



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA19/06796

Date and time of decision: 1 August 2019 16:57:00

J McLeod, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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 (the applicant) claims to be a Faili Kurd national of Iran. He arrived in Australia on [in] September 2012 and lodged an application for a temporary protection visa (TPV) on 25 June 2015. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 8 July 2016.
2. On 20 October 2016 the IAA affirmed the decision not to grant the visa (IAA16/00605). [In] January 2019 the Federal Circuit Court dismissed the application for judicial review of the IAA's decision however [in] May 2019 the Federal Court of Australia, on appeal, remitted the matter for reconsideration.

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' or 'referred material').
4. Following the delegate's decision, on 5 September 2016 the IAA received from the applicant a copy of his passport bio-page and a submission reiterating his claims in detail and responding to the delegate's findings. None of this is new information; I have had regard to it. However, while it is inferred in the submission that there are people who can corroborate aspects of the applicant's claims, the IAA is under no duty to contact third parties to obtain evidence or to seek verification. I am not satisfied the circumstances warrant such approach in this case; I have not contacted the named parties.
5. Following the Court's remittal of the IAA decision, on 5 July 2019 the IAA received a bundle of documents from [Lawyers] then advised they were acting for the applicant on a 'one-off' basis. The bundle included a legal submission of just over five pages, a statutory declaration of roughly five pages and a two and a half page submission detailing why the IAA should consider the new information contained therein, a letter of support from the applicant's [relative], purported baptism and confirmation certificates substantiating the applicant's claimed conversion to Christianity (discussed below), a letter of support from a fellow asylum seeker who purportedly attended church services with the applicant in detention, 14 letters of support from members of [Church 1] in [Suburb], Melbourne.
6. While the statutory declaration contained some new information relating to the applicant's claimed religious conversion, as [Lawyers] acknowledged, the remainder of the information contained therein, and contained in the letter of support from the applicant's [relative] reiterates and provides further details regarding his existing protection claims in response to adverse findings made by the delegate. I have some concerns about whether these in fact amount to further submissions and therefore would constitute non-compliance with the five page limit provided for submissions in the *Practice Direction for Applicants, Representatives and Authorised Recipients* given by the Administrative Appeals Tribunal President under s.473FB of the Act. However, for circumstances relevant to this particular case, in this instance, I have decided not to return the submissions for revision, or to otherwise further delay the matter and to consider all submissions.
7. Previously, the applicant claimed that although he was raised in a Shi'a family, he had a negative view of Islam as he perceived it to be based in violence and revenge, and he considered himself

agnostic. However the submission and statutory declaration provided in 2019 advances a new claim that the applicant fears harm on the basis of his conversion to Christianity. As noted above, the bundle also contained other documentary evidence in support of this claim and the submission contained country information in support.

8. The applicant's statutory declaration provides an overview of the purported influences which led to his interest in Christianity from a young age and his exploration of the faith in Australia, participating in Church services and communities in [Detention Centres 1 and 2] and visiting various denominations in Melbourne before settling on [Church 1] in [Suburb] in June 2016. He claims he has been attending regular services and engaging in bible study there for more than three years and also participates in [meetings] to manage church affairs and helps out in other ways [for] the church. The applicant has provided his 2017 baptism certificate, his 2018 confirmation certificate and several letters of support including from the Reverend at [Church 1], teachers from [a] College (also members at [Church 1]) and 14 other members of the congregation, many of whom attended his baptism and confirmation. He also provided a letter from a fellow former detainee with whom he used to attend Bible and prayer groups with in [Detention centre 2], and subsequently. All these letters emphasise the authors' belief in the applicant's genuine conversion and commitment to the Christian faith, as demonstrated through their witnessing of his consistent regular attendance at church and Bible study over the past few years, his baptism and confirmation, and their ongoing personal interactions with him. In addition, the applicant also gave oral evidence in support of his claims relating to Christianity at interview which he was invited to attend with the IAA. This interview was conducted in person on 26 July 2019.
9. The applicant's new claims regarding Christianity and all the supporting detail, oral evidence and documentation is new information. I accept it is credible personal information in the relevant sense.
10. This new information amounts to a claimed material change in the applicant's circumstances and is potentially determinative of his protection status. It must be said that there was a long delay in raising these religious claims. The applicant had had plenty of opportunities to disclose to the delegate, and to the previous IAA reviewer, that he had been engaging in explorative Christian activities since his arrival in Australia in 2012. When asked about his religion in the TPV interview in 2015 he gave, in my view, a mixed response. He mentioned that he had compared Islam and Christianity. He said he did not want to talk about Christianity, but that there were other things much better than Islam, 'a violent, revengeful religion'. He also said he could not deny or accept the existence of God and identified as agnostic, but if he were to choose a religion it would be Baha'ism as they were the people who had shown him refuge (as was a key part of his existing claims). In his statutory declaration (2019) the applicant explained he was unable to provide the new information earlier because although he had been learning about Christianity since his arrival in Australia, he had not been ready to commit to baptism at the time the previous submissions were lodged. In his letter the Reverend mentioned the applicant had been reluctant to raise his conversion as part of his case earlier. The Reverend stated the applicant told him that new evidence was not allowed. The Reverend also stated that a lawyer had also informed them following the applicant's recent court case that there was a risk in raising the information now as it may appear as though the applicant had only converted to support his case. The applicant reiterated these explanations in the IAA interview and he also pointed out he was unrepresented when his case was previously reviewed by the IAA. I have considered these matters carefully and I am satisfied in these circumstances that s.473DD(a) and (b)(i) are met. I have had regard to all the new information relating to the applicant's claimed Christian conversion (sent in writing, and given via interview with the IAA) in assessing the applicant's claims for protection.

11. As for the remainder of the information in the bundles, to the extent that the information provided in these bundles reiterates information already before the delegate, references judicial decisions and raises arguments against the delegate's and the previous IAA reviewer's findings, I am satisfied this may be characterised as argument rather than new information. While I am not reviewing the previous IAA decision I have nonetheless had regard to the points raised by the applicant in so far as they may be relevant to this review.
12. As the applicant's claims of religious conversion were not previously raised with the delegate, I have obtained new information¹, by way of country information to address these claims. I am satisfied these amount to exceptional circumstances to justify considering this new information.

Applicant's claims for protection

13. The applicant's claims can be summarised as follows:

- He is a Faili Kurd who has held Iranian citizenship since his birth in [year]. His parents and [siblings] had been expelled from Iraq in 1972 and settled in a village in Ilam province. During his childhood the family lived in impoverished circumstances.
- His Faili Kurdish identity has always been evident through his accent and the information on his birth certificate regarding his father's origin. As a member of his minority group he has suffered discrimination, bullying and abuse, particularly at school but also afterwards.
- His eldest brother was arrested in the aftermath of the Iranian revolution in 1979. He was sentenced to death for collaborating with the Tudeh party but their father negotiated that he instead be sent to fight in the Iran-Iraq war, which he did, from 1983 – 1987.
- He was a good student. He gained entry on academic merit to a highly regarded school in Ilam, and then in [year], to the highly competitive [subject] program at [University]. While at university he tutored high school students in [subjects] (which he had learned from a young age). There were some Baha'is among his students and he was welcomed into their families and given books and materials on Baha'ism.
- He had a very negative view towards Islam. Through his Baha'i associations he realised that Islamic laws and practices were outdated. He questioned his Shi'a room mates' practices; they distanced themselves from him and suspected he was converting to Baha'ism.
- In 1999 he was detained for a week for engaging in political discussions at university. In [2000], he was arrested, interrogated, tortured, taken to the Revolutionary Court three times and then jailed for [number] months on (false) accusations and charges related to national security. He was accused of having close contact with anti-revolutionaries and enemy spies and of being a traitor who gave information to Baha'is spying for Israel. He developed a drug addiction in jail. In [2002], he was pardoned by the Supreme Leader for good behaviour.

¹ UK Home Office (UKHO), "Country Policy and Information Note: Iran: Christians and Christian converts", 27 February 2017, OG6E7028813; Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), "Iran: House Churches; Situation of Practising Christians; Treatment by Authorities of Christian Converts' Family Members", 14 June 2017, CISED850AD4620; DFAT, "DFAT Country Information Report – Iran", 7 June 2018, CIS7B839411226

- After his release he saw a psychiatrist who prescribed four different medications to him, and saw a counsellor for three months.
- He tried to return to university but he had been barred for three more semesters and as a result, exceeded the maximum length of time in which to complete his course; he was unable to graduate.
- Although a medical panel found him eligible for exemption on medical grounds, he was required to complete his military service. He did this from [year range] and then went to Tehran where he worked as a [occupation], earning an insufficient income.
- In about June 2006 while holidaying with his [relative] in Northern Iran, he and his [relative] met a Baha'i man who introduced him to two Baha'i brothers, who were businessmen and gave him a job doing [tasks]. He worked for them until he left Iran in 2012, and travelled overseas on business for them, which they were unable to do as they would face problems on exit.
- Around August 2006 he was arrested by plain-clothed officers, handcuffed and taken in their car in which they beat and abused him for being unclean and a Baha'i before throwing him out a few hours later.
- People (neighbours, friends, relatives) started 'backbiting', accusing him of being Baha'i. He was scared of the consequences of this. In December 2006 he took his friend's advice to complete the Haj in Saudi Arabia. This worked as it showed he was a devout Muslim. The backbiting stopped.
- From 2010 – 2012 he tutored Baha'i students of the Baha'i 'virtual university'. In June 2012 he heard that several Baha'i students and their tutors had had their homes raided and been arrested. He was very scared the authorities would find out about his activities and arrest, torture and imprison him again.
- He decided to leave the country and with the help of his brother, he departed [in] July 2012.
- Shortly after he arrived in [Country], authorities had gone after him to the [workplace] and arrested his Baha'i employers.
- In Australia he has converted to Christianity and has been living with his de facto partner, also a Christian.
- He fears that if returned to Iran he will be arrested, imprisoned and tortured and also killed, under accusation of cooperating with foreign states against Iran, converting to Christianity and for returning as a failed asylum seeker.

Refugee assessment

14. 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

15. 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.
16. There are no identifiable concerns as to the applicant's claimed identity. I accept he is an Iranian citizen whose Faili Kurdish ethnicity is apparent from his accent and birth certificate as claimed.
17. The applicant claims, inter alia, to fear harm on the basis of his Faili Kurdish identity, his imputed political views (as an alleged anti-Government/pro-Israel spy), his association with Baha'is and his perceived conversion to the faith. I accept the applicant has suffered some harm in the past, including discrimination, abuse and insults on the basis of his ethnicity during his childhood, a week's detention at university in 1999 for engaging in political discussions and debates, and [number] months imprisonment in 2000. However, I have concerns about his other claims, including inter alia, his brother's pardoning, his drug addiction in jail and release on parole, the reasons he was unable to finish university, his claims to have continued engaging with Baha'is up until he departed in 2012, and about the issuance of arrest warrants by the authorities. The applicant's evidence on these matters has been problematic on several fronts, affected by numerous inconsistencies and implausibilities. I note too, that the applicant had already considered coming to Australia in the months before he departed Iran, and this, and the other problems in his evidence lead me to doubt the veracity of his claims that he departed in fear of being apprehended by Iranian authorities who were pursuing him, or that he fears returning to Iran for any of these claimed reasons.
18. However the nature of the applicant's TPV application has substantially changed; at this time his claimed conversion to Christianity is the central claim to be determined. The applicant claims that he has converted to Christianity in Australia and that as he would seek to practise his faith openly upon return, he would come to the adverse attention of the Iranian authorities, leading to his arrest, brutal interrogation, torture, imprisonment and probable death.
19. In assessing these claims I have taken into account the background information the applicant provided prior to the delegate's decision in 2016 relating to his negative view of Islam and agnostic feelings, and the new information relating to his claimed conversion to Christianity provided in writing and in an interview I conducted with him just recently, on 26 July 2019 ('the IAA interview').
20. According to the applicant, he was brought up in a Shi'a household and had a comprehensive religious education. However he never developed this faith and objected to the Mullahs' teachings which he now describes this as 'indoctrination'. He recalls his first good impression of

Christianity came at age nine when watching a scene from Les Miserables but considered himself agnostic before coming to Australia. It was known to his housemates and other students at university that he was not a committed Shi'a Muslim; actually they suspected that he ascribed to the Baha'i faith. Although he completed the Hajj in 2006, this was to allay ongoing accusations of his associations with Baha'ism, and was a successful strategy which stopped people 'back-biting' about Baha'ism.

21. The applicant claims that on arrival in Australia, he identified as agnostic and I note the record of his Entry Interview indicates he stated he had no religion. The applicant states he did not believe in Islam's Allah but was open to the possibility of finding faith in another god. He found Baha'ism more appealing but rejected it due to its shared beliefs with Islam. In Australia he felt free and wanted to learn more about Christianity, particularly after meeting an older couple who led services [in Detention Centre 1]. He started attending church services there, continued his engagement through the Iranian church community in [Detention Centre 2] where he did Bible studies in English and Persian. In Melbourne he engaged with churches of various denominations in [Suburbs] before eventually settling with [Church 1] in [Suburb]. He was influenced in his religious journey in part by his friend W, a fellow Christian convert asylum seeker he knew from [Detention Centre 2], his partner [Ms A], whom he met in 2013 and whom herself had converted in 2008 and the Reverend and other members of [Church 1]. Although he had been engaging in Christianity for a number of years, he did extensive research and it was a long time before he felt as though he was re-born and decided to fully commit and become baptised.
22. Overall, I have found the applicant's evidence to be convincing and un-exaggerated on these matters. I also consider his responses to my questioning in the IAA interview were unrehearsed and given without hesitation. I have some reservations about the surface level knowledge he demonstrated of some Bible verses but nonetheless my impression was that his reflections were genuine and did not undermine his claimed engagement. He willingly shared his personal views and insights into certain other aspects and was able to explain why particular tenets of the faith have resonated with him. His account of involvement in [Church 1] is also consistent with the views shared by the Reverend and 18 other members of the [Church 1] congregation in the letters provided.
23. I have considered the letters provided by members of the [Church 1] congregation and from his friend he practised with in [Detention Centre 2]. The authors explain how they met the applicant and attest to now knowing him well. They share their observations of his exploration and practise of Christianity over the past few years and their belief in his genuine conversion. Some of them specifically comment on the applicant's level of commitment to the church and the faith, and explain why they hold no suspicions that his conversion to Christianity was influenced by his protection case. I have no reason to doubt the credibility of the authors of these letters; I give the letters considerable weight. I accept the applicant has converted to Christianity.
24. As noted above, there was a substantial delay in the applicant's raising of his religious conversion claims. I have considered this, as relevant to the applicant's overall credibility and to the consideration of whether his engagement in Christianity has only been undertaken to strengthen his claims for protection.
25. I have considered whether there were any indicators of the applicant's exploration of Christianity in his earlier evidence. I note there was an interesting discussion in the TPV interview in which the applicant mentioned he had compared Islam and Christianity and decided there were better things than Islam, however he said he didn't want to talk about Christianity. At that point, he said if he were to choose anything it would be Baha'ism as Baha'is had shown him kindness. The applicant has since explained in his statutory declaration and at the IAA interview

that he then rejected Baha'ism because of its shared aspects with Islam and he realised he did not believe in those things. While I am satisfied the applicant had raised no claims relating to Christianity at this stage, I nonetheless consider his reflections to the delegate indicative of his religious contemplations at that time.

26. It still remains curious to me why the applicant did not mention his engagement with Christianity earlier - particularly when it pre-dated the delegate's interview and decision, and even his application and arrival in Melbourne. However these issues were discussed at the IAA interview and I accept the applicant's explanations. I accept it was deeply personal and sacrosanct experience for the applicant which he was not ready to discuss in the TPV interview. I accept too, noting that he was unrepresented in the first review before the IAA and giving some weight to the explanation given in the Reverend's letter, that he did not believe it appropriate to raise the new claim before the IAA in 2016. In these very particular circumstances, I accept the submissions that if he was engaging in this conduct to strengthen his claims, he would have raised them at the TVP interview and before the IAA in 2016. Overall I find the evidence before me, particularly the statements from the applicant's Reverend and other members of the congregation, supports a finding that the applicant has engaged with the religion because of a genuine belief. In reaching this finding I also take into account the applicant's comments regarding how he would want to practise Christianity in Iran. I am satisfied his conduct in Australia in converting to Christianity, attending services, bible study groups, and performing other roles within the church, has been engaged in otherwise than for the purpose of strengthening his claims to be refugee.
27. The applicant claims that if he is forced to Iran he would continue practising. He claims he would want to talk to his friends and other people about his faith and would probably use his own house as a church or gathering place to practise his faith with others. He claims he would be compelled to be open and honest about this, and that this could result in his attracting adverse attention from his family members, the authorities and others. I accept these claims; I am satisfied that the applicant holds a genuine conviction and that if he were to return to Iran he would seek to engage in communal worship and openly share his beliefs.
28. In assessing what would happen to the applicant on return, I have considered the country information I obtained including reporting from the UKHO, ACCORD and DFAT, as well as reporting cited by the representative from the United States' State Department and the US International Commission for Religious Freedom.
29. Country information supports the applicant's claims that he would not be welcomed into one of the existing churches, such as the Armenian churches in Iran. DFAT (2018) states that none of the three recognised minority religions in Iran (Christian, Jewish, and Zoroastrian) proselytises or accepts converts as members. Churches in Tehran and elsewhere are under strict instruction not to Minister to Iranians and there are a range of measures in place to enforce these prohibitions. Security officials reportedly monitor registered congregation centres to verify that services are not conducted in Farsi, and perform identity checks on worshippers to confirm that non-Christians or converts do not participate in services. As a result of these prohibitions, Iranian Christians who are not members of the recognised ethnic minority churches generally practise in underground 'house churches', as I note the applicant envisages he would do, or perhaps himself facilitate, upon return.
30. While there is a significant and growing unrecognised Christian population which includes a high percentage of Farsi-speaking converts from Islam, authorities have interpreted the growth in house churches as a threat to national security: official reports and the media have characterised house churches as 'illegal networks' and 'Zionist propaganda institutions'.

Authorities have periodically cracked down on house churches, focusing particularly on the leaders of churches that actively broadcast, proselytise, or seek out new members. Security forces have reportedly increased the frequency of these crackdowns under the Rouhani administration, although probably not as a result of any direct instruction from the government. I accept the applicant would seek to immerse himself in a Christian group upon return, mostly likely by seeking out and joining an existing house church or by trying to start a similar gathering himself. I accept that in doing so, there is a real chance that he would come to the adverse attention of the Iranian authorities.

31. As a child born to a Muslim father, the applicant is considered to be Muslim and he could be charged with apostasy for his conversion to Christianity. Though this is not an everyday type occurrence, authorities continue to use religiously-based charges including against Muslim-born converts to Christianity. DFAT assesses that those accused of religiously-based charges are also likely to face charges related to national security. They are unlikely to have adequate legal defence, and are likely to be convicted.
32. DFAT and other sources report that death sentences for apostasy are now rare and I do not accept the applicant faces a real chance of persecution in this manner. However, the judiciary has handed down long sentences in relation to house church activities: in July 2017, the Revolutionary Court convicted eight Christians of 'acting against national security through the establishment of a house church' and 'insulting Islamic sanctities', and sentenced the group to between ten and 15 years' imprisonment. According to international observers, as of December 2016 approximately 90 Christians were in detention or awaiting trial because of their religious beliefs and activities. Human rights observers have reported that authorities have subjected Christians in detention to severe physical mistreatment, including beatings and solitary confinement. Those Christians whose cases are brought to court tend to be convicted on political rather than explicitly religious charges and sentences issued to Christians tend to range between one year and eight years.
33. In 2018 DFAT further noted that international observers advise that Iranians who convert to Christianity outside the country are unlikely to face adverse attention from authorities upon return to Iran, provided they have not previously come to the attention of authorities for political activities conducted in Iran, maintain a low profile and do not engage in proselytisation or political activities within the country. DFAT assesses that small, self-contained house church congregations that maintain a low profile and do not seek to recruit new members are unlikely to attract adverse attention from authorities beyond monitoring and, possibly, low-level harassment. Members of larger congregations that do engage in proselytisation and have connections to broader house church networks are more likely to face official repercussions, which may include arrest and prosecution.
34. Other sources indicate that any gathering of Christians, including social gatherings, such as birthday or engagement parties, is also perceived by Iranian security officials as a potential underground church activity and threat against national security. Christian Today reported in October 2016 that three Iranian men who converted to Christianity to Islam are appealing against criminal convictions for drinking alcohol (communion wine) and have also been charged with acting against national security. Finnish Immigration Service report on Christian converts in Iran, dated 21 August 2015, citing various sources stated no research data on the return of Christian converts to Iran is available, but the common perception is that they will get into trouble mainly if they try to proselytise or otherwise make their religious views public. I take into account too, the submissions from the representative based on the USSD's IRF report and the USCIRF's 2019 report regarding the current state of the law, and suggesting an uptick in arrests of Christians and the persecution faced by converts from Islam.

35. I am satisfied that Christian converts in Iran who do not modify their behaviour (by acting discreetly and secretly in their worship and maintaining a low profile) and who attend illegal house churches face more than a remote possibility of being subject to monitoring, a raid by the Iranian authorities, arrest and subsequent detention during which there is a real chance they will be subjected to torture or significant physical abuse. I am satisfied this real chance would arise for the applicant for expressing his religious faith by attending or facilitating an underground house church, and/or by openly sharing his views on his Christian faith with others in Iran. I accept he faces a real chance of harm amounting to significant physical harassment, significant physical ill-treatment, and a threat to his liberty and would amount to serious harm. I am satisfied that this harm is systematic and discriminatory conduct carried out by the Iranian authorities against Christian converts from Islam for the essential and significant reason of their religion.
36. Country information indicates that an extensive network of police, security, and intelligence services exercises effective control over almost all areas of the country. As the harm feared by the applicant would be inflicted by the authorities, I find that effective protection measures are not available to the applicant and that the real chance of harm relates to all areas of Iran.
37. I accept the representative's submissions about a modification of behaviour being impermissible in this circumstance; the applicant cannot reasonably be expected to renounce his religious conversion or conceal his Christian beliefs to avoid a real chance of persecution.
38. I am satisfied the applicant's fear of persecution on the basis of his conversion to Christianity is well-founded. Given this finding, while I have flagged some issues for consideration above, I have not made any findings on the applicant's other claims for protection.

Refugee: conclusion

39. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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.