



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA20/08620

Date and time of decision: 17 September 2020 16:52:00

K Allen, Reviewer

Decision

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

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be from Kermanshah, Iran. On 12 August 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. On 31 July 2020 a delegate of the Minister for Immigration (the delegate) made a decision to refuse the grant of the visa on the basis that the applicant was not owed protection.

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 27 August 2020 the applicant's representative sent the IAA a submission on the applicant's behalf, a statutory declaration from the applicant and approximately fourteen attachments containing new information. To the extent that the submission and the applicant's statutory declaration contain argument about the delegate's decision, I have had regard to that information in making this decision.
5. The applicant provided new information about his claimed Christian conversion. He provided a letter of support dated 1 July 2020 from [Rev Dr A], Pastor of [Church 1]. The letter pre-dates the delegate's decision by a month. The applicant's representative submitted that this letter was in fact prepared after the applicant's SHEV interview. The applicant was of the understanding that the letter had been directly sent to the Department by the church as he was advised. However, as no reference of this letter has been made in the decision record, the applicant presumes this was not received by the decision maker at the time of decision. I am willing to accept the applicant's explanation for the delay in the provision of the letter. I have therefore considered the letter on the basis that there are exceptional circumstances to justify considering the letter and the letter contains credible personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claims.
6. The applicant also provided photographs of himself at his baptism ceremony, a video snippet labelled church vigil and a video snippet of a church service. None of these are dated and, given the applicant was baptised in 2017, I cannot be satisfied that this information could not have been provided with the delegate. Additionally, I already have information before me that the applicant was baptised, and I am not satisfied that the videos add anything further to the applicant's claims about his Christian conversion. I am not satisfied that that there are exceptional circumstances to justify considering this new information.
7. The applicant provided letters of support about his Christian faith, dated August 2020 from [Ms B], [Mr C], and [Mr D]. He also provided printouts of [Social Media 1] posts he claims he made between 2017 and 2019. The applicant's representative submitted that the applicant was unrepresented at the SHEV interview and post interview stages of his protection application. He was not well informed about the kind of evidence he could provide in support of his claims. It is submitted that the above-mentioned new information is credible personal information, which was not previously known and, had it been known, may have affected the consideration of the applicant's claims. While I accept that this new information pertains to the applicant, I consider that it is all new information which could have been obtained and provided to the

delegate at the primary stage. Further, there is no new information contained in the letters of support that point to any change in circumstances for the applicant which occurred after the delegate's decision. I am not satisfied that there are exceptional circumstances to justify considering this new information.

8. The applicant provided recent news articles about the treatment of Christians in Iran. The articles from Persecution.org, Radio Farzan and the Human Rights Monitor were all published in August 2020 after the delegate's decision. As the articles were published in recent weeks, I am satisfied that they could not have been provided to the delegate before a decision was made. Given their apparent relevance to the recent treatment of Christians in Iran I am satisfied that there are exceptional circumstances to justify considering this new information.
9. The applicant provided new information about his claimed marriage to his former spouse. He provided what he claims are wedding photos and wedding video screenshots. Given that the applicant had the opportunity to provide information in support of his claims after the SHEV interview and he provided wedding videos at that stage, I am not satisfied that this additional information could not have been provided to the delegate before a decision was made. The applicant has not pointed to any exceptional circumstances to justify consideration of this new information and I am not satisfied that there are any.
10. The applicant's representative has submitted that the circumstances of the applicant's SHEV interview were not appropriate and hindered him in his ability to respond to the delegate. In support of this claim he provided a letter dated 10 August 2020 from the applicant's employer [Mr E]. I have listened to the interview and reviewed the file. I am satisfied that the applicant was not given notice of the interview as he was notified electronically even though he had specified not to receive communication that way. I accept that he was clearly at work during the interview as confirmed in the support letter by the applicant's employer and, in spite of obvious distractions, I note that the interview was never stopped and postponed to another time. Consequently, I am satisfied that there are exceptional circumstances to accept the letter from [Mr E] and I note that it contains credible personal information that was not previously known and had it been known may have affected consideration of the applicant's claims.
11. As a consequence of the circumstances of the applicant's SHEV interview, the applicant's representative requested that an interview be scheduled with the IAA to allow the applicant to present his case adequately and under suitable conditions. The IAA agreed to this and conducted an interview on 15 September 2020. The applicant did not raise any new information at that interview but was able to articulate his claims in his own time, undistracted. I have considered the IAA interview in making this decision as I am satisfied that there are exceptional circumstances to justify doing so.

Applicant's claims for protection

12. The applicant's claims can be summarised as follows:
 - He was born in Kermanshah, Iran in [year] to Kurdish Shia parents. His mother, [brothers] and one sister continue to live in Kermanshah and one brother lives in Tehran. His father passed away after he came to Australia.
 - In around 2010 he moved to Tehran and found work in a bazaar selling [products]. In around August 2012, he met his future wife at the bazaar. They were going out for two or three months and he decided he wanted to marry her. Her family accepted this.

- After they were married her three brothers divulged that they were part of the intelligence service of the Revolutionary Guards. They did not want him working for the bazaar as it was not a reputable job, and they tried to convince him to get involved in the intelligence service which he did not want to do because he did not believe in their values.
- One day in around March 2013, they argued about this and he had to flee to a friend's house in Tehran. The brothers said that they were going to file for divorce on his behalf and that he had to go to court. At court the judge just said the divorce had been granted. He was not given any divorce documents. In the hallway of the court, the brothers said that he owed them a dowry for his wife, which was 400 gold pieces, and that they were going to have him taken to prison.
- His ex-wife's family had new identity documents issued for them which showed that they were never married so that she could re-marry. After this time, the brothers continued to chase him, and he had to stop working. He decided to flee Iran because of the requirement to re-pay the dowry and fear of retribution from his ex-wife's family.
- In the first two or three months of coming to Australia, one of his friends took him to a church in Melbourne and he first became exposed to Christianity. When he moved to [Suburb 1], he went to church alone in [Suburb 2] and then he went to a church in [Suburb 3]. He was drawn to Christianity because everyone is singing and happy and women and men are together. Currently, he attends [Church 1] where he was baptised in 2017.
- If he returns to Iran, he fears he will be detained immediately and punished because the brothers of his ex-wife would have notified the authorities that he betrayed the intelligence service and chose not to join them. They would also be aware that he has not paid the dowry to the family.
- He fears harm because he does not believe in Islam and is of the Christian faith. This is a crime in Iran. He would not be able to practise Christianity and would have to modify his behaviour and not go to church.
- He fears harm on the basis that he would be punished for seeking asylum in Australia.

Factual findings

Identity

13. During his SHEV interview the applicant was able to describe his life in Kermanshah, and the area in Tehran where he worked, spontaneously and in sufficiently convincing detail. In support of his claimed identity he provided his Shenanameh (birth certificate) and translation and his Iranian National Identity Card. Based on his account, I accept that the applicant is an Iranian Citizen and I am satisfied that Iran is the receiving country.
14. I note that the delegate accepted that the applicant was of Kurdish ethnicity and considered whether the applicant faced any harm on that basis. The applicant stated that his parents are Kurdish and country information confirms that Kermanshah is largely a Kurdish province¹. Based on his account of his family history and the fact that the applicant is from Kermanshah, I am satisfied that the applicant's ethnicity is Kurdish. The applicant has not raised any claims

¹ Center for Human Rights in Iran (United States), "43 People Charged in Iran's Kermanshah Province For Protesting Against the State", 30 March 2018, CXBB8A1DA25444

to fear harm on the basis of his ethnicity. He confirmed this in his IAA interview, and I am satisfied that no such claims arise on the material before me.

Marriage and divorce

15. The applicant claims to fear harm from his ex-wife's brothers and the Iranian authorities because he did not want to join the intelligence service and because he did not pay a dowry, which he owed them after he was divorced. I have a number of significant concerns about this claim.
16. Firstly, the applicant has not convinced me that he was ever married or divorced in Iran. At his arrival interview held on 5 August 2013 he said that he came to Australia for a better life. When he was working in Iran, he was not paid what he was entitled so he travelled to Australia for a job, a better life and freedom. He indicated when asked, that he was never married and that his religion was Shia. In his SHEV application lodged on 12 August 2017 he said that he fled Iran in 2013 because of fear of retribution from his ex-wife's family who were members of the intelligence service of the Revolutionary Guards. He said that in his arrival interview he did not talk about the real reason for fleeing Iran because he was terrified that that he would be sent back to Iran and his ex-wife's brothers would find out that he had divulged information about them. The applicant did not provide any evidence to support that he had been married or divorced. At his SHEV interview the delegate asked the applicant about these discrepancies in his accounts of his claims under s.57 of the Act. The applicant repeated his claim that he had been afraid to tell the truth. He also said he had no material proof of the marriage because his ex-wife's family took the marriage certificate. He was asked if he could provide a photo of his ex-wife. He stated that he tore them up but that his brother may have video from the wedding. In a post interview submission, the applicant provided two video files. The first one was 1.50 minutes long and very poor quality. It showed the applicant sitting next to a woman who was wearing a veil. It was not possible to determine who the woman was or the occasion. The second one was 2.19 minutes long and also poor quality. It showed the applicant signing an official looking document with the same woman. Neither of the videos contain any dates or names in English. At his IAA interview the applicant was asked more questions to determine whether in fact he was married. At the interview he could not recall the date of marriage or the date of divorce. He continued to rely on the video evidence as proof of marriage. He explained that he could not recall the dates because it was a terrible memory. Given that this was a central element of the applicant's claims both in terms of the brothers-in-law and the dowry repayment, I do not find this explanation at all plausible. I have doubts as to whether the applicant was actually ever married or whether he was married to the person described in the application on the date described in the application.
17. Secondly, I do not find it plausible that after his claimed divorce in 2013 his ex-wife's brothers had his birth certificate reissued saying he had never been married. The applicant provided a number of documents which he claimed were old and new documents but none of them supported this claim. The documents were his birth certificate and translation and his passport which was untranslated. DFAT reports² that Iranian identity documents include sophisticated security features and are difficult to manufacture for fraudulent use. While it may be possible to obtain a genuine identification document with the intention of impersonating another person, DFAT assesses that sophisticated border control procedures would make it difficult to use such a document in order to leave Iran. Local sources told DFAT³ that document fraud is

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Iran", 14 April 2020, 20200414083132, 5.41

³ DFAT, "DFAT Country Information Report – Iran", 14 April 2020, 20200414083132, 5.42-5.45

'extremely difficult' for primary forms of documentation like passports, national identity cards, shenasnameh and driver's licences. Obtaining these documents is considered beyond the technical and financial means of most Iranians. Multiple layers exist to protect against the issuance of fraudulent documents. In addition to being prohibitive financially, the potential consequences for officials involved in the fraudulent procurement of primary or secondary forms of identification, if caught, act as a major deterrent (including imprisonment). While DFAT cannot discount the existence of corruption in relation to official documentation, it does not assess it to be prevalent, particularly in relation to primary and secondary forms of documentation. Given the lack of documentary evidence, the low occurrence of fraud in relation to shenasnameh, and the risk inherent in producing such documents, I do not accept that the applicant's ex-wife's family applied for a new birth certificate for him deleting the fact that he was ever married.

18. Finally, the applicant claimed that he remained in Tehran for three months after his divorce yet he did not claim to have been summonsed to pay the dowry and he did not claim that he was ever harmed by his ex-wife's family during that time even though there was ample time for this to occur. Further his description about the threat he faced in those three months has been inconsistent. In his SHEV application the applicant stated that in the hallway of the court, the brothers said that he owed them a dowry which was 400 gold pieces and that they were going to have him taken to prison. He also stated that the brothers continued to chase him. They kept showing up to the bazaar and he had to stop working. He did not claim they harmed him. In his SHEV interview he was asked about why he was not put in prison and he said the brothers could not find him for three months. In his interview with the IAA the applicant stated that the brothers were after him because he owed the dowry but that they did not try to stop him leaving the country because they did not expect him to do so. He also said that they threatened him with prison. When pressed, the applicant stated that they threatened him six or seven times. When asked where the threats occurred, he stated by telephone. He made no claim of them chasing him at the bazaar. He made no claim that he was wanted by them because of his views about joining the intelligence service.
19. Overall, I do not accept the applicant's claims about his marriage and divorce, and I do not accept that he is wanted by his ex-wife's brothers in relation to a dowry payment or because he refused to join the intelligence service. I consider that the applicant made up this claim in order to enhance his protection application.

Christian conversion

20. I also note that at the time the applicant lodged his SHEV application, he began attending [Church 1] and that he had plans to be baptised as a Christian. In his SHEV application he stated that he was in the process of being baptised and that he had attended the church for about three months. He also said the he does not believe in Islam and is of Christian faith. This is a crime in Iran and so he would also be captured because of that and he would not be able to practice Christianity as he would be too scared to practice. The applicant was asked about his claimed Christian conversion in his SHEV interview. Having listened to that interview I found that the applicant's answers to questions about his conversion were superficial and tended to sound vague. He was, in my view, unpersuasive. After that interview the applicant provided a copy of his baptism certificate which noted that he was baptised on 29 September 2017.
21. As the conditions for the applicant's SHEV interview were not ideal, he was interviewed again by the IAA. At the IAA interview the applicant was questioned in detail about his Christianity. He was not rushed as he was not at work and he was not having to handle other calls and demands. Overall, there was a sense that the applicant was more engaged with the interview.

At that interview the applicant was able to better articulate his religious beliefs and reason for conversion. I consider that this was because the previous interview was held under suboptimal conditions.

22. The applicant explained that he initially attended a church after his release from detention. He claimed that he went because his father had recently died, and he was feeling lonely. He attended the church and found the people were kind and nice. He explained that in Iran he was nominally Shia but did not practise any religion. He did not claim to have explored any other religions. I note that in spite of having attended church with a friend after his arrival into Australia, the applicant did not join a church and become baptised until he was due to lodge his SHEV application. Country information⁴ indicates that there is a phenomenon of asylum seekers converting to Christianity and that some do so for the suspected purpose of furthering an asylum claim. Some Christian church officials and organisations have acknowledged that, in their view, baptism is sometimes sought for this reason. Given the timing of his baptism and his lack of religious practise in the past, I consider that it is highly likely the applicant began attending [Church 1] for the purpose baptism in order to further his protection claim. Nevertheless, the evidence before me indicates that the applicant has embraced Christianity and has regularly attended Christian services since that time. He was able to describe with spontaneity and in detail, his actions evangelising which is consistent with the ethos of his church. He stated that he regularly made Christian posts on [Social Media 1]. He described some of the charity work the church was involved in and he described attending church via Zoom as a result of COVID-19.
23. Although I have concerns that the applicant commenced attending his church in order to further his claims for protection, I am satisfied that over time he has come to embrace Christianity and he has been a full participant in the community life of his church since 2017. I accept that he has now become a practicing Christian and that he speaks about his religious beliefs publicly over social media, to friends and colleagues and to his family in Iran.

Failed asylum seeker

24. The applicant claims that he fears harm on the basis of seeking asylum in Australia. He claims that he disposed of his Iranian passport en route to Australia and that if he was returned to Iran, he would be doing so on temporary travel documents. I accept that if the applicant returns to Iran it may be apparent to the Iranian authorities that he sought asylum in Australia due to the circumstances of his return.

Refugee assessment

25. 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.

⁴ Spectator, The (UK), "Iran's boat people — and why they're coming to Britain", 5 January 2019, 20190214101246; NPR (National Public Radio), "Iranians Are Converting To Evangelical Christianity In Turkey", 14 December 2018, 20190613181541; Daily Express (UK), "Muslim asylum seekers converting to Christianity to stop deportation from Britain", 14 June 2016, CX6A26A6E5192

Well-founded fear of persecution

26. 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.
27. I have accepted that the applicant has genuinely converted to Christianity and that he practises his religion regularly and he evangelises and speaks publicly about his religion. He claims that he fears harm if he is returned to Iran because he does not believe in Islam and is now of the Christian faith and this is a crime in Iran. In support of this claim he has provided recent news articles which describe the arrest and detention of Christians in Iran and the conditions of those detentions. The applicant claims he would not be able to practise Christianity openly and he would have to modify his behaviour and not go to church.
28. Country information before me indicates that a Muslim who leaves his or her faith or converts to another religion or atheism is likely to face a range of problems in Iran and can be charged with apostasy⁵. In Iran, the punishment for apostasy is subject to judicial discretion and there is no provision in Iran's Penal Code criminalising the act. Nevertheless, Article 167 of the Iranian Constitution requires judges to apply Sharia in situations in which the law is silent and Article 220 of the Iranian Penal Code effectively states that crimes punishable under Iranian law are not limited to the ones specified in the Penal Code. According to Article 160 of the Iranian Penal Code, confessions, the testimony of two male witnesses or the 'knowledge of the judge' can each be the basis for a conviction. In the rare instances that they are applied, charges of apostasy have in the past resulted in the death penalty and are often combined along with other crimes related to national security such as waging war against God and the Prophet⁶. Since 1999, the United States of America has designated Iran as a "Country of Particular Concern" (CPC) under the *International Religious Freedom Act of 1998* for having engaged in or tolerated particularly severe violations of religious freedom⁷.
29. DFAT considers it unlikely that individuals will be prosecuted on charges of apostasy. Perceived apostates are only likely to come to the attention of Iranian authorities through public manifestations of their new faith, attempts at proselytization, attendance at a house church or via informants⁸. DFAT assesses that Iranian authorities will rarely intervene actively to stop Muslims attending churches whilst their attendance is low-key⁹. However, all Christian

⁵ DFAT, "DFAT Country Information Report – Iran", 14 April 2020, 20200414083132, 3.73

⁶ Ibid.

⁷ US Department of State, "2019 Report on International Religious Freedom: Iran", 10 June 2020, 20200615122952

⁸ DFAT, "DFAT Country Information Report – Iran", 14 April 2020, 20200414083132, 3.75

⁹ Ibid, 3.57

churchgoers in Iran must register with the authorities. Failure of churchgoers to register and attendance at churches by unregistered individuals may subject a church to closure and arrest of its leaders by the authorities¹⁰. In 2019 the US State Department credibly reported religious minorities in Iran can face serious mistreatment if they come to the attention of Iranian authorities and that Christian converts can face lengthy prison sentences in Iran as they are seen as propagandists against the Islamic character of the state¹¹. This is supported by the news articles provided by the applicant. On 8 May 2020 Prosecution. Org reported on four Iranian Christians who were charged and imprisoned for “actions against national security,” “attending home churches,” and “spreading Zionist Christianity.” The report states that Iranian Christians are often discriminated against by the judicial system, despite the nation’s obligation to serve all citizens equally, regardless of their religious affiliations. The Iranian regime still sees conversion and house-church membership as criminal offences, increasing the day-to-day persecution of Christians. DFAT reports that citizens who are not recognized as Christians, Zoroastrians, or Jews may not engage in public religious expression, such as worshiping in churches¹². Attendance at churches is monitored by the authorities in Iran. If the applicant returned to Iran and openly practised his new faith, it is likely that he would be identified by the Iranian authorities and would have penalties imposed against him. The alternative, of worshiping in private and keeping his conversation secret, would preclude his full participation in the faith of his choice.

30. I am satisfied that the applicant’s fears in relation to his religious conversion are the essential and significant reason he fears persecution upon return to Iran. After carefully considering the circumstances in this case, I conclude that the applicant would face a real chance of serious harm if returned to Iran as a Christian, and that the serious harm would involve systematic and discriminatory conduct.
31. Discrimination against Christians in Iran is pervasive and structural. It is imposed by the State and relates to all areas of Iran. Generally, there is no state protection from such state-directed discrimination¹³. As a consequence, the applicant would be unable to obtain effective protection from discrimination by the State if he was returned to Iran. I conclude that if the applicant was returned to Iran, he would be unable to practice his Christian faith openly without suffering from discrimination by the State.
32. S.5J(3)(c)(i) of the Act prohibits requiring a person to modify their behaviour in a way which would alter their religious beliefs, renounce a religious conversion, conceal true religious beliefs or to cease the practice of their faith. Having found the applicant is a genuine practicing Christian, I am not satisfied that he could take reasonable steps to modify his behaviour in a way which would conceal his Christianity.
33. I conclude the applicant has a well-founded fear of persecution in Iran due to his Christian conversation.
34. Having made this finding, I am not required to address the remainder of the applicant’s claims for protection.

¹⁰ US Department of State, “2019 Report on International Religious Freedom: Iran”, 10 June 2020, 20200615122952

¹¹ Ibid.

¹² Ibid.

¹³ DFAT, “DFAT Country Information Report – Iran”, 14 April 2020, 20200414083132, 3.58

Refugee: conclusion

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

Decision

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

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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