



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA18/05041

Date and time of decision: 9 July 2018 10:46:00

I Sheck, 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) is an Iranian national from Karaj, in Alborz province. He departed Iran [in] March 2012 and arrived in Australia [in] December 2013. On 3 February 2017 he lodged an application for a protection visa (PV).
2. On 28 May 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate accepted that the applicant had been a non-practising Muslim while living in Iran and had converted to Christianity in Australia. She did not accept that details of his conversion were available on-line. The delegate accepted that the applicant would practise his Christian faith on return to Iran but not that he would proselytise. The delegate concluded that the applicant would not face serious harm in Iran as a Christian convert, a failed asylum seeker, a person who was convicted of people smuggling in Australia, due to the Department's data-breach or for any other reason.

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) (the review material). On 2 July 2018, the IAA received a submission and additional documents on behalf of the applicant from his [representative].
4. Section 473DD of the Act provides that the IAA must not consider any new information from an applicant unless satisfied there are exceptional circumstances which justify considering the new information, and the new information was not and could not have been provided to the Minister or is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims. [The representative]'s submission addresses the delegate's decision and findings. As such, these elements may be regarded as argument rather than new information and I have had regard to them. At page 4 of his submission [the representative] discusses the applicant's chance of harm due to his "Membership of a particular social group of Failed asylum seeker, having Tattoos and Web disclosure of Confidential information". The applicant has at no point claimed to have tattoos and [the representative] makes no mention of tattoos in the paragraph that follows this heading. I am satisfied that the reference to tattoos is a "copy and paste" error and not new information.
5. [The representative] also provided the following, which was not before the delegate and is new information: the Department of Foreign Affairs and Trade (DFAT), DFAT Country Report, Iran, published on 7 June 2018.¹ Due to its date of publication it could not have been provided to the delegate. The delegate referred to the most recent report before her, this being the DFAT Iran Country Information Report 2016, published on 21 April 2016. In light of the age of the previous DFAT report, the currency of the new report, and the potential for changes in conditions in Iraq since early 2016, particularly with reference to the response of the current Iranian government to Christian converts and returnees from western countries, I consider that there are exceptional circumstances to justify considering this new information.
6. [The representative] has also provided a letter of support from [a] Chaplain, of [a] Correctional Centre, dated [May] 2018. Due to the date of this document it could not have been provided to the delegate. I note that the applicant is no longer [incarcerated]. [The chaplain] confirms

¹ DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226

the applicant's conversion to Christianity and notes that while incarcerated [the] applicant undertook Christian activities. The period covered is not stated. The review material contains letters of support from [a priest] of the Coptic Orthodox Chaplaincy Service dated [January] 2018 and [a named person] of [Church 1 organisation], dated [February] 2018. [The priest] states that he has known the applicant since 2014 and discusses the applicant's conversion to Christianity, his baptism and his Christian activities over the years that [the priest] has known him. The [Church 1] letter describes the applicant's current religious activities as a detainee in [name] Immigration Detention Centre. I am not of the view that [the chaplain]'s letter adds anything to the applicant's claim or is of assistance in assessing the claim. I am not satisfied that there are exceptional circumstances that justify consideration of the letter.

Applicant's claims for protection

7. After his arrival at [a location] the applicant was interviewed by an officer of the then Department of Immigration and Border Protection (now part of the Department of Home Affairs). No record of that interview is before me. Together with his PV application the applicant provided a statutory declaration dated 1 February 2017. On 20 February 2018 he attended an interview ("the PV interview") with the delegate at which [the representative] was present. [The representative] provided submissions and additional documents to the delegate on 18 February 2018 and 19 February 2018. The applicant claims:

- He and his family fled Iran because of the problems faced by his father. His father's business failed in 2008 and he turned to selling [product] in order to survive. The enterprise was doing well however in late 2011 their home was raided by the Basij, who were searching for their stock. Shortly after this the applicant's father ceased selling [product] but two more raids occurred. The Basij beat the applicant, his father and his mother. After this the applicant's father went to stay in his birth city of [City 1] and the applicant, his mother and [brother] went to stay with their grandmother. The police gave the applicant's mother a summons requiring the applicant's father to appear before the revolutionary court. The family departed the country;
- The family travelled to [Country 1] and boarded a smuggler's vessel for Australia. This boat however sank and the family were returned to [Country 1]. The smuggler demanded more money from the family and subsequently agreed that three of the family members could board another boat. The applicant remained behind in [Country 1] where he [worked] for the smuggler and acted as liaison with further asylum seekers over the next year or so. The applicant was allowed to travel to Australia in December 2013. [In] February 2014 he was arrested and charged with people smuggling. [In] October 2017 he was convicted of aggravated people smuggling and sentenced to [a] term of imprisonment, with a non-parole period ending [in] December 2017;
- While in detention, the applicant was introduced to Christianity by [another] man. He began studying Christianity and [in] October 2015 was baptised in the Coptic Orthodox faith. Since then he has been committed to practising as a Christian; he has also proselytised, which is one of the key requirements of Christianity. If he were to return to Iran he would be at risk of arrest, detention and the death penalty due to his Christian conversion;
- Details of his arrest and conviction were reported in both the print and on-line media. On return to Iran he would be questioned about this. His sentencing report is available on-line and includes a reference to him being a devout Christian. The Iranian authorities would be aware of this and it would lead to his arrest. In addition, his details were

released on line in February 2014 by the Department. The Iranian authorities will be aware of his application for asylum and the reasons that he gave for the application.

- While in detention he has expressed views against the Iranian government. He could be executed for expressing these views.

Factual findings

8. Based on the information provided in his visa application and identity documents, I accept that the applicant's background is as follows: he was born on [date] in Karaj and is an Iranian national. He is of Persian ethnicity. He is [one of a number of] brothers. He completed primary and some secondary education, withdrawing from school in [Year]. He completed his compulsory military service from December 2008 to September 2009. He travelled to [another country] for a week in 2009. He has never undertaken open employment. He departed Iran in March 2012 on his legally issued passport, together with his parents and [brother]. He has been in detention since his arrival in Australia.
9. The applicant claimed in his statutory declaration that his family decided to flee Iran because his father's life was in danger. He advised that his father had owned a [business] but that the business was "lost" in 2008. At the PV interview the applicant explained that he had helped his father in the shop prior to undertaking his military service and was unable to secure employment after completion of the service. Once his father's business closed there was no income. His father started selling [product] at the suggestion of one of his friends. They sold [products]. The stock was stored in a warehouse in a friend's [place]. His father obtained the [product], the applicant did not know who or where it came from. His father also took the orders and made the sales. The applicant assisted by delivering the orders, on foot or in a taxi. This account is credible and I accept that it occurred.
10. The applicant then claims that some three to four months before March 2012 their home was raided by Basij. The applicant did not know why the Basij raided the house or how the Basij knew that they were selling [product]. His father stopped selling [product] a week after the raid but there were two more raids after this. The Basij beat the applicant and his father; during the third raid they also beat his mother and when he went to her defence they pushed him through a window. His hand was badly injured. After the third raid his father left Karaj and went to stay in [City 1]. The remainder of the family went to stay with the applicant's grandmother. The applicant advised the delegate that there was no further interaction with the Basij after this, however when his mother went back to the family home she was handed a summons by a police officer: this summons required the applicant's father to attend the Revolutionary Court.
11. I have a number of concerns regarding this aspect of the applicant's evidence. The delegate put to the applicant that it was an unlikely coincidence that a police officer would be delivering the summons at the exact time that his mother briefly returned to their former family home to collect some belongings. The applicant responded that the family had also considered it very surprising. The delegate asked what the summons said and the applicant stated that he did not know "but I know it was about having to go to Court relating to his [business]". This response is internally inconsistent. Country information provides that the Iranian judiciary includes Revolutionary Courts and the Special Court for the Clergy, both established following decrees from Ayatollah Khomeini. Revolutionary Courts primarily deal with prosecutions involving acts against national security, as well as drug smuggling and espionage.² There is no evidence to

² DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 5.13

support the conclusion that the home-based sale of [product] is dealt with by the Revolutionary Courts, rather than the criminal courts. The applicant has not indicated that his father had ever been questioned by the police or that the police had ever attended their home. The Basij had been unable to locate any [product] in the applicant's family home (as it was stored elsewhere). I do not accept that investigation into the applicant's father's sale of [product] would be undertaken by the Revolutionary Court as claimed. I do not accept that the applicant's father was summoned to attend the Revolutionary Court. This claim causes some doubts as to the applicant's credibility. The applicant has at no point claimed that he himself was questioned by the Basij or the police and I find he was not. I do not accept that the applicant was of any interest to the Iranian authorities on the basis that he or his father were involved in [product] sales.

12. The applicant stated that he had departed the country on his legally issued passport in March 2012. A few weeks later he returned to Iran in order to collect some money for his father, from the sale of a block of land. He then departed again. The delegate put to the applicant that this would indicate that he was of no interest to the authorities in 2012 and would not be of any interest on return. The applicant responded that it had now been some years, the authorities might now have decided to take him to court and imprison him in order to get his father to return. If he (the applicant) returns "they will retaliate and do to me what they want to do to my father". This claim is both speculative and implausible and I do not accept it.
13. The applicant's central claim for protection is that he has converted to Christianity. The delegate asked him what led to his decision to change religion. The applicant responded that Islam had not meant much to his family. They did not practise their religion at all. He advised that he attended mosque and prayers when he was at school because it was required. The applicant was not asked whether he complied with any other Islamic requirements, such as fasting during Ramadan, or observing Ashura. On the basis that he outwardly complied with the requirements of his religion by way of attending prayers at school I conclude that the applicant did not fast at home during Ramadan but would have done so at school (while he was of school age) and in public. The applicant also stated at the PV interview that a friend had given him a Christian book when he was [age] years old. He read it a couple of times but knew that if he were to convert from Islam while in Iran he would be in trouble, so took it no further. The applicant had not mentioned this in his statutory declaration, instead stating that he was "introduced to Christianity" while in detention in Australia. I do not accept that the applicant was introduced to Christianity in Iran.
14. The applicant maintains that he accepted Jesus as his saviour and was subsequently baptised in the Coptic faith in October 2015. He has provided a number of references attesting to his religious activities over the last few years including attending and participating in religious services, reading the bible and praying. He has his own copy of the Bible, in Farsi. The review material includes some on-line material on Coptic beliefs, which include that man achieves salvation through works of merit, such as fasting, almsgiving and receiving the sacraments. The Coptic church split from the Roman Catholic church in 451 AD however still shares many beliefs and practices, including confession, mass and communion.³ The applicant's parents have also converted to Christianity since arriving in Australia. Unlike the applicant, they are followers of [Church 1], a [type of] church. The applicant provided a letter from a [Church 1 organisation] Team Leader Volunteer which confirmed that since moving to the [name] Immigration Detention Centre in December 2017 he has been attending [Church 1]'s Sunday services. The delegate asked the applicant whether the Coptic and [Church 1] churches are similar. The applicant responded that the differences did not really matter to him, it was all

³ Jack Zavada, ThoughtCo, "Coptic Christian Beliefs" updated 14 January 2018

about accepting Jesus Christ as his saviour. From his evidence and statements at the PV interview it is clear that the applicant is extremely familiar with the contents of the Bible. The references he has provided confirm that he has consistently participated in Christian activities for several years. Despite my concerns regarding his credibility, there is no evidence before me to support a conclusion that his Christian activities are solely undertaken for the purpose of furthering his protection claims. I find that these activities have been undertaken because he is a genuine convert to Christianity. I further note that the applicant's practise of Christianity does not appear to be limited to the beliefs and practices of a single Christian faith; his evidence was that he was baptised in the Coptic Orthodox faith because this was the particular faith that he was introduced to by his [friend]. He now attends [Church 1] services.

15. The applicant claims that if returned to Iran he would still pray, read his bible and proselytise, even though he would not be able to attend a church. He added that "even if there are only two of us, Jesus Christ said that is a church". The applicant claimed that proselytising is one of the key requirements of Christianity. Although that may be the case for [churches] such as [Church 1], the review material does not indicate that it is a key component of the Coptic faith. Notwithstanding this, in his letter of January 2018, [the priest] notes that the applicant is unique in not only deciding to become Christian but in "preaching the Lord" to other Iranian inmates. As a result, [the priest] baptised two other inmates as a direct result of the applicant's preaching to them.
16. The delegate rejected the applicant's claim that he had proselytised in Australia or that he would do so in Iran, concluding that "I accept the applicant has discussed Christianity with other detainees and prisoners in Australia. However, on the basis of his self-testimony, I do not accept that he has formally proselytised to others." The delegate describes proselytising as a "more formalised process" such as conducting religious sermons. [The representative], in his submission to the IAA, contends that the applicant "managed to convince many of his inmates and other detainees to consider and follow Christianity in their life which is the direct meaning of 'proselytisation'." The Macquarie Dictionary defines the term as "to make a proselyte of; convert", which is of little assistance. The definition does not however indicate that proselytisation requires a formal process. I therefore do not agree with the delegate's conclusion and find that the applicant's relevant actions in prison and immigration detention amount to proselytising. He sees this as a key requirement of Christianity therefore I accept that, if returned to Iran, he would also attempt to proselytise.
17. The applicant claims that he would be arrested on return to Iran because the authorities are aware that he has claimed protection in Australia. In February 2014, a report released on the Department of Immigration's website unintentionally enabled access to certain personal information about people who were in Immigration Detention on 31 January 2014 (the data breach). That information was removed from the website eight days later. As the applicant was in detention on 31 January 2014, his personal information (name, date of birth, nationality, gender, detention details and details of any other family members in detention) may have been accessed from the Department's website during the period of the data breach. I accept that the applicant's details would have been available on the website at that time and if accessed, may reveal that he has sought asylum in Australia. I do not accept that details of the applicant's claims for protection would have been available or that these were provided to the Iranian authorities. There is no evidence before me that suggests that the information was accessed by the Iranian authorities. I do accept that the applicant may be identifiable on re-entry as a person who sought asylum in Australia, due to the manner of his return.
18. The applicant has also claimed that the Iranian authorities would be aware of his conversion to Christianity as details of this have been posted on-line. [The representative] referred the

delegate to the applicant's court decision record at www.caselaw.nsw.gov.au, which states at paragraph 139: "the offender tendered two references from Chaplains he has had contact with whilst in custody. They describe him as a devout Christian". The delegate referred to this document, however somewhat surprisingly concluded that "I have not seen any evidence, and the applicant has not provided any evidence, that details about the applicant's religion were published". I disagree. This information is available online, should the Iranian authorities seek it.

19. The applicant has also claimed that he has expressed views against the Iranian authorities since coming to Australia. I accept that he may have expressed such views. Country information indicates that the government of the day may be criticised robustly, both in public (for example, during conversations on the street and in workplaces) and online (for example, on social media).⁴ I am of the view that most if not all asylum seekers in Australia would express some adverse opinions about the country they fled and/or its rulers. [The representative], in his submissions to the delegate, contends that the applicant can be considered an anti-government activist because he escaped from Iran and because he converted to Christianity. I am not of the view that either the applicant's legal departure from Iran or his conversion to Christianity are activities that are considered to be anti-government. I do not accept that the applicant's conversations with fellow inmates about conditions in Iran are known or would become known to the Iranian authorities. The applicant does not claim to have posted anti-government messages online or made any public statements against the Iranian government and I find he has not. I do not accept that he is or that he will be considered to be an anti-government activist on return to Iran.

Refugee assessment

20. 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

21. 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

⁴ DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 3.48

- 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.
22. I have found that the applicant is an Iranian national. It follows that Iran is his receiving country. I have not accepted that the applicant is of any interest to the Iranian authorities due to his father's previous business selling [product], or that he is or will be considered to be an anti-government activist. I have found that the applicant's conversion to Christianity in Australia is genuine and am satisfied it was not for the sole purpose of strengthening his claims for protection. I have found that the applicant's ongoing involvement in Christian activities is based on a genuine commitment to Christianity.
23. I accept that the applicant will continue to practise his beliefs on return to Iran. In relation to whether he would be able to find a Coptic or other church in which to worship in Iran, there is no reference to the Coptic religion in the recent DFAT report. The remainder of the review material also includes no information specific to this faith in Iran. None of the three recognised minority religions (Christian, Jewish, and Zoroastrian) proselytises or accepts converts as members. Strict instructions not to minister to Iranians apply to the small number of Latin Catholic and Protestant churches in Tehran and elsewhere. Security officials reportedly monitor registered congregation centres to verify that services are not conducted in Farsi, and perform identity checks on worshippers to confirm that non-Christians or converts do not participate in services.⁵ As a result of these prohibitions, Iranian Christians who are not members of the recognised ethnic minority churches generally practise in underground 'house churches'.⁶ According to DFAT under Iranian law, a Muslim who leaves his or her faith or converts to another religion or atheism can be charged with apostasy.⁷ 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.⁸
24. By law, non-Muslims may not engage in public religious expression, persuasion, or conversion of Muslims. Such activities are considered proselytizing and are punishable by death.⁹ I accept that the applicant considers "sharing the Good News" to be a fundamental requirement of the Christian faith and that he would seek to proselytise, were he to return to Iran. There are regular, credible NGO and media reports of harassment and monitoring of evangelical Christians, with arrests made for proselytisation. According to international observers, as of December 2016 approximately 90 Christians were in detention or awaiting trial because of their religious beliefs and activities.¹⁰ On the evidence before me, I find the applicant will face a real chance of being subject to monitoring, arrest, being charged and detained for a period of time, for reasons of his beliefs and for the public manifestation of those beliefs.
25. Country information indicates that arbitrary arrest, torture and ill treatment in detention in Iran is common. Individuals under arrest often remain in detention facilities for long periods without charge.¹¹ Human rights organisations report that torture and other ill-treatment of detainees remains common in Iranian detention facilities, especially as a means to force confessions during interrogation. International sources report that commonly reported methods of torture and abuse include prolonged solitary confinement, threats of execution or

⁵ DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 3.30

⁶ Ibid; 3.31

⁷ Ibid; 3.41

⁸ DFAT "DFAT Country Information Report Iran", 21 April 2016, CIS38A8012677; 3.55

⁹ US Dept of State, "2016 Report on International Religious Freedom - Iran", 15 August 2017, OGD95BE927135; p.4

¹⁰ DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 3.33

¹¹ Ibid; 4.15

rape, forced virginity tests, sexual humiliation, sleep deprivation, electroshock, burnings, the use of pressure positions, severe and repeated beatings, and the denial of medical care.¹² Human rights organisations have reported that authorities have systematically failed to investigate allegations of torture and other ill-treatment, and have sometimes threatened to subject complainants to further torture and long sentences.¹³ I am satisfied that the harm the applicant may face is serious harm, I am also satisfied that the essential and significant reason for the harm is his religion, and that it involves systematic and discriminatory conduct.

26. 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 relates to all areas of Iran. I am satisfied he has a well-founded fear of persecution for the purposes of s.5J(1).
27. As the Iranian government is the agent of harm and maintains control throughout the country, I am satisfied that effective protection measures are not available to the applicant in Iran and s.5J(2) does not apply.
28. The applicant can avoid a real chance of persecution by not practising his faith or concealing his faith but this would involve an impermissible modification of behaviour. I find that s.5J(3) does not apply. I consider that requiring the applicant to modify his behaviour, either by concealing his Christian beliefs, by renouncing his Christian faith or by ceasing to be involved in the practice of that faith including "sharing the Good News" falls within a kind of modification that an applicant cannot be required to make in s.5J(3)(c)(i).
29. Accordingly I am satisfied the applicant has a well-founded fear of persecution in Iran for reason of his religion. I have therefore found it unnecessary to make conclusive findings in relation to his other claims.

Refugee: conclusion

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

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*.

¹² DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 4.10

¹³ Ibid; 4.11

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.