



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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IRAN

IAA reference: IAA17/03368

Date and time of decision: 26 April 2018 09:50:00

Matthew Currie, Reviewer

**Decision**

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

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Iranian citizen of Farsi (Persian) ethnicity. He arrived in Australia in May 2013. In October 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV). A delegate of the Minister for Immigration and Border Protection refused to grant the visa in August 2017 on the grounds that Australia did not owe protection obligations to the applicant. On 14 August 2017 the matter was referred to the Immigration Assessment Authority (IAA).

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). A migration agent, acting on behalf of the applicant emailed the IAA twice submitting several documents to the IAA.
3. The first email contained:
  - A legal submission, which argued against the findings of the delegate. I have had regards to the argument in the submission.
  - A document titled '*Church Support Letter*', which contained copies of two letters. Having reviewed both letters I note the first letter (typed) appears to be a summary of the second letter (hand written). The letters were not before the delegate. They are new information. The letters take the form of a character reference, and purport to describe the applicant's enthusiasm and commitment to Christianity.
4. The letters were written by a retired pastor from a Protestant Church attended by the applicant. Both letters are dated [in] August 2017, after the date of the delegate's decision. As the letters did not exist at that time, I am satisfied that the letters could not have been given to the Minister before the delegate made the decision under s.65 of the Act and so s.473DD(b) is met.
5. The applicant has not provided any explanation for submission of these letters. However, I note that as part of his SHEV application the applicant had submitted an earlier letter from the same author which also supported his claim to be a Christian as part of his SHEV application. As the earlier letter was unsigned, the delegate had given it very little weight. I infer that the new information, in the form of letters from the same author, was submitted in order to provide further evidence for the applicant's claim to be a Christian convert. As both letters outline claims that were already before the delegate, which were not accepted, I am not satisfied that the letters contain any information which was not previously known or which provided any special insights into consideration of the applicant's claims. I do not consider that the delegates failure to give weight to the earlier letter gives rise to exceptional circumstances to submit further material from the same source (the Pastor). Given the information in the letters is essentially the same as evidence that was before the delegate and that no reasons have been provided by the applicant (or his representative) for submission of the letters, I am not satisfied that there are any exceptional circumstances which justify consideration of the letters. Thus I am prevented from doing so.
6. The second email from the agent contained:

- A document titled '*Reference Letter*'. This document, despite its different title, was in fact a duplicate copy of the document titled '*Church Support Letter*'. For the same reasons as outlined above, I am prevented from considering this document.

7. In September 2017, the Department sent further information to the IAA:

- This information was obtained by the Department after the delegate made a decision under s.65 of the Act, via a phone call with the Pastor (referred to above). The information (the call record) was not before the delegate. It is new information.
- During the phone call the Pastor outlined information about the applicant's claimed conversion to Christianity. Not surprisingly, this information was consistent with the content of the unsigned letter the applicant had submitted in his SHEV application and the two (signed) letters which had been submitted to the IAA, all of which had been written by the Pastor. I note that during the applicant's protection visa interview, the interviewer had indicated his intent to contact the Pastor and question him about the first letter. He made multiple, unsuccessful attempts to contact the Pastor before the date of the s.65 decision.
- As the Department initiated the process of contacting the Pastor, and the Pastor was merely reacting to the Departmental officer's attempted contact, I am satisfied that there are exceptional circumstances for considering the new information in the call record and I have done so.

### **Applicant's claims for protection**

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

- The applicant was born in Iran on [date]. He is of Farsi (Persian) ethnicity. He lived the majority of his life in [Town 1], Fars Province (Southwestern Iran). He was born a Shia Muslim.
- During his teenage years, he became disenchanted with Islam. He started to research alternative religions.
- The applicant has completed training as [Occupation 1], and [Occupation 2]. He worked in [Town 1] as [Occupation 2] in a shop he owned.
- Around the age of [age], during [university] study he met another student (S1). The applicant admired S1 and he a great influence over him. Overtime, the applicant became aware that S1 was from a Christian family.
- S1 introduced the applicant to other Christians and invited him to a 'house church'. The applicant attended the house church regularly throughout his university years with a small group of 5 - 6 other persons, usually around twice per month.
- In around early 2012, the house church was 'raided' by the Iranian authorities. The applicant and the other attendees were arrested. He was detained for seven days.
- Whilst in in detention the applicant was mistreated. He was forced to sign a statement that he would no longer attend Christian services or house churches. He was released, but advised that from now on, his activities would be subject to monitoring from the Iranian security services.
- In April 2013 the applicant received a phone call from his mother advising him that a court summons had been delivered to her house, the applicant was required to attend a

court hearing at [a] Revolutionary [Court] at the behest of the Criminal Investigation Division of the State Intelligence Force because of his Christian activities.

- The applicant did not attend the hearing, and fearing for his life made arrangements to flee Iran. The applicant came to Australia.
- Since arriving in Australia the applicant has formally joined a Christian church, and been baptised.
- He fears, that if returned to Iran, he would be persecuted because of his conversion to Christianity.

### **Factual findings**

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9. Since his arrival in Australia the applicant has provided Australian authorities with copies of a number of documents in order to establish his identity. These documents include an Iranian Drivers Licence (with translation) and copy of the biographical data page from his Iranian Passport (but no original Passport), educational and business certificates (and translations) issued in his name. These documents establish the applicant's identity to my satisfaction. I accept that he is an Iranian citizen of Farsi (Persian) ethnicity who was born in Iran on [date]. For the purposes of this decision, I find that Iran is his receiving country.
10. The applicant lived for most of his life in [Town 1], Fars Province (in Southwestern Iran) except for short period when he lived in Shiraz the Provincial capital. The applicant was employed in a [Occupation 1]. Later, he opened his own [business]. He completed compulsory military service between [years]. He went to University between [years] and studied [an Occupation 1 course]. As evidence of these claims the applicant has provided copies of his educational certificates and his business licence endorsed by the [related authority]. I accept these claims.

### **Christianity, Detention, Summons & decision to flee**

11. The applicant has claimed that during his teenage years, when he was around [age] years of age, he became disillusioned with the state of the Islamic world, which he felt contrasted poorly with the West. He decided to inquire as to the causes of this disparity, and diagnosed that one of the chief factors was Islam itself; he concluded that Islamic theology and cultural practice promoted inequality, injustice violence and war. He became disenchanted with Islam and started to research alternative religions.
12. Around [year], the applicant entered university. During his first year of study, he met another student (S1). S1 and the applicant became friends. S1 was very mature and the applicant admired him. S1 gave guidance to the applicant and was very influential. Over time the applicant came to understand that S1 was a Christian. The applicant formed the view that many of S1's admirable qualities were the result of his Christian outlook. He became more interested in Christianity and discussed it with S1.
13. Later, S1 invited the applicant to attend a bible discussion group of five to six people at a 'House Church'. Afterward, the applicant regularly attended the house church throughout his time at university. Usually about twice per month. The applicant has recounted that these sessions took place in a variety of locations when circumstances permitted. The house church meetings usually took the form of bible discussions, or other explorations of Christian theology. On many occasions (but not all) S1 would attend and assist the attendees by outlining his own knowledge of Christian lore. In this way he acted as a mentor.

14. During the final semester of University before he graduated, the house church was raided by the authorities. The applicant and other attendees were arrested. He was detained for seven days. During this time he was mistreated, though he has not outlined exactly what mistreatment he suffered. He was questioned about why he was turning away from Islam, the authorities characterised the house church as satanic sect. He was forced to sign a statement admitting his guilt. Before he was released he had to promise that he would never attend Christian services or ceremonies again. He was advised that, as he had come to the attention of the Authorities, he would be subjected to ongoing monitoring.
15. After he was released the applicant returned to his normal life. By this stage he operated a [business]. He felt intimidated by the threat of Government surveillance. From time to time some representatives of the Government would visit the shop and would question him. They would imply that his clothing, his hairstyle, even the name of his shop had Western overtones and infer that he was still 'Christian'. A person subject to such suspicion in Iran can be subjected to further harassment. During this period did not participate in any Christian activities or associate with the other members of his house church. He refrained from any overtly anti-Islamic activity. [In] April 2013, he received a phone call from his mother. She advised that a letter had been sent to her home which contained a 'Summons' for the applicant to appear before a court hearing. The applicant claims that the summons was related to his earlier detention. He says he became very frightened and decided to flee Iran as soon as possible. He did not attend the court, and departed Iran from Tehran airport approximately 10 days later.
16. The applicant has provided evidence about his Christianity since his earliest contact with Australian authorities after his arrival in this country. He claimed be a Christian in his Entry Interview with the Department of Immigration in 2013. He has consistently maintained that he was a secret Christian in Iran, though he concedes that was not formally baptised into a particular Christian sect. During interview, the applicant outlined what elements of Christianity attracted him, was able to describe the characteristic differences between the Old and New Testaments in the bible and to explain the centrality and the importance of Jesus to Christianity. He was able to recite the Lord's Prayer (Our Father). He contrasted Christianity with Islamic practice, which he characterised as full of violence, inequality and punishment.
17. Having considered all of the evidence before me I have some doubts about the applicant's claims. I observe that his description of Christianity was somewhat superficial and while he was able to outline important elements of the Christianity his specific knowledge of Christian theology was limited. I would expect that a person who attended regular Christian discussion groups for approximately four years would be able to provide fuller explanations of Christianity and its theology. I do not wish to impose an artificial or arbitrary standard on the applicant about the level of doctrinal knowledge required of a convert, but I did not find his explanations to be entirely convincing.
18. The applicant's claims about his seven days of detention are also vague. He asserts mistreatment, but did not explain how he was mistreated. His description of the seven days of detention was very brief and lacked detail. He has not described where he was held, or which agency held him, or how he was mistreated or how his interrogation occurred. The applicant has not provided any independent evidence in support of this period of detention, though I note that he has provided a document titled '*Health Discharge Assessment for Person in Immigration Detention*'. This document does record that he had claimed some 'Torture and Trauma' to the Australian authorities whilst in Immigration Detention. The scope of this claim is not clear, no details of the claimed 'Torture & Trauma' are noted, nor are the circumstances described when it was said to have occurred. I am not satisfied that this document can be

taken as probative of the applicant's claim, since the claim of torture comes from the same source, the applicant. I give very little weight to this document.

19. The applicant has provided a copy of the Court Summons and an accredited translation. The Summons is dated [in] April 2013. It states that the applicant is required to attend [Branch Office] [in] April 2013. The Summons records that it was prepared by the [related office]. The document does not identify why the applicant was being summonsed. The Summons states that if the applicant failed to attend, an arrest warrant would be issued. The Summons is issued for [a] Revolutionary [Court].
20. Country Information before me indicates that the Revolutionary Courts in Iran deal with cases concerning internal and external security (including political cases) and drug smuggling. They do not use juries, and trials are frequently closed to the public (though show trials have occurred). Defendants have the right to legal representation in Revolutionary Courts, and can appeal sentences to the Supreme Court. The Government has stated that all trials should be held in open courts and all political and press offences should be tried in the presence of a jury, but Revolutionary Courts are exempt from this rule. Revolutionary Courts are not required to release their documents to the public. Human rights defenders and those arrested in protests, including following the 2009 election, are usually tried in the Revolutionary Courts. Credible sources have told DFAT that those suspected of political crimes – threatening the constitutional foundations or territorial integrity of the Islamic Republic are most likely to be tried in Revolutionary Courts<sup>1</sup>.
21. Under Iranian law, a Muslim who leaves his or her faith or converts to another religion or atheism can be charged with apostasy. While cases of apostasy are rare, Muslim-born converts to Christianity, Baha'is, Muslims who challenge the prevailing interpretation of Islam, and others who espouse unconventional religious beliefs have been charged with apostasy in the past. Apostasy charges have also been applied against political opponents of the regime<sup>2</sup>.
22. The punishment for apostasy is subject to judicial discretion. There is no provision in Iran's Penal Code criminalising the act. Nevertheless, Article 167 of the Iranian Constitution requires judges to apply Shari'a in situations in which the law is silent and Article 220 of the Iranian Penal Code effectively states that crimes punishable under Iranian law are not limited to the ones specified in the Penal Code. According to Article 160 of the Iranian Penal Code, confessions, the testimony of two male witnesses or the 'knowledge of the judge' can each be the basis for a conviction. In the rare instances that they are applied, charges of apostasy have in the past resulted in the death penalty and are often combined along with other crimes related to national security such as waging war against God and the Prophet<sup>3</sup>.
23. The information provided by the applicant about this 'Summons' contains contradictions. He claims his mother received the document [in] April 2013 and informed him on the same date, but this is listed as the day he was due to attend the Court. I find this evidence hard to reconcile but, given the passage of time, I am willing to concede that the applicant may have confused the dates slightly. I conclude that the Summons is genuine and I observe it is issued in his name. I am satisfied that this document indicates he was of interest to the authorities in Iran in 2013, and that this interest related to the jurisdiction of the Revolutionary Court which has responsibility for crimes of a political nature. Despite the doubts I have expressed about some elements of the applicant's evidence, I find the Summons to be compelling evidence in support of the applicant's claims. I am willing to accept that the circumstances of overt

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), Country Information Report: Iran April 2016", CIS38A8012677, 5.15

<sup>2</sup> DFAT, Country Information Report: Iran April 2016", CIS38A8012677, 3.52

<sup>3</sup> DFAT, Country Information Report: Iran April 2016", CIS38A8012677, 3.53

Christian worship the applicant describes may be treated in Iran as 'political' or as being 'against God and the Prophet' and may have brought him to the attention of the Revolutionary Court. Given the persuasive evidence of the Summons, I am willing to accept that the applicant was a member of 'House Church', that he was detained and arrested, and later summonsed before the Revolutionary Court in Shiraz. I also accept that the applicant departed Iran, legally, via Tehran airport, on a passport issued in his own name.

24. Since his arrival in Australia, the applicant claims to have engaged in open Christian worship, and to have formally converted to Christianity. He has evidenced this claim with a Certificate of Baptism and through the provision of a statement by a Christian Pastor at a church he attended whilst living in [city]. The Pastor was spoken too by an officer of the Department. A brief outline of this conversation was included in the materials referred to the IAA. Broadly this material supports the applicant's claim to have been an active, practising member of several Christian churches since his arrival in Australia. I accept that since his arrival in Australia the applicant has openly engaged in Christian worship and has been baptised. I conclude he is a practicing Christian.

### **Refugee assessment**

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25. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

### **Well-founded fear of persecution**

26. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
  - the real chance of persecution relates to all areas of the receiving country
  - the persecution involves serious harm and systematic and discriminatory conduct
  - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
  - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
  - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
27. I have accepted above that the applicant was summoned before the Revolutionary Court in Iran for activities related to Christianity, and Christian worship at a 'House Church'. For the sake of clarity, I do not accept that the applicant could be said to have been a Christian while in Iran (as he himself conceded in 2013), only that his activities were overtly Christian in character and demonstrated a desire to become a Christian. In any case, the suspicion held against him

by Iranian authorities' amounts to the same thing – that he had engaged in Christian activities and was, for all intents and purposes, an apostate.

28. The evidence before me indicates that as a Muslim who has converted to another faith the applicant could be charged with apostasy<sup>4</sup>. As he has come to the attention of Iranian authorities previously for Christian activities and that he had been warned not to resume them, I conclude he would be unable to prevent his conversation being known to the Government. In the past charges of Apostasy have resulted in the death sentence, though DFAT is not aware of any cases since 2011 and The last known time the death penalty was carried out for apostasy was in 1990<sup>5</sup>. 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<sup>6</sup>. However, DFAT assesses that Iranian authorities will rarely intervene actively to stop Muslims attending churches whilst their attendance is low-key<sup>7</sup>.
29. All Christian churchgoers must register with the authorities in Iran. Failure of churchgoers to register and attendance at churches by unregistered individuals may subject a church to closure and arrest of its leaders by the authorities<sup>8</sup>. In 2016 the US State Department credibly reported that Christian converts can face lengthy prison sentences in Iran as they are seen as propagandists against the Islamic character of the state<sup>9</sup>. Attendance at churches is monitored by the authorities in Iran. If the applicant returned to Iran and openly practiced his new faith, it is likely that he would be identified by the Iranian authorities, and would have penalties imposed against him. The alternative, of worshiping in private and keeping his conversation secret, would preclude his full participation in the faith of his choice. I conclude that if the applicant was returned to Iran, he would be unable to practise his Christian faith openly in a communal setting with a like-minded community.
30. Having considered all of the evidence before me, I am satisfied that if returned to Iran, the applicant would be identified as a Muslim apostate and a convert to Christianity by the authorities in Iran. Given his earlier dealings with the authorities I am satisfied that the applicant would face a real chance of persecution amounting to serious harm on the basis of his religion if returned to Iran. I conclude that the essential and significant reason for persecution would be the applicant's religion.
31. Discrimination against Christians in Iran is pervasive and structural<sup>10</sup>. The harm that the applicant fears emanates from the Iranian authorities operating under laws which apply throughout Iran. As such, I find that the real chance of persecution is imposed by the State and relates to all areas of Iran. As the Iranian government is the agent of harm, I am satisfied that the applicant cannot access effective protection in Iran. I find that effective protection measures are not available and s.5(2) does not apply.
32. Section.5J (3)(c)(i) of the Act prohibits requiring a person to renounce a religious conversion, conceal true religious beliefs or to cease the practise of their faith to avoid a real chance of

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<sup>4</sup> DFAT, Country Information Report: Iran April 2016", CIS38A8012677, 3.52

<sup>5</sup> DFAT, Country Information Report: Iran April 2016", CIS38A8012677, 3.54

<sup>6</sup> DFAT, Country Information Report: Iran April 2016", CIS38A8012677, 3.54 – 3.55

<sup>7</sup> DFAT, Country Information Report: Iran April 2016", CIS38A8012677, 3.56

<sup>8</sup> US Department of State, "2015 Report on International Religious Freedom - Iran", 10 August 2016, OGD95BE926723

<sup>9</sup> US Department of State, "2015 Report on International Religious Freedom - Iran", 10 August 2016, OGD95BE926723

<sup>10</sup> DFAT, Country Information Report: Iran April 2016", CIS38A8012677, 5.1

persecution. I am satisfied for the applicant to avoid a real chance of harm he would have to conceal his true faith. As such s.5J(3) does not apply.

33. The applicant has a well-founded fear of persecution.

**Refugee: conclusion**

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

**Decision**

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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

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

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

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

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

...

## 5J Meaning of well-founded fear of persecution

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

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

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

## 5K Membership of a particular social group consisting of family

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

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

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

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

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

#### **5L Membership of a particular social group other than family**

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

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

#### **5LA Effective protection measures**

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

...

#### **36 Protection visas – criteria provided for by this Act**

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- (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.