



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN
IAA reference: IAA20/08755

IRAN
IAA reference: IAA20/08756

IRAN
IAA reference: IAA20/08758

IRAN
IAA reference: IAA20/08757

Date and time of decision: 21 December 2020 11:34:00
G Deal, Reviewer

Decision

In respect of the referred applicant (IAA8755) the IAA remits the decision for reconsideration with the direction that:

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

In respect of the other referred applicants (IAA8756, IAA8757, IAA8758) the IAA remits the decision for reconsideration with the direction that:

- the other referred applicants are members of the same family unit as the above-named applicant and satisfy the criteria in s.36(2)(c)(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 applicants claim to be from Tehran, Iran. The applicants comprise a mother (IAA8755) (the applicant), her de-facto partner (IAA8756), her [Age]-year-old daughter (IAA8757) and [Age]-year-old son (IAA8758). [In] May 2013 they arrived by boat in Australia. On 15 August 2017 they lodged applications for Protection Visas (protection visa applications) with the then Department of Immigration, now part of the Department of Home Affairs (the Department).
2. On 10 November 2020 a delegate of the Minister for Immigration (the delegate) refused to grant the visas. The delegate had several concerns about the applicants' evidence including in relation to the genuineness of some of the documentation provided. The delegate accepted the applicant suffered domestic violence at the hands of her former husband (the father of the applicant son and daughter) but not that they were still married. The delegate considered that the applicant had divorced her former husband and started a new relationship with the applicant partner. The delegate was willing to accept the applicant and applicant partner were accused of adultery by the applicant's former husband but considered these allegations were thrown out of the court and that they were not wanted by authorities in connection with this when they left Iran in 2013. Essentially finding it implausible the delegate did not accept the applicants left Iran illegally or by fraudulent means in the staggered fashion claimed, but rather that they left together, legally. Overall, the delegate found the applicants did not meet the relevant definition of refugee, did not face a real risk of significant harm, and were not persons in respect of whom Australia had protection obligations.
3. I note that a question may have arisen as to whether the applicants are 'excluded fast track review applicants' for the purposes of Act. Like the delegate, on the evidence, I am satisfied that they are not.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. The day prior to the expiration of the 21 day period for applicants to provide submissions and new information to the IAA, by email dated 2 January 2020, the applicants' representative (who also represented them at the primary stage) asked for an extension of time until 17 December 2020 to provide a written submission and supporting documents. The representative advised the IAA that they were awaiting the receipt of documents from the Iranian government confirming there was no record of the applicant son and daughter having left Iran (in support of the claim they left using passports in other peoples' names) and that the applicant was still married to her husband (the applicant claims her husband refuses to divorce her and has accused her and the applicant partner of having an adulterous relationship). The representative advised that office closures due to the pandemic had caused delays in obtaining these documents in Iran. By email dated 3 December 2020 the IAA allowed an extension of time until 7 December to provide the written submission and an extension of time until 17 December to provide the documents requested from the Iranian government.
6. By email dated 18 December 2020 the IAA received a submission from the applicants' migration agent and the applicant and a Certificate of Marital Status and Marriage Certificate extract, discussed below. I have had regard to the information in these documents that was also before

the Delegate and any arguments raised. The documents also contain new information, discussed below.

7. The applicant previously provided the Department with a transcription copy of the Deed of Marriage dated in 2017 claiming this showed she was still married to her estranged husband. The applicant now provides a Certificate of Marital Status and Marriage Certificate Extract both issued by the National Organization for Registration of Deeds and Real Properties in Iran on [in] December 2020. In his submission the migration agent states that the Deed of Marriage is cancelled upon divorce. I consider this and the certificates new information. I am satisfied the information could not have been provided to the delegate before she made her decision in November 2020. The certificates appear to be proforma documents, printed in Farsi and are signed. They look to be genuine. The certificates indicate that as at [December] 2020 the applicant was still married to her estranged husband, which is central to her claims for protection. I am satisfied the information is credible personal information which had it been known may have affected consideration of the referred applicant's claims. However, as detailed below, I accept the applicant is still married to her estranged husband. I am not satisfied there are exceptional circumstances to justify considering the information.
8. The applicant's submission also includes new details about the treatment of women in Iran, relevantly including the beheading of an Iranian women by her husband. This is new information. The information is not personal in the relevant sense and it is unsupported. The issue of her mistreatment in Iran as a woman was squarely at issue in her visa application and at the visa interview. I am not satisfied this information could not have been provided to the delegate before her decision was made. I am not satisfied this is credible personal information which had it been known it may have affected consideration of the applicant's claims. I am not satisfied as to the matters in s.473DD(b). As an aside I also note that even if I were satisfied as to s.473DD(b) I have other detailed and recent country information before me about the treatment of women in Iran and I am not satisfied that there are exceptional circumstances to justify considering the information.

Applicants' claims for protection

9. The applicant daughter and son rely on the applicant's claims. The applicant partner made his own claims.
10. The applicant's claims can be summarised as follows:
 - They are Iranian nationals from Tehran, Iran.
 - Her parents and one brother live in Iran and she has one brother in [Country 1] and another in Australia.
 - Her father was conservative and strict and despite wanting to study after finishing high school, in 1992 she was married to a man many years her senior and against her will. She had the applicant daughter and son with her husband in [Year] and [Year], respectively. Other than a short period working for her brother she mostly attended to household duties.
 - A well-connected [Occupation 1], her husband was extremely religious, very abusive and controlling.
 - In 1997 without explanation her husband forced her to travel to [Country 1] and they lived in a refugee camp and sought protection. Again, without explanation they left after

only two years and before they knew the outcome of the visa application. While in [Country 1] she had major [surgery].

- Her husband often beat her and was also violent and controlling with the children. However, he became more violent in 2010 and she reported him to the police and eventually managed to separate from him in 2011.
- She met the applicant partner in 2011 when he was visiting relatives in the same apartment block and stepped in to protect the applicant against her husband during a fight. The applicant later contacted him to see if he would be a witness in relation to legal action she was taking against her husband. Their relationship grew from there and eventually in March 2013, they became romantically involved.
- Her husband refused to divorce her. He commenced court proceedings accusing her of having an adulterous relationship with the applicant partner. Her husband would not leave them or their families alone. He continued to harass the applicant and her partner's families after they left and has created a lot of trouble for them.
- The applicant, her partner and children attempted to leave Iran [in] January 2013. The applicant's passport was seized at the passport gate because of a travel ban placed by her husband.
- A contact "R" arranged a fake divorce certificate which was used to update her *Shenasnameh*. She was able to use this to retrieve her confiscated passport and have her name removed from the airport watch-list. At R's advice and feeling she had no choice she promptly fled Iran from the Imam Khomeini airport on her own passport without issue and in fear of her safety [in] April 2013.
- The contact, R, also arranged passports for the applicant children, which were obtained through fraudulent means, and [in] May 2013 the applicant partner and children fled Iran in fear of their safety.
- The applicants reunited in [Country 2] and then travelled together onto Australia.
- They have lived happily together as a family since being in Australia. Both children completed high school and secured scholarships and study at the tertiary level in Australia. She has worked [in] Australia and attends to home duties.
- She fears harm from her violent husband and arrest, torture, long imprisonment and death at the hands of the Iranian authorities for her adulterous relationship, abducting the children and leaving Iran illegally.
- She fears that if they return her husband will take her daughter and son and harm them and will not let the daughter marry a man of her choice.

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

- He is a Kurdish Shia from Tehran, Iran.
- He has completed his compulsory military service, lived and worked in [Country 3] for a short period, worked [in] Iran including in his own business and has been married and divorced twice. He has worked as an [Occupation 2] in Australia.
- He fears arrest, torture, long imprisonment and death at the hands of the Iranian authorities for being in a relationship with a married woman, helping to arrange fraudulent documentation assisting the applicant and applicant children to depart Iran illegally, kidnapping the applicant children and for not attending court when summonsed in relation to the dispute with the applicant's husband.

Refugee assessment

12. 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

13. 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.

14. Based on the applicants’ evidence, including the documentary evidence, I accept they are Iranian nationals. I consider Iran the receiving country. They are from Tehran, where they have family, and I consider if they were to return it would very likely be to there. Given the detail and consistency of the evidence I accept the applicant’s background details in relation to her parents and siblings and her education and employment history in Iran. Based on the university letters provided I accept the applicant daughter and son both study at university having been accepted on scholarships. Based on the Compulsory Military Services Discharge card, I accept the applicant partner has completed his military service. Given the consistency and detail of his evidence I also accept his background information in relation to his education and employment history and family. When asked his ethnicity and faith at interviews the applicant partner said he was a Kurdish Shia, although he has not made any claims in this regard and none are apparent on the evidence before me. In his arrival interview in response to specific questions the applicant partner spontaneously mentioned protesting against the government a couple of times in the past and said he was not an activist. He also spontaneously mentioned being arrested and/or detained and/or lashed on a few occasions more than 20 years ago in connection with being with unmarried women in public and the consumption of alcohol. The country information before me indicates this is plausible and I am willing to accept this, although I note the applicant partner has not since mentioned these historic incidents or sought to raise them as claims.¹

15. A large volume of documentation was provided in this matter. Most of the original documentation appears to be in Farsi. The delegate advised that English translations of documents were required, and the applicants provided several translations. However, there are

¹ Department of Foreign Affairs and Trade (DFAT) ‘DFAT Country Information Report - Iran’, 14 April 2020, 20200414083132

several documents for which no translations have been provided and their contents are unable to be ascertained.

16. The applicant claims she was forced to marry when young and that her husband is much older. She claims he is violent and abusive and that she suffered years of domestic violence and that when she left him, he refused to divorce her. Her husband subsequently took her to court in Iran, accusing her of adultery with the applicant partner and harassed her, her partner and their families on an on-going basis. She claims her estranged husband is well-connected.
17. Based on the applicant's documentary evidence including her *Shenasnameh* I accept the applicant married her husband in 1992 and that he is [Number] years her senior.
18. In her visa application and visa interview the applicant consistently claimed her husband was abusive and extremely religious. He was verbally and physically abusive and controlled her, including financially. Her father was conservative and strict and so she kept the abuse a secret for many years feeling she just had to endure it. In about 1996 her husband went to [Country 1] without her. After about five months he sent for her and they went to a [Country 1] refugee camp. Her husband arranged for them to seek asylum. While there, her husband was secretive and would often leave the camp and contact Iran. She also had [major surgery] while in [Country 1] and gave birth to her daughter. Without explanation her husband arranged for them to leave [Country 1] in 1999. In [Country 1] her husband was less abusive, however, on return this behaviour recommenced. She gave birth to their son a couple of years later. Her parents gave her an apartment in their block and she and her husband and their children moved in. During this period her husband was often away, and things improved for a while. However, he became more violent again in 2010 after they moved into an apartment which he had purchased. Her daughter was a very good [sports person] and in about April 2011 the daughter needed to travel and stay overnight in [City] to compete in a [Sport] competition. The applicant knew her husband would not agree to this, so she kept the whole affair from him. When he discovered this, he beat her severely including burning her arms with hot metal skewers and she fled with her children to her parent's place. Her husband went to her parents' place looking for her and she sought refuge in a neighbour's apartment and the police were called. The applicant partner was visiting at the neighbour's apartment at the time and the police took a statement from him and other witnesses. I note that the applicant partner's evidence in his separate visa interview (conducted on the same day as the applicant's and about five minutes after the applicant's interview was completed) was spontaneous, detailed and consistent with the applicant's claims. He also provided detail in relation to how the applicant called him after these events to ask him if he could be a witness in her case against her husband, to which he agreed. The applicant claims her husband subsequently promised to improve and after some persuasion from his friends she reunited with him in late 2011. Initially things improved, but he was suspicious of her and would check her mobile. [In] November 2011 he came home and accused her of having an affair and locked her in a room and punched and kicked her and she fled with her children to her parent's place. She reported the incident to police and was sent for a medical assessment. She changed the locks on her apartment. She later appeared in court to give evidence against her husband. Also present were witnesses who had seen the violence at her parent's apartment block in April 2011, including the applicant partner. Outside the court room her husband threatened the applicant and applicant partner, accusing them of having an affair. [In] March 2012 her husband tried to take their daughter from school. The school called the applicant who went there immediately to find him forcing their daughter into his car against her will. The applicant intervened and he assaulted her. She reported the incident to police and was sent for a medical examination. She moved to a new house so that her husband did not know where they were living. Having gotten to know one another during the court case, she and the applicant partner grew closer and began dating in March 2012. The applicant partner's evidence in the visa

interview in relation to the development of their relationship was detailed and consistent with this. He said they began talking and grew closer and shared common ground having both recently separated at the time. The applicant claims she attended several hearings during this period and her husband was ordered to pay compensation, but that he never paid it. Her relationship with her current partner grew stronger at this time, however, her husband refused to divorce her, and she and her partner were living in an adulterous relationship, which is not allowed in Iran.

19. The applicant has provided a copy of two letters from the Judiciary Iran Legal Medicine Organisation, one in respect of the assault on her in November 2011 and the second in respect of the assault on her in March 2012. She has also provided a copy of a summons for her husband to appear in court in relation to the assault in November 2011. The letters document her injuries after each assault stating she suffered bruising and swelling of the upper lip and bruising and severe swelling around the right eye as the result of the impact of a hard object, among other injuries. They both contain photos of a woman bearing a strong resemblance to the applicant and while the quality of the images is poor, one clearly shows her with a black eye. These documents appear on official looking proformas, the originals appear to have been written in Farsi and they contain signatures and official looking stamps. I accept the letters and summons are genuine.
20. I note the country information before me² which indicates that domestic violence occurs frequently across Iranian society and that there are no specific laws penalising it. Victims can file a complaint for bodily assault, which is what the applicant appears to have done in relation to the more recent assaults on her in Iran. It also reports women face a high evidentiary bar to prove bodily assault and that they are required to produce two male witnesses to the assault, which might also explain why the applicant reached out to the applicant partner at the time, asking if he would be a witness.
21. I accept the applicant's claims to have been married to a religiously conservative older man as a young women, who was controlling and violent, that they had two children who also witnessed this violence, that the applicant reported the later assaults to police and took her husband to court and he was ordered to pay compensation but never did and that she and the children eventually managed to leave him in about 2011. Given the consistency and detail of her and her partner's evidence I also accept they commenced a romantic relationship in about March 2012.
22. The applicant has consistently claimed to have travelled to [Country 1] and lived in a refugee camp in [Country 1] until 1999 at her husband's request. She has also consistently said her controlling husband arranged for them to claim asylum while in [Country 1] and largely kept her in the dark in relation to this application. Her daughter was born in [Country 1] just prior to their returning to Iran. The applicant also spontaneously provided detail in relation to surgery she had [in] [Country 1] which was consistent with evidence regarding this in her visa application and I accept this aspect of her claims. I note she has not elaborated on or indicated this issue persists. In the visa interview the applicant indicated she was in good health. I do not consider the applicant continues to suffer any health issues because of this historical health issue.
23. In her visa application the applicant claims that [in] August 2012 she was summoned to the police station to answer accusations of adultery by her estranged husband and that [in] September 2012 her partner received a similar summons and [in] November 2012 her partner was summonsed to appear before the court in relation to this matter.

² DFAT, 'DFAT Country Information Report - Iran', 14 April 2020, 20200414083132.

24. The country information before me indicates that at around that time the penalty for adultery could include execution.³
25. In support of this claim the applicant has provided copies of court summonses dated in August and September of 2012 requesting her and her partner, respectively, to attend the Morality Police as well as one dated in November 2012 requesting her partner to go to court specifying it is with regard to a complaint made by the applicant's husband. The summonses addressed to the applicant partner also contain the name "A" in brackets before the applicant partner's first name. In his visa interview the applicant partner provided a spontaneous and plausible explanation for this stating that after making enquiries with neighbours about the applicant partner's identity the applicant's husband confused the applicant partner with the applicant partner's brother, who lived at the same address as him at the time, and whose name was "A". In her decision the delegate did not accept these documents as genuine noting they did not contain the particulars of the offence, were handwritten and other minor issues such as that the text was misaligned. The quality of the copies of the originals provided are not as good as the others provided in relation to her husband's assaults however, I consider there is no obvious misalignment of the text. Further, the country information before me indicates some variation in the form and content and even the procedures for issuing summonses.⁴ For example, it states they may comprise proforma documents that are typed or filled in by hand and that reasons may be omitted in certain circumstances. The summonses appear to be proforma document that have been filled in by hand and contain signatures. On their face and having regard to the country information detailed above, there is nothing to suggest these summonses are not genuine. I accept these summonses issued to the applicant and applicant partner as genuine.
26. In the visa interview the applicant said the summonses related to her husband's accusation she was a "loose woman" and false claim she had stolen his vehicle. When asked to elaborate on these events the applicant indicated her husband provided insufficient evidence. She said the judge grew impatient with her husband and dismissed the matter and that her husband did not attend the second hearing. She said that when she left Iran, she was not required to attend further court hearings in relation to this matter. Somewhat at odds with the other evidence, in his visa interview the applicant partner indicated for the first time that he did not attend court when summonsed in relation to allegations by the applicant's husband, and suggested there might be a warrant out for his arrest as a consequence. The delegate asked if any court documents had been issued against him since he left Iran. The applicant partner did not answer the question only stating that an officer of the Ministry of Intelligence and Information had told his parents he had kidnapped the wife and children. Despite having ongoing and regular contact with his family in Iran the applicant partner has not produced any evidence of any warrants for his arrest or other documents being issued since he left. I also note the applicant partner left Iran legally on his own passport and without issue and the country information before me indicates it would be difficult for someone who was wanted by the authorities to leave Iran at the airport without issue.⁵ I accept the applicant's husband accused her of committing adultery with the applicant partner and of stealing his vehicle and that she and her partner attended court in relation to this. I do not accept the applicant partner is wanted by authorities or has a warrant out for his arrest in relation to this. I accept that the judge dismissed the allegations and that the applicant and her partner were not wanted in this regard when they left Iran in 2013.

³ Danish Immigration Service, 'Human Rights Situation for Minorities, Women and Converts, and Entry and Exit Procedures, ID Cards, Summons and Reporting, etc.', 1 April 2009, CIS17329.

⁴ Immigration and Refugee Board of Canada, 'IRN200131.E - Iran: Court summonses and arrest warrants, including issuance procedures; description of the documents, including security features; whether copies can be obtained from outside the country or by a third party; prevalence of fraudulent court', 13 March 2020, 20200402125418.

⁵ DFAT, 'DFAT Country Information Report - Iran', 14 April 2020, 20200414083132.

27. The applicant and her partner claim the applicant's husband has continued to cause trouble for their families since they left Iran. In her visa interview the applicant said that since leaving Iran her husband had harassed her and her partner's families and made all sorts of accusations and threats against their families in Iran including that they were hiding the daughter and son somewhere. She said that their families had told the husband to pursue his complaints through legal channels and that they would respond to these accordingly. In his visa interview the applicant partner added that the husband had gone to his family home with officers from the Intelligence and Information Department demanding information and photos of him and that the husband had sent a letter to his brother a few years ago which had been misplaced, although he did not elaborate. The applicant submitted to the IAA that her partner's parents were elderly and in poor health and that the officer would have visited them unannounced and to obtain evidence of this visit was not realistically possible. I do not accept the applicant and her partner were wanted by authorities in connection with her husband's complaints when they left Iran in 2013. I also note the late mention and lack of detail in relation to the claim the applicant's husband has gone to the applicant partner's house with the authorities looking of him and do not accept this aspect of the applicant partner's claims. In the circumstances, including the consistency of the evidence, the husband's history of violence and past attempts to pursue the applicant legally, I find it plausible that he would continue to harass their families and accuse them of hiding the daughter and son, however the evidence indicates the husband has not had any success in formally pursuing them in this regard and that the families have essentially dismissed him by encouraging him to take his concerns up with the authorities or legally, which I am willing to accept.
28. The applicant and her partner have consistently claimed the applicant's husband was [an Occupation 1] I accept this aspect of the claim. The applicant has also indicated her husband is well-connected and able to exert influence. I have found the evidence on this point speculative and lacking in detail. For example, on the basis that the husband was secretive, stayed away from other refugees and often left the camp while in [Country 1], the applicant appeared to intimate that her husband was working for the Iranian regime or government, was possibly a spy or otherwise well-connected. In the visa interview the applicant partner said the husband taught the children of high-ranking officials and that he was able to have things go his way quickly with a phone call. I note this information was only provided at a later stage by the partner who has no personal relationship with the husband. As an aside I also note that the husband was not able to exert any influence over the outcome of his legal matter against the applicant and her partner or it seems against their families since they have left Iran. I do not accept the applicant's husband is well-connected within the regime or government, able to exert influence on public officials or that he is otherwise well-connected, as claimed.
29. The applicant claims they were forced to leave Iran illegally when her husband refused to divorce her and placed a travel ban on her and the children. The applicant partner claims he helped organise their illegal departure. The applicant was advised to leave promptly after retrieving her passport through fraudulent means, to avoid being caught. The applicant partner subsequently escorted the applicant children out of Iran on passports obtained through fraud.
30. The country information before me⁶ reports that the laws pertaining to marriage and divorce are tilted heavily in the man's favour and that a woman can only obtain a divorce with the husband's permission or in certain court approved circumstances (for example where the husband is found to have violated the terms of the marriage or to be drug addicted or insane).

⁶ Iran Human Rights Documentation Centre, Mohammad H. Nayyeri, 'Gender Inequality and Discrimination: The Case of Iranian Women', 1 March 2013, CIS25511; DFAT, 'DFAT Country Information Report - Iran', 14 April 2020, 20200414083132; US Department of State, 'Iran Reciprocity Schedule' 1 March 2014, CIS27527.

The country information⁷ also indicates that a husband can place a travel ban on his wife and children, and if the wife subsequently attempts to leave her passport will be seized by airport authorities. It is also reported that even in the case of divorce and where the mother has custody of the children, the father or a paternal relative will have guardianship over the children and the mother cannot take them out of the country without their approval.⁸

31. From the time of her arrival interview⁹ the applicant has consistently said her husband would not divorce her and that he banned her and the children from leaving Iran but that her partner had a contact and they paid to help them leave through fraudulent means. The applicant's evidence has also consistently been that she left separately, and her partner and children followed.
32. In her visa application and interview the applicant elaborated on their departures. The applicant said that she originally obtained her passport (which included her children) years prior for a trip to [Country 4]. However, that they did not end up going with her husband on that trip. The applicant said that she and her children and her partner unsuccessfully attempted to depart Iran [in] January 2013. They were stopped at the gates and the applicant's passport was seized. Authorities asked if her husband knew they were leaving. She said that he did, however they were still stopped from leaving. They had paid someone who said they would have their names removed from any lists at the airport, but the applicant thought they had been tricked by that person. With the help of her partner's brother who was there seeing them off on that day, they were able to talk their way out and to leave the airport and return home.
33. In about March 2013 the applicant partner found a person, R, who said he could help them leave. For a sum of money R was able to procure a false divorce certificate (containing a forgery of the applicant's husband's signature) which was used to update the applicant's *Shenasnameh* to show she had divorced her husband. The applicant then used her *Shenasnameh* to have the travel ban removed and her passport returned to her. R recommended the applicant leave promptly before authorities discovered the fraud and reassured her that he would help the children depart shortly afterwards with her partner. Under pressure and feeling she had no choice [in] April 2013 the applicant fled Iran in fear on her safety on her genuine passport and without issue. In his visa interview the applicant partner said that R had told them that even an hour's delay would be risky and that was why the applicant left before they did. When the delegate asked the applicant in the visa interview if she had a copy of the fake divorce certificate the applicant said, without hesitation, that R insisted it be returned to him, stating he was anxious at the time he would be caught if it was discovered, which explanation I find plausible.
34. R knew a family with children of similar ages to those of the applicant children at the time. The family were poor and unlikely to travel in the near future. For a large sum they were willing to sell their children's *Shenasnameh* and provide their school letters, which the applicant claims are the documents required to apply for a child's passport, which is consistent with the country information before me.¹⁰ The applicant claims the children's *Shenasnameh* do not have photos. In his visa interview the applicant partner said they were lucky because for children there were no photos in the *Shenasnameh*. The country information before me confirms this would have

⁷Iran Human Rights Documentation Centre, Mohammad H. Nayeri, 'Gender Inequality and Discrimination: The Case of Iranian Women', 1 March 2013, CIS25511; Austrian Centre for Country of Origin and Asylum Research and Documentation, 'Iran: Exit procedures for married women', 12 June 2017, CISED850AD4618; DFAT, 'DFAT Country Information Report - Iran', 14 April 2020, 20200414083132.

⁸ Danish Immigration Service, 'Human Rights Situation for Minorities, Women and Converts, and Entry and Exit Procedures, ID Cards, Summons and Reporting, etc.', 1 April 2009, CIS17329.

⁹ I only had regard to the written record of the arrival interview, given that, as indicated in the delegate's decision, the audio was unavailable.

¹⁰ DFAT, 'DFAT Country Information Report - Iran', 14 April 2020, 20200414083132.

been correct in the case of children the same age as the applicant son and daughter at that time.¹¹ R replaced the photos of the children in the school letters with those of the applicant children and then arranged for the issue of passports in the other children's names but with the applicant children's photos. The applicant children attended the passport office for an informal interview and the passports were subsequently delivered. This is consistent with the country information before me which indicates new passports are dispatched 10 to 15 days later by registered post.¹² The applicant children left Iran at the airport using these passports without issue in May 2013 accompanied by the applicant partner who left on his own genuine passport. The applicant also spontaneously explained in the visa interview that her partner met the costs of their departure through the sale of his home.

35. When the delegate raised concerns in the visa interview about the claim that the children left without a parent or legal guardian the applicant said her partner was behind them and when he saw they had cleared the gates, he proceeded. She also indicated that while a valid passport was imperative, airline policies regarding minors were not strictly followed, which was also echoed by her migration agent in his verbal submissions at the interview. In his visa interview the applicant partner's evidence on this point was consistent with the applicant's and appeared credible. He explained there were several exit gates at the airport and that he only proceeded once he saw the children had successfully cleared the gate. He also noted that regardless of the airline policies, the children were not asked by airport staff if they were accompanied. He said that they do not care if a minor has anyone with them, whether they are a mother, father or aunt they would be allowed to leave the country regardless. He also mentioned, for the first time, that there was a letter on his file and that R had blackmailed someone to remove it. When pressed the applicant partner could not remember how much this cost. He said he did not have any issues leaving the airport.
36. I find the applicant husband's description consistent with the country information before me¹³ which indicates that passports are shown to staff at a number of steps while checking into an international flight at the airport and scrutinised against records at the final check by Immigration Police, who sit behind glass, before being stamped with an exit stamp and the passenger is released into the duty free zone. An airline policy before me¹⁴ dated around that time, indicates children between five and 12 years of age could travel unaccompanied provided the relevant form was filled out. This suggests those over 12 years of age can travel unaccompanied and without a form. I note that at the time of departure the applicant son's claimed passport showed he was on the cusp of this policy being applicable to him at [Age] years or age and that it did not apply to his sister, who was over 12 years of age.
37. In support of these claims the applicants have provided two flight reservation confirmations issued by [Airline]. Consistent with their claims one shows that the applicants booked tickets to leave Iran in their own names [in] January 2013 (their first failed attempt in their own names) and the second shows the applicant partner and a "Mrs A" and MSTR M" booked tickets to leave Iran [in] May 2013 (second and successful attempt using the passports obtained for the children through fraudulent means). The documents contain official looking logos with scannable barcodes and are very detailed in relation to the flights and the terms and conditions of their travel. The barcodes on each differ. There is nothing to suggest they are not genuine. The birthdate of "MSTR M" was in [Year] as was the applicant son who would have been [Age] at the time. The tickets indicate the applicant daughter travelled under the name of a married woman.

¹¹ Ibid.

¹² Ibid.

¹³ Danish Immigration Service, 'Human Rights Situation for Minorities, Women and Converts, and Entry and Exit Procedures, ID Cards, Summons and Reporting, etc.', 1 April 2009, CIS17329.

¹⁴ Iran Air, 2016, 'IranAir Unaccompanied minors travellers', 20200225152539.

I note the country information before me indicates that the legal minimum age of marriage for girls in Iran is 13 but that girls as young as nine years of age can be married in certain circumstances. At about [Age] years of age at the time I consider it is within the realm of possibility that the applicant daughter could have passed as married with airport staff and authorities in Iran. The applicant has also provided a copy of her *Shenasnameh* and the translation shows she was married in June 1992 in Karaj and divorced [in] February 2013. The applicant also claimed she obtained a letter from the Department of Deeds and Estate Registry in 2017 indicating it would say she were divorced if she were and so that it confirmed she was still married. However, this document appears to be merely a marriage certificate, albeit recently provided to her by the government department, documenting the applicant's past marriage and I place no weight on it regarding her claim she is still married.

38. In assessing the applicant's claims regarding their departure, among other things the delegate had regard to country information dated in 2020. The applicant submits that this would not accurately reflect the security features in operation at airports at that time. I agree. The country information before me¹⁵ published prior to and around the time of their departure reported it was possible to both purchase fraudulent documentation and obtain legal documents fraudulently in Iran. The information about whether such documentation could be used to leave Iran at that time is conflicting but there were known cases of Iranians who had managed to leave the airport in Iran on forged documents including forged visas. It was stated that it would be impossible to leave on a forged Iranian passport. There were examples of people having left on foreign forged passports. It was also reported that everyone has connections and that anything was possible in Iran. Even in 2020 DFAT's report indicates that while document fraud for primary forms like passports is extremely difficult, secondary forms are technically more vulnerable, albeit costly to obtain, and paper-based documents are relatively easier to obtain through fraudulent means. It also reports that the existence of corruption in relation to official documentation cannot be ruled out. I note the applicant departed on her genuine passport and the applicant children's passports were legally issued so not forgeries. They were merely obtained through fraudulent means. I also note it is claimed the applicant children left under different names not their own so that when their names were checked against a list this would not have alerted authorities.
39. Based on the applicant and applicant partner's consistent and detailed evidence and the country information detailed above I accept the applicant's religious, controlling and abusive husband who was causing on-going issues in Iran refused to divorce her and placed a travel ban on her and the children. As an aside I note that even if they had divorced (which I do not consider to be the case) and she had custody of the children the country information reports that the applicant would have still required her husband's approval to take the children outside Iran, which in the circumstances I do not consider he would have given.¹⁶ Given its late mention and the lack of detail I do not accept the applicant partner had a letter against him on his file which they bribed an official to remove. I acknowledge security at the Imam Khamenei airport is strict and that reports are that it is impossible to leave on a forged passport. However, based on the applicant and her partner's consistent and detailed evidence, including the documentary evidence, that it was only the children whose passports were obtained through irregular means, their passports

¹⁵ Danish Immigration Service, 'Human Rights Situation for Minorities, Women and Converts, and Entry and Exit Procedures, ID Cards, Summons and Reporting, etc.', 1 April 2009, CIS17329; Immigration and Refugee Board of Canada, 'IRN104624.E - Iran: Exit and entry procedures at airports and land borders, particularly at the Imam Khomeini International airport; whether authorities alert border officials of individuals they are looking for', 1 October 2013, CIS27380.

¹⁶ Iran Human Rights Documentation Centre, Mohammad H. Nayyeri, 'Gender Inequality and Discrimination: The Case of Iranian Women', 1 March 2013, CIS25511; Austrian Centre for Country of Origin and Asylum Research and Documentation, 'Iran: Exit procedures for married women', 12 June 2017, CISED50AD4618; DFAT 'DFAT Country Information Report - Iran', 14 April 2020, 20200414083132.

were legally issued albeit with fraudulent secondary or paper based documentation, and country information which indicates corruption in relation to official documentation cannot be ruled out, that secondary documentation and paper based documents are more vulnerable to forgery and that there were cases of Iranians around that time who had managed to leave the airport on forged documents, I am willing to accept the applicant daughter and son departed Iran on legally issued but fraudulently obtained passports, as claimed. I consider there would be no official record of the applicant daughter and son having left Iran. This may explain why the applicant claims that in the past her husband accused family in Iran of hiding the children.

40. The country information before me¹⁷ reports that where a mother leaves the country with her children without the consent of the father/paternal guardian and the father/paternal guardian lodges a complaint it will be viewed as abduction, the mother will be subject to criminal charges and liable according to Shia law and that the punishment for this ranges from short term imprisonment, a lifetime sentence or the death penalty. It is reported that arbitrariness pervades court rulings in Iran and that Sharia law is always stronger than ordinary laws. In 2018 the US State Department noted that Iran allegedly committed arbitrary or unlawful killings, most commonly by execution after arrest and without due process for crimes not recognised as the “most serious crimes” by international standards. In some matters confessions were said to be extracted through torture and used as evidence in a conviction resulting in execution. The use of physical and mental torture to coerce confessions also remained prevalent, especially during pretrial detention and there were credible reports of security forces and prison personnel torturing and abusing detainees and prisoners with impunity.
41. The Danish Immigration Service¹⁸ also reports that according to Sharia the penalty for adultery is execution. If two witnesses swear on the Quran that the accused committed adultery, then the accused will be prosecuted and sentenced. One report cited by the Danish Immigration Service states anyone could easily go into the street and find volunteers, who for a small amount of money, would testify against an accused. While Sharia Law is often used in very strict and traditional parts of the country it was reported that it could not be ruled out that Sharia judgements could also occur in more urban settings like Tehran. It is also reported the outcome in a matter largely depends on the presiding judge’s interpretation of the law and that judges’ views vary. In 2018 the US Department of State¹⁹ reported that adultery remained punishable by death by stoning, although since 2001 authorities have been ordered not to provide this information to the public.
42. Given the acrimony between the applicant and her estranged husband, his religious conservatism and past violence and the circumstances of her travel to Australia and life with the applicant partner and her son and daughter in Australia over the last several years, I consider there is a real chance that if she were to return to Iran her husband would lodge a complaint against her for abducting the children and again accuse her of adultery. I note the country information detailed above which states that arbitrariness pervades court rulings, the lack of due process and prevalent use of physical and mental torture by authorities as well as the disadvantaged position of women in Iran and the penalties for these crimes. I am satisfied the applicant faces a real chance of serious harm on account of having taken the children from Iran

¹⁷ Danish Immigration Service, 'Human Rights Situation for Minorities, Women and Converts, and Entry and Exit Procedures, ID Cards, Summons and Reporting, etc.', 1 April 2009, CIS17329.

¹⁸ Danish Immigration Service, 'Human Rights Situation for Minorities, Women and Converts, and Entry and Exit Procedures, ID Cards, Summons and Reporting, etc.', 1 April 2009, CIS17329

¹⁹ United States Department of State, 'Country Reports on Human Rights Practices for 2019 - Iran', 11 March 2020, 20200312093514.

without her husband's approval and her relationship with the applicant partner. However, I am not satisfied this would be for one of the reasons in s.5J(1)(a).

43. I also consider there is a real chance of the applicant and her daughter and son coming to the adverse attention of authorities at the airport on their return given there is no record of the applicant daughter and son having departed Iran.
44. DFAT²⁰ reports that Iran has historically refused to accept involuntary returnees but that under a Memorandum of Understanding with Australia signed in March 2018, Iran agreed to facilitate the involuntary return of citizens who arrived after March 2018 and have exhausted all legal and administrative avenues to regularise their immigration status in Australia. As such I consider that if the applicants were to return it would be on a voluntary basis. DFAT reports that those without a valid passport would be required to obtain a *laissez-passer* for re-entry, which can be obtained from an Iranian diplomatic mission on proof of identity and nationality. Those returning on a *laissez-passer* are questioned by the Immigration Police about the circumstances of their departure and why they are travelling on a *laissez-passer*. This can take from half an hour up to an hour and longer if it is considered they are being evasive, or Immigration authorities suspect a criminal history. Those with an existing profile may face a higher risk of coming to official attention on return to Iran.
45. The applicants have consistently claimed they were pressured to dispose of their identity documents on their journey to Australia by the people smugglers and I accept this. Accordingly, they would be returning on *laissez-passers* and questioned regarding their travel. Given the lack of records regarding the applicant daughter and son's departure it is at this point that I consider there is a real chance the applicants would be detained and further questioned about their departure and there is a real chance it will be discovered that the applicant daughter and son left on passports issued in other people's names, that they left in contravention of a travel ban imposed by their father and that the mother took them outside Iran without consent. When looked at cumulatively and bearing in mind the country information detailed above including the prevalence of mental and physical torture of detainees by the authorities, the lack of due process, the position of woman in Iran and arbitrariness of court rulings and penalties imposed for taking children without the father's consent and adultery I am satisfied the applicant would face a real chance of significant physical harassment and physical ill treatment and a threat to her life and liberty if she were to return to Iran. However, I am not satisfied this would be for one of the reasons in s.5J(1)(a).
46. The applicant partner fears being accused of having kidnapped the daughter and son. While the applicant partner said in the visa interview that there would be airport security footage of them leaving at the airport, the evidence before me is that the applicant children took themselves through the airport with the applicant partner some way behind them in the queue watching to ensure they cleared the gate before proceeding himself. The applicant partner also fears being punished for having assisted the applicant and her children to leave Iran. The country information before me²¹ reports that smuggling people or aiding and abetting in such smuggling is punishable by imprisonment of two to ten years and, with the exception of minors, if the smuggled person was forbidden from leaving the country they shall be punished by fine and a term of imprisonment of two to eight years. It is also reported that those involved in a forgery

²⁰ DFAT, 'DFAT Country Information Report - Iran', 14 April 2020, 20200414083132.

²¹ Immigration and Refugee Board of Canada, 'IRN200128.E - Iran: Exit and entry procedures at airports and land borders, particularly at the Imam Khomeini International Airport; whether authorities alert border officials of individuals they are looking for; incidence of bribery of Iranian border off', 10 March 2020, 20200402124242.

activity can be subject to one to ten years imprisonment.²² The evidence is that the applicant partner was not practically involved in the fraud. I am not satisfied the applicant partner faces a real chance of being charged for his limited part in assisting the applicant and her children to leave Iran. Even if he did face a real chance of being charged (which I do not accept) I do not consider that this would be for one of the reasons in s.5J(1)(a) of the Act.

47. The applicant fears her husband will harm her and her son and daughter, he will take the son and daughter and not allow the daughter to marry a man of her own choosing. In the visa interview the applicant said the daughter and son had had limited contact with their father in Iran. While I acknowledge the father is very religious and has been violent in the past and the country information which indicates a daughter requires her father's consent to marry, there is no evidence before me to suggest that the applicant's estranged husband has indicated he intends on taking the daughter and son (who are now young adults) if they return or interfering in the daughter's future relationships or to otherwise harm them as speculated by the applicant.²³ It has also now been more than seven years since they last saw their father and been in Iran. If the applicant partner were to return to Iran with them, and there is no suggestion that he would not, they would also have the support of the applicant partner and their extended families including several male relatives. I am not satisfied there is a real chance the husband will harm the applicant or their daughter or son or prevent the daughter from marrying as claimed, now or in the reasonably foreseeable future.

Refugee: conclusion

48. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

Complementary protection assessment

49. Under s.36(2)(aa) of the Act, 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

50. 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.

²² Canadian IRB: Immigration and Refugee Board of Canada, 'IRN101054.E - Iran: The passport; its features and procedures for application including whether an applicant who was refused a passport would be notified and have recourse; the use and prevalence of fraudulent or counterfeit passports to exit Iran', 3 April 2006, OGF10222E67.

²³ DFAT, 'DFAT Country Information Report - Iran', 14 April 2020, 20200414083132.

51. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
52. In considering the applicant's refugee status, I concluded that there was a 'real chance' the applicant would suffer serious harm on her return to Iran for the reasons claimed but not that this would be for one of the reasons in s.5J(1)(a). 'Real chance' and 'real risk' involve the same standard. For the same reasons, I am also satisfied the applicant would face a 'real risk' of being arbitrarily deprived of her life, the death penalty, torture, cruel or inhuman treatment or punishment or degrading treatment or punishment. I am satisfied the applicant would face a real risk of significant harm at the hands of state authorities if she were returned to Iran. As I consider the real risk of significant harm emanates from the state, I do not consider relocation an option or that the applicant could obtain protection from the authorities. Nor is the risk one faced by the population of Iran generally. I do not consider any of the exceptions in s.36(2B) applicable.

Complementary protection: conclusion

53. There are 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 meets s.36(2)(aa).

Member of same family unit

54. 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 relevantly defined in r.1.12(4) of the Migration Regulations 1994 (the Regulations) to include a de facto partner and a dependent child.
55. Under s.5CB of the Act, a person is in a de facto relationship with another person, and thus the de facto partner of that person, if relevantly they are not married to each other but have a mutual commitment to a shared life to the exclusion of all others; and the relationship between them is genuine and continuing; and they live together or do not live separately and apart on a permanent basis. Circumstances that may be considered in determining whether a de facto relationship exists are set out in r.1.09A of the Regulations. They include financial aspects, the nature of the household, social aspects, and the nature of the persons' commitment to each other.
56. A 'dependent child' of a person is defined in r.1.03 to include the child of the person (other than a child who is engaged to be married or has a spouse or de facto partner), being a child who (a) has not turned 18; or (b) has turned 18 and (i) is dependent on that person; or (ii) is incapacitated for work due to the total or partial loss of the child's bodily or mental functions.
57. For the purposes of an application for a protection visa, a person is dependent on another person if the first person is wholly or substantially reliant on the other person for financial, psychological or physical support: r.1.05A(2).
58. Central to the applicant's claims is her ongoing relationship with the applicant partner and the trouble this caused them in Iran. As detailed above I accept the applicant and applicant partner

commenced a romantic relationship in Iran in about March 2012, that her husband accused them of adultery and that her husband has continued to harass both their families in Iran. The consistent and detailed evidence is that the applicant, her partner, and her daughter and son (who were minors when they arrived to Australia) have always lived together since coming to Australia some seven years ago. Documentary evidence provided also supports this claim. As detailed above I accept the applicant daughter and son currently attend university. In his arrival interview the applicant partner said he had grown close with the applicant daughter and son. In her visa application the applicant said that she and the applicant partner continued to live as de facto partners under the same roof, he was a very nice person, they loved each other and that the children loved him too. The applicants have also provided photos of them together which they have described as “family photos”. The photos look natural, not staged. They appear to span several years. They show the four of them celebrating what appear to be birthdays and other similar events at home. Some images show them all sitting closely together on a couch at home. Others show the applicant and her partner dressed up and attending an event publicly together as a couple. Others shows the four of them in public, at the beach, in the car on their way somewhere and holidaying in Sydney. In the images they look to have a close and happy relationship. They often have their arms around one another. The applicant partner sold his home in Iran to finance their departure from Iran and journey to Australia. In her visa interview the applicant said that in addition to their studies her son and daughter worked [and] neither was in a relationship. I accept the applicant and her partner have been in a relationship and lived together for some seven years, undertaken joint social activities as a couple, worked and have together created a home sharing day-to-day household expenses and the joint responsibility and care of the son and daughter and that those close to them know of their relationship. I accept the applicant and applicant partner are in a de facto partnership. I also accept the applicant son and daughter are substantially reliant on the applicant for financial and psychological support and as such that each is a dependent child of the applicant.

59. As the applicant is a person mentioned in s.36(2)(aa), the applicant’s partner and her children meet s.36(2)(c)(i).

Decision

In respect of the referred applicant (IAA8755) the IAA remits the decision for reconsideration with the direction that:

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

In respect of the other referred applicants (IAA8756, IAA8757, IAA8758), the IAA remits the decision for reconsideration with the direction that:

- the other referred applicants are members of the same family unit as the above-named applicant and satisfy the criteria in s.36(2)(c)(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.