



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA23/10424

Date and time of decision: 10 March 2023 09:28:00

C Wilson, Reviewer

Decision

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

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be an Arab from Iran. He arrived in Australia with his brother and the brother's family on [date] August 2012. He applied for a Safe Haven Enterprise Visa (SHEV) on 6 February 2016.
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused the application on 7 November 2016. The delegate did not accept the applicant, or his brother, had been detained and tortured by the Iranian security service. The delegate found the applicant did not have an adverse profile as an Arab.
3. A reviewer of the IAA affirmed the delegate's decision on 7 June 2017. The applicant sought judicial review, and by order of Judge [A] dated 21 November 2023 the decision was quashed and remitted to the IAA for reconsideration.

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).
5. Following the court remittal the Secretary provided to the IAA a copy of the decision record for the applicant's brother and his family, and copies of the interviews from 2016 of the applicant's brother and sister-in-law. The applicant provided transcripts of these two interviews. This information is not new, as it is clear from the delegate's decision that they had this information before them when they made their decision on the applicant's SHEV application.
6. The applicant's representative says the IAA is obliged to conduct a hearing with the applicant and his brother to discuss their detention, the recent death of their cousin, and the applicant's fears should he be returned to Iran. I do not accept I have any such obligation. Part 7AA of the Act provides for a limited form of review by the IAA and there is no right to a hearing. Except in limited circumstances I must conduct a review on the papers. I may exercise a discretion under s.473DC to invite a person to give new information, at an interview or in writing, but there is no obligation to do so. The applicant has provided information regarding his alleged detention in his application and in the interviews with the Department. He has provided new information relevant to the death of his cousin and information of his reasons to fear returning to Iran in his recent statutory declaration. There is no indication he has further new information that could not have been provided in writing. Taking into account the limited form of review provided for by the Act I have decided not to exercise the discretion to invite him or his brother to an interview.
7. The applicant's representative requests the IAA to exercise their discretion to obtain the brother's full SHEV application file. I have before me already copies of the brother's decision record and audio recordings of the SHEV interviews for the brother and his wife. The applicant has not indicated what else in the Department's file they want to rely on. I am not making a decision on the brother's application. I am not persuaded the entirety of the brother's file may be relevant for the review. I have therefore not exercised the discretion to obtain it.

8. The applicant provided new information in the form of a statutory declaration dated 20 February 2023. The new information contained therein includes information regarding the recent death of a cousin in Iran, photographs annexed purportedly showing that the young woman who died is his cousin, and other comment or clarification on his claims and his fears about returning to Iran. I accept the information could not have been provided to the delegate as it refers to more recent events. I accept the information is capable of being believed such that it amounts to credible personal information that may have affected the consideration of his claims. I am also satisfied there are exceptional circumstances to consider the new information taking into account the more than 6 years since the original decision and the significant recent event of the cousin's death.
9. The applicant has provided new information in the form of 26 country reports. The 26 reports all post-date the delegate's decision and I accept they could not have been provided before the decision was made. The applicant submits there are exceptional circumstances because they reflect changed country circumstances in Iran. I accept this submission for the majority of the reports provided and I am satisfied there are exceptional circumstances to consider new country information relevant to the current situation in Iran. I note however amongst the new information is the 2017 Human Rights Watch World Report and an article from Human Rights Watch 'Iran – Rights Under Attack' dated 12 January 2017. Given these reports are from 6 years ago I consider they are quite dated. In the submissions the applicant relies on these reports as evidence of 'arbitrary arrests during and following the recent protests in Iran', which I consider must be an error. I am not satisfied there are exceptional circumstances to consider the two reports from 2017. I am satisfied there are exceptional circumstances to consider the other 24 reports.
10. It has been more than 6 years since the delegate made the decision, and therefore the country information before me is dated. In addition to the country information provided by the applicant I have obtained the following new information: Human Rights Watch World Report 2023, 12 January 2023; and the Department of Foreign Affairs and Trade (DFAT) Country Information Report Iran, 14 April 2020. I am satisfied there are exceptional circumstances to justify considering new information relevant to the current situation in Iran. Whilst the DFAT report is also somewhat dated, it is the most recent DFAT report available and is more current than the 2016 report relied on by the delegate.

Applicant's claims for protection

11. The applicant's claims can be summarised as follows:
 - The applicant is an Arab from Khuzestan, Iran. He is unmarried. His father died when he was an infant. He has two older brothers and a sister.
 - In Iran he did not practice any religion. He now identifies as atheist.
 - As an Arab he experienced some discrimination at school and in accessing government jobs. However he completed tertiary studies and had a good job [at] [a workplace].
 - In July 2012 his sister-in-law, who was away with her child visiting relatives, called him to say she was worried because she could not get hold of her husband by phone. The applicant went to his brother's house to look for him but when he got there he found the door was open and saw three men going through his brother's computer and other possessions. He was going to call the police but the men saw him and detained him. They forced him into a car, with a sack over his head, and took him to an unknown location.

- He was detained for 4 days. He realised he was being held by Sepah. They questioned him about his brother, accusing the brother of being involved in the Wahabi group. They physically mistreated, assaulted and threatened the applicant. They also showed him his brother being mistreated. He feared for his life and eventually agreed to sign a document stating his brother was an Arab activist and member of Wahabi.
- He was released and told his family the brother was detained by Sepah. Until that point the family did not know what had happened to either of them. His oldest brother paid bribes to have the middle brother released around 12 days later. His oldest brother also arranged to quickly get the brother out of Iran. Shortly after the oldest brother made arrangements for the applicant also to leave Iran with the middle brother's wife and child.
- After he left Iran he heard from the oldest brother that summons had been issued for the brother to attend court and for the applicant and older brother to give evidence.
- A cousin in Khuzestan died in late 2022 after being detained by the security services for taking part in protests. The family believe her death was caused by the security services but staged to look like a suicide. Another cousin, living [overseas], spoke out against the Iranian authorities following the death. His family fear they will be targeted and his brother has already received threatening calls telling the family to stop speaking out.
- He fears returning to Iran because the security services have a record against him and he failed to comply with a summons. He will likely be arrested on arrival at the airport and imprisoned. Even if he is released, they would monitor and harass him to destroy his life. His profile is also enhanced because he is Arab, atheist, relative of a known activist, and a returnee from a western country.

Refugee assessment

12. 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

13. 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.
14. I accept the applicant is a national of Iran, based on the identity documents he provided to the Department. The applicant lived in Khuzestan in Iran and his relatives continue to live there. I find Iran is his receiving country and Khuzestan is the place he is likely to return to.
 15. The applicant is a single man from Khuzestan who claims he experienced discrimination as an Arab, but that he left Iran primarily because he had been detained and tortured by the Iranian security services. He fears returning as he believes he remains a person of adverse interest for that reason and because of his cumulative profile as an Arab, an imputed profile as a perceived activist or relative of activists, an atheist, and a returning failed asylum seeker from a western country.
 16. The applicant claims to be an ethnic Arab from the Beni Naami tribe from Khuzestan. His identity documents and evidence relating to his family support this claim. I find he is an Arab from the Beni Naami tribe from Khuzestan.
 17. Arabs are a small ethnic minority in Iran, living predominantly in the applicant's home province of Khuzestan. They are often referred to as Ahwazi Arabs, in reference to Ahwaz the capital city of Khuzestan. DFAT reports Arabs complain of economic neglect and discrimination in education, employment, housing, politics and culture. Whilst Arabs can express their ethnic identity, expressions of Arab culture that are interpreted as political or separatist acts are not tolerated. According to DFAT Arabs who do advocate for greater rights and autonomy face a high-risk of official harassment, monitoring, imprisonment and mistreatment.¹
 18. DFAT reports the Arab population in Khuzestan has been a sensitive topic for the Iranian regime since a terrorist attack in September 2018. In that attack gunmen targeted a military parade in Ahwaz, killing 25 people including civilians and members of the security organisation the Islamic Revolutionary Guards Corps. An Arab separatist group claimed responsibility for the attack, although the Islamic State of Iraq and the Levant claimed responsibility as well.² In response the authorities arrested hundreds of Arabs, targeting in particular known civil and political activists, in order to crush dissent in Khuzestan.³ DFAT reports protests are common in Khuzestan, and there is a history of violent repression by the authorities and large numbers of Arabs being arrested at such times.⁴ There has been significant protest activity in Khuzestan and Iran generally in recent years. Protests broke out from July 2021 in Iran against the deteriorating living conditions in Khuzestan and other provinces. By the end of the month it was reported at least 9 people were killed in the protests.⁵ The most recent wave of protests began in September 2022 following the death of a young woman Mahsa Amini at the hands of the Basij ('morality police'). Protests broke out across Iran, with many reports of protestors being killed by security forces, and thousands detained. Executions of protestors were also reported.⁶ I acknowledge reports that in the

¹ DFAT, Country Information Report Iran, 14 April 2020.

² DFAT, Country Information Report Iran, 14 April 2020.

³ Amnesty International, Iran: Hundreds arrested in vicious crackdown on Ahwazi Arabs, 2 November 2018.

⁴ DFAT, Country Information Report Iran, 14 April 2020.

⁵ Human Rights Watch, Iran: Deadly Repression on Khuzestan Protests, 29 July 2021.

⁶ UN News, Iran: UN rights chief Turk warns against further 'State-sanctioned killing', 11 January 2023; UN News, Iran "40 people killed in protests over past week – OHCHR, 22 November 2022; Amnesty International, Iran – Young man at grave risk of execution in connection with protests amid killing spree, 11 January 2023.

recent past ethnic minorities such as Arabs have been disproportionately affected by death sentences in Iran.⁷

19. The applicant does not claim to have a history of protesting or being an activist for Arab rights. I do not accept he will be imputed with a political opinion as anti-regime and/or pro-Arab rights merely for reason of his ethnicity. There is nothing before me to indicate he intends to engage in political activity on return to Iran. I find the chance of him facing harm for reason of his Arab ethnicity alone is too remote to amount to a real chance.
20. I have taken into account the evidence that a cousin, who was publicly recognised as an activist, died in suspicious circumstances in late 2022. The applicant provided evidence of public reporting of her death.⁸ She was reported to have been detained by security services for her part in anti-regime protests, and then to have been found dead at home shortly after her release. The reports state her death appeared to have been staged as a suicide, and her family believe she was murdered by the security services. Her brother, an Arab rights campaigner now living [overseas], spoke openly to the media about his sister's death.
21. The applicant has provided a number of photographs as evidence that he is related to the female activist who died. I accept they share the same family name. I also accept the photographs show the late activist with the applicant's sister and mother in social and domestic settings. She is recognisable by the likeness to the photographs published in the reports of her death. I am also satisfied the other women in the photographs include the applicant's sister and mother, as the applicant has also provided photographs of himself with his sister and mother. The likeness in the photographs is evident. I accept the applicant is related to the female activist whose death, allegedly at the hands of the security services, was reported on in late 2022. The photographs evidence a close relationship between the women and I accept the late activist is the applicant's relative. For the purpose of this assessment I have accepted she is his cousin.
22. The applicant claims his older brother has received threatening calls telling the family to 'shut up' about the activist's death. There is no evidence however that the older brother or other close relatives have been detained or otherwise harmed by the security services. I find the chance of the applicant facing harm merely for being related to his cousin is too remote to amount to a real chance.
23. The applicant claims to fear harm as an atheist in Iran. In his arrival interview, when he was asked to specify his religion, he said he had no religion. In his SHEV application in 2015 he answered 'no religion' to the question asking him to specify his religion. In his written claims however he declared he is spiritual and believes in God, but does not identify with any particular religion. At his SHEV interview in 2016 he said he had not practised Islam even in Iran, although maybe as a child at school he may have. His family were not religious. The delegate asked if he identified as a non-practising Muslim but the applicant said no, he was not a non-practising Muslim as he had never associated with Islam. He told the delegate he was not religious at all. He was quite definite about this. In submissions to the IAA he has used the word 'atheist' for the first time, but I consider that is consistent with what he told the delegate about not being religious at all. If in fact back in 2015 he did have some belief in God, but no affiliation to religion, I accept that since at least since 2016 he has had no religious beliefs. I accept he considers himself an atheist and would not practice Islam or any other religion in Iran.

⁷ Amnesty International, Report on Human Rights in Iran, 2021.

⁸ [deleted].

24. Iran is a theocracy with Islamic beliefs and customs enshrined in its law. Shia Muslim is the official state religion, and legislation and policy heavily favours Shias whilst discriminating against other religious minorities. A Muslim who leaves their faith or converts to another religion can be charged with apostasy in Iran, a charge which can attract capital punishment. Actual death sentences for apostasy are rare however, and are usually politically motivated. Although Iran is an Islamic country secularism is widespread, particularly in major cities and amongst the younger and wealthier Iranians. A significant proportion of the population do not attend mosque or pray on a regular basis.⁹
25. There is no claim that the applicant was harassed or noticed for not practising Islam when he lived in Iran. There is no evidence before me that the applicant asserts his lack of religion publicly. Whilst I accept he may not hide his lack of religion, he has never engaged in any anti-Islamic or pro-atheist activism. I do not accept his personal views are known to or of interest to the Iranian authorities. I do not accept he faces a real chance of harm on return to Iran merely for his lack of belief in Islam or identifying as atheist.
26. The applicant claims to have been detained and mistreated by the Iranian security services shortly before he left Iran. He does not claim to have been personally targeted, but says he was detained when he went to check on his brother who had been detained due to accusations of involvement with the Wahabi group or other anti-regime activities. The applicant says he was held for 4 days during which time he was tortured and questioned about his brother. He says he was only released after he agreed to sign documents confessing his brother was an Arab activist and a member of the Wahabi group.
27. The delegate did not accept the applicant was detained in Iran. The primary reason for this finding was because the delegate found in the brother's case that the brother had not been detained. No assessment was undertaken as to the standalone credibility of the applicant's account to have been detained. The delegate relied on their findings that the brother's claims regarding his detention were vague, inconsistent and unsupported by any documentary evidence. I have listened to recordings of the delegate's interviews with the brother and his wife. I do not agree that the brother's evidence was vague. It also appeared to me to be largely consistent with his claims, as set out in the delegate's decision. Whilst I am not making findings on whether the brother was or was not detained, I consider there is nothing in the brother's claims or his presentation of them at the SHEV interview that makes them vague, inconsistent or not credible such that the applicant's claims are undermined.
28. The applicant has consistently claimed to have been detained by Sepah. He first made this claim in his arrival interview in 2012. He made claims consistent with his arrival interview in his SHEV application in 2016. After considering his claims and listening to recordings of both the arrival and SHEV interviews, I consider his claims are plausible. He has provided a detailed account of what he claims happened to him in Iran. He went into considerable detail about the detention in his earliest interview with the Department, that is the arrival interview in 2012. The written record captures most of what he said and captures the essence of his narrative, but there was even more said by the applicant that was not written down. At one point he is reluctant to continue, saying this wasn't a good memory [to speak about]. He also says he promised himself he would never tell anyone what happened to him. However he continues after prompting by the interviewer, including being told the information would be kept confidential. I found the applicant's description at the arrival interview of what happened to him in Iran was told in a manner that suggested he was speaking from lived experience. Overall I found the applicant's oral account at the arrival and SHEV interviews to

⁹ DFAT, Country Information Report Iran, 14 April 2020.

be convincing and credible. I give weight to that, and to the general consistency in the evidence he has given to the Department and IAA through written claims, his interviews, and his recent statutory declaration.

29. The applicant's alleged detention by Sepah is also consistent with country information. The authorities in Iran are reported to target ethnic minorities.¹⁰ DFAT reports arbitrary arrests are commonly used to impede perceived anti-government activities by ethnic minorities, amongst others. There are reports detainees in Iran can remain in detention facilities without charges. Detainees are vulnerable to torture and other mistreatment in Iranian detention facilities, often with the purpose of extracting information.¹¹ Based on my assessment that the applicant has given a credible account of being detained in Iran, and this claim is supported by country information, I accept that he was detained as claimed.
30. The applicant does not claim he was charged or sentenced in relation to his detention. He says he was detained and tortured for information about his brother. He believes there is ongoing interest in him because he left the country before attending court to give evidence against his brother and believes he will be arrested on return for this reason. He has not personally seen any summons for him to attend court, nor can he provide any such documentation. He has provided a letter described as a subpoena to his older brother in Iran dated 2 March 2014 asking that brother to attend at the police station to answer questions. If that letter is genuine, there is no indication in the letter what the police wish to question him about. I am not satisfied on the information before me that the applicant has been summoned to attend court nor that there is any warrant to arrest him on return.
31. I have considered whether the applicant would otherwise be of adverse interest to the Iranian authorities on his return. DFAT reported in 2020 that little attention is paid to failed asylum seekers on their return to Iran. However those who were of adverse interest before leaving Iran face a higher risk of attracting the authorities attention on return.¹² I do not accept the applicant had a high profile in Khuzestan prior to being detained. I note he was released after 4 days without charges, and even if a bribe was paid at the airport, he had no issues travelling out of Iran on his own passport. However I accept the detention has brought him to the attention of the security forces and I accept there may be a record of this.
32. The applicant will be returning to Iran at a time where the authorities are clamping down on any perceived threats to the regime. Reports from the last few years on the treatment of Arabs in Khuzestan who are perceived to be a threat detail killings during protest activity, arbitrary detention without charges, sham trials, and even executions.¹³ The applicant does not himself have a profile or history of protest or activism. However, I consider his cumulative profile could now put him at risk of attracting adverse attention on return. This risk is increased by the fact he is returning to Khuzestan, not Tehran, noting the high level of security forces and security sweeps conducted in his home province.¹⁴ I consider the unique set of factors in his case now make him vulnerable to attracting adverse attention on return. That is: he was detained shortly before leaving Iran; he will be returning after seeking asylum in a western country at a time when the authorities are alert to any perceived threat to the

¹⁰ HRW, World Report 2023, p.306.

¹¹ DFAT, Country Information Report Iran, 14 April 2020.

¹² DFAT, Country Information Report Iran, 14 April 2020.

¹³ HRW, Deadly Repression of Khuzestan Protests, 29 July 2021; Amnesty International, Iran: Hundreds arrested in vicious crackdown on Ahwazi Arabs, 2 November 2018; Amnesty International, Iran: Horrifying execution of young protestor exposes cruelty and risk of further bloodshed, 8 December 2022; UN News, Iran: UN rights chief Turk warns against further 'State-sanctioned killing', 11 January 2023.

¹⁴ DFAT, Country Information Report Iran, 14 April 2020.

regime; he is a member of a minority ethnic group in Khuzestan that suffers discrimination and disproportionate adverse attention from the authorities; and his family has come under recent scrutiny by the authorities due to the death of his activist cousin and public calling out of the authorities by another activist [cousin]. I acknowledge that while he says the family in Iran have been threatened, there is no evidence they have as yet suffered serious harm since the publicity around the cousin's death. However I consider the applicant's past detention and a return from Australia put him at greater risk of attracting adverse attention than that faced by his family in Iran.

33. Taking all of these factors into account, I am satisfied there is a real chance that cumulatively the applicant's past detention, Arab ethnicity, returning to Khuzestan, and events surrounding the recent high-profile death of his cousin, would bring him to the adverse attention of the authorities in Iran on return.
34. Having regard to country information referred to in this decision, I accept the applicant faces a real chance of being detained, questioned, physically mistreated or tortured on return to Iran by the security services for reason of his cumulative profile. I accept the persecution could involve serious harm, and that the persecution involves systematic and discriminatory conduct. I accept the essential and significant reason for the persecution the applicant fears would be his cumulative profile as a person with an imputed political opinion as anti-regime due to his past detention, ethnicity, being a failed asylum seeker returning from Australia, and events connected to the recent death of his cousin. As the state is the agent of persecution I find issues of state protection do not arise. I also find the real chance of persecution relates to all areas of Iran. I am satisfied the applicant's fear of persecution in Iran is well-founded.

Refugee: conclusion

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

Decision

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

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of *well-founded fear of persecution*, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.