



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA17/03067

Date and time of decision: 19 January 2018 09:43:00

Belinda Mericourt, 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 an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be an Iranian national. On [date] September 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV). In a decision dated [date] July 2017 the delegate of the Minister of Immigration and Border Protection (the delegate) refused to grant the visa.
2. The delegate did not accept the applicant's claims made at the time of his arrival in Australia and, although he accepted the applicant converted to Christianity since his arrival in Australia, he was not satisfied that he would be at risk of serious or significant harm if he were to be returned to Iran now or in the reasonably foreseeable future.

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. The IAA received a submission from the applicant's representative on 31 July 2017. To the extent that this engaged in argument with the delegate's decision based on information which was before the delegate, I have had regard to it. No new information has been obtained or received by the Immigration Assessment Authority (IAA).

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - before he left Iran the applicant had been expelled from school when he was in year [grade] for listening to the lyrics of a forbidden anti-regime song and was unable to enrol in any other school due to the reasons for his expulsion;
 - after he arrived in Australia the applicant began to attend Bible study classes whilst he was in detention. He then converted to Christianity and was baptised [in] November 2013;
 - the applicant claims to hate the idea of a theocracy and the lack of distinction between church and state in Iran. He believes if he revealed his true political beliefs he may be reported to the authorities and harmed by them for reasons of his political beliefs;
 - the applicant's name and personal details were published on the Department's website in February 2014 as he was in detention on 31 January 2014. He fears the Iranian authorities may have this information;
 - if the applicant is returned to Iran he will do so as a failed asylum seeker.

Factual findings

6. The applicant's claims as to his identity and nationality have been consistent since his arrival in Australia. He conducted interviews in Farsi and has submitted copies and translations of his national birth record and Iranian identification card. I accept the applicant's nationality and identity are as claimed and find Iran to be the receiving country for the purpose of the

application. There is no evidence before me to suggest that the applicant has a right to enter and reside in any country other than Iran and I am satisfied he does not: s.36(3).

7. Based on the applicant's evidence, I am satisfied he departed Iran legally by plane in May 2013 as the holder of a valid genuine passport. I am satisfied that he arrived in Australia by boat from [another country] on [in] June 2013 and that his passport was lost at sea.
8. I am satisfied that the applicant was in detention on 31 January 2014 and his personal details were published on the Department's website during the period of the data breach in February 2014.
9. I am satisfied that since his arrival in Australia the applicant has married an Australian permanent resident [in] 2015 and that he has a [stepchild], now aged [age] years.

Refugee assessment

10. 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

11. 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.

12. Real chance is a substantial chance as distinct from a remote or far-fetched possibility.¹

Claims related to the applicant's expulsion from school for 'imputed political opinion' as a result of listening to prohibited music

13. In his written submission to the Department dated [September] 2016, the applicant provided a detailed account of his enjoyment of music, including songs which were considered to be unacceptable by the Iranian regime, which he liked because he found them interesting and

¹ *Chan v MIEA*, (1989) 169 CLR 379 at 389.

‘eye-opening’. One of his favourite songs, [Song 1], is by a controversial Iranian singer, [Singer A]. [Singer A’s] songs had been censored. Iranian authorities consider the message of the song, [Song 1], to be offensive. The applicant provided details about how he had to be listening to the song at his [school] when he was approached by a staff member who could hear that he was listening to a song on his phone. This person took the phone from him and began listening to the music and when he realised what he was listening to, he took the applicant to the headmaster. His parents were called come and collect him and he was sent home that same day. He was expelled [a number of] days later. After this he tried to apply for [a number of] other schools unsuccessfully. At his SHEV interview the applicant named the [other] schools and explained that because the reasons for his expulsion had been recorded the schools refuse to accept him as a student. He then realised he was unable to continue his education in Iran and worked [with] his brother in his [shop]. When his brother decided that he was leaving Iran for different reasons, the applicant decided to accompany him.

14. The applicant believes that as a result of this incident he would be denied access to basic services such as education. Without a high school diploma he is unable to attend university and his future prospects would be significantly harmed. He was also concerned he would not be able to support his wife in Australia if he returned to Iran because of the negative effects his expulsion had on his education. If he returns to Iran the applicant would be obliged to undertake mandatory military service which would be much worse for him as he has a lower level of education.
15. The applicant believes he has been imputed with an anti-regime political opinion due to his interest in banned music and he “would not be able to speak freely about corruption in the Iranian government, corruption of Islam or the corruption that the supreme leader exerts.”
16. Country information indicates that [Details of Singer A].²
17. Given the consistent detail the applicant provided about this particular incident and his expulsion from high school, and the fact that it occurred after the release of the song, I accept that it did occur. I accept that he was unable to enrol in other state schools at the time and that he was therefore unable to complete his high school education. The applicant did not claim that he had been arrested, detained or charged with any moral, religious or political crime. He did not claim that he had been seriously harmed or persecuted as a result of this incident.
18. I have found that the applicant departed Iran as the holder of a genuine valid passport. He claimed to have no problems departing Iran which would suggest he was not of any interest to the Iranian authorities for reasons of having an adverse political or religious profile. I am therefore satisfied that the applicant had no adverse profile with the Iranian authorities prior to his departure.
19. Whilst I accept that his school record indicates that he listened to banned music, I am satisfied that there is no real chance that the applicant will suffer serious harm as a consequence of this activity if he is returned to Iran now or in the reasonably foreseeable future. The applicant has stated that he believes he has been denied access to basic services such as education which threatens his capacity to subsist. I do not accept that the applicant would be unable find employment and earn an income without a high school diploma. The applicant has stated that he was working [in] his brother’s [shop]. He did not require a high school diploma to do this. If he [continues training at his brother’s shop] he would be able to find employment as a

² [Source deleted].

[occupation], particularly as the [shop] was owned by his father and he would therefore be employed by him.

20. The applicant has also stated that if he returns to Iran he would be forced to attend mandatory military service. The conditions for him would be much worse due to his lower level of education. Socially he would be considered to be an outcast. There is no supporting country information or other information before me which suggests that people who do not complete their high school diplomas in Iran are treated as outcasts or are persecuted in any way either in general society or in the military service. Consequently, I do not accept that the applicant has a well-founded fear of persecution for reasons of imputed political or religious opinions as a consequence of his expulsion from school after listening to prohibited music.

Claims related to the applicant's conversion to Christianity from Islam (persecution for reasons of religion and political opinion)

21. The applicant was born into a Shia family and claims that both his parents are religiously conservative. His father went on Pilgrimage and obtained the title of Haji. When he was growing up he was forced to go to mosque three times a week and pray. His parents taught him that he should never be critical of God and never question His wishes. He was also taught to never question the government and especially not the Supreme Leader. Nevertheless, at his SHEV interview he told the delegate that he stopped attending mosque with his father when he was perhaps [age] or [age] years old because it did not feel right that he was being forced to accept without an opportunity to ask questions. He also felt strongly opposed to many things that were happening in his surroundings, which is one reason that he listened to forbidden songs such as "[Song 1]" sung by the controversial Iranian singer, [Singer A].
22. After his arrival in Australia the applicant was placed in detention with his brother. He was lonely and felt 'devastated'. He started attending Bible study classes as well as English classes. Bible study classes lifted his mood and spirit. He regularly attended 1-2 sessions per week whilst he was in the detention centre for a period of about eight months. At his SHEV interview the applicant stated that he found Christianity to be a very good way of life. "It's whole message is affection, love, salvation of mankind and it gives you the sense of relief and liberty which is exactly what I needed given the circumstances in which I was."
23. After three months of attending Bible study classes the applicant felt he was ready to convert and asked for a baptism ceremony. He was baptised in [a church] in [Australian city 1] on [a date in] November 2013. He provided the Department with a baptismal certificate. The applicant claimed that he attended church services and bible studies, mainly in the detention centre for about 8 months in total. After he was released from detention the applicant moved to [another state] and attended an Anglican church in the local area with his brother. He moved from this area and started attending [Church 1] in [Suburb 1]. Finally the applicant moved to another suburb of [Australian city 2] where he commenced attending [Church 2]. The applicant has provided a letter from the Secretary of [Church 1] at [Suburb 1] dated [January] 2017 stating that the applicant and his brother had attended the church "for some time"; a copy of a signed "covenant" witnessed by the Minister at [Church 2], dated [April] 2017 and a letter of reference from the Minister of [Church 2] dated [June] 2017. This letter states that the applicant and his brother recently commenced attending the church, they attend regularly and wished 'to grow in their Christian faith'. None of the letters indicate the applicant is involved in any other church activities.
24. At his SHEV interview, the applicant said that he had told his parents that he had converted to Christianity, but he had not told his sister as he was concerned that his telephone calls could

be intercepted by the authorities in Iran and that might cause problems with the family and with her safety. The same reasons he did not attempt to proselytise to his parents or sister. His father is not happy with his decision and has 'never consented.'

25. When asked by the delegate at his SHEV interview whether he had promoted Christianity amongst his friends in Australia. He said that he and his brother encouraged two people to attend church during the time he was in detention. He has also tried to encourage his wife's friends 'when the opportunity arises'. He thought that his wife is ready to convert to Christianity but she has not done so yet. "She grew up in [a foreign country] in a paradise of diversity of religions and is very open-minded". They had discussed religious ideas a lot. He was not aware of anyone who had actually converted as a result of his promotion of Christianity.
26. The applicant recited a prayer and told the story of the good Samaritan in the gospel of Luke to the delegate.
27. In a written submission to the Department after his SHEV interview dated [September] 2016, the applicant stated that he feared he would be subjected to harm in Iran on the basis of converting from Islam to Christianity as apostates are regularly targeted by the authorities in Iran. If he returned he would be forced to conceal his true religious beliefs or he may be reported to the authorities and harmed by them. He would also be at risk of harm as he would be required to conceal his true political beliefs as he hates the idea of a theocracy and the lack of distinction between church and state. He believes their ideology is dated and their beliefs are backward, especially with regard to the way they treat women. He would not be able to speak freely about the corruption in the Iranian government and the corruption of Islam and the Supreme leader. If he revealed his true political beliefs he may be reported to the authorities or harmed by the authorities for his beliefs.
28. Based on the applicant's evidence, and the supporting documents he provided in respect of his baptism in November 2013 in [Australian city 1] and church attendance at [Church 1] in [Suburb 1] in 2016 and [Church 2] in [Australian city 2] from April to June 2017 I accept that the applicant converted to Christianity in 2013, attended Bible study and church services whilst in detention, attended [Church 1] in [Suburb 1] in 2016 and attended [Church 2] in 2017.
29. Given the reasons the applicant has provided for his interest in Christianity after his arrival in Australia, and his understanding of some of the basic tenets of Christianity, I accept that he did not convert or become baptised as a Christian solely for the purpose of strengthening his application for protection in Australia. I therefore find that his conversion and baptism were not *sur place* activities subject to s.5J(6) of the Migration Act. I therefore gave consideration to the applicant's claim that his conversion would lead to a real chance of his persecution by the authorities in Iran.
30. The applicant claims that if he were to return to Iran he would continue to practice his Christian faith in the way that he does in Australia, that is, attending church services and talking to others about his Christian faith.
31. DFAT advises that Iranian interpretation of Sharia law provides that Shia Muslims are not permitted to renounce their religion or convert to another religion. Apostasy is not codified in Iran's Penal Code, but the Constitution allows judges to turn to Sharia if Iranian law is not clear about an issue. 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. Convictions for apostasy are not common. However, some judges have applied Sharia to hand

down sentences of the death penalty and lengthy imprisonment for apostasy. The last time the death penalty was carried out for apostasy was in 1990. The most recent case of the person charged with apostasy and sentenced to death was in 2011. As a result of sustained international pressure the conviction of apostasy was commuted to proselytization and the death sentence was dropped. Whilst a Muslim person who leaves his or her faith to practice atheism can be potentially charged with apostasy, 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 informants.³

32. Based on the above country information I accept that the applicant may be considered to be an apostate because he has converted to Christianity from Islam. I accept that the lack of codification of the crime of apostasy means a defendant to this charge may be subject to the death penalty. However, I consider in the applicant's case, that there is only an extremely remote chance that this would occur, given the last time the death penalty was carried out was 1990 and the most recent charge of apostasy occurred over six years ago. His parents are aware of his conversion but, given his father's support for his departure from Iran, I am satisfied that there is no real chance that his parents would inform on their son to the authorities.
33. DFAT advises that Iran only recognises those Christian faiths and churches that existed in Iran prior to the Islamic Revolution. Most of these churches belong to the minority Assyrian and Armenian ethnic groups, but there are also Anglican, Catholic and Orthodox churches. Recognised churches have certain rights, but are not allowed to accept new members; one must be born into the church to be a member of it.⁴
34. Based on this information I accept that the applicant's only option would be to attend an unregistered or 'house' church. DFAT advises that Christians belonging to unregistered churches are at higher risk of adverse attention from officials and face considerable official discrimination. This is in part due to Islamic mores concerning apostasy and deep suspicion of evangelism. Most evangelical churches in Iran are not recognised and therefore cannot openly worship. Instead, some form underground 'house churches', which are illegal. As the majority of house church members are converts from Islam (or children of converts), they are likely to be considered apostates. There have been reports, which DFAT assesses as credible, that many house churches come under surveillance by authorities. DFAT is also aware of allegations that authorities monitor attendance at churches on religious holidays to ensure no Muslims are present, along with reports that churches self-monitor congregations to ensure no Muslims are present. However, DFAT assesses that Iranian authorities will rarely intervene actively to stop Muslims attending churches whilst their attendance is low-key.⁵
35. Iranians who convert to Christianity outside Iran could face adverse attention upon their return if they join a house church, but generally speaking, DFAT concludes that while the possibility of low-level harassment for merely attending house churches cannot be discounted, the mere fact of conversion and worship in a house church would be insufficient to attract attention. Additional activities are generally required, such as an attempt to proselytise, give sermons or

³ Department of Foreign Affairs and Trade (DFAT) , "DFAT Country Information Report Iran", 21 April 2016, p.14, CIS38A8012677

⁴ Ibid, p.13

⁵ DFAT, "DFAT Country Information Report Iran", 21 April 2016, pp 13-14, CIS38A8012677

otherwise speak out against the principles of the Islamic Republic, and for these activities to become known to Iranian officials.⁶

36. Freedom House in its 2016 report stated that there is an on-going crackdown on Christian converts and in the past three years a number of house churches have been raided and their pastors detained.⁷
37. I accept that the applicant regularly attends church. The letters of support that he has provided indicates that he enjoys the social contact and making friends in his local area by participating in the congregation. Whilst I agree with the applicant's migration representative that a person's 'attempt to proselytise' has no bearing on his ability to effectively proselytise, the applicant has provided little supporting evidence that he engages in the promotion of Christianity other than to his wife. He provided no detail about what he meant by talking to his wife's friends 'when the opportunity arises'. The two supporting letters from the two churches he has attended gave no indication that he does anything other than attend church services. There is no evidence before me that the applicant has served in a leadership role or intends to serve in a leadership role in the reasonably foreseeable future in a church.
38. The applicant has not satisfied me that he actively attempts to proselytise to non-Christians in Australia, other than having religious discussions with his wife. I am therefore not satisfied that the applicant will attempt to proselytise if he is returned to Iran, and that his decision not to do so is not based on fear of persecution, but is the usual way he manifests his faith.
39. Taking the all the above findings into consideration, I am not satisfied there is a real chance that the applicant will suffer serious harm as a result of his conversion from Islam to Christianity, and attendance at a house church if he is returned to Iran now or in the reasonably foreseeable future.

Claims related to release of the applicant's personal details during the Department data breach of February 2014

40. The applicant was in Immigration Detention on 31 January 2014 and his personal details were published on the Department of Immigration and Border Protection website in a data breach which occurred in February 2014. The Department states that information including the names of approximately 9,250 people who were in detention in Australia on 31 January 2014, their date of birth, their nationality, and details of their detention was inadvertently released on the Department's website. The Department states that no details regarding protection visa applications or claims were breached when this data breach occurred.
41. In assessing the consequences and implications for the applicant I accept that the data breach is a breach of his confidentiality and the duty of care that the Department has towards a person who is in Immigration detention. I note that the information about the applicant that was inadvertently published on the Department's website was limited to the applicant's full name, gender, citizenship, date of birth, when immigration detention began, the location of the immigration detention, boat arrival details, and reasons why the applicant was deemed to be unlawful (e.g. unlawfully arriving by boat). The information was published on 10 February 2014 and remained on the Department's website until 10am on 19 February 2014. The information about the applicant was included with information about 9,249 other people also published at the same time in the same spread sheet.

⁶ Ibid.

⁷ Freedom House, "Freedom in the World 2016 – Iran", 7 March 2016, NGE43874C130

42. Given the limitations on the personal information published as outlined above, I do not accept that the Iranian authorities would be aware of the applicant's claims for protection as a result of the data breach itself. According to the reports, including the reporting in the Guardian Australia, which broke the story, the information that was available to be accessed did not include details as to whether detainees had lodged protection visa applications or any other type of visa application.
43. While there is no definitive information as to whether or not the Iranian authorities accessed the spread sheet listing 9,250 detainees, I accept that they may have done so. If this is the case, the Iranian authorities would have discovered the applicant's name, date of birth, nationality, arrival and detention details including that the applicant was in detention because he arrived unlawfully in Australia on a boat. Irrespective of this, if the applicant is returned to Iran, it is more than likely that this information about the applicant would be evident regardless of the data breach. It would more than likely become evident from the fact that the Iranian authorities would need to be contacted to provide the applicant with a travel document enabling him to travel to and enter Iran
44. For the above reasons I find that the data breach does not, of itself, give rise to a real chance of the applicant facing serious harm or significant harm in Iran now or in the reasonably foreseeable future.

Claims related to returning as a failed asylum seeker

45. As discussed above, I accept that it is more than likely the Iranian authorities would assume that the applicant had applied for protection given the nature of his arrival in Australia and the reason he was in protection at the time of the data breach. There is therefore a real chance that the Iranian authorities will consider the applicant to be a failed asylum seeker. However, they will be unaware of the applicant's specific claims for protection unless he tells them himself. The applicant stated that he was a Shia Muslim in Iran. He is not a member of an ethnic minority. As he departed Iran legally as the holder of a valid genuine passport, I am satisfied that this suggests he was not of adverse interest to the authorities prior to his departure. Given the applicant will be assumed to have made a claim for protection based on a Convention reason I consider that it will be likely that he will be questioned about any claims he made relating to his religious or political beliefs or opinions.
46. In 2013, the International Organisation for Migration (IOM) stated that Iranians who have left the country on their passports and are returned on a *Laissez-passer* will be questioned by the Immigration Police at the airport for a few hours.⁸ In 2016 DFAT stated that where temporary travel documents have been issued by Iranian diplomatic representatives overseas, authorities at the airport will be forewarned about a person's return because of Iran's sophisticated government systems. Irrespective of whether a returnee is travelling on a temporary travel document or their ordinary passport, credible sources have told DFAT that they will generally only be questioned if they had done something to attract the specific attention of the authorities. The vast majority of people questioned would be released after an hour or two.⁹ DFAT has commented that it consider it unlikely that authorities would prosecute someone simply for claiming asylum overseas. Strong anecdotal evidence suggests that officials do not attempt to prosecute a voluntary returnee - largely because most failed asylum seekers leave Iran legally.¹⁰

⁸ UK Home Office, "Country Information and Guidance - Iran: Illegal Exit", 16 December 2015, OG8F59D8D34, p.7

⁹ DFAT, "DFAT Country Information Report Iran", 21 April 2016, CIS38A8012677, p.29

¹⁰ Ibid, p.28

47. Considering the country information before me I am not satisfied the Iranian authorities impute failed asylum seekers from Western countries or people who have resided in Western countries as holding an anti-regime, Western sympathiser or anti-government opinion in Iran or seek to prosecute or otherwise harm them for reasons of having made a claim for asylum.
48. As discussed above, I accept that the applicant will be likely to be questioned on return to Iran by the Iranian authorities, however, I am not satisfied this amounts to serious harm having regard to the extensive examples provided in s.5J(5) of the Act. I am not satisfied the applicant faces a real chance of serious harm on return to Iran on the basis of being a failed asylum seeker from Australia and/or because he resided in a Western country.

Cumulative consideration of claims

49. I have considered the cumulative effect of the applicant's circumstances, including the possibility he will be imputed with an adverse political opinion as a result of listening to banned music and his expulsion from high school combined with his extensive period of residency in a Western country; his conversion to Christianity and attendance at an illegal church (house church) if he is returned to Iran; and his membership of particular social groups, that is, failed asylum seekers and persons subject to the Department data breach in February 2014.
50. Although I am not satisfied that the applicant has a well-founded fear of persecution on the basis of each of his individual claims, I accept that the harm that he fears on the basis of each of these claims is for Convention reasons.
51. A fear may be 'well-founded' even though persecution is *unlikely* to occur. The High Court in *MIEA v Guo, Chan* establishes that a person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50%.¹¹
52. I have accepted that there is a real chance that the applicant would be more closely interrogated and questioned on his arrival at the airport as the Iranian authorities will more than likely assume he is a failed asylum seeker if he is returned to Iran without a valid passport, and it is possible that they are aware that he was in protection and arrived in Australia unlawfully by boat as a result of the Department data breach.
53. I also accept that the applicant demonstrated his dissatisfaction with Islam and his interest in alternative political opinions as expressed in songs about forbidden topics whilst he was a teenager in Iran, and that his dissatisfaction with Islam increased after his arrival in Australia. I accept that as a religious convert returning to Iran, the applicant may be imputed with an anti-regime political opinion because religion and politics are intertwined in Iran, and this combined with his school record of expulsion for listening to banned anti-regime material, may increase the chance that he will be more closely interrogated on his return.
54. I have found being questioned for a few hours on his return as a result of returning with Iranian issued travel documents rather than a valid passport, does not amount to serious harm in and of itself. Whilst I am satisfied that he was not identified as a political dissident or as having an adverse political profile prior to his departure, I am satisfied there is still a possibility that he is

¹¹ *Chan v MIEA* (1989) 169 CLR 379 at 429; see also *MIEA v Guo* (1997) 191 CLR 559 at 573, per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow JJ; and *MILGEA v Che Guang Xiang* (unreported, Federal Court of Australia, Jenkinson, Spender and Lee JJ, 12 August 1994) where the Court stated at 17: 'The delegate may have thought it was unlikely that [the applicant's] fears would be realised but the question to be answered was whether the prospect of persecution was so remote as to demonstrate the fear to be groundless.'

at risk of mistreatment during questioning he will undergo on his arrival in Iran, particularly if he does not conceal his conversion to Christianity. When considering the applicant's claims cumulatively I am satisfied that there is more than a remote chance that the applicant will be detained and interrogated for more than a few hours on his arrival in Iran. When released, I am satisfied there is a more than remote chance that his activities will be monitored by the Iranian authorities, particularly if he is imputed with having an anti-regime political opinion as a result of his expulsion from school for listening to anti-regime music and his lengthy residency in Australia and marriage to an Australian permanent resident. I consider there is more than a remote chance that his conversion from Islam to Christianity will be discovered by the authorities if he attends a house church to practice his faith as he has been doing in Australia. I am therefore satisfied that cumulatively there is a real chance the applicant will suffer serious harm, having regard to the extensive examples provided in s.5J(5) of the Migration Act, if he is returned to Iran now or in the reasonably foreseeable future.

55. I am therefore satisfied that there is a real chance the applicant will face serious harm if he is returned to Iran now or in the reasonably foreseeable future and he has a well-founded fear of persecution.
56. I am satisfied the real chance of persecution applies to all areas of Iran.
57. I am satisfied that the applicant is unable to seek or obtain protection from the relevant authorities as it is the State authorities who would inflict serious harm on the applicant.

Refugee: conclusion

58. 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

...

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.

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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.