



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

**Decision and Reasons**

**Referred application**

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IRAN

IAA reference: IAA19/06309

Date and time of decision: 20 March 2019 14:22:00

M Brereton, 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) claims to be a Shi'a and a Hazara from the city of Mashhad in Iran who has had his Iranian citizenship revoked. He left Iran legally in September 2012 and arrived [in] April 2013. On 29 September 2017, he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 30 January 2019, a delegate of the Minister for Immigration (the delegate) refused to grant the visa.
2. The applicant claimed to fear harm because his Iranian citizenship has been revoked and he will be removed from Iran to Afghanistan. He fears harm from anti-government elements (AGE) in Afghanistan, as a Shi'a and a Hazara.
3. The delegate accepted that the applicant had provided genuine identity documents. The delegate considered information about citizenship law in Iran and did not accept that the applicant's citizenship had been revoked. The delegate considered whether the applicant faced harm in Iran as a failed asylum-seeker who has been in a Western country and found that he did not face a real chance of serious harm or a real risk of significant harm for this reason. The delegate found that the applicant is not a person in respect of whom Australia has protection obligations.

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

### Applicant's claims for protection

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6. The applicant's claims can be summarised as follows:
  - He is a Shi'a and a Hazara who was born in Iran and held Iranian citizenship but his family has Afghan heritage.
  - In about 2011, his maternal grandfather's Iranian citizenship was revoked. About one year later his mother's Iranian birth certificate was revoked.
  - The applicant's father had a permanent residence visa because of his marriage to the applicant's mother. The Iranian authorities told his father that that visa was being cancelled after the mother's birth certificate was revoked.
  - The applicant reacted angrily and the authorities took him to the police station. He was beaten with batons, kicked and detained for [a number of] hours.
  - The Iranian government has begun cancelling the citizenships and visas of Afghans and deporting them to Afghanistan. Not long before the applicant came to Australia, the Iranian authorities came to the family home and confiscated his mother's documents.
  - Soon after the applicant left Iran, the authorities came to the family home and confiscated his birth certificate. It is very likely that he is no longer entitled to live in Iran.

- There is a high chance that he will be deported to Afghanistan. He faces harm from anti-government elements (AGE) in Afghanistan because he is a Shi'a and a Hazara. He cannot obtain protection from the Iranian government because if he approached them he would be at risk of being deported to Afghanistan.
- He fears being pressed into fighting in the Syrian civil war, being arrested for leaving Iran illegally and for seeking asylum in Australia. He also fears harm as a Hazara in Iran.

## Refugee assessment

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7. 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

8. 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.
9. The applicant claims to have held Iranian citizenship and has provided Iranian documents to support this. He also claims to have undertaken compulsory military service in Iran between [certain years]. He explained to the delegate how his family and he obtained and then lost their citizenship in Iran as follows:
  - His maternal grandfather ("MG") came from Afghanistan. The applicant does not know a lot about MG but he understands that MG settled in Iran 60 or 70 years ago and obtained Iranian citizenship.
  - The applicant was born in [year] and his mother ("M") obtained a shenasnameh<sup>1</sup> for him.
  - In about 2011, M tried to obtain a shenasnameh for the applicant's sister. M and MG attended the police station to do so but MG was accused of having obtained his

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<sup>1</sup> Iranian birth certificate.

citizenship illegally. MG's shenasnameh was revoked sometime later and MG died soon after that.

- The applicant's father ("F") had been born in [Afghanistan], but had come to Iran at the age of about [age]. F had permanent status in Iran because he was married to M, who had Iranian nationality. In about 2012, F was told to report to the Immigration and Passport Police Office. The applicant went there with F and the authorities told F that his permanent status was being rescinded.
  - At about this time, M was told to relinquish her shenasnameh but did not do so. About two months later, the police came and confiscated that document.
  - Shortly after this, the applicant came to Australia. He travelled to Australia on a genuine passport issued to him by the Iranian government. Sometime later, the authorities came to the family home and took his shenasnameh.
  - F passed away in 2013 but M and the applicant's siblings remain in Iran. The applicant's siblings have obtained temporary residence cards but M has refused to do so and has no identity documents or legal status in Iran.
10. On 17 December 2018, the applicant provided a post-interview submission in which his migration agent submitted that the applicant is stateless and has no current right to return to Afghanistan or Pakistan. The agent submitted that because of the applicant's complicated immigration status, he meets the requirements of either s.36(2)(a) or s.36(2)(aa).
  11. The key issues before me are whether the applicant held Iranian citizenship and if so, whether it has been revoked.
  12. According to a report in the applicant's post-interview submission,<sup>2</sup> children born to an Iranian father obtain Iranian nationality regardless of where they themselves were born. The applicant has consistently claimed that F was from Afghanistan and did not have Iranian nationality or citizenship. He has provided documentary evidence including what he claims is a copy and translation of part of F's Afghan passport. This does not bear any name or photograph. It does contain a number of stamps which are said to be residency permit renewals and a notation that (according to the translation) the passport has been annulled due to the cancellation of the holder's wife's birth certificate and the holder is listed as "to be deported". There are no other documents in the review material which indicate that F had Iranian nationality or citizenship.
  13. Information before me indicates that an Iranian woman who enters into marriage with a foreign man and can retain her Iranian citizenship. The foreign husband does not become an Iranian citizen but he can be granted a residence permit.<sup>3</sup> I am satisfied on the evidence before me that F was not an Iranian national and that the applicant has therefore not obtained Iranian nationality by descent from F. Further, as the applicant's father is not Iranian, the applicant does not enjoy citizenship by birthright.<sup>4</sup>
  14. Although Iranian children do not obtain nationality by descent from their mothers, prior to 1984 Iranian mothers could register their children under the mother's name and obtain identity documents for them. However, other information before me indicates that in 1984 (two years before the applicant's birth), the Iranian civil law was amended to remove this

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<sup>2</sup> Toker, Dr J, "Exploring Statelessness in Iran", Tilburg University, 2014.

<sup>3</sup> Landinfo - Country of Origin Information Centre - Norway, "Afghan citizens in Iran", 1 March 2011, CIS24357.

<sup>4</sup> Human Rights Watch, "Unwelcome Guests: Iran's Violation of Afghan Refugee and Migrant Rights", 1 November 2013, CIS27022.

right unless the children were illegitimate. This amendment remained in force until 2006.<sup>5</sup> The applicant said that M was able to obtain a shenasnameh for him and according to the translated copy in the review material M also held a shenasnameh when she applied for the applicant's document.

15. The applicant's shenasnameh shows that he was registered with M's family name and all of his subsequent documents also use this family name. While I note that Iranian mothers could register illegitimate children up until 1984, the applicant has consistently claimed that F and M were married, and F's name appears as the applicant's father on the shenasnameh and the applicant's other documents. There is no marriage certificate or any other documents in the review material which indicate the date of this marriage. The applicant's post-interview submission of 12 December 2018 attaches a handwritten letter and translation which purports to be a letter from a Civil Status Registry General Office, advising that the marriage certificate is "nulled and is no longer valid", but there is no reference to the date of the marriage.
16. It is at least possible that F and M were not married at the time of the applicant's birth, or alternatively, that M falsely reported the applicant as illegitimate to exploit the loophole that existed. In either event, I am satisfied that the applicant was issued a shenasnameh and was granted Iranian nationality. The applicant lived, studied and worked as an Iranian national, including undertaking two years of compulsory military service. I am satisfied that the applicant was, and was considered by the authorities to be, an Iranian national at least up until 2011.
17. The applicant claims that he had Iranian citizenship from birth but as I have found above, he was not eligible for citizenship by birth. The information before me indicates that Iranian nationals born to foreign fathers could apply for citizenship if the national had lived in Iran for 12 months after they attained the age of 18 and had no outstanding military service obligation. In the applicant's case, he would have been eligible to apply for citizenship after August 2007, when he completed his military service.
18. The applicant has not claimed that he applied for citizenship and there are no documents in the review material which indicate that he applied for, or was granted citizenship. However, he told the delegate that he departed Iran on his own, genuinely issued Iranian passport. He did not obtain this passport through bribes or other fraudulent means. He claims that this passport was subsequently taken from him by the people smugglers who arranged his travel to Australia and he has not provided any copy of this document. I am not able to conclude when the passport was issued but as the applicant left Iran on that passport in September 2012, I am satisfied that he obtained the passport sometime before that date.
19. As the applicant held an Iranian passport I find that the applicant had therefore applied for Iranian citizenship at a time after August 2007 and that he obtained and held this Iranian citizenship as at September 2012. I take into account information before me that it is not possible for first and second generation Afghan citizens in Iran to acquire Iranian citizenship (apart from women who enter into marriage with Iranian men) and I am satisfied that the applicant, having been granted Iranian citizenship, was not considered by the Iranian authorities at that time to be an Afghan citizen.<sup>6</sup>

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<sup>5</sup> Macrothink Institute, "Afghan Immigrants in Iran and Citizenship", 4, 7 December 2014, CIS2F827D92458

<sup>6</sup> Landinfo - Country of Origin Information Centre - Norway, "Afghan citizens in Iran", 1 March 2011, CIS24357.

20. According to information before me, under the Iranian Constitution the government cannot withdraw citizenship from any Iranian unless he himself requests it, or he acquires the citizenship of another country.<sup>7</sup> The applicant has not claimed to have requested the withdrawal of his citizenship. He told the delegate that his siblings are currently living in Iran on temporary residence permits but he has not claimed that any of his siblings have previously obtained Iranian citizenship and then had that cancelled. Even if the applicant's siblings are now living on temporary residence permits, given my finding that the applicant obtained citizenship by application and not descent, I do not consider that the status of his siblings is determinative of the applicant's status. Similarly, even if I accept that M's shenasnameh has been revoked, the information before me does not indicate that the revocation of a parent's nationality is a ground that could lead to the withdrawal of a person's citizenship. Further, the revocation of M's shenasnameh does not of itself mean that the applicant now has citizenship of another country, nor has he claimed that he has taken any steps to obtain such citizenship.
21. The applicant's post-interview submission refers to cases of Australia granting citizenship because of "administrative oversight" and submits that if the bureaucracy of a first world country could make this sort of mistake, it is not inconceivable that a similar administrative oversight could have occurred in Iran in the 1980s. I have found above that the applicant did not obtain citizenship in the 1980s but that he applied for and was granted citizenship sometime after August 2007. The information before me does not indicate that Iranian citizenship, once granted, can be revoked due to having been granted by oversight but in any event, even though the applicant claims that the authorities came and took his shenasnameh, he has not provided any further documentation that indicates his citizenship or his passport has been revoked or cancelled. He has not claimed that he or his family has received any letters advising him that his passport is cancelled, that he has no legal status in Iran or that he needs to apply for a temporary residence permit. He told the delegate that the authorities refused to provide any confirmation documents or letters to his family when his family asked for them. He also said that the letter advising of the annulment of his parents' marriage was obtained by paying a bribe, because the authorities would not otherwise issue it. He said that the authorities were acting in this way because the government is racist and against Hazaras. While I accept that it is possible that local authorities may have refused to issue written confirmation to the applicant's family, I do not accept that government authorities in a large city such as Mashhad would not issue written confirmation to the applicant in relation to something as significant as the cancellation of his passport and/or citizenship.
22. I also take into account that the applicant was arrested following an altercation with the authorities when F's permanent residency was cancelled. Although the applicant was detained for (he claims) [a number of] hours, he was not questioned about his own nationality or citizenship status, or threatened with deportation. The authorities did not demand to see his shenasnameh or order him to surrender it to them. He was not further detained or subject to any further investigations as to his status. I consider that if the applicant's own status was in doubt, there was ample time while he was in detention or shortly thereafter for the authorities to have undertaken questioning or other investigations about this.
23. Further, even if I accept that F's permanent residency has been cancelled, as I have noted above the applicant did not obtain citizenship by descent from F. I do not consider that the claimed cancellation of F's permanent residency would of itself lead to the revocation of the applicant's citizenship.

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<sup>7</sup> Toker, Dr J, "Exploring Statelessness in Iran", Tilburg University, 2014.

24. Ultimately, I found the applicant's evidence to be vague and unconvincing. The information before me does not indicate that nationality, passports or citizenship can be revoked or cancelled at the whim of local officials. While the applicant may believe that his citizenship is in question, I am not satisfied on the evidence before me that the Iranian authorities have revoked or cancelled the applicant's citizenship or passport, nor do I accept that they have confiscated the applicant's shenasnameh.
25. Although the applicant has left Iran, the information before me does not indicate that citizens who leave Iran lose their status. Temporary Afghan residents can lose their status if they leave the country and the Iranian authorities are aware of it<sup>8</sup>, but as I am not satisfied that the applicant's citizenship has been revoked, I am not satisfied that he would be considered to be a temporary Afghan resident of Iran.
26. Having regard to all of the above, I find that the applicant is a citizen of Iran and that Iran is the receiving country for the purposes of this review.
27. The applicant claims to fear he will be detained by the Iranian authorities and deported to Afghanistan, including because he has no proper documentation. At the interview with the delegate on 3 December 2018 (the interview), the applicant claimed that when he left Iran, he paid a bribe to a person "who had influence" at the airport, because he was not sure if his passport was still valid. I have found above that the applicant was not told at any time that his citizenship and passport had been revoked or cancelled. I find that the applicant was holding a lawful and current passport when he left Iran and I do not accept that he paid a bribe in order to transit the airport. I have found that he continues to hold Iranian citizenship and I am not satisfied that he faces a real chance of being deported to Afghanistan should he return to Iran.
28. The applicant claims in his SHEV application to fear harm because the Iranian government pursues a systematic and racially-discriminatory policy towards Hazaras and Afghan people in Iran. This is said to include restrictions on employment and education, the ability to hold a driver's licence, access to health care and freedom of movement. He also stated that he fears being conscripted or pressured to fight in Syria. At the interview the delegate asked what particular harm the applicant feared if he was to return to Iran and the applicant said he only feared that he has no documents, would be stateless and would be deported to Afghanistan. He did not claim to fear harm in Iran for any other reason. The applicant's post-interview submission referred to issues of citizenship and nationality and then made submissions and provided information in relation to claims against Afghanistan. There were no claims made or information provided relating to Iran, or to Hazaras in Iran.
29. In any event, the applicant's evidence is that he has not been prevented from obtaining employment, education or accessing health care in Iran. He told the delegate that he initially did not complete his high school diploma but he said that this was because he was "lazy" and he was able to complete his diploma after he finished his military service. He held a driver's licence and worked as a [Occupation 1], and did not at any time have his movements restricted. He was not subjected to harassment or violence from the security forces other than the claimed incident when F's visa was revoked. While I accept that he was detained and mistreated on that occasion, I am satisfied that this was the result of a specific incident and not from his ethnicity. He was released without charge and has not claimed that the authorities have harassed, monitored or threatened him since that incident. He has completed his compulsory military service with the Iranian military and was not then, or at

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<sup>8</sup> Landinfo - Country of Origin Information Centre - Norway, "Afghan citizens in Iran", 1 March 2011, CIS24357.

any other time, pressured or asked to fight in Syria. To the extent that he claims that his status has now changed because of the revocation of citizenship, I have found above that he is still a citizen of Iran and I am not satisfied that his ability to live and work in Iran will be any different to his past experiences. I am not satisfied that he faces any more than a remote chance of being harmed, including as a Hazara, should he return to Iran.

30. The applicant claims to have departed Iran using his lawful Iranian passport and the evidence before me does not indicate that the passport has since been cancelled. I am not satisfied on the evidence before me that the applicant departed, or would be considered to have departed, Iran illegally.
31. According to the Australian Department of Foreign Affairs and Trade (DFAT),<sup>9</sup> Iran has historically refused to issue travel documents to allow the involuntary return of its citizens from abroad. On 19 March 2018, Iran and Australia signed a Memorandum of Understanding (MOU) on Consular Matters that includes an agreement by Iran to facilitate the return of Iranians who arrived after that date and who have no legal right to stay in Australia, but I note that the applicant arrived in 2013 and is not subject to this MOU. The delegate noted other country information which suggests that Iran may accept involuntary returnees from other countries<sup>10</sup> but this information does not indicate whether that is pursuant to similar MOU. I am satisfied that if the applicant was to return to Iran, it would be as a voluntary returnee.
32. DFAT indicates that the Iranian authorities would usually question a voluntary returnee only if the individual has already come to the official attention of the government, such as by committing a crime in Iran before departing. DFAT also indicates that the Iranian authorities pay little attention to failed asylum-seekers on their return to Iran. Since the 1979 revolution, Iranians have departed Iran in large numbers and the authorities accept that Iranians will seek to live and work abroad for economic reasons. The Iranian authorities have little interest in prosecuting failed asylum-seekers for activities engaged in abroad, including activities relating to protection claims. Persons with existing high profiles, particularly political activists, may face a higher risk of coming to official attention on return. Other information<sup>11</sup> supports DFAT's assessment that unless a person is of interest to the authorities, has a particular profile or departed Iran illegally, they will not come to the adverse attention of the authorities merely for having departed Iran.
33. I have found above that the applicant remains a citizen of Iran. While I am prepared to accept that he was involved in an incident with the authorities when F's residency permit was cancelled, he was not arrested or charged and has not claimed that any warrants or orders have been issued in relation to this or any other incident. I am not satisfied that he has any ongoing adverse profile with the authorities because of this or any other incident. He has not

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<sup>9</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226

<sup>10</sup> "Woman Asylum Seeker Lashed 80 Times After Being Deported to Iran From Norway", Iran Human Rights, 20 September 2017, CXC90406614387.

<sup>11</sup> "Iranian poet/activist arrested at Tehran airport", Radio Zamaneh, 8 January 2016, CX6A26A6E140; "New Video: Iranian Expats Face Arrest upon Return to their Homeland", International Campaign for Human Rights in Iran, 23 April 2015, CXBD6A0DE5203; "Jailing of returning journalists called part of anti-Rohani plan", Radio Zamaneh, 31 July 2014, CX324017; "Rouhani has yet to deliver on press reforms in Iran", Committee to Protect Journalists, 13 March 2014, CX318970; "Mousavi's campaign worker arrested upon return to Iran", Radio Zamaneh, 16 February 2014, CX318168; Amnesty International, "We are ordered to crush you': Expanding Repression of Dissent in Iran", 28 February 2012, CIS22610; Amnesty International, "AMNESTY INTERNATIONAL - URGENT ACTION: UA 125/11: Student activists held in Iran", 6 May 2011, CX264288; Danish Refugee Council and Danish Immigration Service, "Iranian Kurds: On Conditions for Iranian Kurdish Parties in Iran and KRI, Activities in the Kurdish Area of Iran, Conditions in Border Area and Situation of Returnees from KRI to Iran", 1 May 2013, CIS26587.



claimed that he left Iran because of any adverse profile other than the citizenship issue I have discussed above. He has not claimed that he has been engaged in any activities, discussions, protests or other incidents since he left Iran which may bring him to the adverse attention of the authorities. He has not claimed to have committed any crimes since he left Iran or to be subject to any extant arrest warrants or other criminal proceedings in or outside Iran.

34. While I accept that the applicant has been in Australia for about five years, the information before me does not indicate that absent any other concerns, individuals who return to Iran after spending a prolonged period of time in a western country such as Australia, including those who have sought asylum unsuccessfully, are imputed with an adverse opinion or profile and harmed as a result.
35. Having regard to all of the above, I am not satisfied the applicant faces a real chance of harm in Iran as a Hazara, for being a returned asylum-seeker or for having been in a western country. I am not satisfied that he has a well-founded fear of persecution.

#### **Refugee: conclusion**

36. 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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37. 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**

38. 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.
39. I have found above that the applicant does not face a real chance of harm for any of the reasons claimed should he return to Iran. As 'real chance' and 'real risk' equate to the same threshold<sup>12</sup> and for the same reasons given above, I find that the applicant does not face a real risk of significant harm for these reasons.

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

**Complementary protection: conclusion**

40. 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.