



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

**Decision and Reasons**

**Referred application**

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IRAN

IAA reference: IAA19/06458

Date and time of decision: 29 April 2019 10:18:00

J McLeod, 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) arrived in Australia [in] June 2013. He lodged a SHEV application on 15 June 2017 claiming that he fled Iran and will be harmed upon return because he is homosexual and has been falsely accused of raping a Basij officer's daughter. A delegate of the Minister for Immigration (the delegate) interviewed the applicant about his claims on 16 January 2019 and on 6 March 2019 the delegate refused the grant of visa. The delegate did not accept the applicant's claims regarding his sexuality and the alleged rape and was not otherwise satisfied that the applicant would face a real chance of persecution or real risk of significant harm in Iran.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) ('the review material').
3. On 22 April 2019 the IAA received a submission from the applicant's representative. In part, the submission reiterates claims and re-submits information already provided to the delegate and raises arguments in response to the delegate's decision. To that extent, I am satisfied it is not new information and have had regard to it.
4. However some new information was also provided regarding the applicant's physical and mental health. The submission refers to difficulties the applicant has faced trying to settle in Australia and in reaction to the delegate's decision, and states that the applicant is both physically and mentally in "...a very vulnerable situation". The applicant did not previously advance any such claims in the SHEV process but I take into account the suggestion that some of these difficulties arose in reaction to the delegate's reasoning and findings. However no other information (medical or otherwise) about the applicant's physical health or mental state has been provided and there is no evidence that he has a diagnosed mental health condition or requires treatment. Nor has any other information been provided to support that he has or has ever had any specific vulnerabilities. I am not satisfied there are exceptional circumstances to warrant considering this new information.
5. The submission also references several country information reports which were not before the delegate when the decision was made. This is new information. All of it pre-dates the decision, with publication dates ranging from 2010 to 1 February 2019 (around one month before the decision was made) yet no explanation has been given as to why it could not have been provided before the decision was made. Nor has it been explained how this information is credible personal information and I am not satisfied that it is; I consider it to be general country information. I note it was explained to the applicant in the SHEV interview that it was his responsibility to raise claims and provide evidence in support of those claims and that he may not have a further opportunity if his application was refused. He was also told that any further information provided before a decision was made would be considered and I note that a post interview submission covering country information was provided on his behalf. Furthermore, the delegate considered a range of relevant information including recent reports from various sources when making his decision and this information is already before me. The applicant's representative has offered no suggestion as to why the circumstances should be considered exceptional and nor can I identify any such reasons myself. I am not satisfied that there are

exceptional circumstances to justify the consideration of the updated schedules and country information.

### **Applicant's claims for protection**

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

- He is a homosexual Iranian male.
- He was raised in a religious family with a devout Muslim father who attends mosque every day.
- He was [age] years old when he first became aware of his sexuality. His friends started talking about girls but he had no feelings for them. Rather, he was attracted to his friend [Mr A]. He lost touch with [Mr A] but during middle school and high school, he had the same feelings towards other male classmates and friends. He was confused but due to his fear (from society generally and especially from his family), he had never been able to disclose his feelings to anyone, or even ask questions about them. In his last year of high school he finally understood his sexuality was different from his friends.
- He saw [Mr A] again with a girlfriend in late 2012. [Mr A] introduced him to a male friend, [Mr B], and the next day they all went together to [a location] where he became more comfortable and attracted to [Mr B]. They exchanged numbers and the following weekend went to the cinema together. During the movie the applicant became emotional and suddenly held [Mr B]'s hand. He immediately let go, fearing being exposed. [Mr B] looked at him, surprised; they did not discuss it.
- The following day he sought psychological counselling, seeking a solution for what he thought was a personality disorder. The counsellor said he had a terrible sickness named homosexuality and would have to fix himself as it was a capital crime and he would be severely punished if he continued having feelings towards boys. He advised him not to tell anyone and to try a relationship with a girl. The applicant took the advice seriously and after a few months, believing he could change himself, he started a relationship with [Ms C], although he did not develop feelings towards her.
- One day, he attended a party with [Mr B] and when he arrived, he noticed there were no girls present. Men would arrive, go into a room and change and come out looking completely different, in different clothes and piercings. [Mr B] said he had understood what happened in the cinema and had invited him to the party to be around people who felt the same way. The applicant realised he was not sick and did not have to hide his sexuality. People danced to the music and even kissed. He became excited and emotional and hugged and kissed [Mr B].
- After a few hours the local police and Basij stormed the house responding to neighbours' complaints about excessive music noise. They arrested everyone and put them in police holding cells. Some high ranking officers insulted and shamed them and pressured them to confess or face a religious court with a heavy file against them.
- As he was the only one who had not changed at the party and was still of normal appearance, he was able to claim he was just a guest of his friend and deny his association with anything illegal. His father gave a surety to bail him out. Going home, his father was very cold and angry and would not even let him eat with the family.
- The next day, the applicant met with [Ms C] in a park and he told her he was gay. While driving her home they were stopped by the Basij who suspected they were in a

relationship and took them to their station. When [Ms C]’s father arrived to collect her, the applicant realised he was one of the high-ranking Basij officers who stormed the party. Her father was very angry. He accused the applicant of raping [Ms C] and sent her to have medical checks. The applicant signed a declaration and went home but a few days later [Ms C] called, crying, saying the medical checks showed she was not a virgin and fearing her father would kill her, she blamed the applicant, claiming he had made her unconscious and raped her.

- His world crumbled around him – he could not tell [Ms C]’s father he was gay for fear of incriminating himself.
- He decided to escape Tehran and asked a friend for keys to his house in Ardebil. He called his mother when he arrived there and she said some people had come to the house looking for him.
- The next night he was apprehended, blindfolded and handcuffed, from his hiding place. He was beaten severely and held for a week in an underground room by [Ms C]’s father and given only water. [Ms C]’s father threatened to torture him and called his parents saying he had raped the applicant in retaliation for the rape of his daughter and if they went to the police they would never see him again. He passed out and woke up to his parents taking him home.
- [Ms C]’s father had threatened them against going to the court but the applicant’s father was so angry he made a complaint. However as [Ms C]’s father was very resourceful and had many contacts in the system, the complaint went nowhere. They were told in the court that there was an outstanding complaint against the applicant, and that [Ms C]’s father was following up on his first complaint. A family friend advised they would not achieve anything through their complaint. The applicant knew the guests from the party would make trouble against him if the court called him, and he had confessed to [Ms C] and she would have told her father about him.
- He realised he could not stay in the country anymore.
- He fears returning because he is gay and homosexuality is a crime in Iran, punishable by execution, and because [Ms C]’s father is after him for allegedly raping his daughter.

## **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.

#### *Identity/receiving country*

9. The applicant has consistently claimed to be an Iranian national and has provided documentary evidence of his claimed identity. I accept the applicant's identity is as claimed and that Iran is the receiving country for the purpose of this review.

#### *Events leading to departure*

10. The applicant's central claims are that he fled Iran and cannot return because he is homosexual and has also been falsely accused of raping [Ms C], a high-ranking Basij officer's daughter. He also claims he filed a complaint against [Ms C's] father, which is still active. However, the applicant's evidence as to these matters has been problematic on several fronts.

11. The applicant's claimed timeline has been particularly confused and contradictory. For example:

- He gave differing evidence as to when he met [Mr B], stating in his SHEV application that it was in late 2012, but in the SHEV interview that it was *"in late high school, in 2011"*. However, according to the applicant's SHEV application, he had already completed high school by 2009.
- In the SHEV interview he estimated that he went to the cinema with [Mr B] and saw the counsellor in 2011, but again, according to his SHEV application he had not even met [Mr B] by then. The delegate sought to clarify the timeline with reference to life events such as school or military service. For example he asked the applicant if he had seen the counsellor during his military service but the applicant responded *"[R]oughly, sort of..."* He then said he wasn't sure, then suggested it might have been 1390 (2011) or 1391 (2012) and stated that if he had seen the counsellor in 1390 then it was in the middle of his military service.
- In the SHEV interview he stated that he and [Mr B] were arrested at the party when he was about to finish his military service but according to his SHEV application he finished his military service in May 2012 and did not meet [Mr B] until late 2012.
- Whereas the applicant's SHEV statement indicates there was only around two days between his first arrest (from the party) and his second arrest (while driving [Ms C] home), in the SHEV interview he vacillated quite considerably, stating it was *"about a month....or less than a month.....not a long time... probably one week.....yes one week after that"*. He also waived when asked if he was still doing his military service at that time, stating *"Probably yes.....No, at that time I was not in military service"*. He then reiterated he was not doing military service when arrested with [Ms C], but introduced a new arrest claim, stating he was still in the military when arrested at the second party. He stated he had been arrested from two parties, and three times in total. The delegate asked the applicant again whether he was still doing military service when he was arrested from the homosexual party with [Mr B] and he further contradicted himself, stating *"no"*. When the delegate pointed out that his evidence had changed the

applicant disputed it and stated that he had only been a conscript at the first party he was arrested from (which he stated was many years beforehand), and was not a conscript when he was arrested from the homosexual party.

12. I take into account that it has been almost six years since the applicant left Iran. The applicant has claimed he is not good with times and dates and I am mindful of this, and that some variance in evidence over time is not uncommon. However even when the delegate sought to establish a timeline by reference to significant life events such as whether he was still in high school, or still doing military service at the times these things occurred, he continued to give unclear or even contradictory answers. No satisfactory explanations have been given for the problems in the applicant's claimed timelines and his changing evidence about how many times he was arrested. These are no insignificant matters and the events in question are said to have predicated his departure from Iran and are central to his claims for protection. I have significant concerns about this and also because the applicant had previously made no mention of a third arrest which preceded the other two arrests by "*many years*" and has given no further details about it. Furthermore, I note that the applicant claimed at one point that he was still completing his military service when he was arrested at the party, but when asked by the delegate how the military reacted to his arrest, he gave a response I consider implausible, that the police had not informed the military and that they are not in contact with each other. I consider this further undermines the applicant's claims, particularly, as the applicant claims he was arrested by the Basij, a section of the Islamic Revolutionary Guard Corps (IRGC) with whom he claimed he was doing his military service.
13. There are other problems with the applicant's evidence. He was asked about what became of [Mr B] after the party which resulted in their arrest and the applicant stated he didn't know. He stated he never saw [Mr B] after the arrest and never made any enquiries about him and did not know if [Mr B] had ever enquired about him. He stated he had his own problems and forgot about him. However he stated "*100 per cent he might have*" been executed. I have considered the applicant's responses to this, including those in the submission to the IAA but I do not find them to be convincing. Even taking into account the problems the applicant claimed he was facing at the time, it is difficult to accept he would not have sought information about the fate of someone he knew, and was in a similar situation to himself, particularly as he claims he had just had his first homosexual experience with this person and had feelings for him. I consider it implausible that the applicant would have forgotten about [Mr B] and/or not sought to contact him or learn what had happened to him. I also have concerns about the plausibility of the party scenario overall, as by that time the applicant and [Mr B] had only met a few times and both had been shocked when the applicant had touched [Mr B]'s hand a few months earlier which, on the evidence, was the last time they saw each other before attending this party. Given this limited history together, I have difficulty accepting [Mr B] would have taken the applicant to an openly homosexual party without warning.
14. There were also internal variances in the evidence the applicant gave in the SHEV interview that are difficult to reconcile. He provided inconsistent evidence about whether he had actually been charged with an offence after his arrest from the party and over this rape allegation, at some points in the interview stating he hadn't been charged and at other points stating he had. He was unable to explain why, particularly when the offences he had been arrested for potentially carried a death penalty, he was released on bail from the first arrest without any conditions, and on the second arrest, faced court but was never subject to any bail arrangement. The applicant gave no satisfactory explanation, instead referring to the complaint he had made against [Ms C]'s father. He also said bail was not required for the rape charge because there was no written evidence of the crime and he could not be charged. The applicant's representative suggested that perhaps the applicant had not been taken before a judge and therefore had not had any

charges laid against him, but the applicant later seemed to contradict this by claiming he had been required to face court over the rape.

15. In SHEV interview the applicant stated that around a month before he left Iran he was questioned in court over the rape charge. He said he was asked if he had any evidence to prove he did not do it to which he stated he did not, but he said the other party also had no evidence to provide that he committed rape. I have considerable doubts about this, noting: that in his SHEV application the applicant gave no indication that he had ever attended court; that he has given no other evidence as to how the proceedings ended that day, or how he was able to be released while the charges remain active against him; and that the evidence does not suggest he faced any issues or problems in the month following the court proceedings nor on his lawful departure through the airport, despite the apparent seriousness of the allegations.
16. The applicant claimed in the SHEV interview that around a month or two after he left Iran his parents received summons documents from the court in relation to the rape allegation. He also claimed they have been visited by the authorities looking for him. When the delegate asked if he had the documents, the applicant said he did not, because as he was absent, his parents had not taken care to keep the documents they received. I do not accept this as a credible explanation. I have significant concerns about the claims of the applicant undergoing some court proceedings for rape and being released and able to legally depart the country, and the applicant's parents not taking care to keep court summons against him.
17. In summary, I consider the applicant's evidence on these matters to be riddled with inconsistencies and implausibilities and overall, highly unpersuasive. The applicant's claims regarding his sexuality, his relationship with [Mr B], his visit to the counsellor, the claimed incidents of arrest and detention, and the rape allegation and dispute with the Basij officer ([Ms C]'s father) are not credible. I do not accept the applicant was ever suspected of associating with homosexuals or engaging in homosexual acts in Iran. I do not accept the applicant was of adverse interest to the authorities or anyone in Iran – for any reason - at the time he lawfully departed the country, nor afterwards. I do not accept the applicant faces a real chance of harm arising from any of the claimed events which preceded his departure.

#### *Experiences in Australia*

18. The applicant claimed in the SHEV interview that he has been engaging in a homosexual lifestyle in Australia. He stated that coming from Iran with its *"totally different"* culture, to a country where he was alone and he didn't know the language, even using a translation application ('app') it took some time – roughly two years – to get used to things and be able to talk about his sexuality in Australia. He said that after almost two years in Australia his language improved enough for him to try text messaging with people on the [Social media 1] app. When the delegate asked the applicant if he still had any of his [Social media 1] messages, the applicant said *"no"*, because he hadn't used [Social media 1] for a long time since he found out about [Social media 2] (another app), and at that point he had deleted [Social media 1]. He said he hadn't had the [Social media 1] app for many years. He said he has been using the [Social media 2] app for about three years now, not to look for a relationship, but to chat and arrange one night stands.
19. The applicant claims he has had two previous relationships in Australia, with men he had met on [Social media 2] but that neither of them had worked out. The more recent relationship had lasted around one month in 2018 and the first had been even shorter, and occurred around two years earlier, when he had just started using the [Social media 2] app. The delegate asked the applicant to show him his app messaging conversations with these men and the applicant said

he had deleted those conversations, but could show conversations evidencing his one night stands. He said his previous boyfriends had blocked him, and when he tried to message one for New Years through [Social media 3], he received a reply from one of their new boyfriends warning him off.

20. The delegate asked when he had had his first interaction or message on [Social media 2] and the applicant said that that he had deleted the earlier conversations after spending time with those men as he had no intention to continue a relationship with them. He said the oldest messages he kept on [Social media 2] were probably from around two weeks ago. The delegate expressed scepticism. He clarified with the applicant his claim that he had been using the [Social media 2] app for three years but the oldest messages he had kept were from two weeks ago and the applicant responded that if he had kept everything it would be a very long list and would be very crowded so he deleted them to make space for new messages.
21. The delegate asked the applicant about his [Social media 4] profile. The applicant said his [Social media 4] profile was public because he likes his friends to be able to see the material he shared and did not see any reason to hide it. The applicant was asked if he had faced any issues living openly as a homosexual in his area in Sydney and the applicant indicated he had. He said that was the reason he had lost friendships with his Iranian friends. He said he had been keeping a secret but felt he couldn't hide himself. The applicant was asked whether he had been open about his sexuality with his flatmate. The applicant said "no". He said he is happy where he is and it is difficult to find good flatmates. He said that his flatmate is Iranian and he has kept his sexuality secret from him, and does not share everything with him. He said in the year they have lived together, he has sometimes brought partners home when his flatmate has been out, but has also gone to their places' instead. He said a lot of people have secrets, which they even keep from their family members, and it is very important that he does not share this with anyone. The delegate put to him that he had earlier claimed that his [Social media 4] profile was public because he had no reason to hide his sexuality and this was at odds with his need to hide it from his flatmate. The applicant responded that the people who see his [Social media 4] page are not in his daily life and he doesn't meet them. He said he didn't see any reason to hide on [Social media 4] but he had to hide it from his flatmate because he wanted to keep living there.
22. During the SHEV interview the delegate raised a number of concerns with the applicant. The applicant's representative responded with a verbal submission and also provided a written submission on 5 March 2019. The applicant also provided some sexually explicit photographs of himself with another man, photographs of himself at what appears to be an LGBTQ+<sup>1</sup> pride function, and purported extracts of several conversations with other men in 2015, 2016, 2018 and "Today" (January 2019), across three different social media platforms. At the SHEV interview he also provided a loyalty card for '[Venue 1]', described as a gay sauna club in [Sydney]. He said he is a member of [Venue 1] and goes there roughly once every two or three months. He said he also goes to '[Venue 2]' which is closer to his home.
23. I accept it is the applicant pictured in the photographs provided. Nonetheless, after considering the evidence overall, I have numerous concerns about the applicant's claim to be homosexual and about his motivations for posing for the photographs.
24. The applicant had made no mention in his SHEV application in 2017 of his homosexual lifestyle in Australia and it was not until the SHEV interview that he raised these claims and not until after the SHEV interview that the photographs and social media screenshots were provided. Given the applicant detailed in his SHEV application his claimed sexuality and claimed experiences arising

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<sup>1</sup> LGBTI: Lesbian/Gay/Bisexual/Tran-sexual/Queer or Questioning/+



from this in Iran, I do not consider the omission of detail and evidence relating to his life in Australia arose due to any reluctance on the part of the applicant to put such matters forward. As such, the delay in raising these claims and the fact that the photographs and purported social media content was not provided until after the interview lead me to have some doubts about the applicant's motivations.

25. I also have concerns about the authenticity of the purportedly screenshotted extracts from social media:

- Apart from the [Social media 1] conversations, there is no contextual information indicating what social media platforms were used, although I note the applicant had also mentioned he moved between [Social media 2], [Social media 4] and [Social media 3];
- There is no information or documentation regarding the applicant's profiles on these messaging platforms, it is difficult to determine whether the small photos on the [Social media 1] app are photos of the applicant or someone else, and there is no profile name or photo on the extracts of messages from "Today" which appear on the app with the black background.
- The extracts of messages from "Today" shows an incoherent timeline, showing messages from 4.57pm followed by messages from 1.36pm and later. Another conversation shows plans to meet up that night around 8.30pm but the timestamp indicates the suggested meeting times had already lapsed on that day.
- The applicant's evidence in the SHEV interview that he had deleted older conversations is at odds with his submission of extracted conversations purportedly dating back as far as 2015. And similarly, while the applicant stated in his SHEV interview that he had not used the [Social media 1] app for many years and had deleted it, he provided screenshots of purported conversations from December 2018. It is also questionable that the applicant could not show the delegate these messages during the SHEV interview and has not given any details to explain how he was able to retrieve these conversations later on.
- The evidence before me does not indicate the material provided have been certified as genuine screenshots taken from the applicant's device.

26. I also have some concerns about the applicant's evidence in the SHEV interview that he maintained a public [Social media 4] profile and was not concerned about hiding his sexuality on that platform, but at the same time claiming he felt the need to be secretive with his flatmate and some other Iranian friends. I find the applicant's evidence to be incongruous in this respect and while I have considered the proffered explanations including those given in the post interview submission, I do not accept them.

27. I have found the applicant has not been credible in relation to the claimed events in Iran and I have significant doubts about the authenticity of the social media evidence. As for the loyalty card, as the delegate noted, there is nothing on the card to indicate it belongs to the applicant. The delegate noted similar issues in his decision and concluded that the photographs had been staged. The delegate found the applicant was not and has never been homosexual.

28. I take into account that it is the applicant pictured in the photographs and that they were given to support his claims of engagement with, and support for, the gay community in Sydney, and his engagement in sexual acts with males. While the delegate found the photographs related to some of the text messages and were taken after the interview, I have no evidence of this and I

note also that the applicant did offer to provide photographs during the SHEV interview. However, I am satisfied that the applicant was on notice from the delegate's decision that his claims of homosexuality were under scrutiny (and ultimately not accepted), and that the delegate did not accept the social media evidence, loyalty card or even the photographs to be genuine evidence of his homosexuality.

29. Section 5J(6) of the Act provides that in determining whether the applicant's fear of persecution on this basis is well-founded, any conduct he engaged in in Australia is to be disregarded unless he satisfies the decision maker that he engaged in the conduct otherwise than for the purpose of strengthening his claim to be a refugee. I have considered all of the applicant's evidence and submissions but the applicant has failed to satisfy me that he has undertaken these activities in Australia for a purpose other than strengthening his claim to be a refugee. Weighing everything together, including that I have found the applicant's claims relating to his experiences in Iran to be fabricated, that I am not satisfied the social media evidence is genuine or that the loyalty card is even the applicant's, noting my concerns about the dichotomy between his being open about his sexuality on [Social media 4] while still claiming to be hiding it from some friends and flatmate, and noting the applicant was on notice as to these issues as discussed in the interview and/or in the delegate's decision, and that my concerns as to the applicant's motivations have not been alleviated, I conclude that the applicant is not genuinely homosexual, and is not committed to a homosexual lifestyle. I am not satisfied that the applicant has engaged in these activities in Australia otherwise than for the purpose of strengthening his protection claims.

#### *Participation in protests in 2009*

30. In his Entry interview the applicant was asked if he had ever been involved in any activities or protests against the government and he answered "yes" and stated "*I protested in 2009 against the government regarding the controversial presidential election*". However he gave no indication that he had been arrested or charged or was of any adverse interest to the authorities on this basis. Nor has he referred to these matters in his SHEV application or interview, nor the submission to the IAA. Nor has he otherwise claimed that he has been politically active in Australia or that he would wish to be so upon return. No such matters were considered by the delegate and the applicant has raised no concerns about such to the IAA. I am not satisfied the applicant has raised any claims to fear harm on this basis.

#### *Status upon return*

31. Although not initially raised by the applicant, the delegate considered whether the applicant would face harm upon return on the basis of his being a failed asylum seeker from a western country and the submission to the IAA made submissions on this basis.
32. The 2018 DFAT reports notes that Iran has historically refused to issue travel documents (*laisser passers*) to allow the involuntary return of its citizens from abroad. On 19 March 2018, however, 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 this date and who have no legal right to stay in Australia. However I am satisfied this would not apply to the applicant who arrived in 2013. I find that if the applicant is returned to Iran it would only be on a voluntary basis. In the event of voluntary return, although the evidence indicates he left Iran lawfully using his own genuine passport, I accept he is no longer in possession of his passport and would be issued with temporary travel documents or a *laisser-passe* from an Iranian diplomatic mission to facilitate his travel and return to Iran. I accept that through this process, the authorities will be forewarned of the applicant's imminent return, and that they may surmise he is a failed asylum seeker from Australia/a western country.

33. DFAT states that according to international observers, Iranian authorities pay little attention to failed asylum seekers on their return to Iran and have little interest in prosecuting failed asylum seekers for activities conducted outside Iran, including in relation to protection claims. The authorities will usually only question a voluntary returnee on return if they have already come to official attention, such as by committing a crime in Iran before departing. Sources considered by the delegate note there have been some reports of mistreatment of returnees however an analysis of such cases indicates those returnees were already of interest before departing Iran or were identified as having been critical of the government while abroad.
34. There is no credible evidence before me to indicate that the applicant had an adverse profile with Iranian authorities when he departed Iran or that he was otherwise of any interest to the authorities. I have not accepted that the applicant otherwise has a profile which would attract adverse attention on return.
35. I am not satisfied that the applicant faces a real chance of harm either now or in the reasonably foreseeable future, on the basis of his departure from Iran or several years residence in Australia, nor on the basis of being a failed asylum seeker returning from Australia/a western country, without his passport.

#### **Refugee: conclusion**

36. I am not satisfied the applicant has a well-founded fear of persecution in Iran.
37. 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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38. 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**

39. 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.
40. I have found the applicant's claims relating to the rape allegation are not credible. I am not satisfied the applicant faces a real risk of significant harm arising from such claims.
41. I also found that notwithstanding the evidence of his purported homosexual lifestyle in Australia, the applicant is not genuinely homosexual. I am not satisfied the social media content is genuine or that he genuinely attends [Venue 1] and I found he only engaged in the activities in

the photographs for the purpose of strengthening his refugee claims. Nonetheless, he did engage in those activities in the photographs and noting that s.5J(6) does not apply in relation to s.36(2A), I have considered whether these activities in Australia would give rise to a real risk of significant harm to the applicant on return. The evidence does not suggest that anyone in Iran would know of these activities. The applicant does not claim that the photographs of him at the Pride function or the sexual photographs have been given to anyone with Iranian connections or that they appear on his [Social media 4] or any other social media platform. I find the chance of the photographs, the social media messaging (which I consider has been fabricated in any case) or any related allegations of homosexuality reaching the Iranian authorities or anyone in Iran to be remote. Overall, I consider the chance that the applicant's activities in the photographs have already, or will in the future, come to the attention of the authorities in this way is remote. As for the applicant's claim that he was open on [Social media 4] about his homosexuality, as I do not accept he is genuinely homosexual and he has given no evidence to support his claims about this [Social media 4] activity I do not accept these claims are credible.

42. I have not accepted the applicant was of previous interest to the Iranian authorities for any reason or that he is genuinely homosexual and would seek to practise or engage in any related activities upon return. Nor is there anything before me to suggest he has come, or would come, to the authorities' attention for his activities in Australia, or that he would engage in homosexual activities or related conduct in Iran which would bring him within the authorities' purview of concern. Given these factors I find that he would not face a real risk of harm arising from his claimed homosexuality or his activities in Australia. I find that the applicant does not face a real risk of significant harm as defined in s.36(2A) upon return.
43. As noted above, the applicant has given no indication that he had been arrested or charged or was of any adverse interest to the authorities on the basis of his claimed participation in demonstrations in 2009 and I am not satisfied the applicant has raised any claims to fear harm on this basis.
44. I have otherwise found the applicant would not face a real chance of harm from anyone on return. For the same reasons, I am not satisfied he faces a real risk of harm, including significant harm.

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

45. 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:

...

***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.