the applicant was interviewed by an officer of the then Department of Immigration and Border Protection (now the Department of Home Affairs) on 17 October 2012. He was further interviewed by a Departmental officer on 1 November 2012 for the purpose of assessing his age. He provided details of his claims for protection at questions 88 to 96 of his PV application. On 4 July 2018 he attended an interview ("the PV interview") with the delegate at which his then representative was present. Additional submissions were provided to the delegate on 3 August 2018.
7. The applicant claims:
- He will be subject to persecution in Iraq due to being a Faili Kurd;
 - As a Faili Kurd he will be perceived as being a Shia Muslim. This will expose him to targeted harm from Sunni extremist groups;
 - He does not practise or identify as a Shia Muslim, which would further heighten his risk of being a target of both Sunni and Shia extremists;

- His father was a member of the Iraqi Communist Party (ICP). The applicant's perceived ties to this group would only further exacerbate his ostracism from the community while also increasing his vulnerability of becoming a target of Islamist militias and extremists who see the secular and socialist ideologies being propagated by the ICP as a threat;
- His prolonged period of stay in Iran as a refugee has altered his language, manner of dress and behaviour causing him to stand out and be perceived as an Iranian or a foreigner/stranger in Iraq;
- His lack of documentation or family members able to vouch for his identity on return to Iraq would impact his ability to travel freely in Iraq and access basic services;
- His time spent in Australia that would further enhance the view that he holds views that could be viewed as anti-Islamic or "blasphemy" by religious extremists who remain in Iraq.

Factual findings

8. The applicant has provided varying evidence regarding virtually every aspect of his history, which significantly undermines his credibility. The review material contains the "Irregular Maritime Arrival and Induction Interview" (IMA) form completed at his arrival interview on 17 October 2012 as well as the audio record of that interview. It appears from the audio that some details of the relevant form had been previously entered, as the Departmental officer notes early in the interview that "the information I have says you were born in Iraq". I infer from this that the applicant provided some detail of his background earlier than 17 October 2012 but there is no record of this interaction in the review material. I can however see no reason why the details entered onto the IMA form prior to the 17 October interview would not be an accurate reflection of information provided by the applicant.
9. Turning first to the applicant's age, at the arrival interview the applicant was accompanied by a "responsible adult" from [an organisation], as he had claimed to be under 18 years of age. His date of birth was recorded on the IMA form as [Date of birth 1]. On his PV application the applicant lists his date of birth as [Date of birth 2]. Together with his PV application the applicant provided a document purporting to be a record of his vaccinations. His date of birth is recorded as [Date of birth 3]. He also provided a copy of a Special Identity Card for Foreign Nationals or "Amayesh" issued by the Iranian Bureau for Aliens and Foreign Immigrants' Affairs (BAFIA) on [date] May 2011. This records his date of birth as [Date of birth 4]. The applicant provided the latter document again at his PV interview in July 2018 and his date of birth was translated by the Farsi interpreter used at that interview as [Date of birth 5]. This highlights the errors that can occur when translating dates from the Persian to the Western calendars, however I am not of the view that it explains the wide range of dates of birth provided by the applicant. In any event, during the course of the PV interview the applicant admitted that the Amayesh he had provided was fraudulent and that his actual date of birth was [Date of birth 6]. He subsequently provided the delegate with the original Amayesh issued on [date] May 2011. This was identical to the copy previously provided other than containing the new date of birth. I accept that the applicant was born in [year] as now claimed.
10. Turning to his place of birth and upbringing, the applicant apparently informed the Department on entry to Australia that he was born in Iraq. At the arrival interview he informed the officer that this was incorrect, he had been born in Yazd, in Iran. He also advised that he was a citizen of Iraq, however the IMA form has noted this as Iran. Later in the arrival interview, however, he claims to be "a stateless person". He claimed to have lived in [City 1], Khuzestan Province

(Iran), from around [age years old] until his departure for Australia, has never attended school and is entirely illiterate. The family was supported by the proceeds of his father's roadside [stand] and lived in poverty. In contrast with this, at his age assessment interview conducted in November 2012 the officer observed that "He was articulate, appearing sophisticated and intelligent. The client gave the impression that he was mature, has had a voluptuous upbringing and is perhaps an academic".

11. In his PV interview the applicant initially claimed to have been born in [City 1], and to have citizenship of no country. The delegate subsequently put to the applicant that his older brother had claimed protection in Australia in 2000 and had stated that all of his family (which included the applicant) were Iraqi citizens and were born and living in Iraq. The applicant consequently admitted that he was an Iraqi citizen and was not in fact stateless. In relation to where he was born he stated that he did not know whether it was in Iraq or Iran and that there was "not much difference, it's all close to the border". It is now claimed that the applicant's family are from [Town 1], Wassit Province (Iraq) and in the absence of any credible evidence to the contrary I conclude that the applicant was born there and lived there until at least 2000. [Mr A] contends that on return to Iraq the applicant would be perceived as a foreigner or stranger due to the time that he has spent in Iran, however I note that he was resident in Iraq until at least his teens. The review material does not support the contention that people perceived as Iranian are subject to discrimination in Iraq, particularly in areas near the Iranian border.
12. The applicant has also provided widely varying evidence on the number of siblings he has, their ages and locations. At his arrival interview he stated that he had an older brother resident in Australia, as well as an older sister and younger brother who were Iraqi citizens and lived with their parents in Iran. In his PV application he listed four brothers and three sisters. At the PV interview he appeared to state that he had five brothers and three sisters, however in counting siblings I note that applicants frequently include themselves in the count. I am satisfied that the applicant has four brothers and three sisters. As the applicant has confirmed that all of his family were resident in Iraq in 2000 I am satisfied that at least some of his immediate family members remain in [Town 1].
13. [Mr A] has listed the applicant's first claim for protection as being due to his ethnicity: that of a Faili Kurd, and has provided extensive submissions on the harm that is faced by Faili Kurds in Iraq. The delegate has noted in his decision that "the applicant maintained throughout his dealings with the department that he was a stateless Faili Kurd". I completely disagree with this statement. At his arrival interview of 17 October 2012 the Departmental officer does not ask the applicant his ethnicity, however the IMA form lists, at question 19: Ethnic group: "Persian/Farsi" and I am satisfied that this was based on information previously provided by the applicant. In his PV application, question 32: "Ethnic group you belong to" has been left blank. At questions 88 to 96 of the application the applicant sets out his claims for protection. While he makes numerous references to being stateless, there is no mention whatsoever of being a Faili Kurd or indeed any reference to his ethnicity. The first time that this was mentioned in any of the applicant's dealings with the Department was in the PV interview of July 2018 when the delegate directly asked "what's your ethnicity" and the applicant responded "Faili Kurd". The applicant has at no point claimed to speak any Kurdish dialects and has stated that his parents spoke Arabic and Farsi. In view of the applicant's lack of credibility I conclude that this is another fabrication. I am not satisfied that the applicant is a Faili Kurd.
14. The applicant has consistently stated that he is a Shia Muslim and I accept that this is the case. [Mr A] contends that the applicant does not identify as Shia or practise his faith. I do not accept the former claim as he has clearly identified as Shia in all of his dealings with the

Department. I am prepared to accept that he does not practise his faith in Australia and would not do so on return to Iraq.

15. At the end of the PV interview the applicant told the delegate that the main reason his father moved to Iran in 1980 was because he was a communist. Because this is a crime in Iran they did not tell anyone and pretended to be Muslim instead. This issue had not previously been mentioned. Given that being a member of the Communist Party is not a crime in Iraq, it makes no sense at all that the applicant's father would move from Iraq to Iran due to his party membership. Further to this, the claim is directly contradicted in the additional submissions provided to the delegate on 3 August 2018, which state in part: "In 1970 [the applicant's] family have been exiled to Iran by the order of Saddam Hussein. They lived in a camp for 5 years. In 1975, Saddam Hussein grants them an absolution to return. [The] family came back to Iraq In 1980, Saddam Hussein exiled [the applicant's] family again because he believed they are Iranian!" I do not accept that the applicant's father was a member of the Iraqi Communist Party (ICP). It is further claimed in the August 2018 submissions that the applicant "strongly believed this party appreciated and followed their beliefs and principles". The applicant has not claimed that he joined the ICP at any point or that he has been involved with any equivalent political parties in Australia. [Mr A] notes in his submissions that there has more recently been a resurgence of the ICP in Iraq. There is nothing in the review material to indicate that members of the ICP are subject to societal or official discrimination in Iraq. In view of his lack of political activity to date (at [age years old]), I am not satisfied that the applicant holds any interest in politics, in political activism or that he would be imputed with any political opinions adverse to the Iraqi government.
16. Considering then the applicant's travel to Australia, he claimed in his arrival interview and PV application that he obtained a false Iranian passport and departed Iran on this passport from Imam Khomeini International Airport in Tehran. In his PV interview the applicant varied this and stated that it was an Iraqi passport. The applicant's evidence regarding the issue of his passport and his departure was particularly unimpressive. He claims that his travel was organised by his father. The total cost of travel was \$US [amount]. His father had borrowed this money from his brother (the applicant's uncle) who ran a business in Iraq. The applicant provided his name and the smuggler produced the passport. When prompted, the applicant added that he had provided a photograph as well. He and his father went to Qom (Iran) to obtain the passport. He could not recall how many checkpoints he passed through when departing the airport. There were no visas or stamps in the passport. When asked why no-one queried his departure from Iran on an Iraqi passport with no visa for entry to Iran, the applicant said that there may have been a visa or some stamps in the passport. Due to these inconsistencies and the applicant's poor credibility, I conclude that all of this is a fabrication. I find that the applicant commenced his trip to Australia from Iraq, having departed from that country on his legally issued Iraqi passport. I conclude that prior to his departure the applicant was resident in [Town 1] in Wassit province.

Refugee assessment

17. 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

18. 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.

19. I have found that the applicant is a national of Iraq. It follows that Iraq is his receiving country. I have not accepted that the applicant is a Faili Kurd. He has not otherwise claimed that he faces harm due to his ethnicity. I have not accepted that he would face harm due to being perceived to be Iranian.

20. The applicant is a Shia Muslim and claims to fear harm on this basis as well as due to the security situation in Iraq. Country information referenced by the delegate notes that the security situation in Iraq is fragile and susceptible to rapid and serious deterioration with large scale conflict in some areas.¹ The recent report published by DFAT however notes that anti-Shia violence has reduced in 2018 following the defeat of ISIS/Daesh in late 2017.² It also notes that ISIS/Daesh will likely continue to indiscriminately target Iraqi civilians and commit human rights abuses as a small-scale insurgency.³ Having regard to information about the nature and frequency of the security incidents in the southern provinces including Wassit, the level of influence of ISIS/Daesh and Sunni insurgent groups in the south, the dominance of the Shia population, and the general security situation, I am satisfied that the risk of harm is not one that rises to a real chance. In the context of the risk of harm to Shias, DFAT also notes that there is a risk of being caught up in intra-Shia violence but this risk is borne by those active in the militia or tribal groups, rather than ordinary civilians.⁴ There is no evidence to indicate that this would apply to the applicant.

21. I have accepted that the applicant is a non-practising Muslim. Country information from prior to the defeat of Daesh/ISIS indicates that in Daesh/ISIS controlled areas, Sunni civilians who do not support that organisation or its ideals/religious views face a high risk of violence including death.⁵ There is no indication in either the 2017 or 2018 DFAT reports that this occurs to Shias in areas where Shia militias are prevalent or that Shias are subject to harm for being insufficiently devout. I have had regard to the International Humanist and Ethical Union (IHEU) report provided by [Mr A].⁶ I am not satisfied that [Mr A]’s claim that “the latest report for

¹ DFAT, “DFAT Country Report, Iraq”, 26 June 2017, CISED50AD4631; 2.33

² DFAT, “DFAT Country Information Report - Iraq”, 9 October 2018, CIS7B839419766; 3.33

³ Ibid; 2.34

⁴ Ibid; 3.33 and 5.15

⁵ DFAT, “DFAT Country Report, Iraq”, 26 June 2017, CISED50AD4631; 3.39, 4.2

⁶ IHEU, The Freedom of Thought Report : Key Countries Edition, 29 October 2018

2018 confirms Iraq continues to commit “grave violations” in respect to expression of religion, including the freedom to identify as non-religious” is entirely supported by this report. The report indicates that Iraq is currently rated as “grave violations” in the thematic strand “Freedom of expression and advocacy of humanist values” and “severe discrimination” in the thematic strand “Family, community, society, religious courts and tribunals”. Although the “boundary conditions” for the latter thematic strand include “The non-religious are persecuted socially or there are prohibitive social taboos against atheism, humanism or secularism”, the introduction explaining the Ratings System notes “every country in this report is assessed against a range of ‘boundary conditions’. These are statements which may or may not apply to each country.” The applicant has not claimed to have been subject to any harm in the past due to his failure to practise Islam. Unlike Iran, Iraq is not a theocracy. I am not satisfied on the evidence before me that there is a real chance that the applicant would be subject to societal or official harm in the future on the basis that he is a non-practising Muslim.

22. On the totality of the evidence before me, including the applicant’s particular circumstances and the independent information, I am not satisfied that the applicant faces a real chance of harm as a Shia Muslim, a non-practising Shia Muslim or due to sectarian violence, on return to Wassit province in southern Iraq now or in the reasonably foreseeable future.
23. The applicant has also claimed that he will be harmed, should he return to Iraq, on the basis that he sought asylum in Australia and that his time in a Western country would enhance the view that he holds opinions that could be viewed as anti-Islamic. The DFAT country report indicates that the practice of seeking asylum and then returning to Iraq once conditions permit is well accepted amongst Iraqis. DFAT has limited evidence to suggest that voluntary returnees from the West face difficulties in assimilating back into their communities. However, local sources have said that returning to Iraq can be difficult, particularly if the individual does not return to their original community.⁷ I have concluded that members of the applicant’s family reside in [Town 1] and this is his original community, from which he departed in 2012. I am not satisfied that the applicant faces a real chance of harm on the basis that he has spent time in a western country or that he unsuccessfully sought asylum in Australia.

Refugee: conclusion

24. 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

25. 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

26. Under s.36(2A), a person will suffer ‘significant harm’ if:
 - the person will be arbitrarily deprived of his or her life

⁷ DFAT, “DFAT Country Report, Iraq”, 26 June 2017, CISED50AD4631; 5.24

- 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.

27. I have concluded above that the applicant does not face a real chance of harm due to being a non-practising Shia Muslim, from general or sectarian violence or because he sought asylum in Australia. As 'real risk' and 'real chance' involve the application of the same standard,⁸ I am not satisfied that the applicant would face a real risk of harm. I am equally not satisfied that the applicant faces a real risk of being killed, seriously injured or facing any other form of significant harm on return for the purposes of s.36(2)(aa) for these reasons, including when considered cumulatively.

Complementary protection: conclusion

28. 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.

⁸ *MIAC v SZQRB* (2013) 210 FCR 505

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.