



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

**Decision and Reasons**

**Referred application**

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IRAN

IAA reference: IAA18/05946

Date and time of decision: 5 December 2018 12:59:00

I Sheck, 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 claims to be a stateless Faili Kurd, born in Sadr City, Baghdad and deported to Iran as a child. He left Iran [in] July 2013 and arrived in Australia [later that month]. On 14 June 2017 he lodged an application for a protection visa (PV).
2. On 8 November 2018 a delegate of the Minister for Immigration (the delegate) refused to grant the visa. The delegate accepted that the applicant was a Faili Kurd but concluded that he held Iranian citizenship. The delegate found that the applicant did not face a real chance of persecution or a real risk of significant harm due to his ethnicity or for any other reasons in Iran.

### 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). No further information has been obtained or received.

### Applicant's claims for protection

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4. 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 4 August 2013. Together with his PV application he provided a statement of claims dated 31 May 2017. On 2 October 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 9 October 2018 and additional documents on 9 October and 8 November 2018.
5. The applicant claims:
  - He is a stateless Faili Kurd. He was born in Baghdad in [year]. He and his family were deported from Iraq to Iran by the Saddam regime in [year]. The applicant lived in Iran until July 2013 as a registered refugee. As a stateless person he had no rights. He obtained a fake passport, which he used to depart from Iran. As his refugee card has now expired he has no right to enter Iran;
  - Although he was born in Iraq his Iraqi citizenship was revoked when he was expelled by the Saddam regime. He returned to Iraq in 2006 to seek citizenship but this was refused. He does not have the right to enter or reside in Iraq;
  - He was discriminated against on the basis of his Kurdish ethnicity. The authorities watch Kurdish people with great scrutiny. He was too afraid to be involved in any kind of protest or demonstration as he feared the authorities would use this as a reason to punish and harm him;
  - He would be at risk of serious harm on return to Iran due to his extended period abroad and the fact that he would be returning as a failed asylum seeker.

### Factual findings

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6. Based on the information consistently provided in his visa application, documents and oral evidence, I accept that the applicant's background is as follows: he was born on [date] in

Baghdad, Iraq. He and his family were expelled from Iraq to Iran in or around [year]. His parents have resided in Ilam province (Iran) since that time. He has [specified family members]. He is of Shia Muslim faith. He completed [school] education, a pre-University year followed by [number] years University study in [a named] University, where he attained a Bachelor degree in [subject] in [year]. He undertook some [specified] work in his father's business. From 2011 he was employed by a [services] company, [with specified duties].

7. At his arrival interview in 2013 the applicant gave his ethnicity as Kurdish. In his PV application he has claimed that he is a Faili Kurd. Country information that Faili Kurds originate from the Zagros Mountains in what is now the Kermanshah region of Iran. Many migrated to Baghdad and other areas of what is now Iraq at the beginning of the 20th century but were later expelled to Iran, including during the Iran-Iraq war, where they were accepted as refugees but subject to strict registration.<sup>1</sup> The applicant also claims to be a Shia Muslim, which is consistent with the profile of Faili Kurds.<sup>2</sup> Country information indicates that many Faili Kurds live in border areas such as Ilam province, where the applicant claims that he and his family lived.<sup>3</sup> He has consistently stated that he speaks Faili Kurdish and Farsi, which accords with his stated ethnicity. On the other hand, Ilam is a majority Kurdish-inhabited province, with Iranian Kurds who speak the Feyli dialect of Southern Kurdish.
8. The applicant has consistently claimed that the only Iranian identity document he holds is his "refugee card" or "white card". In April 2018 he provided a copy of a Special Identity Card for Foreign Nationals issued by the Iranian Bureau for Aliens and Foreign Immigrants' Affairs (BAFIA) in his name and a translation of the document. This indicates that the card was issued [in] June 2013. These cards are known as Amayesh. Following the PV interview the applicant provided a copy of a further Amayesh in his name issued [in] June 2011. Amayesh cards are replaced annually.<sup>4</sup> They were initially white although there have been a number of other colours since then and the translation notes that the applicant's 2013 card is blue. The Amayesh system was introduced around 2002 and replaced the previous system by which Iraqi refugees were issued with a green card. The applicant has also provided his father's green card, which contains no date of issue. I am satisfied that this was the card issued to the applicant's father in the 1980s following the family's expulsion from Iraq.
9. In his statement of claims the applicant focusses mainly on the restrictions he was subject to as a refugee or stateless person. The applicant claims that he was good at sport but was unable to play at a representative level because he was not an Iranian citizen; he was frequently denied employment and when he was employed it was for lower wages than Iranian workers. The applicant also claimed that he could not marry an Iranian national or hold a bank account. The former statement is however contradicted by his evidence that [a number] of his [siblings] have married Iranians and been granted Iranian citizenship. The country information related to this indicates that in general, any non-Iranian woman who marries an Iranian citizen assumes the husband's citizenship automatically. This rule applies regardless of the woman's nationality, and would apply to stateless persons and those without documents. A non-Iranian man does not assume Iranian nationality on marriage to an Iranian woman. However, a non-Iranian man married to an Iranian woman can apply for facilitated naturalisation if children result from the marriage.<sup>5</sup> The review material does not support the applicant's claim that he could not marry an Iranian woman. In relation to the stated inability to hold a bank account, the text on the back of the applicant's Amayesh clearly states that the card "is valid as an

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<sup>1</sup> DFAT, "DFAT Thematic Report – Faili Kurds in Iraq and Iran", 3 December 2014, CIS2F827D91722; 2.2-2.4

<sup>2</sup> Ibid; 2.8

<sup>3</sup> Ibid; 2.14

<sup>4</sup> DIBP Tehran, "Feyli Kurds - obtaining identity travel documents", 17 September 2015; CISEC96CF13392

<sup>5</sup> DFAT, "DFAT Thematic Report – Faili Kurds in Iraq and Iran", 3 December 2014, CIS2F827D91722; 3.28, 3.29

identity card for opening a bank account". The applicant's evidence displays some lack of knowledge as to the actual rights and entitlements of registered Iraqi refugees in Iran (whether Faili Kurd or not).

10. In his PV application the applicant claimed that as he was born in Iraq, he returned to Iraq in 2006 in order to regain his Iraqi citizenship. He stated that "I was told that my family's citizenship has been cancelled and I have no citizenship rights in Iraq." Country information indicates that anyone who has had their Iraqi citizenship withdrawn has the right to demand its reinstatement. The Iraqi Nationality Law of 2006 provides for the restoration of citizenship to Iraqis whose citizenship was revoked.<sup>6</sup> At the PV interview the delegate questioned the applicant about this trip. He stated that he went with his parents, as they were considering going back to live in Baghdad. When asked where they stayed the applicant responded that first they thought to stay in their own home, however when they arrived there they saw it was occupied "by one of the Ba'athist generals" so they went to stay with his father's [relative]. I find this statement implausible and it reflects poorly on the applicant's credibility. I do not accept that the applicant's family would have expected to return to their former home after an absence of some [number] years; further to this, I do not consider that a Ba'athist general would still be living in Sadr City some three years after the fall of Saddam's Ba'athist regime. The applicant did not explain how they had formed the opinion that the occupant of their former home was a Ba'athist general. The applicant did not indicate that either he or his father took any steps to investigate whether they would be entitled to Iraqi citizenship in 2006 and I find they did not.
11. Turning then to the citizenship of the applicant's parents, he states that his family were Iranian many generations back. His father was born in Iraq. He has provided little information on his mother however has stated that when they first arrived in Iran she was granted Iranian citizenship. I conclude from this that she already held such citizenship. With regard to his father, the applicant claimed in his arrival interview that his father held both Iraqi and Iranian citizenship; he had been granted Iranian citizenship three years before (2010). The applicant also indicated that all of his siblings now held Iranian citizenship. When asked why he did not, the applicant responded that "the Iranians have an issue with young adults". In his PV application the applicant has stated that it took [a number of] years for his father to be granted citizenship. He repeated this assertion at the PV interview, stating that his father had applied in [year] and Iranian citizenship was granted to him in 2011. The applicant stated that both of his grandparents had Iranian citizenship and his father provided proof of this after the family were expelled to Iran. The delegate asked why the applicant had not been granted citizenship at the same time as his father and siblings and the applicant referred to article 985 of the The Civil Code of the Islamic Republic of Iran. He asserts that this provides that, as he was over the age of 18 when the citizenship was granted to his father, then he is not covered by his father's application.
12. The Article in question actually states: "Article 985 - Adoption of Iranian nationality by the father in no [sic] affects the nationality of his children who may have attained the full age of 18 *at the date of his application for naturalization*".<sup>7</sup> [emphasis added] As the applicant has consistently stated that his father applied for citizenship when he was a child, Article 985 would indicate that he would also be granted Iranian nationality. Application of Article 985 is however not of relevance in the applicant's case as it refers only to applications for citizenship *by naturalisation*. Article 979 of the Civil Code outlines the conditions a person is required to

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<sup>6</sup> DFAT, "DFAT Thematic Report – Faili Kurds in Iraq and Iran", 3 December 2014, CIS2F827D91722; 3.11

<sup>7</sup> Alavi and Associates (United States), 'The Civil Code of the Islamic Republic of Iran (as amended)', n.d., CIS17938

meet in order to be eligible to obtain Iranian nationality through naturalisation, stating that 'persons can obtain Iranian nationality if they:

- Have reached the full age of 18.
- Have resided five years, whether continuously or intermittently, in Iran.
- Are not deserters from military service.
- Have not been convicted in any country of non - political major misdemeanours or felonies.<sup>8</sup>

The applicant further referred to Article 980 of the Civil Code and claimed that his father had been granted Iranian citizenship on the basis of his charity works, however Article 980 simply provides an exemption to the five years residence rule set out at the second dot point above and is not the basis for granting citizenship through naturalisation. Advancing such a claim indicates a lack of knowledge of the relevant provisions of the Civil Code and further diminishes the applicant's credibility.

13. The applicant's father had not been resident in Iran for five years in 1990 therefore would not have applied for Iranian nationality through naturalisation. As the child of Iranian parents I conclude that he applied under Article 976, the relevant parts of which provide: 'Article 976 - The following persons are considered to be Iranian subjects ... 2. Those born [in] Iran or outside whose fathers are Iranian'.<sup>9</sup> Once the applicant's father became an Iranian subject, it follows that all of his children would also have become Iranian subjects. Although I accept it may have taken some time for the citizenship to be granted, I do not accept that it took the [number range] years claimed by the applicant. I conclude that the applicant and his father were both Iranian citizens by at least the time they travelled to Iraq in 2006. I find that he remains an Iranian citizen.
14. The applicant has consistently claimed that he departed Iran on a false passport. In his arrival interview he stated that his friend "K" had organised the passport for him, through an agent in Tehran. In his statement of claims the applicant stated that he had obtained a passport in K's name. At the PV interview the applicant described the process in detail; this being that he took the identity documents of K (who was also his distant [relative]), together with a photo of himself, to the Police +10 and lodged a passport application. The delegate asked why K had agreed to this and the applicant explained that K lived "in a village in Ilam and has no use for a passport". This sounded potentially plausible, however the applicant then claimed that K had travelled to Iraq in 2016 for a pilgrimage. He had been one of a party of "five million people walking to Iraq" so his details were not recorded at all when crossing the border from Iran to Iraq. On return K's details had been checked. He was not carrying his passport (as this had been taken by the applicant and subsequently destroyed) so his details were simply entered into the immigration record. The applicant claimed that he had found all this out ten days prior to the PV interview from his [relative], who had a neighbour who worked at the immigration office. How the neighbour would have known that the applicant had exited Iran on a passport in K's name in 2013 was not explained. I do not consider any of this to be remotely plausible and reject the claim in its entirety. I conclude instead that the applicant departed Iran on a legally issued passport in his own name.
15. The applicant further claimed at the PV interview that his father had been taken for interrogation several times since his departure from Iran. He was asked where the applicant had gone and what he was doing. He had not previously made such a claim. The delegate

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<sup>8</sup> Alavi and Associates (United States), 'The Civil Code of the Islamic Republic of Iran (as amended)', n.d., CIS17938

<sup>9</sup> Ibid

asked the applicant how, if he had used a false passport as claimed, the authorities could have been aware that he had left the country. The applicant responded that Ilam was a small province and “they know everything”. I find this to be a fabrication and conclude that the applicant is of no interest to the Iranian authorities.

16. I have noted at paragraph 7 above that the applicant has only recently claimed to be a Faili Kurd. Due to his poor credibility I am not satisfied that this is the case and prefer the evidence given at his arrival interview that he is of Kurdish ancestry. Country information indicates that unlike other ethnic minorities, many Kurds harbour strong separatist tendencies.<sup>10</sup> The applicant stated in his statement of claims that “I was too afraid to be involved in any kind of protest or discrimination as I feared the authorities would use this as a reason to punish and harm me”. He has at no point claimed that he has been involved with any separatist groups or displayed any interest in Kurdish rights either in Iran or Australia and I find he has not. In view of his lack of political activity to date (age [noted]) I am not satisfied that he would become politically active on return to Iran.

### **Refugee assessment**

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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 an Iranian national; accordingly, Iran is his receiving country. I have not accepted the applicant’s claim that he is stateless or that he was a registered refugee prior to departing Iran. I have not accepted that he is a Faili Kurd.

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<sup>10</sup> DFAT, “DFAT Country Information Report - Iran”, 7 June 2018, CIS7B839411226; 3.11

20. I have accepted that the applicant is of Kurdish ethnicity. DFAT assesses 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. The risk to members of ethnic minority groups who are involved (or are perceived to be involved) in activism is higher.<sup>11</sup> The applicant has not been involved in any political activities related to his ethnicity and I have that he would not be so involved in the future. In the absence of any public assertion of cultural or political rights, the review material does not support a finding that Kurds face a real chance of harm from the Iranian authorities. The Iranian Shia Kurdish minority in Iran are fully integrated into Iranian society, have full rights as Iranian nationals and are not subject to discrimination by authorities.<sup>12</sup> There is however institutional discrimination in Iran and it would for example be harder for a Kurd to get a job compared to a Persian Iranian.<sup>13</sup> The applicant has claimed to have been denied employment in Iran due to his ethnic background. I note however that he did work for a [services] company from shortly after his graduation from University and that his father has maintained his [sales] business. The material before me does not support the conclusion that the applicant would be denied access to any employment or that he would be unable to subsist because of his ethnicity. I conclude that the applicant does not face a real chance of serious harm of the basis of his ethnicity.
21. I do not accept that the applicant would be returning to Iran as a non-citizen without identity documentation, that he left illegally and so would be at risk of punishment for that offence, or that he has no right to reside in Iran. The applicant claims that he faces a real chance of serious harm on return due to his seeking asylum in Australia. Recent reports indicate that Iranian authorities pay little attention to failed asylum seekers on their return to Iran. Iranians have left the country in large numbers since the 1979 revolution, and authorities accept that many will seek to live and work overseas for economic reasons. International observers report that Iranian authorities have little interest in prosecuting failed asylum seekers for activities conducted outside Iran, including in relation to protection claims.<sup>14</sup> I am not satisfied that the applicant faces a real chance of harm on return to Iran because he has lived in Australia for several years or has sought asylum overseas.
22. With the exception of some 2018 arrivals, Iran does not generally accept involuntary returnees. In the applicant's case, not being a recent arrival, the evidence indicates that if he is to be returned to Iran it is highly likely that it would only be on a voluntary basis. DFAT is not aware of any legislative or social barriers to voluntary returnees finding work or shelter in Iran, nor any specific barriers to prevent voluntary returnees from returning to their home region.<sup>15</sup>

### **Refugee: conclusion**

23. 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).

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<sup>11</sup> DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 3.6

<sup>12</sup> DIBP Tehran, "Feyli Kurds - obtaining identity travel documents", 17 September 2015; CISEC96CF13392

<sup>13</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', February 2013, CIS25114, p.42

<sup>14</sup> DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 5.25

<sup>15</sup> Ibid; 5.24

## Complementary protection assessment

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24. 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

25. 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.

26. I accept that the applicant was subject to societal discrimination in Iran due to his Kurdish ethnicity and may again face such actions in the future. I am not satisfied that such behaviour or its consequences, though regrettable, constitutes significant harm. It does not amount to the death penalty; an arbitrary deprivation of life or torture. Further, on the evidence, it does not amount to pain or suffering, severe pain or suffering or extreme humiliation. I have concluded above that the applicant does not face a real chance of harm on the basis that he sought asylum in Australia. As 'real risk' and 'real chance' involve the application of the same standard,<sup>16</sup> I am equally not satisfied that the applicant faces a real risk of significant harm on return for the purposes of s.36(2)(aa) for these reasons, including when considered individually or cumulatively.

### Complementary protection: conclusion

27. 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>16</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.