



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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IRAN

IAA reference: IAA19/06550

Date and time of decision: 4 June 2019 09:18:00

C Wilson, 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 an 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 an atheist and military service evader from Iran. He arrived in Australia [in] August 2013 as an unauthorised maritime arrival. On 30 June 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. A delegate of the Minister for Home Affairs (the delegate) refused the application on 9 April 2019. The delegate did not accept the applicant had left Iran illegally. The delegate did not accept the applicant had evaded military service, and found he had either completed it or had been granted an exemption on health grounds. The delegate did not accept the applicant would be of interest to the authorities on return as a failed asylum seeker, past drug user or for having a relationship with a Christian woman in Australia.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 3 May 2019 the applicant's representative provided written submissions. The submissions primarily respond to the delegate's decision and contain legal argument.
5. There was one piece of new information in the submissions: that the applicant '*would feel compelled to express his own beliefs*' regarding Islam if he was returned to Iran. The representative claims that this was not expressed at the SHEV interview because the delegate did not ask the right questions, or moved on too quickly after asking questions, or generally gave the applicant a limited opportunity to express his views. I note the applicant was represented at the SHEV interview and given a break after which he was invited to provide any further comment or claims. His representative provided post-interview submission. The representative did not raise any concerns in the submissions about the conduct of the interview. There was no statement from the applicant post interview to provide any further detail about his claims regarding religion. There were no examples in his original statement of claims, or in his evidence at the SHEV interview, or in the post-interview submissions, of instances where the applicant had felt compelled to express his beliefs in Iran in the 11 years since finishing high school. I consider this new claim is inconsistent with his evidence to date. I do not accept he was unable to put the claim forward that he would feel compelled to express his beliefs, and his failure to put in to the delegate raises doubts about whether this is credible personal information. In all of the circumstances, I am not satisfied there are exceptional circumstances to justify considering this new information.

### Applicant's claims for protection

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6. The applicant's claims can be summarised as follows:
  - The applicant is a single man from Tehran.
  - He avoided military service in Iran because he does not believe in violence and does not want to support the regime.
  - His family are Shia Muslims, but he does not believe in Islam. He does not have any religion.

- He left Iran illegally by walking from the city of Urmia in western Iran across the border to Van, Turkey.
- In Australia he has suffered from drug addiction and serious health issues.
- He is in a relationship with a Christian woman in Australia.
- He fears returning to Iran because he left the country illegally. He fears being targeted because he is atheist, has an actual and imputed political opinion opposed to the government, and because he would be returning as a failed asylum seeker and has been Westernised. He fears he will be harmed for evading military service and/or be forced to do military service.

## 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. I accept the applicant is a citizen of Iran as he has consistently claimed this and has provided identity documents to evidence this. His mother and other family members continue to live in Tehran, and I accept this is where the applicant would return to. I find Iran is his receiving country and Tehran is his home area and the area he would likely return to.
10. The applicant has consistently claimed since arriving in Australia that he left Iran illegally.<sup>1</sup> The delegate did not accept this was the case, and was critical of inconsistencies in the

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<sup>1</sup> I note in his written statement dated 29 June 2017 the applicant stated at [16] that he departed Iran from the airport in Tehran, rather than by the illegal border crossing he has otherwise claimed. The applicant said at interview this claim in the written claims was erroneous, and I accept the explanation from the applicant and his representative that the inclusion of [16] in his written statement was an error.

applicant's account. For example, he stated at the entry interview that he crossed the border from Iran to Turkey illegally by car, but in his SHEV application he said he walked for 7 days from Iran to Turkey. The applicant now says some of the journey was by vehicle, but for the most part he walked between Urmia and Van. I have listened to the applicant's account in the SHEV interview recording of the journey he took from Iran to Turkey. He provided a reasonable amount of detail about the journey and I accept he may have left Iran by crossing the border on foot/by car into Turkey. For the purpose of this assessment, and in the absence of any evidence to indicate otherwise, I accept the applicant departed Iran illegally.

11. The applicant was diagnosed with [specified illness] after arriving in Australia. He claims only to have suffered the symptoms of the illness since leaving Iran and arriving at Christmas Island. I do not accept this is the truth. [The illness] is a genetic disorder characterised by [specified symptoms]. The symptoms mostly emerge by [age]<sup>2</sup> but [number] per cent of sufferers experience symptoms by [age].<sup>3</sup> I consider it is possible the applicant may not have had an official diagnosis of the illness whilst in Iran, but I do not accept he had no symptoms until arriving in Australia. His oral evidence at the SHEV interview was that he was not physically well or strong enough to work. He said this has been the situation since he was 17 or 18 years old, that his physical condition meant he was not suitable for work. Although it was written on his application that he worked for his brother from 2005 to 2013, in fact he now says he worked only a few days here or there and that all the days he worked would not amount to more than 6 months in the [years] since leaving school. I consider his inability to work due to being not physically well enough is evidence he suffered serious health issues in Iran. I consider it is likely those health issues were related to his [illness]. Certainly he has not disclosed any other physical condition that would account for him being unfit for employment for [number] years. In the absence of any medical evidence or claim otherwise, I consider he had been afflicted with [the illness] since at least his teens.
12. The applicant claims to fear harm if he is returned to Iran because he has evaded military service. He claims he did not want to complete the service because he is opposed to violence and does not want to work for the regime. Military service is compulsory in Iran for all men age 18 to 40, and usually entails 18 to 24 months service. There is no alternative to military service and the authorities do not recognise conscientious objectors. Exemptions can be granted on several grounds however, including medical reasons, being the only son in a family, having elderly parents, and having a brother currently serving. It is also possible to purchase an exemption by paying an absence fine. DFAT reports this practice is common.<sup>4</sup>
13. The applicant was [age] when he came to Australia and claims he never completed military service, but nor did he seek an exemption. I note the applicant lived at the same address his whole life in Iran. He was not in hiding. He claims to have avoided the authorities by never working, so that he was never checked and found out for not doing the service. However, he has also given other reasons for not working, primarily his health problems but also that he stayed at home with his widowed mother. He has also disclosed occasions when he did come in contact with the state: being found by the police with alcohol as a young man, and the few occasions he says the Basij came to his house, when they discovered his brother had alcohol there. He claims the Basij suspected he too consumed or kept the alcohol they accused his brother for. I consider that if the Basij were investigating his household for possible infringements concerning alcohol, they would have noted there was a young man there who had not completed military service.

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<sup>2</sup> [Information deleted]

<sup>3</sup> [Information deleted]

<sup>4</sup> DFAT *Country Information Report Iran*, 7 June 2018 (DFAT report).

14. I accept the applicant did not complete military service in Iran. However, I am not satisfied he evaded the service and fears being harmed for this on return. I consider someone who was not well or strong enough to work would also not be well or strong enough for military service. The Iranian government is intertwined with daily life and checking of documents and confirmation of military service or exemption is frequently checked.<sup>5</sup> As noted by the delegate, the applicant's *Shenasnameh* (birth and identity certificate) has [numerous] stamps on it, indicating multiple transactions with the authorities over his lifetime in Iran. The applicant suffered no harm or consequence in Iran for not undertaking military service, which also supports a finding he was not required to undertake it. I find the applicant did not complete military service, and did not need to complete it because he was exempted on health grounds.
15. The representative submits I should consider 'what if I'm wrong' in relation to the applicant's exemption from military service. However, for the reasons already given, I find the applicant was exempted from such service and I do not accept I am required to consider 'what if I'm wrong' on this issue.
16. I have considered the applicant's claim that he must have been evading military service, because his illegal departure is evidence of his inability to obtain a passport. I consider there may be other explanations for why he left illegally. The applicant told the delegate at the SHEV interview that he only made the plans to leave Iran a couple of days before leaving. He told the delegate his family suggested he travel to Turkey and a couple of days later he went. There would not have been time to obtain a passport. The applicant accompanied his [Relative A] on the border crossing. The applicant's [sibling], [sibling's partner] and their younger children had flown to Turkey on their passports, but [Relative A] did not have a passport for reason of not having done his military service. It may have been his family suggested only a few days before the trip that the applicant also go, so that there would be someone to accompany [Relative A], a younger man, on the border crossing. It is also plausible that he had a passport but crossed the border illegally with [Relative A], and then flew out of Turkey on his own passport, rather than a fraudulent passport as claimed. I find that just because the applicant may have left Iran illegally, this does not indicate he must have done so because he was evading military service. As found above, I consider he received an exemption for military service on health grounds, and I find there are other reasons why he chose to depart Iran illegally.
17. I have considered the applicant's claim that he did not do military service because he was opposed to it. He has provided little detail to expand on this claim, and has not provided any evidence that he was an active conscientious objector. On the material before me I am not satisfied he faces any risk of harm for objecting to military service, because I do not accept he did so in any public manner, and for the reasons given above I find he is exempted on health grounds in any event.
18. The applicant has consistently claimed not to practice any religion. When he arrived in Australia he said at the Entry Interview that he was a Shia Muslim in Iran, but now he is 'nothing'. When pressed about his religious needs being met in detention, he said he had no religious needs. In his written statement dated 29 June 2017 he stated '*I believe in God but do not identify as having a religion*'. At the SHEV interview he clarified that he did not even believe in any god and said the interpreter must have made a mistake when preparing his statement. He claimed to be an atheist. He said if you do not practice Islam in Iran it can

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<sup>5</sup> 'Iran: Background information, including actors of protection and internal relocation'. UK Home Office, 1 September 2018.

cause problems. He said if the Iranian government realises he is not religious they could execute him. He also said at the SHEV interview he has not believed in religion since leaving school, and had not practised Islam since he was at school. He raised for the first time at the interview that he questioned Islam whilst in his last year at school, and it was suggested to him that it was better he left school if he was going to make such comments. There is no suggestion his comments were reported to the authorities. In any event, he suffered no ongoing consequence for comments made at school in the [years] post-school that he lived in Iran.

19. DFAT advises that atheists in Iran are unlikely to come to the attention of the authorities unless they seek to publicly express their views.<sup>6</sup> Apart from questioning Islam at school [years] ago, there is no evidence the applicant ever sought to publicly express his views. The applicant has not practiced Islam throughout his adult life, and there is no evidence this has ever caused any issues with his family or with the authorities. To identify as an atheist is not unknown occurrence in Iran. Sources indicate there is a growing number of atheists in Iran, and that it is more accepted amongst some Iranians.<sup>7</sup> Under Iranian law a Muslim who leaves the faith can be charged with apostasy, with the death sentence a possibility. However apostasy charges are now rare, and in the rare cases they are made they usually have political overtones.<sup>8</sup> As an ordinary non-practising Muslim who identifies as an atheist, but who has no public profile as doing so and no political profile, I find the chance of the applicant coming to the attention of the authorities is remote. I find his chance of harm for his non-belief in Islam and identification as an atheist is too remote to amount to a real chance. I find he does not face a real chance of harm for his 'religion', that is no religion, or an actual or imputed political opinion being against Islam or for atheism.
20. The representative submitted the applicant cannot be expected to hide his religious views and live discreetly to avoid harm. The applicant has lived his life in Iran as an atheist by not practising any religion. There is no evidence the applicant hid his views from his family. There is also no evidence he made public comments against Islam or religion, either in person or online, as an adult in either Iran or Australia. The lack of any activity in Australia to publicly express views that are anti-Islam or pro-atheist indicates he feels no need to undertake such activity. I am satisfied the applicant could continue to hold his religious views, that is his lack of belief in any religion, without the need to modify his behaviour.
21. The applicant says he was never arrested or detained in Iran. He does admit, in his written statement, to being caught by the police on one occasion in 2001 or 2002 when he was out driving with friends and they had alcohol in the car. He says they paid a bribe to the police and were let go without penalty. At the SHEV interview he also said the Basij found 4 litres of alcohol at his house and arrested his brother for this. His brother was sentenced to a fine and lashes, but the applicant's family paid the fine so the lashes sentence did not need to be carried out. He said the Basij suspected him of being involved in the alcohol at the house as well, however they arrested and charged his brother only because they could not find the applicant. I consider this most unlikely, given the applicant's evidence that in Iran he stayed at home with his mother. I do not accept he was in hiding or escaped from the Basij. I find the Basij could have arrested him if he was a person of interest to them. I note this claim that the Basij wanted him over alcohol found at his house was only raised at the SHEV interview, and not in his written application. I consider it was an exaggeration he made at the interview, and not a genuine event or genuine fear or reason why he left Iran. I do not accept

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<sup>6</sup> DFAT Country Information Report Iran, 21 April 2016.

<sup>7</sup> 'Update on the Situation for Christian Converts in Iran', Danish Immigration Service, June 2014; 'Iran: Freedom of Religion, Treatment of Religious and Ethnic Minorities' ACCORD, 1 September 2015.

<sup>8</sup> DFAT report.

he was wanted by the Basij. I find the applicant lived at his parent's home all his life in Iran, including as an adult, and faced no issues with the authorities during his life in Iran, apart from the one occasion where he and his friends paid a bribe to police as teenagers caught with alcohol.

22. There is reference in the application to the applicant suffering drug issues in Australia. He spoke at the SHEV interview of being on [a treatment] program, but said he was no longer receiving treatment. The delegate put to the applicant that country information indicated Iran had some progressive views on drug rehabilitation these days, and asked if there was any reason the applicant feared he could not access such treatment. The applicant told the delegate he would not need to participate in such treatment, and he no longer had any issues with drugs or alcohol. There is nothing before me to indicate the Iranian authorities would be aware of or take adverse interest in his drug taking in Australia. There is no medical evidence before me that the applicant suffers an ongoing drug addiction or health issues relating to drug use. I consider it too speculative to say that he may have drug issues in the future in Iran, when the applicant's recent evidence is that he no longer has drug issues. I am not satisfied on the evidence before me that the applicant faces a real chance of harm in Iran for drug issues he had in Australia.
23. The applicant claims to fear harm if returned to Iran because of an imputed political opinion as being opposed to the Iranian authorities because he is a failed asylum seeker returning from Australia. The applicant has clearly stated he would not return to Iran as a voluntary returnee. Iran has historically refused to accept involuntary returnees by refusing to issue travel documents to allow them to be returned from abroad.<sup>9</sup> I acknowledge the applicant has indicated he would not voluntarily return to Iran, and he cannot be returned involuntarily.
24. I have considered the chance of the applicant receiving adverse attention in the event he did agree to return voluntarily to Iran. DFAT advises the Iranian authorities pay little attention to failed asylum seekers. International observers report the Iranian authorities have little interest in prosecuting failed asylum seekers for activities conducted outside of Iran, including in relation to protection claims. Seeking asylum is not a criminal offense in Iran.<sup>10</sup> People with an existing high profile, particularly political activists may however face a risk of coming to official attention on return to Iran.<sup>11</sup> I do not accept the applicant has an existing high profile. I acknowledge there is a small chance the applicant may be questioned at the airport as an illegal departee returning from abroad, however DFAT reports the authorities usually only question a voluntary returnee if they have already come to official attention such as by committing a crime prior to departing Iran. This is not the case for the applicant. I accept that should he be questioned on return, his lack of military service may be noted in the questioning. However for the reasons given above, I find he was exempted from such service and therefore his lack of military service would not be an issue. I do not accept the applicant is a person with a high profile, or any adverse profile at all. He lived in Iran until [age] without coming to the attention of the authorities. There is no evidence before me that he has ever engaged in any political activity in person or online, either in Iran or in Australia. I rely on country information to find the Iranian authorities would not be interested in him merely for having sought asylum abroad. I find he does not face a real chance of harm for being a returning failed asylum seeker or for seeking asylum in Australia.

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<sup>9</sup> DFAT report.

<sup>10</sup> 'Iran: On Conversion to Christianity Issues concerning Kurds and Post-2009 Election Protestors as well as Legal issues and Exit Procedures', Danish Refugee Council, Landinfo and Danish Immigration Service, February 2013.

<sup>11</sup> DFAT report.

25. The applicant claimed to fear harm as a member of a particular social group 'young Iranians with a Western appearance and attitude'. The applicant has claimed he liked to wear Western style clothes and drank alcohol in Iran, and has had issues with alcohol and drug use in Australia. I note at the SHEV interview the applicant said he no longer had issues with alcohol and drugs, and there is no medical evidence before me to indicate this is not true. The applicant quoted country information in submissions dated 7 January 2019 that when a man disrespects social mores by wearing long hair, piercings, tattoos or shorts or short sleeves, they face harassment and arrest on a regular basis. There is no evidence the applicant was harassed or arrested in Iran prior to coming to Australia. There is no evidence before me that he has long hair, piercings or tattoos. DFAT advised in its 2016 report that the usual penalty for a Western appearance, if a penalty is imposed, would be a warning or a fine. DFAT also advised that up to one third of Iranians, mostly living in urban areas, aspired to living a modern lifestyle. The applicant is from Tehran, a highly urban area. In 2018 DFAT reported it was in fact common to see young men in 'Western-style' on the streets, particularly in larger cities such as Tehran. I note the applicant was never harassed or arrested for his appearance before leaving Iran. In the event his appearance and attitude has been more Westernised through his time in Australia, I consider the chance of him attracting adverse attention is low. DFAT advises low-level harassment from the security authorities in Iran is directed particularly at young Iranians, and when this occurs it is likely because the person has already come to the attention of the authorities for another reason, particularly political activism. The applicant is now a man [approximate age], and is not a young man involved in political activism. I find the chance of him experiencing any adverse attention for reason of a Western appearance or attitude in the city of Tehran is too remote to amount to a real chance.
26. The applicant claims he has been in a relationship with a Christian woman in Australia, but little information has been provided about his partner. He said at the SHEV interview he had been living with her for the past 3 years. It is not clear whether she is actively Christian or whether she is not a practising Christian but is from a Christian background in the same way he is from a Muslim background. There is no claim the applicant has engaged with any Christian activities in Australia. In submissions dated 7 January 2019 the representative submits the applicant's family in Iran are 'well aware of his relationship' but there is no claim from the applicant that his family is opposed to his relationship or have threatened any harm because of the relationship. The applicant has not claimed his Australian partner would accompany him to Iran. As noted above, the Iranian authorities have little interest in activities conducted outside of Iran. There is nothing to suggest his relationship with a Christian woman in Australia would be known or of interest to the Iranian authorities. I find he does not face a real chance of harm in Iran for reason of his relationship in Australia.
27. I have considered the applicant's claim cumulatively, that is, as a non-practising Muslim and atheist, who was exempted from military service, left Iran illegally, is privately opposed to the regime, who may have a Western appearance or attitude, had a relationship with a non-Muslim in Australia, had drug and alcohol issues in Australia, is a failed asylum seeker and would not return voluntarily. I note the applicant had no adverse profile in Iran. The applicant has not committed any political activity in Australia to draw the adverse interest of the Iranian authorities. I consider his personal issues, such as his health, views on religion, and relationship, would not be known or of interest to the Iranian authorities. Even with all of his claims considered cumulatively, I do not accept that the applicant would be of adverse interest to the authorities if he returned to Iran in the reasonably foreseeable future. I find his personal factors are either not known or not of interest to the authorities, and he is not an activist in relation to his personal views such that he would make them known. I find the



applicant does not face a real chance of harm in Iran, even considering his claims cumulatively.

28. After considering the applicant's claims both separately and cumulatively, I find the applicant's fear of persecution in Iran is not well-founded.

#### **Refugee: conclusion**

29. 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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30. 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**

31. 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.
32. I have found the applicant does not face a real chance of harm in Iran for reason of his religion (or lack of), his illegal departure, an actual or imputed political opinion being opposed to the regime, being a failed asylum seeker, being exempted from military service, having a Western appearance or attitude, having a relationship with a non-Muslim, or having drug and alcohol issues in Australia, or for any reason including considering these factors cumulatively. 'Real chance' and 'real risk' has been found to equate to the same threshold. For the same reasons given above, I find the applicant will not face a real risk of significant harm for any of the reasons claimed.
33. The representative submitted in post-interview submissions that the applicant would face economic vulnerability should he return to Iran, because of his poor physical and mental health. The representative submits the applicant's mental health will decline if he is returned to Iran. I do not have any medical reports before me in relation to the applicant's mental health, and I consider this submission is mere speculation. In Iran the applicant was already a vulnerable and physically unwell person who did not work, but he was supported by his family, particularly his mother. The applicant confirmed at the interview that he maintains contact with his mother. The applicant told the delegate his mother still lives in the same family home he grew up in. There is nothing before me to indicate he could not resume living with his mother or that she would not support him, financially and emotionally, should he

return to Iran. I do not accept the applicant would be unable to subsist should he be returned to Iran because I find his family in Iran would support him.

**Complementary protection: conclusion**

34. 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.