



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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IRAN

IAA reference: IAA21/09685

Date and time of decision: 22 September 2021 15:41:00

D Power, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicant a protection visa.

*Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) is a national of Iran. On 30 May 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV).
2. On 12 August 2021, a delegate of the Minister for Immigration refused to grant the visa. The delegate did not accept that the applicant would be targeted by the authorities due to his consumption of alcohol or drugs, western appearance or other behaviours. The delegate also found that the applicant did not have a well-founded fear of harm or a real risk of significant harm on the basis that he is a non-practising Muslim or atheist, his activity on social media, his tattoos or as a former asylum seeker or returnee from a western country.

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

### Applicant's claims for protection

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5. The applicant's claims can be summarised as follows:
  - The applicant is an ethnic Azeri, born in Tehran on [Date]. He has lived in Tehran all his life.
  - The applicant was born and raised as a Shia Muslim but does not currently follow any religion. His parents believed in Islam, but his family was not very religious. They did not attend religious ceremonies or rituals.
  - The applicant had to practice Islam and attend Qur'anic classes at his primary school. He did not like religion being forced upon him. When he was about 14 or 16 years old, he decided he did not want to follow Islam. He stopped fasting and did not attend any religious celebrations.
  - Sometime around [Year], when he was about 17 years old, he decided he was no longer a Shia Muslim and that he was an atheist but kept his beliefs hidden. He told his parents how he felt about Islam and they worried that he would have problems with the Iranian regime. In Australia, he has shared his beliefs about atheism with some of his close friends.
  - The applicant does not believe in God. He respects all religions but does not follow any religion himself. He rejected Islam because saw only negative aspects of Islam, such as corruption and people being harmed and even killed. However, he has not expressed his views publicly in Iran. His mother in Iran is aware of his views on Islam.
  - The applicant has attracted the adverse attention of Sepah and the Basij in the past. The applicant was arrested by the Basij in 2007 for having a MP3 Player and loudspeakers in his car. He was detained for 1 night and beaten. The Basij arrested him again for drinking beer in his car, detained him for 2 nights and beat him. The Basij checked his

car on many other occasions and have objected to aspects of his personal appearance, such as his manner of dress and his long hair.

- The applicant has never been formally charged. He was previously released after signing an undertaking not to grow his hair long and dress in tight clothes. He cannot live according to the Iranian rules.
- The applicant was approximately 16 or 17 when he got a tattoo of an [Image 1] but kept the tattoo covered because tattoos are not permitted in Iran. In Australia, the applicant got a tattoo of a [Image 2], a [Image 3], a large tattoo of a [Image 4] and a large tattoo of a [Image 5]. He got these tattoos because he has had an interest in tattoos since adolescence and likes animals. He believes these tattoos would be offensive to the Iranian regime.
- The Iranian authorities, including the Basij will harm him because he was previously a Shia Muslim but has now become atheist. He will also be targeted by the authorities because he was previously monitored and targeted by the Basij, and because of his tattoos and westernised appearance.
- The applicant could not relocate to any other part of Iran because the Basij operate throughout Iran. The Basij outrank the police, so the police could not protect him. The applicant did not try to relocate from Tehran to another part of Iran because the authorities operate everywhere in Iran and he did not have enough money to move from home.
- The applicant was not a member of any political or religious group in Iran. He does not support any party. However, he believes things were much better 40 years ago when the Shah of Iran was in power. Things are much worse now economically and religion has been forced on people.
- The applicant has posted a video on his Facebook account about the Supreme Leader stating that Iranians living outside Iran should be brought back and imprisoned or executed. He posted this video to warn Iranians living in Australia against returning to Iran. He has also made other posts of a political nature. He fears that the Iranian authorities would become aware of his views on return because there are informants in Australia who would report him. If he returned to Iran, he would express his views publicly in Iran by posting them on social media and this would lead to the authorities targeting him.
- The applicant suffered from depression and anxiety and became involved with drugs for a time. However, he has since decided to address his drug issues and has attended counselling at [a drug and alcohol services centre] since 7 April 2021.

## Refugee assessment

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6. 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

7. 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.
8. The applicant was born and raised in Tehran. The applicant worked in Tehran for some years up until his departure. The applicant's father has passed away, but his mother and siblings all continue to reside in Tehran. I am satisfied that Tehran is the area to which he would return in Iran.
9. The applicant claims that he was subjected to ongoing harassment in Tehran by the Sepah and the Basij. He also claims that he is an atheist and no longer a practising or observant Muslim, and fears that he would be targeted on that basis on return to Iran. He has also posted material critical of the current regime in Iran on social media and fears that the authorities have learned of this and will subject him to serious harm.
10. As noted above, the applicant lived all his life in Tehran. As he got older, he claims that he began attracting the attention of police. The applicant claimed that on one occasion he was caught with alcohol in his car and that on one or more separate occasions he received adverse attention from the Sepah because of the loud music from his mp3 player. He was also harassed about his appearance, such as his long hair and jewellery. He claims that the specific incidents mentioned above were not the only examples of such harassment and that he was repeatedly targeted by the Basij and the Sepah for various perceived infringements of Islam.
11. The applicant specifically mentioned two incidents. The first incident was in 2007, when he was arrested by the Basij for having a mp3 player and loudspeakers in his car. The Basij asked him to take it out of his car but he refused. He then claims that he was arrested and held for one night, during which time he was beaten. On the second occasion, he was sitting on his car drinking with friends. He still had the mp3 player in his car. On that occasion, he claims he was detained for two nights and also beaten. He thinks his friends were also arrested but cannot recall precisely.
12. The applicant also made claims at interview that are not in his initial written statement of claims. He stated that the Basij had frequently stopped and beaten him and that they had even beaten him in front of his family.

13. The applicant stated at interview that he was never charged with any offense or required to appear at court as a result of these encounters. He further states that he never considered moving to another part of Tehran because the Basij are everywhere and in communication with one another. He stated that he could not afford to move out of Tehran.
14. I do not accept as plausible the applicant's claim that the Basij or others constantly sought to target the applicant in the manner described. Despite this harassment allegedly commencing in 2007, the applicant never sought to move elsewhere in Tehran. I note the applicant's claim that he could not afford to move out of Tehran. However, the applicant's SHEV application indicates that he was employed continuously in Tehran in [work sectors] and so on. He was also able to undertake holiday travel overseas. The applicant's SHEV application also indicates that at the time it was lodged he had relatives, his mother and sister, in Ardibil. I consider it relevant that, despite what he claims was severe or ongoing harassment, he never attempted to move elsewhere or even move within Tehran to avoid further trouble.
15. I note also that in all the incidents he describes, he was never held for more than a couple of nights. The Basij never sought to charge or detain him for a longer period, let alone formally arrest him. I note the applicant twice travelled out of the country, to [Country 1] and [Country 2] for holidays in 2009 and 2012 respectively, and chose to return each time. He did not indicate at interview that he ever thought of staying abroad or attempting to seek protection while overseas. I note also that the applicant was able to obtain a visa and depart Iran on a passport in his own name.
16. The applicant also made claims at interview that are not in his initial written statement of claims. He stated that the Basij had even beaten him in front of his family. However, he provided little detail about these alleged incidents at interview or explained the circumstances under which he was allegedly beaten in front of his family.
17. As noted above, the applicant was stopped and detained at one point because he was drinking alcohol on his car. DFAT confirms that alcohol consumption is forbidden and its use punishable by 80 lashes<sup>1</sup>. Nonetheless, DFAT states that alcohol consumption is common in Iran and its use widespread in private settings<sup>2</sup>. DFAT understands that police do not seek to entrap individuals consuming alcohol in the home nor do they actively investigate alcohol offences<sup>3</sup>. Prosecutions for alcohol consumption are not common<sup>4</sup>. A recent study indicated that more than a third of Iranians drink occasionally or regularly<sup>5</sup>.
18. As noted above, the applicant was not even charged in connection with the incident where he was found with a bottle of beer in his car. The applicant has not indicated that he ever sought to consume alcohol openly in Iran or that he intends to do so on return, nor has he claimed that there were any ongoing issues regarding his alcohol consumption.
19. The applicant has provided a letter from his treating drug and alcohol clinician. The applicant has admitted to drug use in the past. However, at interview the applicant confirmed that he has never been arrested or charged for his drug use. He stated that he had used drugs for a little while but that he saw a psychologist and she helped him stay away from drugs. The letter from the clinician underscores the sincerity of the applicant's desire to stop using

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<sup>1</sup> Ibid

<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup> Ibid

<sup>5</sup> The Group for Analyzing and Measuring Attitudes in IRAN, "Iranians' Attitudes Towards Religion: A 2020 Survey Report", 1 August 2020, 20200918134111

drugs. The applicant has not claimed to fear harm on return to Iran because of his previous drug use.

20. I note that even if the applicant were to relapse, support for drug users is available in Iran. Drug addiction is an increasing problem in Iran and the country has taken a relatively enlightened approach to treating drug addiction<sup>6</sup>. UNAIDS, The United Nations Programme on HIV/AIDS, noted that the national program to combat AIDS evolved “to launch a pioneering, highly regarded harm reduction programme” for people who inject drugs. Similarly, a wide range of hospitals offer mental health services on both an inpatient and outpatient basis, almost all of which are in Tehran<sup>7</sup>. A range of antidepressant medications are also available<sup>8</sup>.
21. A wide range of NGOs, charities and other groups provide support services for drug users and Iran has over 1300 rehabilitation centres and over 7500 treatment and harm reduction centres<sup>9</sup>. Again, most of these services are based in the applicant’s hometown of Tehran. DFAT notes that the police do not generally victimise or harass drug users, although occasionally ‘round ups’ do occur<sup>10</sup>.
22. I note that the clinician has indicated that stressors for the applicant included his “migration experience, current financial distress and homeless”. I understand that the applicant clearly prefers to remain in Australia. However, if he returned to Iran, it would at least bring a resolution to his situation and the possibility of re-joining his family. The letter does not indicate that the applicant requires medication or urgent intervention and appears to indicate that his mental health is being adequately managed through non-pharmaceutical strategies such as goal setting and stress management.
23. I accept that the applicant was stopped and detained on two occasions in Iran because he was consuming alcohol and playing music. However, noting that the applicant never sought to move within (or outside) Tehran, the disparity between the details of his encounters with the Basij in his written claims and his account at interview, his decision travel abroad rather than moving within Iran and his voluntary return to Iran from those travels, and the absence of any charges or extended periods of detention despite what he alleges was the sustained attention and scrutiny of authorities, I consider that the applicant has exaggerated the extent and severity and frequency of his encounters with the Basij and other authorities within Iran.
24. I do not consider that the applicant’s sporadic and relatively brief encounters with the authorities rises to the level of serious harm. Nor do I consider that the specific incidents described to indicate a pattern of harassment or adverse attention by the authorities towards the applicant as he has claimed.
25. The applicant has also claimed that from approximately 17 years of age, he stopped being a Shia Muslim and became an atheist. He claimed that his parents worried that he would have problems with the Iranian regime because of his non-belief. The applicant has claimed that he would be targeted by the regime on this account if he returns to Iran.

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<sup>6</sup> DFAT, “DFAT Country Information Report – Iran”, 14 April 2020, 20200414083132; UK Home Office, “Country Policy and Information Note - Iran: Medical and healthcare issues”, November 2019, 20200110110200

<sup>7</sup> UK Home Office, “Country Policy and Information Note - Iran: Medical and healthcare issues”, November 2019, 20200110110200

<sup>8</sup> Ibid

<sup>9</sup> UK Home Office, “Country Policy and Information Note - Iran: Medical and healthcare issues”, November 2019, 20200110110200; DFAT, “DFAT Country Information Report – Iran”, 14 April 2020, 20200414083132

<sup>10</sup> DFAT, “DFAT Country Information Report – Iran”, 14 April 2020, 20200414083132

26. I note that the applicant confirmed at interview that he had stopped being an observant Muslim from around the age of 16 or 17 and decided that he was an atheist. His family noticed that he stopped observing rituals, attending prayer and making other observances.
27. DFAT quotes local sources as saying that secularism is widespread in Iran<sup>11</sup>. It also states that “a significant proportion” of the population does not regularly pray or attend mosque<sup>12</sup>. It further states that religious observance is considered a private matter<sup>13</sup>. A recent study showed that almost one in ten people identified with atheism and that a further 6% identified as agnostic<sup>14</sup>. Even where they did not identify as atheist or agnostic, more than one in five respondents stated they followed none of the recognised or established religions in Iran<sup>15</sup>.
28. I note that the applicant resided in Tehran for approximately a decade after the time he stopped being an observant Muslim and decided he was an atheist. Despite the fact that his family knew of his non-observance and that he remained for almost a further decade in Iran, the applicant did not indicate any occasions on which he was targeted for his lack of belief or observance of the Shia religion. Although the applicant alleged that he received the close attention of authorities for a variety of reasons, he did not report that he suffered any adverse attention in regard to his atheism or non-observance per se.
29. The applicant has claimed that he has posted material critical of the regime on his Facebook account. He stated at interview that he had put up a video of the Supreme Leader stating that those living outside of country should be brought back and imprisoned or executed.
30. Country information indicates that posting material online or undertaking protest activity outside Iran is unlikely to draw the scrutiny of authorities on return. DFAT currently assesses that the Iranian authorities “pay little attention” to returning asylum seekers<sup>16</sup>. DFAT also notes international observers as reporting that the Iranian authorities have a similar lack of interest in prosecuting former asylum seekers for activities undertaken outside of Iran, even those related to their claims or activities such as posting comments critical of the government on social media, protesting outside a diplomatic mission, or converting to Christianity<sup>17</sup>. DFAT has further noted that, to its knowledge, authorities do not check the social media accounts of those returning from abroad<sup>18</sup>.
31. The applicant was asked by the delegate to provide evidence of the material he placed on Facebook that was allegedly critical of the government. The applicant undertook to do so but there is no evidence that such material was provided to the delegate, and no further information on this issue has been provided by the applicant to the IAA. It is therefore difficult to assess the impact of any material on the applicant’s social media accounts.
32. In any event, as set out above, the available country information indicates that the Iranian authorities do not monitor the online activities of returnees undertaken while they were abroad, nor do they have any particular interest in other activities undertaken abroad, even where those activities might include such things as protesting outside an Iranian mission or

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<sup>11</sup> DFAT, “DFAT Country Information Report – Iran”, 14 April 2020, 20200414083132

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> The Group for Analyzing and Measuring Attitudes in IRAN, “Iranians' Attitudes Towards Religion: A 2020 Survey Report”, 1 August 2020, 20200918134111

<sup>15</sup> Ibid

<sup>16</sup> DFAT, “DFAT Country Information Report – Iran”, 14 April 2020, 20200414083132

<sup>17</sup> Ibid

<sup>18</sup> Ibid

converting to Christianity. I consider they would be similarly unaware and similarly uninterested in evidence of the applicant's sporadic Facebook posts regarding the current regime.

33. DFAT notes that millions of Iranians travel in and out of the country each year without incident<sup>19</sup>. It further assesses that unless a person was already the subject of adverse attention by authorities, it is unlikely that they would attract attention on return<sup>20</sup>. As set out above, although I accept that the applicant had occasional minor brushes with elements of the Sepah or Basij in the past, I do not accept that the authorities had any particular or ongoing interest in the applicant when he departed Iran in 2012. I note that the applicant departed Tehran legally on a passport in his own name.
34. The applicant stated that he remained critical of the current regime. When asked to elaborate on his political views, he referred to the time when the former Shah of Iran was in power. He said that Iran was more prosperous then, and people had more freedom. The applicant contended that if he had to return to Iran, he would express those views publicly and that this would put him at risk of serious harm from the authorities.
35. The applicant was asked if he supported any political groups in Iran or any that supported a return to the time of the Shah. The applicant said that he was not aware of any groups. When asked if he had been a member of any political groups in Iran, the applicant said that he had not. He also stated that he was not a member of any political group in Australia. The applicant was asked how he would express his views and he said that he would post on social media as he had done in Australia.
36. When asked how often he posted material of a political nature on Facebook, the applicant stated that he was not sure how frequently he posted political material but that he would post something whenever he came across something relevant.
37. Given that the applicant's lack of any involvement with politics or protest activity in Iran, his lack of any activism or political involvement here, the sporadic nature of his social media activity in Australia, and the lack of any other protest activity or public expression of his views, I do not accept that the applicant would become vocal about his views or seek to become politically active on return to Iran. In this respect, I consider that his lack of participation or involvement in politics would stem not from any fear of reprisal, but rather a lack of any genuine interest in or commitment to political issues beyond a general dissatisfaction with the current regime.
38. The applicant previously claimed that he was harassed about his 'westernised' attire and appearance, such as the fact that he wore tight jeans, sported jewellery and had his hair long. The applicant has several tattoos and fears receiving adverse attention from the authorities because tattoos are not permitted in Iran. The applicant claims that he got a tattoo in Iran when he was 16 or 17 but that he covered it up by wearing a long sleeve shirt. The applicant has had further tattooing done since leaving Iran. The applicant's tattoos, by his own account, are predominantly of various animals as well as a tattoo of a [Image 3] and a [Image 4]. He chose them because he likes animals and he did not indicate that there is any political dimension or underlying message with the tattoos.
39. As noted above, the applicant's written claims state that in Iran he covered his first tattoo by wearing a long sleeve shirt. His written claims do not specifically mention any adverse

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<sup>19</sup> DFAT, "DFAT Country Information Report – Iran", 14 April 2020, 20200414083132

<sup>20</sup> Ibid



treatment stemming from his tattoo. At interview, he gave a different account. He stated that when he wore a short sleeve shirt, the Basij would see it and begin to harass him.

40. When recounting his troubles with the Basij, he never initially mentioned tattoos as an issue despite alleging he was regularly stopped and harassed for relatively minor infractions. His failure to mention the tattoos as an issue earlier in the interview is especially notable given that the applicant mentioned a range of specific issues about his personal appearance that allegedly drew the attention of the Sepah and Basij, including his long hair, wearing tight jeans, and wearing jewellery. It was only when the delegate specifically raised the issue of the applicant's tattoos that he then asserted that he was also targeted or harassed on that account.
41. I accept that the applicant may have received adverse comments regarding his appearance in the course of those encounters that primarily involved being stopped for alcohol and loud music although, for the reasons set out above, I also consider that he has exaggerated the level of adverse attention he received. However, although the applicant may have received adverse comments or attention about his appearance prior to his departure in 2012, I do not consider that he would attract such attention on return.
42. Department of Foreign Affairs and Trade (DFAT) notes that it is generally agreed that men are subject to less strict controls than women in Iran regarding their personal appearance<sup>21</sup>. DFAT recently reported that men sporting a 'westernised' appearance are a common sight in Iran, especially in Tehran<sup>22</sup>. This includes men wearing jeans (including with 'western' brands), long hair or hair treated with hair gel, waxed eyebrows and the like<sup>23</sup>.
43. As regards tattoos, these are also common in Iran and increasingly popular among young Iranians<sup>24</sup>. As the applicant himself noted at interview, the attitude towards tattoos and westernised appearance appears to have relaxed in recent years. The applicant referred at interview to seeing Iranian soccer players on television here in Australia and noting that they no longer appeared to have to cover their tattoos as they did when he was in Iran.
44. An Iranian article from 2017 indicates that the only 'punishable' tattoos are those containing 'nasty or obscene' images<sup>25</sup>. It also notes that the majority of jurists agree that unless tattoos contain obscenity or harm the health of the person, they are otherwise allowable<sup>26</sup>.
45. DAFT currently notes that men sporting visible tattoos are common in Iran, even tattoos extending almost the entire length of the arm ('sleeve' tattoos)<sup>27</sup>. DFAT is not aware of tattooists being targeted by authorities. It is not aware of instances of authorities targeting people for visible tattoos or a westernised appearance.
46. DFAT states that arrest and mistreatment are not common during the airport re-entry process and that authorities accept that many Iranians will seek to live and work abroad for a variety of reasons<sup>28</sup>. The applicant's interactions with authorities relate to relatively minor incidents regarding the music he was playing, having a bottle of beer in his car, and his personal appearance. I consider that the applicant does not have a profile, a significant

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<sup>21</sup> DFAT, "DFAT Country Information Report – Iran", 14 April 2020, 20200414083132

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> Ibid

<sup>25</sup> Iran Front Page (Iran), "Is Tattooing a Crime in Iran?", 20 February 2017, CXC90406620781

<sup>26</sup> Ibid

<sup>27</sup> DFAT, "DFAT Country Information Report – Iran", 14 April 2020, 20200414083132

<sup>28</sup> Ibid

history of previous adverse interactions with authorities, or any other indicators that would trigger any particular interest in him on return to Iran.

47. I accept that the applicant may be dissatisfied to an extent with the current regime and that he has made occasional posts on Facebook that are critical of the government. However, as set out above, I consider that the applicant has not shown any particular interest in or commitment to political activism or social change. His descriptions of those interactions he has had with authorities relate to relatively minor infringements that did not result in charges, let alone a conviction. I do not accept that he would seek to become politically active or vocal about his beliefs on return to Iran or that there is anything that would lead to the authorities to take a particular interest in him.
48. I am not satisfied that there is a real chance the applicant would face any harm, whether from the Iranian authorities or any other party, on account of his previous interactions with Sepah, the Basij or other authorities, being a non-observant Muslim or atheist, posting on social media, consumption of alcohol, his tattoos or appearance or on any other account. I am also not satisfied that there is a real chance the applicant, with his profile and background would face any harm as a returnee from a western country or former asylum seeker, whether from the Iranian authorities, or on any other account.
49. The applicant does not have a well-founded fear of persecution.

#### **Refugee: conclusion**

50. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

#### **Complementary protection assessment**

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51. 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**

52. 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.
53. 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.

54. I have concluded that the applicant is not of interest to the Iranian authorities, nor is there a real chance the applicant would face any harm for any of the reasons put forward. Based on the same information, and for the reasons set out above, I find that the applicant does not have a real risk of suffering significant harm on return to Iran in connection with those claims.

**Complementary protection: conclusion**

55. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

**Decision**

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The IAA affirms the decision not to grant the referred applicant a protection visa.

## 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.