



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA20/08209

IRAN

IAA reference: IAA20/08210

Date and time of decision: 13 May 2020 11:10:00

I Sheck, Reviewer

Decision

In respect of the referred applicant (IAA20/8209) the IAA remits the decision for reconsideration with the direction that:

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

In respect of the other referred applicant (IAA20/8210), the IAA remits the decision for reconsideration with the direction that:

- the other referred applicant is a member of the same family unit as the above-named applicant and satisfies the criteria in s.36(2)(b)(i) of the *Migration Act 1958*.

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

Background to the review

Visa application

1. The referred applicants are a husband, born in Kermanshah and his wife, born in Tehran. The applicants are citizens of Iran who departed Iran [in] June 2013 and arrived in Australia [later in] June 2013. On 1 May 2017 the applicant lodged an application for protection visa (PV).
2. On 15 April 2020 a delegate of the Minister for Immigration (the delegate) refused to grant the visas. The delegate accepted that the applicant had been subject to low levels of harassment in Iran due to his Kurdish ethnicity and for infractions of the dress code or his appearance. The delegate accepted that the applicant had been baptised as a Christian and attended church in Australia but did not accept that his conversion was genuine. The delegate concluded that the applicant would not face harm in Iran on the basis of his ethnicity, religious activities in Australia, as a failed asylum seeker or for any other reason.
3. The applicant made the primary claim for a PV; the applicant's wife is relying on the family unit criteria.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material). On 11 May 2020 the IAA received a submission on behalf of the applicant from his representative, [Representative A] of [business name]. Section 473DD of the Act provides that the IAA must not consider any new information from an applicant unless satisfied there are exceptional circumstances to justify considering the new information, and the new information was not and could not have been provided to the Minister or is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims. The submission by [Representative A] addresses the delegate's decision. It may be regarded as argument rather than new information and to that extent I have had regard to it.
5. [Representative A] also states in the submission that, if the applicant is detained in Iran, he will be at serious risk of contracting Corona virus due to the Iranian authorities' mismanagement and negligence in controlling the disease. This was not before the delegate and is new information. The new information does not comprise credible personal information in the relevant sense, nor has the applicant satisfied me that the information could not have been provided to the delegate prior to her decision of 15 April 2020. As neither limb of s.473DD(b) is met, I have not had regard to this new information.
6. In her submission [Representative A] has referenced a number of publications. The names and dates of these publications are not stated and no relevant extracts have been provided. There are only hyperlinks to the various reports or articles, for example: "<https://www.refworld.org/docid/3ae6ab1018.html>". To the extent that all or any of these documents are not contained in the review material they are new information. As the new information does not comply with paragraph 30 of the IAA's Practice Direction I am not required to accept it (s.473FB(5)) and decline to exercise my discretion to do so.
7. [Representative A] has also provided additional documents with her submission, namely letters of support for the applicant from a [Mr A] (undated) and [Pastor A] of the [Church 1] dated [in] May 2020. I note that on 6 February 2020 [Representative A] emailed the Departmental

interviewing officer “the church support letter” however the officer advised her by return email that “I don’t think this is the intended attachment.” It does not appear that the letter in question was re-sent by [Representative A]. I am satisfied that the information contained in the two new letters comprises credible personal information. As the letters appear to corroborate the applicant’s Christian activities in Australia they may affect consideration of his claims. [Representative A] has not provided any information on why there are exceptional circumstances that warrant consideration of the new letters or why they could not have been provided to the delegate prior to her decision of 15 April 2020. I note that the applicant has been represented throughout the application process including at his PV interview on 4 February 2020. I am not satisfied that there are exceptional circumstances that warrant consideration of the two letters and have not had regard to them.

Applicants’ claims for protection

8. After their arrival in Australia the applicant and his wife were separately interviewed by officers of the then Department of Immigration and Border Protection (now the Department of Home Affairs) on 17 July 2013. The applicant provided details of his claim in a statutory declaration dated 26 April 2017 lodged with his PV application. On 4 February 2020 the applicant and his wife separately attended interviews (“the PV interviews”) with a Departmental officer. Supporting documents were provided to the Department with the PV application and at the applicant’s PV interview. The applicant claims:
 - His mother is a Faili Kurd and was expelled from Iraq by the Saddam regime. His father is an Iranian Kurd. Due to his ethnic background he experienced racial discrimination and bullying at school and during his childhood. He was later mistreated during his military service. He was unable to obtain suitable employment due to the discriminatory system of his country. Because of this he determined to leave Iran;
 - He was also discriminated against in Iran due to being of Sunni faith and this caused him to become disillusioned with Islam;
 - Since arriving in Australia he became familiar with Christianity while in immigration detention on Christmas Island. He is now a practising Christian. He prays daily, attends church weekly and undertakes various Christian activities. If he is returned to Iran he would be imprisoned or killed because of his religious beliefs, which would be considered to be apostasy and proselytising by the Iranian authorities.
9. The applicant’s wife has not made any claims for protection independent of the applicant. The Departmental interviewing officer spoke to her separately on 4 February 2020 and she confirmed that she was aware of her husband’s claims and had none of her own.

Factual findings

10. The applicants’ evidence regarding their family, education and work history has been largely consistent and I am satisfied that it is as stated. Based on the information provided in their arrival and PV interviews and identity documents, I find that the applicant’s background is as follows: he was born on [date] in Kermanshah province, Iran and is an Iranian national. He has [specified family members]. [Specified family members] reside in [another country], his parents and other siblings in Iran. He undertook primary and secondary schooling [during specified years]. He undertook military service [during specified years]. He was employed in Iran [in three specified occupations]. He departed Iran legally, on his own passport, together with his wife. He has worked [in three specified occupations] in Australia. The applicant and his wife married [in]

August 2009 in Tehran. The applicant's wife was born on [date] in Tehran. She has [specified family members], one of whom lives in Australia. She attended school to [level] and commenced but did not complete [tertiary] studies at University. She worked as [an occupation] in Iran and is employed in Australia as [another occupation].

11. In his arrival interview on 17 July 2013 the applicant advised that he left Iran due to financial problems which were exacerbated by inflation. He did not indicate that he had trouble obtaining employment in Iran however stated that he and his wife saved for two to three years in order to come to Australia. In his statutory declaration the applicant stated that he was unable to obtain suitable employment due to his Kurdish ethnicity. Country information notes that although no laws discriminate on the basis of ethnicity, including in relation to access to education, employment, or housing Iran does, however, remain a strongly Persian-centric society in practice.¹ I accept that the applicant suffered employment discrimination however he did maintain employment from 2007 until his departure from Iran in 2013. The country information does not support that the applicant would be denied all employment on the basis of his ethnicity and I find he would not. At the PV interview the applicant confirmed that he was claiming protection on the basis of his ethnicity. In addition to the employment difficulties the applicant noted that he was not allowed to openly speak Kurdish in Iran. On this issue, country information notes that in 2013 Iranian President Hassan Rouhani pledged to promote ethnic minority rights by increasing minority representation in government and by allowing the teaching of 'Iranian native languages' such as Kurdish, Azeri and Arabic². The applicant did not provide any other examples of racial discrimination that he had encountered as an adult.
12. In his arrival interview, completed some four weeks after his arrival in Australia, the applicant was asked his religion and responded "I'm researching on Christian I've been a Muslim but I'm in the process of converting to Christian". Together with his PV application the applicant provided a baptism certificate indicating that he was baptised at [Church 2] [in] June 2014. He also provided a letter from the [Pastor B] of [Church 2] dated 10 January 2017. [Pastor B] stated that the applicant was a member of her congregation and actively participated in worship. The applicant stated in his statutory declaration that he had a Christian friend during his military service who would talk to him about Christianity. He became more familiar with Christianity during immigration detention in Australia, started reading the bible and attended church services.
13. At the PV interview the applicant stated that his friend during military service would talk about Jesus Christ "in small words" but never spoke to him about Christianity because it is forbidden. When he and his wife arrived in Australia they were in a poor mental state and were befriended by a Christian family, who were very kind to them and gave them a book to read. I infer that the applicant refers to the Bible. The applicant stated that he currently attends [Church 1], where he has been part of the congregation for three years.
14. The applicant advised that he prays daily. He starts off with the Lord's Prayer then "has a conversation". Jesus told people how to pray this way in the book of Matthew, Chapter six Verses 9-14. The applicant added that when he was a Muslim the prayers were in Arabic. "I had to speak to God in a language I did not understand and recite things that I had learned by heart but now I can speak to God in my own words I have no problem to connect. I am direct to him there are no people in between. I believe in Jesus Christ as my God, my own saviour and protector." The interviewing officer asked the applicant what was the difference between the [denomination]

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Iran", 13 April 2020, 20200414083132; 3.1 and 3.3

² Ibid; 3.1

(that he previously attended) and the [church] that he now attends and he responded “Church is church. It doesn’t make any difference, they are following Jesus.” The officer put to the applicant that he needed to consider whether the applicant’s Christian activities were for the purpose of enhancing his claims for protection. The applicant responded that they were not; he became a Christian so that he and his wife would have a better life. When asked how a religion could do that the applicant responded that we have to look at Christianity it’s not a religion it’s a way of living. The Bible tells you how to live your life: don’t give false witness, don’t do fornication, don’t believe in false gods, treat others as you would be treated yourself. Christianity is a way to teach you how to have a better life. The person who believes in Jesus Christ will have a better life and will not commit sins. The applicant said that he used to sin; he was aggressive, he swore a lot and was not a tolerant person. This has all changed because of Christianity. He feels more at peace now he can speak to his God.

15. In terms of whether he would continue to practice Christianity if returned to Iran, in his statutory declaration the applicant noted that “I am a Christian and I will practice my religion wherever I am. If I return to Iran, I will not be able to practice my religion freely.” He also advised that he has undertaken volunteering activities including giving out flyers to promote Christianity at a stall outside [a city location]. At the PV interview the applicant said that he did this every Saturday from 10am to 3pm for about two years. The applicant stated that “My duty and obligation as a Christian is to stay alive and evangelise to share my Christian faith with everyone. Jesus tells his followers go and make all the nations my followers and teach them all I have taught you. I must give the good news to of Jesus to others and introduce him to others”. When asked what is the next step on his faith journey the applicant stated that he wanted to proselytise more. He had done a bit but wanted to do it more. “I have to enrich my knowledge of the matter if I want to preach it to others I must study more”. The applicant stated that if returned to Iran he would be asked his religion and would not lie. He would state that he was a Christian and would be executed or taken directly to gaol from the airport.
16. It is clear from his oral evidence as well as the supporting documents that over the past six years the applicant has regularly attended Christian church services, studied the Bible, undertaken voluntary work as part of a Christian community and undergone baptism. These actions, of themselves, are not indicative of a genuine conversion to Christianity and the review material contains numerous media articles outlining the rush of Iranian asylum seekers in Europe seeking to be baptised so as to avoid being returned to Iran. On this point, the delegate noted “There is another strong other motivation for conversion, namely the attainment of residency, and, based on the country information I have cited, I consider this opportunity to be well known.”
17. During the course of the PV interview the applicant impressed me as a genuine believer in Christianity. The message of his new religion to him appears to be essentially one of peace, the avoidance of sin and treating others as you would be treated yourself. The ability to speak directly to his God every day without any intermediaries is an important facet of Christianity that the applicant did not experience when he practised Islam. I did have concerns regarding the applicant’s claim to be converting to Christianity, immediately after arriving in Australia, and note that In an academic study of Christian and Baha’i conversions among asylum seekers in Turkey published in 2007, the author writes, “notwithstanding the fact that there can be and are genuine believers in Christianity, the new religion is sometimes used as a pretext in order not be deported back to the country of origin.” He described religious conversion as being “only a strategy at the beginning” but that it “may become an essential part of their lives in time.” One asylum seeker told the author that “everyone in Iran hears these kinds of stories ... they say if

you have a good story – or if you say you are Christian – then you get what you want and go to West.”³

18. While it is possible that the applicant’s *initial* interest in Christianity was part of a strategy to strengthen any claims for protection, I am of the view that over time it has become an essential part of his life. I am satisfied that the applicant’s Christian activities over the last six years have not been solely undertaken for the purpose of furthering his protection claims. I find that his activities of private prayer, baptism, church attendance, Bible study and participation in Christian community events have been undertaken because he has become a genuine convert to Christianity and seeks to be a contributing member of his Christian community or family. I conclude that, on the basis of his actions in Australia, the applicant would seek to become a member of a Christian community on return to Iran, likely by joining a house church. I also accept that he believes that it is a Christian duty to proselytise and conclude that he would respond that he is a Christian if asked and would talk about Christianity and his beliefs in Iran, perhaps to family and friends.

Refugee assessment

19. Under s.36(2)(a) of the Act a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee.] 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

20. 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.

³ Sebne Koser Akcapar, *Revue des mondes musulmans et de la Mediterranee*, “What’s God got to do with it? The role of religion in the internal dynamics of migrants’ networks in Turkey,” November 2007, CIS1ACBC921043

21. I have found that the applicant is an Iranian national. It follows that Iran is his receiving country. I have found that the applicant's conversion to Christianity in Australia is genuine and am satisfied it is not for the sole purpose of strengthening his claims for protection. I have found that the applicant's ongoing involvement in both public and private Christian worship as well as community activities is based on a genuine commitment to Christianity. I have found that the applicant will continue to practise his beliefs on return to Iran.
22. None of the three recognised minority religions in Iran (Christian, Jewish, and Zoroastrian) proselytises or accepts converts as members. The activities of recognised Christian communities are closely regulated, to guard against proselytisation. All Christians and Christian churches must be registered with the authorities, and only recognised Christians can attend church. Security officials closely monitor registered churches to verify that services are not conducted in Farsi, and perform regular identity checks on worshippers to confirm that non-Christians or converts do not participate in services.⁴ As a result of these prohibitions, Iranian Christians who are not members of the recognised ethnic minority churches generally practise in underground 'house churches'.⁵ By law, non-Muslims may not engage in public religious expression, persuasion, or conversion of Muslims. Conversion of Muslims or proselytising is a capital crime.⁶ The applicant has engaged in community activities promoting Christianity to members of the public in Melbourne and I have found that he would continue to discuss and promote Christianity, were he to return to Iran.
23. Country information indicates that there has been a change in the way the Iranian authorities look at Christians in general. The change started after the green revolution in 2009, as Christians are perceived to bring ideas of freedom.⁷ According to the group Middle East Concern (MEC), there were waves of arrests in February and May 2012 in Iran affecting both recognized ("building") churches and house churches.⁸ In July 2017, the Revolutionary Court convicted eight Christians of 'acting against national security through the establishment of a house church' and 'insulting Islamic sanctities', and sentenced the group to between ten and 15 years' imprisonment. According to international observers, as of December 2016 approximately 90 Christians were in detention or awaiting trial because of their religious beliefs and activities.⁹ In June 2018, four Christian converts were sentenced to 10 years' prison each, and another 114 were reportedly arrested on charges of proselytising in December 2018.¹⁰ According to media reports, nine Christian converts received five-year prison sentences in December 2019.¹¹ The most recent country information indicates that the Iranian authorities interpret the growth in house churches as a threat to national security.¹²
24. In considering what penalties a Christian convert may face, DFAT notes that under Iranian law, a Muslim who leaves his or her faith or converts to another religion or atheism can be charged with apostasy, which most Islamic judges agree should be a capital crime.¹³ Death sentences in apostasy and blasphemy cases are now rare.¹⁴ When asked whether ordinary Christians living in

⁴ DFAT, "DFAT Country Information Report – Iran", 13 April 2020, 20200414083132; 3.38

⁵ Ibid; 3.50

⁶ Ibid; 3.49

⁷ Danish Refugee Council and the Danish Immigration Service, "Iran: House Churches and Converts", February 2018, CIS7B83941873; p.6

⁸ Danish Immigration Service, Landinfo & Danish Refugee Council, "On Conversion to Christianity, Issues concerning Kurds and Post-2009 Election Protestors as well as Legal Issues and Exit Procedures", February 2013, CIS25114; p.27

⁹ DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 3.33

¹⁰ DFAT, "DFAT Country Information Report – Iran", 13 April 2020, 20200414083132; 3.54

¹¹ Ibid; 3.54

¹² Ibid; 3.52

¹³ Ibid; 3.73

¹⁴ Ibid; 3.76

Iran face a risk due to their Christian faith, a 2013 report quoted a source in Iran who is well-informed about Christians as saying that no persons born inside a Christian community face any risk because of their religious belonging. But those who do proselytism always face a risk, and so do converts, especially if they do not keep a low profile.¹⁵ I have found that the applicant would seek to become part of a Christian community such as those which attend house churches and that he would proselytise or promote Christianity. There is a real chance that such activities would bring him to the attention of the Iranian authorities. DFAT currently assesses that Christians found to be proselytising face a high risk of arrest, prosecution and imprisonment.¹⁶

25. Country information also indicates that Christian converts are typically not charged with apostasy; convert cases are usually considered as national security matters which are handled by the Revolutionary Court. The authorities perceive activities related to conversion as political activities. Death penalty in cases related to conversion is not a common punishment. A Western embassy noted that a death sentence for conversion has not been issued in the last 10 years.¹⁷ I am not satisfied on the evidence before me that there is a real chance that the applicant would be subject to the death penalty due solely to his conversion to Christianity. Taking into account the whole of the review material, in particular the more recent reports, I am however satisfied that the applicant will face a real chance of being subject to monitoring, arrest, being charged and detained for a period of time, for reasons of his beliefs and for the public manifestation or expression of those beliefs.
26. Country information indicates that arbitrary arrest, torture and ill treatment in detention in Iran is common. Individuals under arrest often remain in detention facilities for long periods without charge.¹⁸ Human rights organisations report that torture and other ill-treatment of detainees remains common in Iranian detention facilities, especially as a means to force confessions during interrogation. International sources report that commonly reported methods of torture and abuse include prolonged solitary confinement, threats of execution or rape, forced virginity tests, sexual humiliation, sleep deprivation, electroshock, burnings, the use of pressure positions, severe and repeated beatings.¹⁹ Human rights organisations have reported that authorities have systematically failed to investigate allegations of torture and other ill-treatment, and have sometimes threatened to subject complainants to further torture and long sentences.²⁰ I am satisfied that the harm the applicant may face is serious harm, I am also satisfied that the essential and significant reason for the harm is his religion, and that it involves systematic and discriminatory conduct.
27. The harm that the applicant fears emanates from the Iranian authorities operating under laws which apply throughout Iran. As such, I find that the real chance of persecution relates to all areas of Iran. I am satisfied he has a well-founded fear of persecution for the purposes of s.5J(1).
28. As the Iranian government is the agent of harm and maintains control throughout the country, I am satisfied that effective protection measures are not available to the applicant in Iran and s.5J(2) does not apply.

¹⁵ Danish Immigration Service, Landinfo & Danish Refugee Council, "On Conversion to Christianity, Issues concerning Kurds and Post-2009 Election Protestors as well as Legal Issues and Exit Procedures", February 2013, CIS25114; p.26

¹⁶ DFAT, "DFAT Country Information Report – Iran", 13 April 2020, 20200414083132; 3.58

¹⁷ Danish Refugee Council and the Danish Immigration Service, "Iran: House Churches and Converts", February 2018, CIS7B83941873; p.9

¹⁸ DFAT, "DFAT Country Information Report – Iran", 13 April 2020, 20200414083132; 4.18

¹⁹ Ibid; 4.11

²⁰ Ibid; 4.12

29. The applicant can avoid a real chance of persecution by not practising his faith or concealing his faith but this would involve an impermissible modification of behaviour. I find that s.5J(3) does not apply. I consider that requiring the applicant to modify his behaviour, either by concealing his Christian beliefs, by renouncing his Christian faith or by ceasing to be involved in the practice of that faith including talking about Christianity to others falls within a kind of modification that an applicant cannot be required to make in s.5J(3)(c)(i).
30. Accordingly I am satisfied the applicant has a well-founded fear of persecution in Iran for reason of his religion. I have therefore found it unnecessary to assess whether he faces a real chance of harm in relation to his other claims.

Refugee: conclusion

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

Member of same family unit

32. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the *Migration Regulations 1994* to include a spouse of the family head.
33. In the PV applications lodged with the Department, the applicant and his wife state that they were married to each other [in] August 2009 and have given the same address history from this date. They have provided a copy of their Iranian marriage booklet. Based on the evidence before me, I am satisfied that they are in a married relationship that is valid for the purposes of this Act, they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; the relationship between them is genuine and continuing and they live together pursuant to s.5F(2) of the Act. I am satisfied that the applicant wife is the spouse of the applicant under s.5F(1) and is therefore a member of his family unit for the purposes of r.1.12.
34. The applicant is the family head. His wife is a member of his family unit under r.1.12. They are therefore both members of the same family unit as defined at s.5(1) of the Act. As the applicant is a person mentioned in s.36(2)(a), his wife meets s.36(2)(b)(i).

Decision

In respect of the referred applicant (IAA20/8209) the IAA remits the decision for reconsideration with the direction that:

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

In respect of the other referred applicant (IAA20/8210), the IAA remits the decision for reconsideration with the direction that:

- the other referred applicant is a member of the same family unit as the above-named applicant and satisfies the criteria in s.36(2)(b)(i) of the *Migration Act 1958*.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
 - (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
 - (c) for the purpose of intimidating or coercing the person or a third person; or
 - (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
 - (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;
- but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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