



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA18/04771

Date and time of decision: 16 July 2018 11:29:00

N Becke, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

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 citizen of Faili Kurdish ethnicity born in Ilam Province, Iran. On 14 June 2017 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 16 April 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant this visa.

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).
3. On 10 May 2018 the IAA received a submission on behalf of the applicant ('the IAA submission') prepared by a solicitor and registered migration agent. The IAA submission reiterates claims made to the delegate that are contained in the review material. It also contains arguments in relation to issues before the delegate, which I have noted.
4. Attached to the IAA submission are a number of documents:
 - Baptism certificate from "[church name]", dated [in] April 2018.
 - Letter of support from [named] Church ('the church'), dated [in] May 2018. The letter states that the applicant has been attending the church for approximately five months, during which time he has decided to become a Christian and has been baptised. The letter notes the applicant is gradually making connections and friendships within the church, particularly through the Iranian community.
 - Two undated photos which appear to be from the applicant's baptism, showing him immersed in water.
 - Letter of support from a Mr WS, dated 6 May 2018. Mr WS states he has known the applicant since July 2017, when they met at the church, and that the applicant has a caring and friendly nature. They now meet each week outside the church as well as at Sunday services.
 - A new (unsigned) statement from the applicant, dated 7 May 2018. In the statement the applicant claims the following:
 - In his 2017 SHEV application he stated that he does not have a religion, but now he identifies as a committed Christian.
 - He was considering becoming a Christian from early 2017, when he first attended the church, but did not attend regularly as he was still learning about Christianity.
 - Five months ago he decided to commit to Christianity and since January 2018 has attended at least three Sundays a month. He would like to also attend mid-week church events but is working full time.
 - He finds joy and happiness in Christianity where there is no pressure or judgement, and he likes the respect Christians show each other.
 - As he is not proficient in English he does not understand the contents of the church services but is trying to learn and develop his Christian faith.

- In Iran people are forced to be Shia Muslims and apostates can be executed. The Iranian authorities could seriously harm him for failing to observe Sharia law.
 - If he returns to Iran he will continue to practise Christianity no matter what, and fears the Iranian authorities will kill him for converting.
5. This information regarding the applicant's interest in, and conversion to, Christianity is new information which was not before the delegate. The IAA submission argues that while the applicant had been attending the church regularly at the time of his SHEV interview in late February 2018, he had not yet been officially admitted to the Christian faith and would not have been recognised by others as a member of the church. The IAA submission also argues that this new information could not have been provided prior to the delegate's decision, because the applicant's baptism took place after his SHEV interview and after his representative had already sent the delegate the post SHEV interview written submission. Furthermore the applicant was never asked directly if he was "exploring his faith" during the SHEV application process or at SHEV interview.
 6. I am not persuaded by the arguments advanced in the IAA submission as to why the new information regarding the applicant's conversion to Christianity could not have been provided prior to the delegate's decision. Firstly, at the commencement of the SHEV interview, during which the applicant as represented, the delegate reminded him that it was his responsibility to provide all his claims for protection and that if his application was refused he may not have another opportunity to provide further information, which he confirmed he understood. During the SHEV interview the delegate and the applicant spent some time discussing the applicant's attitude towards Shia Islam. Later in the SHEV interview the delegate asked the applicant if there were any other reasons that he feared harm in Iran, which they hadn't yet discussed, and the applicant again stated that he did not agree with Shia Islam because it had been forced upon him in Iran. One would expect that the applicant would have mentioned he was considering becoming a Christian, and had been regularly attending church; particularly given he is now claiming it is a basis for fearing return to Iran.
 7. Secondly, the applicant's baptism took place more than two weeks prior to the delegate's decision, and the letters of support from the church and Mr WS, as well as the new statement from the applicant, predate the delegate's decision by at least a week. I do not consider it credible that the applicant's representative, a registered solicitor and migration agent, would have not provided this information to the Department on the basis that the SHEV interview had already been conducted and they had already sent their post SHEV interview submissions to the delegate. The same migration agency has represented the applicant throughout the SHEV application process, and I consider they could have been in no doubt as to the relevance or significance of the information regarding his religious practice and belief.
 8. In the circumstances, I do not accept that the applicant did not have the opportunity to raise his interest in Christianity during the SHEV application process, including at interview, or that the fact he had not yet been baptised would have prevented him for doing so. I consider that it was still open to the applicant to seek corroboration of his regular attendance from the church, even if he had not yet been baptised, given he claims that he had been attending regularly for more than a month by the time of his SHEV interview.
 9. Furthermore the applicant gave contradictory evidence throughout the SHEV application process regarding his religious status with regards to Shia Islam - he alternately claimed to be a non-practising Muslim, but also that he does not have a religion. The fact that he is now claiming to be a Christian, and in the absence of any plausible explanation as to why this new

information was not provided earlier, raises real questions as to whether this new information is at all believable.

10. Overall, I am not satisfied exceptional circumstances exist to justify consideration any of this new information relating to the applicant's religious activity in Australia; nor has the applicant satisfied me as to either of the matters in s.473DD(b).
11. The IAA submission also refers to a number of sources of country information which were not before the delegate and which pre-date the delegate's decision. These sources concern the general situation for human rights and religious freedom in Iran, focusing on the treatment of Christian converts. The IAA submission does not explain how, as general country information, these sources constitute personal information. For the reasons discussed above I am not satisfied exceptional circumstances exist to justify the consideration of the new information regarding the applicant's conversion to Christianity. I am similarly not satisfied exceptional circumstances exist to justify the consideration of the new country information. Furthermore, the applicant has not satisfied me as to either of the matters in s.473DD(b).
12. I have obtained new information from the most recent Department of Foreign Affairs and Trade (DFAT) country report for Iran, which was published on 7 June 2018.¹ The delegate relied on the 21 April 2016 DFAT country report for Iran, which the 7 June 2018 report has superseded. I am satisfied that there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

13. The applicant's claims can be summarised as follows:
 - In [year] the applicant was born in Ilam Province, Iran.
 - As a Faili Kurd the applicant experienced racial discrimination during his childhood. He was unable to wear traditional Kurdish dress or speak Kurdish in public, and was forced to learn Farsi at school.
 - In approximately 2003 the applicant left school because he was unable to study what he wanted. He moved to Tehran but found it difficult to subsist because employers always hired Persian people. The applicant survived by doing casual laboring jobs and running his own small business selling [products].
 - Around 2005 the Iranian authorities targeted the applicant twice because he had not completed his compulsory military service and because of [his appearance]. He was held for several hours, beaten, and threatened with imprisonment each time.
 - In January 2008 the applicant undertook his military service as a prison guard in Ilam, so that he could obtain a passport once finished.
 - In July 2009 the applicant finished his military service and continued working to save money to leave Iran.
 - The applicant believes in God but prior to his departure from Iran had ceased to believe in Shia Islam. He kept his views secret because he feared the consequences from the authorities.
 - In May 2013 the applicant departed Iran legally, using his own passport.

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226

- The applicant fears the Iranian authorities will detain, interrogate, torture or kill him because: he is a Faili Kurd, he cannot pretend to believe in Shia Islam, he has a record due to his previous arrests, he would be returning as a failed asylum seeker.
- The applicant also fears he will be unable to subsist in Iran.

Refugee assessment

14. 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

15. 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.
16. The applicant has been consistent in stating his identity since his arrival in Australia. In support, the applicant has provided copies of his Iranian birth certificate, national identity card and military service completion card, with English translations. On the basis of the information before me I am satisfied the applicant’s identity is as claimed and that Iran is the receiving country for the purposes of this assessment.

Faili Kurdish Ethnicity

17. DFAT has stated that it is aware of sufficient incidences of official and societal discrimination against ethnic minorities to suggest a pattern of behaviour, particularly where those groups are the minority in the geographic area in which they reside. However, DFAT also notes that the experience of different ethnic groups is not uniform, and the overwhelming majority of ethnic minority communities are integrated into Iranian society, participate in politics, and identify with the Iranian nation.²

² DFAT, "Country Information Report - Iran ", 7 June 2018, CIS7B8839411226

18. DFAT also stated that it is not aware of cases where Iranian citizens of Faili Kurd background have faced adverse attention specifically because of their ethnicity; although while it has not seen evidence of widespread official discrimination or harassment, it cannot be ruled out in individual cases.³ DFAT has recently noted that it is not aware of specific instances whereby authorities have singled out any cohort of Faili Kurds for mistreatment.⁴
19. However, Kurds complain of discrimination with regard to their access to employment (including government employment), university admissions, and housing and land rights.⁵ The Iranian authorities do not prohibit the use of Kurdish language but prohibit most schools from teaching it, with the exception of the Kurdish language program at the University of Kurdistan.⁶ I note that in contrast to the Faili Kurds, other Iranian Kurds are predominantly Sunni and DFAT draws a distinction between the treatment of Sunni Kurds and those who are from a Shia background, such as the applicant.⁷
20. The applicant's written SHEV statement primarily refers to issues faced by the Kurdish population as a whole, rather than to his own specific situation. When given the opportunity to do so, he did not fully elaborate on claims relevant to his Kurdish ethnicity at SHEV interview or provide personal examples of instances where he has faced discrimination as a Faili Kurd in Iran. I am prepared to accept however that the applicant was not able to wear traditional Kurdish dress had he wished to, and that the applicant had to learn Farsi, not (Faili) Kurdish, at school; however, based on the country information, I do not accept his claim that he was prohibited from speaking (Faili) Kurdish in public.
21. In the applicant's written SHEV statement he has claimed that he left school around 2003 because he was unable to study what he wanted. During the SHEV interview the applicant instead claimed that he had left Ilam around 2003 in order to continue his schooling in Tehran. When the delegate put this inconsistency to the applicant for comment, he explained that he had to move to Tehran to study his preferred course but once he was there he could not afford to continue and began [working]. I accept the applicant's evidence in this regard.
22. The delegate also asked the applicant to elaborate on the discrimination he claims to have faced when seeking employment in Iran. The applicant responded in the plural that "they" do not offer jobs to "us" working in cities, but did not provide any evidence that he had personally experienced discrimination as a job seeker. While the applicant also referred generally to government jobs being unavailable to Kurds, he did not claim that he had experienced this personally. I note under the 'Employment History' section of his SHEV application, apart from the period of his military service, the applicant was continuously employed from the time he left school in 2003 until his departure from Iran in 2013. These roles included casual [jobs] for people in his village, [specified service jobs] in Tehran, as well as a four year period of [self-employment].
23. I accept the applicant's evidence that after he finished his military service in July 2009 it took him four years to save [the amount of] dollars he needed to depart Iran; however, I do not consider that this supports his claim that he struggled to find work, or to subsist. I also note that the applicant has been working as a [different occupation] at various suburbs across [his

³ DFAT, "DFAT Thematic Report – Faili Kurds in Iraq and Iran", 3 December 2014, CIS2F827D91722

⁴ DFAT, "Country Information Report - Iran ", 7 June 2018, CIS7B839411226

⁵ Reuters, "Iran executes Kurdish activist, wary of Kurdish gains in Middle East", 27 August 2015, CXBD6A0DE12731; Amnesty International, "Amnesty International Report 2016-2017", 23 February 2017, NG2A465F54

⁶ US State Department, "2016 Human Rights Report: Iran", 3 March 2017, OGD95BE926964

⁷ DFAT, "DFAT Thematic Report – Faili Kurds in Iraq and Iran", 3 December 2014, CIS2F827D91722

city of residence in Australia] since 2015, and on the evidence overall I am not satisfied that he would be unable to subsist as claimed, should he return to Iran.

24. During the SHEV interview the delegate asked the applicant if he had difficulty accessing healthcare in Iran because of his Faili Kurdish ethnicity. The applicant responded that he had never been denied treatment but appeared to attribute this to the fact he was required to pay money. DFAT indicates that Iranian citizens, including those of Faili Kurdish ethnicity, like the applicant, are able to receive government benefits including health cover and other public services.⁸
25. The Iranian authorities are highly sensitive to political activism, particularly when it is perceived as a threat to the Islamic Republic, and have targeted ethnic minority activists for arrest and prosecution on national security grounds.⁹ The applicant has not claimed that he, or any member of his family, are involved in Kurdish political activism.
26. In light of the country information cited above, I accept some Kurds in Iran may experience a degree of official or societal discrimination; although, for the reasons above, I do not accept the applicant has faced difficulties in Iran for the reasons, or to the extent, that he has claimed. The applicant is most recently from Tehran, Iran's largest and most diverse city, and there is no credible evidence before me that he has faced discrimination or adverse treatment as a Faili Kurd while residing there, independently of his family. While the past is not necessarily determinative of the future, having regard to all the evidence before me, I am satisfied the applicant does not face a real chance of harm in Iran because of his Faili Kurdish ethnicity.
27. During the SHEV interview the delegate also asked the applicant about his claim that around 2005 the Iranian authorities targeted him twice because he had not completed his compulsory military service. The applicant confirmed he was held for several hours and subjected to the "usual torture". When the delegate asked the applicant for further details he did not respond directly and instead raised that on one of these two occasions he had come to the attention of the authorities because of [his appearance]. Military service is compulsory for men above the age of 18, and most completed between 18 and 24 months of service in a variety of positions.¹⁰ The applicant has not claimed that he is a conscientious objector to military service and he confirmed that once he commenced, his service was of standard length with no additional punishment in relation to his initial reluctance to complete it. The applicant also confirmed to the delegate that he never been charged with a crime and has no outstanding matters with the authorities in Iran.
28. I am prepared to accept that on two occasions the Iranian authorities detained the applicant for several hours, beat him and threatened him with imprisonment because he had not yet completed his military service. I accept that on one of these occasions the applicant's [appearance] was a factor in the treatment he received and that these experiences contributed to his desire to leave Iran. However, on the evidence I am not satisfied there is a real chance he would receive further adverse attention from the Iranian authorities for any reason related to his military service.
29. In terms of the applicant's [appearance] at that time, I consider it plausible that the authorities deemed it to be [unacceptable]; however he has confirmed he had no other interactions with the authorities during his time in Iran because of his appearance, and his

⁸ Ibid.

⁹ Ibid.

¹⁰ DFAT, "Country Information Report - Iran ", 7 June 2018, CIS7B839411226

evidence does not suggest that this would be an issue for him in the reasonably foreseeable future. DFAT indicates that while there have been incidents of the harassment of men due to violations of the dress code - such as Western hair, clothing styles or tattoos – these incidents were likely instigated by over-zealous officers outside of metropolitan areas, or because the individual came to the attention of the authorities for other reasons. DFAT assesses the restrictions on the dress code for men are not discriminatory.¹¹ On the evidence I am not satisfied there is a real chance the applicant will come to the attention of the Iranian authorities for reason of his appearance.

30. During the SHEV interview the delegate asked the applicant for further information regarding his duties as a prison guard during his military service. The applicant explained that his duties included transporting prisoners between the prison and the courts, general guard duties, and opening the gate. The applicant further explained that while the prison held both military and civilian prisoners, it was administered by the Ministry of Justice and was not a specific military prison. The applicant's written SHEV statement does not indicate that he fears harm from the Iranian authorities on the basis of any imputed political opinion arising from completing his military service at a prison, nor did he raise this during his discussion with the delegate.
31. However, following a break towards the end of the SHEV interview, the applicant's representative stated that the applicant had revealed to him that he fears the Iranian authorities will target him upon return to Tehran airport because they will believe he has disclosed sensitive information while overseas about what he witnessed as a prison guard. In the post SHEV interview written submission the applicant's representative further argued that the applicant will be imputed with an anti-Iranian government political opinion because of his profile as a former prison guard, who may have disclosed breaches of human rights and his knowledge of the Iranian security apparatus as a defector to the West. The submission goes on to argue that the applicant has the ability and knowledge required to act as a whistleblower and expose the Iranian regime for its human rights abuses, and cites country information regarding cases of whistleblowers.
32. I am not persuaded by these arguments. The applicant's own description of his duties was consistent with those of a low level conscript, and even if he did witness mistreatment of prisoners during the 18 months he worked at the prison, there is no credible information before me that he intends to become as a whistleblower. Furthermore, the country information does not indicate that the Iranian authorities target low level prison workers for the reasons claimed, and the applicant has not claimed to have encountered any difficulty obtaining a passport and leaving Iran after his military service at the prison ended. I consider the claim that the Iranian authorities, upon the applicant's arrival in Iran as an asylum seeker returning from overseas, would conclude that he had disclosed sensitive information simply because he is a former prison guard, is purely speculative. On the evidence overall I do not accept the applicant's profile as former prison guard gives rise to an imputed anti-Iranian government political opinion or that the Iranian authorities would target him for this reason.
33. During the SHEV interview the applicant made regular references to his lack of acceptance of Shia Islam, as a religion which is forced upon people. The delegate put to the applicant that country information indicates despite Shia Islam being a "compulsory" religion many Iranians do not agree with it and do not follow it. The applicant agreed with this statement and estimated more than eighty per cent of Iranians do not believe in Shia Islam. The delegate considered the applicant's status as an atheist, as well as a non-practising Muslim, in his

¹¹ Ibid.

decision; however I note the applicant advised that he does believe in God and on this basis I do not accept that he is an atheist.

34. Country information before the delegate indicates many Iranians are becoming increasingly disenchanted with the Islamic regime and have moved away from institutionalised religion. Apostasy is a crime in Iran and in rare cases has resulted in the application of the death penalty; however such cases are also usually linked to political, or national security related, charges.¹²
35. The delegate asked the applicant if he had ever experienced any problems because of his attitude towards Islam and he responded that he had, during Ramadan, because he was forced to fast; however country information before the delegate indicates that not eating in public during Ramadan is a requirement of all Iranian citizens. I am prepared to accept the applicant did not consider himself a Muslim in the years prior to his departure from Iran, but I note he also confirmed he had not previously come to the attention of the Iranian authorities for this reason and on the evidence overall I do not accept he was hiding his true beliefs out of fear as claimed. I also do not accept that having to refrain from eating in public during Ramadan is discriminatory treatment and therefore I am satisfied there is no real chance of persecution on this basis. On the evidence overall I am not satisfied the applicant faces a real chance of harm in Iran because of his non-adherence to Shia Islam.

Returning Asylum Seeker from Australia/Western Country

36. I accept in May 2013 the applicant departed Iran legally, using a genuine Iranian passport and sought asylum in Australia.
37. According to DFAT, Iran has historically refused to issue travel documents to allow the involuntary return of its citizens from abroad. In cases where an Iranian diplomatic mission has issued temporary travel documents, authorities will be forewarned of the person's imminent return. According to international observers, Iranian authorities pay little attention to failed asylum seekers on their return. Iranians have left the country in large numbers since the 1979 revolution, and authorities accept that many will seek to live and work overseas for economic reasons. International observers report that Iranian authorities have little interest in prosecuting failed asylum seekers for activities conducted outside Iran, including in relation to protection claims. This includes posting social media comments critical of the government; as heavy internet filtering means most Iranians will never see them. Authorities will usually question a voluntary returnee on return only if they have already come to official attention, such as by committing a crime in Iran before departing. Those with an existing high profile may face a higher risk of coming to official attention on return to Iran, particularly political activists.¹³
38. With reference to the applicant's particular circumstances, I have found he departed Iran lawfully, and there is no credible evidence before me to indicate he has an adverse profile with the Iranian authorities. On the evidence I am not satisfied the applicant's Faili Kurdish ethnicity, his profile as a former prison guard, or his lack of adherence to Shia Islam, would lead any differential treatment upon re-entry. Nor does the country information before the delegate support a finding that persons who have sought asylum, or spent an extended period of time, in Western countries such as Australia, are imputed to hold an anti-Iranian government political opinion. Overall, I am not satisfied the applicant had a profile of interest

¹² Ibid.

¹³ Ibid.

to the Iranian authorities for any reason prior to his departure, or would attract the adverse attention of the Iranian authorities as a returning asylum seeker.

39. While I accept the Iranian authorities may question and even briefly detain the applicant as a returnee, I am not satisfied that this treatment would amount to serious harm. Based on the applicant's personal circumstances, I am also not satisfied he faces a real chance of harm for any of the above reasons, should he return to Iran. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

40. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

41. 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

42. 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.
43. I accept the applicant is an Iranian citizen of Faili Kurdish ethnicity, who came to the attention of the Iranian authorities on two occasions because of his failure, at that time, to complete his military service and because of his [appearance]. I also accept the applicant was a prison guard during his military service. However I have not accepted that the applicant, with this background, would face a real chance of harm in relation to these reasons upon return. For the same reasons I also find there is not a real risk he will suffer significant harm.
44. While I also accept that the applicant does not consider himself to be a Shia Muslim, he will still be required to refrain from eating in public during Ramadan; however I am not satisfied that this would amount to significant harm. He will not be arbitrarily deprived of his life or subject to the death penalty. He will not face a real risk of torture, cruel or inhuman treatment or degrading treatment or punishment.
45. I also accept that as an asylum seeker returning to Iran without a passport the applicant may be questioned on his return for a few hours, but I do not consider that this would amount to significant harm. He will not be arbitrarily deprived of his life or subject to the death penalty.

He will not face a real risk of torture, cruel or inhuman treatment or degrading treatment or punishment.

46. I am not satisfied that there is a real risk that the applicant would suffer significant harm from the Iranian authorities upon his return.

Complementary protection: conclusion

47. There are not 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 does not meet s.36(2)(aa).

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

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.