



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

**Decision and Reasons**

**Referred application**

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IRAN

IAA reference: IAA21/09249

IRAN

IAA reference: IAA21/09248

Date and time of decision: 29 June 2021 10:31:00

I Sheck, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

*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 applicants are citizens of Iran. The applicant husband (the applicant) and his wife (the applicant wife) arrived in Australia [in] June 2013. They lodged a combined application for protection visas (PV) which was signed and dated 4 August 2017.
2. On 1 June 2021 a delegate of the Minister for Immigration (the delegate) refused to grant the visas. The delegate accepted that the applicants were illiterate, of Kurdish ethnicity and the applicant was arrested in 2009. The delegate did not accept that the applicant was of any interest to the Iranian authorities from 2009 or that he suffered injuries to his [body parts] during his 2009 arrest. The delegate found that the applicants did not face a real chance of persecution or a real risk of significant harm for any reasons in Iran, including being Kurds, failed asylum seekers from a Western country or due to the applicant's involvement in Green Movement demonstrations.
3. Both the applicant and the applicant wife have their own claims for protection.

### Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). On 29 June 2021 the IAA received a submission on behalf of the applicant from his representative, [Mr A] of [Law firm]. 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 before the decision was made 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. The submission by [Mr A] addresses the delegate's decision and findings. This may be regarded as argument rather than 'information' and to that extent I have had regard to it. [Mr A] refers in his submissions to the applicant's "lower cognitive ability". This is new information. He has not provided any information as to why this claim was not made to the delegate and I am not satisfied that it could not have been. [Mr A] has provided no medical or other information to support that the applicant suffers from any form of cognitive or intellectual impairment. He has not satisfied me that this information is capable of being believed therefore it is not credible personal information. As neither limb of s.473DD(b) is met in relation to the new information, I am prohibited from taking it into account.
5. [Mr A] has also provided seven photographs. It is stated that these are of the applicant's [body part] just after his surgery and the current effects of his medical condition and I accept that they are. Inasmuch as the review material contains the medical report relating to his [surgery] undertaken in 2018 and the delegate viewed and described the current appearance of the applicant's [body parts], this is capable of being believed so comprises credible personal evidence that may affect consideration of this claims (s.473DD(b)(ii)). [Mr A] has stated that as the delegate was aware of the applicant's medical condition and surgery the photographs should not be considered new information. I disagree. I am not satisfied that the photographs could not have been provided to the delegate (s.473DD(b)(i)). In considering whether the requirements of 473DD(a) are met, [Mr A] does not claim that there are exceptional circumstances that justify consideration of the photographs and none are apparent to me. While acknowledging that the claim that the applicant suffers [impairment] to his [body parts] is capable of being believed, I consider the new photographic information to be of little to no

probative value. I am not satisfied that there are exceptional circumstances which justify considering the new information and have not had regard to it.

### **Applicants' claims for protection**

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6. After their arrival in Australia the applicant and his wife were separately interviewed by officers of the then Department of Immigration and Border Protection on 17 June 2013 and 19 June 2013 respectively. The applicant provided details of his claim in a statutory declaration dated 4 August 2017 lodged with his PV application. On 7 April 2021 the applicant and his wife separately attended interviews ("the PV interviews") with the delegate. Identity documents were provided to the Department with the PV application and on 7 April 2021. Medical documents were provided on 7 April and 13 April 2021. The applicant claims:

[at the arrival interview]

- He is an illiterate labourer and was living in poverty. He had no opportunities in life and knew that life would be better in Australia;

[in his 2017 Statutory Declaration]

- In 2009 he went to Tehran by bus to collect some medication. When he disembarked, he was caught up in a large crowd of protesters. Although he was not part of the protest he was arrested and detained on suspicion of being a part of the Green Movement. He was held, questioned and beaten for three days before being released. From that time until his departure in 2013 he was regularly harassed and beaten by the Sepah forces in his village. Because of this constant harassment he left Iran. He would again be constantly harassed by Sepah forces, should he return;
  - Because of his arrest and involvement with the Green Movement he is perceived by the Iranian authorities as having anti-government opinions. As he has now lived in Australia for many years this view would be confirmed in the eyes of the Iranian government if he were to return to Iran. As a result he would be arrested and detained. He may be tortured or killed;
  - He is of Kurdish ethnicity. The Iranian government continuously discriminate against Kurds living in Iran. They are not given equal access to employment;
  - Due to his beating by the Sepah in 2009 he has an impairment to [his] [body part]. This is becoming worse and would prevent him from doing any physical work. He has only worked as a labourer. He would be unable to support himself and his wife;
  - Because of the time that they have spent in Australia he and his wife would be considered to be Westernised Iranians. He fears that they would be arrested, detained, subject to serious harm, torture and death.
7. The applicant wife has made her own claims for protection independently of the applicant. She provided details of her claims in a statutory declaration dated 4 August 2017 lodged with the combined PV application. The delegate interviewed her separately on 7 April 2021. She provided identity and medical documents on 7 April 2021. The applicant wife claims:
- Her husband will be investigated by the Sepah and jailed due to his involvement in a protest against the government. If he is indefinitely detained or killed, she will not be able to survive as she has no male protection;
  - She will not be able to find work as she is illiterate and be unable to support herself;

- She will be discriminated against because she is a Kurdish female;
- As she has lived in Australia for a long time she will be perceived to be a Westernised Iranian and will face serious harm from the Iranian government.

## Factual findings

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8. Based on the information provided in the applicants' arrival and PV interviews and identity documents, I find that the applicant's background is as follows: he was born on [Date] in [a] district, Ilam province and is an Iranian citizen. He is of Kurdish ethnicity and Shia Muslim faith. He is the younger of two brothers. His brother resides in Tehran province; his parents are both deceased. He has never attended school and is illiterate. He completed his compulsory military service from age 18. He was predominantly employed in Iran as a farm labourer. He has not worked in Australia. The applicant and his wife married [in] November 1997. The applicant wife was born on [Date]. She is of Kurdish ethnicity and Shia Muslim faith. She has one brother; her parents and brother live in Ilam province. She did not attend school in Iran and is illiterate. She worked from age 12 to 15 as a farm labourer and [made products] to sell. She has not been in paid employment since that time.
9. In his arrival interview the applicant stated that he left Iran due to poverty. He came to Australia by himself and his wife remained in their home village in Iran. He was not born in a hospital so was never issued with a Shenanameh (birth certificate). He worked on his father's farm from when he was a young boy until his departure for Australia. In her own arrival interview two days later the applicant wife also stated that she and the applicant left Iran because they lived in poverty and had no life. Her husband was unemployed. Although the applicant has subsequently claimed that he was unaware that he had to provide all of the reasons for leaving Iran at his arrival interview, it is unclear why he positively stated he was travelling alone and that his wife remained in their home village in Iran. He also subsequently provided his Shenanameh (issued on [date]) with his PV application, which contradicts his statement that he never had one. These false statements, which are not relevant to his claims for protection, do cause some concern as to the applicant's overall credibility. Neither of the applicants provided any other claims for protection at their arrival interviews. The delegate put this to the applicant at his PV interview and he advised that when they arrived in Australia they were afraid and had no information about the country.
10. The applicants have consistently stated that they are of Kurdish ethnicity and I am satisfied that they are. While they both participated in their PV interviews with the assistance of Farsi interpreters, I note that at their arrival interviews the applicant had a Faili Kurdish interpreter and the applicant wife, a Kurdish interpreter. The applicants have both submitted that Kurds are discriminated against in Iran. The applicant claims that Kurds are not given equal access to employment. This is confirmed by country information, which notes that there is institutional discrimination in Iran and it would for example be harder for a Kurd to get a job compared to a Persian Iranian.<sup>1</sup> Neither of the applicants has provided any examples of discrimination against them due to their ethnicity, however the applicant contended that Kurdish people only work as labourers, farmers, sheep herders and the like. I note that as an illiterate farm labourer living in a rural area, there is likely to be a limited pool of employment available to the applicant. Further to this, country information notes that the provinces in which Iranian Kurds are concentrated (which include Ilam province) are relatively under-developed economically and

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<sup>1</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

have some of the highest rates of unemployment in the country. As at April 2019, Ilam province had an unemployment rate of 10.3 percent. I am not satisfied on the evidence before me that either of the applicants has been discriminated against on the basis of their Kurdish ethnicity.

11. The applicant's central claim, which was first set out in his 2017 Statutory Declaration, is that he was caught up in a protest against the Iranian government while on a trip to Tehran in 2009. Despite not having anything to do with the protest, he was arrested, detained and questioned for three days. The protest in question is one related to the Green Movement in which, following the June 2009 presidential election, up to 3 million supporters of reformist candidate Mir Hossein Mousavi took to the streets of Tehran to protest the official verdict that conservative candidate Mahmoud Ahmadinejad had been re-elected in a landslide.<sup>2</sup> On the basis that security forces arrested hundreds of demonstrators at the time, I am prepared to accept that the applicant may have been inadvertently rounded up and briefly detained and questioned by security forces on the suspicion that he was a demonstrator, even though he stated at his arrival interview that he had never been detained or arrested.
12. The applicant now claims that during a period of three days in detention he was repeatedly questioned and beaten by the Sepah. He contends that these beatings caused permanent injury to his [body parts], this being deformity [and] pain. He has provided medical reports relating to this, including a handwritten report (the doctor's name is not legible) dated 12 January 2021. The delegate referenced this report in her decision, noting that "I have given this letter some weight, however it does not indicate the cause of the deformity or if it is temporary or permanent." The report however states that the cause of the deformity is [Condition 1]. This is a [medical condition] which causes [a deformity]. The condition is generally amenable to surgical treatment however symptoms do return due to the [nature] of the condition. Further medical reports indicate that the applicant was referred for investigation of [Condition 2] in 2015 and that he underwent [surgery] to the [body part] on 9 April 2018. Unfortunately the surgery was not only unsuccessful but the site became infected, necessitating further treatment. It appears that the applicant is awaiting further review by a [surgeon] at [a] Hospital.
13. The medical reports provided by the applicant do not support that his [body part] condition has been caused by injury or beatings as has been claimed. He did not report that he suffered from any medical conditions in his arrival interview and I find he did not. I also note that in her own PV interview the applicant wife stated that her husband had suffered from pain in the [body parts] since their arrival in Australia, which would not be consistent with his claim of being beaten in 2009. I conclude that he has taken advantage of his medical condition to fabricate a claim of having been repeatedly beaten and questioned over several days. I do not accept that this occurred.
14. The applicant then claims that for the next four years he was harassed by Sepah forces in his village. He was required to attend the Sepah Head Office, where he was shown pictures of people and asked if he knew them. I do not accept this scenario as plausible. Country information from 2013, in considering whether a person who participated in the 2009 protests would be subject to ongoing persecution, notes that a great deal of people were involved in the demonstrations and it was therefore considered that the authorities would only track persons who for other reasons are of interest. The risk of ongoing attention also depended

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<sup>2</sup> Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Iran', 20 April 2020, 20200414083132; 3.86

on whether the person continued to be politically active.<sup>3</sup> The applicant is an illiterate farmhand who lived in the same house in the same village in Ilam from birth until his departure from Iran aged [Age]. He has never claimed to have been politically active in any way or involved with political activists. At the PV interview the delegate asked the applicant what actually happened when he was harassed by the Sepah. The applicant responded that they were “coming round and harassing and like hitting. You have seen these things on TV: harassing”. I find this response to be unpersuasive. I find that the applicant was of no interest to the Iranian authorities after he was released from a brief period of detention in 2009. I find that he was not imputed with an anti-government opinion.

15. In addition to the applicant’s medical documents relating to his [Condition 1], he has provided further medical evidence that he suffers from high blood pressure (for which he takes Coveram) and has a prescription for spectacles. In her decision the delegate concluded that the applicants’ illiteracy is not “so burdensome that they are unable to recall details of major incidents that have occurred in their lives”. It appears from their history that the applicants are illiterate because they never attended school. The applicant has provided a letter from [Dr B], registered psychologist, who has been treating the applicant for anxiety and depression since 2019. [Dr B] notes that the applicant’s memory and concentration are compromised due to his excessive anxiety and worry and I am satisfied that this is the case. [Dr B] has also been treating the applicant wife for depressive disorder since 2019. The applicant wife’s memory and concentration have also been compromised due to the symptoms of her psychological condition.

## **Refugee assessment**

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16. 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**

17. 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

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<sup>3</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.49-50

- 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.
18. The applicant is an Iranian national; it follows that Iran is his receiving country. I have accepted that the applicant was rounded up, briefly detained and questioned in 2009 on suspicion of taking part in a post-election protest but I have not accepted that he was detained, questioned and beaten for three days. I have found that he was of no interest to the Iranian authorities in the period from his release in 2009 to when he departed Iran in 2013. I am not satisfied that Sepah forces harassed him from 2009 to 2013 or that they would do so in the foreseeable future, should he return to Iran. I am not satisfied that the applicant faces a real chance of harm on return to Iran, due to his brief period of detention during the post-election protests in 2009.
  19. The applicants are of Kurdish ethnicity. DFAT assesses that members of ethnic minority groups, including Kurds, face a moderate risk of official and societal discrimination, particularly where they are in the minority in the geographic area in which they reside.<sup>4</sup> Kurds asserting their ethnic and religious identity are targeted by the Iranian authorities, as are Kurds engaging in or associated with political activities, Kurds promoting or perceived to be promoting separatism or families, individuals or tribes who are affiliated with women rights.<sup>5</sup> The applicant does not claim to have been at all politically active or to have asserted his ethnic identity, either in Iran or since arriving in Australia. 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.
  20. Country information indicates that no laws discriminate on the basis of ethnicity, including in relation to access to education, employment or housing.<sup>6</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>7</sup> The applicant has provided no examples of being denied employment and I have found that he was not subject to employment discrimination in the past. He indicated that he was employed in the areas of farming and labouring until his departure from Iran, which does not support that he would be unable to subsist. I do note that he now suffers from [Condition 1] for which he is awaiting surgical review. This may affect the employment that he is able to undertake; further, any physical disfigurement caused by the condition may also affect his ability to attract an employer. Turning to the applicant wife, she has only had a brief period of employment from ages 12 to 15, however she has not claimed that she was refused employment after this period. The review material does not support that the applicants would be denied the capacity to earn a livelihood of any kind. I am not satisfied that the applicants face a real chance of serious harm of the basis of their ethnicity.
  21. The applicants both claim that they would face harm on return to Iran due to having sought asylum in Australia and having resided here for some eight years. There is country information predating the applicants' departure which indicates that known asylum seekers are interrogated on return, whether or not they have been political activists in Iran or abroad.<sup>8</sup> Recent reports however 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

<sup>4</sup> DFAT, 'DFAT Country Information Report Iran', 20 April 2020, 20200414083132; 3.7

<sup>5</sup> Danish Immigration Service and the Danish Refugee Council, "Iran: Issues concerning persons of ethnic minorities, Kurds and Ahwazi Arabs", February 2018, CIS7B83941872; p. 5

<sup>6</sup> DFAT, 'DFAT Country Information Report Iran', 13 April 2020, 20200414083132; 3.1

<sup>7</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>8</sup> Amnesty International, "'We are ordered to crush you': Expanding repression of dissent in Iran", 28 February 2012, CIS22610

authorities accept that many will seek to live and work overseas for economic reasons. I note that this is the reason for departure from Iran, given by both applicants in their arrival interviews.

22. The applicant claimed that as he no longer has his passport the Iranian authorities will think he left illegally and imprison him. Country information indicates that those who return on a *laissez-passer*, as the applicants would, are questioned by the Immigration Police at Imam Khomeini International Airport in Tehran about the circumstances of their departure and why they are traveling on a *laissez-passer*. Questioning usually takes between 30 minutes and one hour, but may take longer where the returnee is considered evasive in their answers and/or immigration authorities suspect a criminal history on the part of the returnee. Arrest and mistreatment are not common during this process.<sup>9</sup> 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>10</sup> The country information before me does not support the assertion that returnees are imputed with anti-government or anti-Islamic Republic political views simply for applying for protection abroad. I am not satisfied that the applicants face a real chance of harm on return to Iran because they have lived in Australia for several years or have sought asylum overseas.
23. In his submissions of 28 June 2021 [Mr A] contends that the applicant will be unable to work in Iran due to his medical conditions. He therefore faces a real chance of serious harm in Iran under s.5J(5)(d), which states: “significant economic hardship that threatens the person’s capacity to subsist”. This individual part of the legislation cannot however be read by itself. The subsection 5J(5) commences: “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”. Looking then at 5J(4)(b), this states: “If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a)...the persecution must involve serious harm to the person”. If we then turn to 5J(1)(a), this states: “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 ... the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”. So in order for the person to face a real chance of serious harm by way of significant economic hardship, they must still have a well-founded fear of persecution for a Convention reason. The fact that a person may be unable to work due to age or frailty does not of itself mean that they meet the requirements of s.5J of the Act. I am not persuaded by [Mr A]’s contention. [Mr A] further contends that “it appears his medical condition is permanent.” Although the actual condition of [Condition 1] is indeed permanent, the effects or symptoms of the condition are not. As the applicant is awaiting surgical review, it cannot yet be concluded that his current level of impairment will be ongoing. I am not satisfied that the applicant will be unfit for all and any work, should he return to Iran.
24. The applicant wife has also claimed that if her husband is detained indefinitely or is killed by the Iranian authorities and/or Sepah, she will not be able to survive as she will have no male protection. I have not accepted that the applicant was of any interest to the Iranian authorities therefore I do not accept that he would be detained or killed by the Iranian authorities or the Sepah. The applicant wife would therefore not be lacking in male protection in Iran. I further note that her parents and brother still remain in their home village in Ilam province, should the applicant wife need additional family support. The applicant wife also claims that she will not be able to work because she is illiterate and would not be able to support herself. I note that the applicant wife worked as a farm labourer and selling her [products] at the bazaar, prior to

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<sup>9</sup> DFAT, “DFAT Country Information Report – Iran”, 13 April 2020, 20200414083132; 5.29

<sup>10</sup> Ibid; 5.30



the applicants' departure from Iran. I am not satisfied that she would now be unable to support herself and/or her husband, if needed, due to her illiteracy.

25. The applicant suffers from [Condition 1] and contends that he will be unable to work due to the effects of this condition and to provide for himself and his wife. Both the applicant and the applicant wife also suffer from psychological conditions for which they are currently undergoing treatment. Country information indicates that the Ministry of Health and Medical Education is responsible for planning, monitoring and supervising health-related activities for the public and private sectors. The government remains the main provider of primary health care services across the country. While the quality of healthcare in the public sector is of a good standard, overcrowding and doctor shortages are major challenges in Iran. Sanctions and COVID-19 have placed significant strains on the local health care system.<sup>11</sup> There is nothing in the review material to indicate that people suffering from physical or mental health issues are targeted for harm. In considering whether this situation gives rise to a well-founded fear of persecution on the part of the applicants, the lack of adequate medical care in a country does not constitute systematic and discriminatory conduct. There is no well-founded fear of persecution on the basis that the applicants suffer from physical or psychological conditions or may not be able to access appropriate medical care or medication.

#### **Refugee: conclusion**

26. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

#### **Complementary protection assessment**

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27. Under s.36(2)(aa) of the Act, 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**

28. 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.
29. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.

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<sup>11</sup> DFAT, 'DFAT Country Information Report Iran', 20 April 2020, 20200414083132; 2.22

30. Although I have not accepted that the applicants were subject to societal discrimination in Iran due to their Kurdish ethnicity, they may face actions such as employment discrimination in the future, in which it may be harder for them to obtain employment than a Persian Iranian. I am not satisfied that this behaviour or its consequences 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 due to being detained during a protest in 2009. I have concluded that the applicants do not face a real chance of harm because they have spent time in and sought asylum in Australia. As 'real risk' and 'real chance' involve the application of the same standard,<sup>12</sup> I am equally not satisfied that the applicants face a real risk of significant harm on return for the purposes of s.36(2)(aa) for these reasons.
31. I have also considered whether there is a real risk that the applicants would suffer significant harm due to any lack of adequate health practitioners in Iran or any inability to access appropriate medical care or medication. It has not been claimed or suggested that the applicants will be arbitrarily deprived of their lives or subject to torture or the death penalty due to this. In terms of whether the inability to access medical care or treatment constitutes cruel or inhuman treatment or degrading treatment, these terms are defined at s.5 of the Act as including an act or omission which intentionally inflicts severe pain or suffering on a person, or pain or suffering which in the all the circumstances could be regarded as cruel or inhuman in nature, or an act or omission that causes extreme humiliation. I am not of the view that any lack of health practitioners, treatment or medication in Iran constitutes cruel or inhuman treatment or degrading treatment or punishment. These are situations, not acts or omissions that have the intention of causing harm or extreme humiliation. The situation does not constitute 'significant harm' as defined above.

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

32. 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 applicants will suffer significant harm. The applicants do not meet s.36(2)(aa).

#### **Member of same family unit**

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33. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include a spouse of the family head.
34. As neither of the applicants meet the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

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<sup>12</sup> *MIAC v SZQRB* (2013) 210 FCR 505

## **Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

## Applicable law

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### **Migration Act 1958**

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

In this Act, unless the contrary intention appears:

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**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.