



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

**Decision and Reasons**

**Referred application**

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IRAN

IAA reference: IAA18/05172

Date and time of decision: 17 December 2018 10:46:00

R Mikhail, 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 citizen of Iran. On 5 June 2017 she applied for a Safe Haven Enterprise Visa (application for protection). On 18 June 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the grant of the 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) (the review material).
3. In July 2018 the IAA received a submission and a number of documents on behalf of the applicant. The submission, in part, refers to the delegate's decision, evidence that was before the delegate and legal argument. I do not consider the above to be new information.
4. The submission also attaches information about the miracles of Jesus from the New Testament of the Bible which I consider to be new information. According to the submission, this information has been provided in response to the delegate's finding that the applicant's decision to be baptised was not on the basis of the elements of the Christian faith. The submission argues that the applicant's experience of a miracle was a motivating factor which directly refers to elements of the Christian faith. Although the delegate did raise a general concern at the end of the protection visa interview that she may not accept that the applicant has genuinely converted to Christianity she did not raise a specific concern in relation to the reasons the applicant provided for why she decided to be baptised. I am satisfied this information could not have been provided to the Minister before the Minister made the decision. I also note the delegate's findings in her decision in this regard appear contradictory. She first states that "Although the applicant has provided a certificate of baptism, her testimony as to what lead to her baptism or the impact on her life following her conversion to Christianity do not convince me that the applicant embarked upon baptism in sincerity" but then later states that "The applicant's narrative established credible basis for conversion through her views on Islam, introduction to writings from Scovel Shinn, introduction to church in Australia and the accident that lead to the applicant to believe her vision was saved by a miracle". In the circumstances I am satisfied there are exceptional circumstances to justify considering this new information.
5. The submission also provides evidence from a NAATI accredited Farsi interpreter who provides another translation of aspects of the protection visa interview. This has been provided in support of claims in the submission that the applicant's evidence about her Christianity was affected by poor interpreting during her protection visa interview as the interpreter during that interview was not familiar with specific Christian terminology such as Christian meaning of the "Passion" of Christ. I consider the alternative translation of aspects of the protection visa interview to be new information. I am willing to accept the credibility of this new translation as I also observed that the interpreter, during the protection visa interview, appeared to struggle to interpret a handwritten note of an affirmation by Florence Scovel Shinn when asked to do so by the delegate, and appeared to provide a basic interpretation of Christian terms. It is also plausible that the interpreter may not have been familiar with the Christian meaning of the "Passion of Christ" as the applicant's response during the interview, when asked by the delegate for the most iconic image of the "Passion of Christ", was "kindness and being generous to people" which did not correspond to the question being asked. As the delegate

made adverse findings on the applicant's credibility in relation to her Christian conversion on the basis of the interpretation of the applicant's answers during the protection visa interview, I am satisfied there are exceptional circumstances to justify considering this new information.

6. The submission also states that the applicant's family will find out that she had sexual relations with her previous boyfriend and is not a virgin when she returns to Iran. They will subject her to virginity testing which is a form of torture. When they discover she is not a virgin she will be subject to extreme violence or death. It submits that, as the applicant has been effectively unsupervised by her paternal family for more than five years and given the behaviour of her family, her family (and husband-to-be) are likely to seek reassurance that she is still a virgin. The submission also refers to an article on virginity testing in Iran published in 2016 and another "Statement on Virginity Testing" by Independent Forensic Testing published in 2015. Also provided was an updated letter from the applicant's psychologist dated [in] July 2018 which confirms that the applicant disclosed to her in early 2016 that she is no longer a virgin and raised serious concerns that this may be discovered by her family when she returns to Iran and fears she will be forced to undergo virginity testing. I consider the above claim in respect of the applicant's sexual history and fear of forced virginity testing and the consequences of her family finding out that she is not a virgin and the above articles on virginity testing and the new letter from her psychologist to be new information. The submission notes that the applicant's fragile mental state and extreme sensitivity of her family matters provide justification for the failure to raise these claims earlier and also noted she had been previously allocated a male legal representative by her previous representatives. Whilst I consider the above new claims about the applicant's sexual history and fear of being discovered by her family and the reasons given for why she did not raise it earlier capable of being believed, as I have found that the applicant meets the definition of a refugee in relation to her conversion to Christianity, I am not satisfied there are exceptional circumstances to justify considering this information.
7. The submission to the IAA further argues that the delegate failed to assess serious harm likely to the applicant in the form of suicide and the deprivation of appropriate treatment in light of country information which reports that families often pressure girls to commit suicide in Iran and the applicant has a history of suicide attempts as referenced in her [medical] records which it claims the delegate had before her. There is no credible evidence before me to indicate that the delegate had the applicant's [medical] records before her as they were not referred to by the delegate in the protection visa interview or her decision and have not been included in the review material. I note the applicant's representative have not provided them to the IAA. I have also taken into account that the letter from the applicant's psychologist that was provided to the delegate did not refer to her history of suicide attempts although there was a general reference to her "wish to die" when describing her psychological symptoms. I consider the reference to the applicant's [medical] records and previous suicide attempts and the claim that the applicant is at risk of suicide if she were to be returned to Iran to be new information as I am not satisfied that such information was before the delegate nor am I satisfied that it arose on the material. The submission also refers to a recent European Union decision dated 24 April 2018 which found that an applicant in that case was eligible for subsidiary protection to do a serious risk of him committing suicide on account of trauma as a result of past torture. I also consider this reference to be new information. As I have found that the applicant meets the definition of a refugee in relation to her conversion to Christianity, I am not satisfied there are exceptional circumstances to justify considering this information.

8. I have also considered new information about the author, Florence Scovel Shinn (Scovel Shinn).<sup>1</sup> The applicant claimed that her writings influenced her interest in Christianity and, therefore, I consider it central to her claims to have converted to Christianity. The delegate did not consider any country information about Scovel Shinn when assessing this aspect of the applicant's claims and for this reason I am satisfied there are exceptional circumstances to justify considering this information.
9. I have also considered a new report by the Australian Department of Foreign Affairs and Trade (DFAT) on Iran published on 7 June 2018. This report contains updated information on Christian converts. It updates and replaces the DFAT report on Iran published on 21 April 2016 which was before, and relied upon by, the delegate. I am satisfied there are exceptional circumstances to justify considering this information.

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

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

- She was born in Tehran in [year].
- She came from a very religious Islamic family.
- When she was very young, her paternal grandfather decided that she would be married to her [relative], [Mr A]. She did not want to marry him as he was like a brother to her and she loved someone else. When she was about [age] years old she met her boyfriend, [Mr B], and they were together for approximately [number] years. [Number] years into their relationship, her family found out about the relationship. Her half-brother, [Mr C], threatened her and [Mr B] and physically abused her. The family do not believe in the concept of love and relationships before marriage. They continued to pressure her to marry her [relative] which she continued to refuse.
- Six months prior to travelling to Australia, her boyfriend died in [unfortunate circumstances] and her mental health deteriorated. Her friend gave her a book by Scovel Shinn. She used to repeat affirmations from the book all the time and then realised later that the affirmations were taken from the Bible. As a result she wanted to know more about Christianity.
- She decided to leave Iran due to continuing pressure from the family to marry her [relative]. Her mother supported her and arranged for her to depart Iran without the knowledge of the rest of the family. Her mother travelled with her to [Country 1] in June 2013 and then returned to Iran. After her mother returned to Iran, her family realised the applicant had left Iran and her mother was placed under a lot of stress and was admitted to hospital.
- She has received threats on her phone from people in Iran whilst in Australia and has reported these threats to the police and believes they are from her family.
- A year after arriving in Australia she began attending church and converted to Christianity in 2016 after experiencing a miracle in relation to her health. She attends the [Church 1] in [Suburb 1] and the [Church 2] in [Suburb 2] because the sermons are in Farsi. She told her mother and her sister in Iran about her conversion.

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<sup>1</sup> "The Game of Life and How to Play It Quotes: by Florence Sovel Shinn" at <https://www.goodreads.com/work/quotes/612510-the-game-of-life-and-how-to-play-it> accessed on 13 December 2018; Florence Scovel Shinn, "Excerpt from The Game of Life and How to Play it", 1 January 1925, CIS21717

- In 2016 an Iranian man started stalking her as he wanted to marry her. She reported him to the police and an intervention order was made against him. He threatened her and told her that he has told the Iranian authorities that she has converted to Christianity and she will be stopped at the airport if she was ever to return to Iran.
- She is now suffering from [Medical Condition 1] and [Medical Condition 2].
- She fears harm on return to Iran from the Iranian authorities and her family as a result of her conversion to Christianity, as a woman, as a woman who is being forced into marriage and as a failed asylum seeker returning from western country.

## Refugee assessment

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11. 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

12. 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.
13. The applicant provided her original Iranian passport and a copy of her birth certificate and accredited translation which confirms her claimed identity. I accept her claimed identity and that she is a citizen of Iran and that Iran is the receiving country for the purpose of this assessment.
14. In assessing the applicant’s credibility, I have given weight to the fact that she provided a consistent account of her experiences in Iran since her first “Arrival and Induction Interview” held with Departmental Officers in July 2013. I also found oral evidence during her protection visa interview held on 10 April 2018 to be convincing and un-exaggerated and her responses to the delegate’s questions were without hesitation.
15. I found the applicant’s oral evidence in regards to the reasons for why she no longer believes in Islam to be convincing. She claimed that she was born into a Muslim family without choice but

that she always believed in, and spoke to, God and asked God to save her. She claims she had to practise Islam because her family was very strict but did not believe in those things. She questioned Islam her entire life and gave an example where she questioned why their prophet had 40 wives which she felt was not a good thing and unfair, particularly given her father had two wives and her mother suffered as a result and she did not want the same thing to happen to her. She explained that she felt that women had no place in Islam and that that women are victims as they could not complain about anything and are expected to stay silent. She said that Islam always made her feel scared and guilty.

16. I accept her claim that she was in a relationship with someone in Iran for a number of years, and that her family did not approve of him. I accept that her boyfriend passed away in [unfortunate circumstances] six months prior to coming to Australia and consider it plausible that this would have had a significant impact on her mental health as she claims. I accept that a friend gave her a book by Scovel Shinn to help her during this time and that there were affirmations in the book that she repeated all the time because it gave her peace. I accept that she later realised that the affirmations were taken from the Bible and, when she found out, she wanted to know more about Christianity. In accepting these claims I have given significant weight to information provided by the delegate which indicates that the applicant had with her, upon arrival to Australia, a handwritten note from the writings of Scovel Shinn. During the protection visa interview the delegate asked the interpreter to interpret this note which the applicant indicated was from "that book". Though it appears the interpreter struggled to interpret the language of the note, she interpreted it as "Today your will be done because today is perfect and the best day. I will be grateful for this perfect day. Today a miracle will happen one by one. The good moments never stop". Sources before me indicate that in Scovel Shinn's book "The Game of Life and How to Play It", she writes "'Make an affirmation immediately upon waking. For example: 'Thy will be done this day! Today is a day of completion, I give thanks for this perfect day, miracle shall follow miracle and wonders shall never cease.' Make this a habit, and one will see wonders and miracles come into his life.'"<sup>2</sup> Given the similarities, I am satisfied the note that the applicant had with her on arrival to Australia was likely to be this quote. Sources also confirm the applicant's claim that the writings by Scovel Shinn were significantly influenced by Biblical teachings.<sup>3</sup>
17. During the protection visa interview the applicant said that, a year after arriving to Australia, her brother took her to a church in order for her not to be alone and to have something to do and to find out about church because she was feeling depressed. The applicant provided an honest account of the fact that she did not attend church regularly for the first three years as she was very depressed, although many of the church congregation used to visit her and take her out and helped her. She explained that, although the church could help her with her depression, she had gotten worse and needed treatment in order to feel better. This is corroborated by a letter she provided from her psychologist dated [in] April 2018. In her letter, the psychologist indicated that she had been treating the applicant since June 2015 for management of her [Medical Condition 3] and [Medical Condition 1]. She indicated that the applicant has been taking [Treatment 1] and [Treatment 2] for the management of her mental health symptoms and assessed that the applicant requires ongoing psychological treatment.
18. The applicant explained that, in 2016, she had an accident and fell into a hole and was admitted to hospital due to subsequent injury to her [Body Part 1] and was told by the surgeons that she was going to lose her [specified sensory function] because she had internal

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<sup>2</sup> "The Game of Life and How to Play It Quotes: by Florence Sovel Shinn" at <https://www.goodreads.com/work/quotes/612510-the-game-of-life-and-how-to-play-it> accessed on 13 December 2018

<sup>3</sup> Florence Scovel Shinn, "Excerpt from The Game of Life and How to Play it", 1 January 1925, CIS21717

bleeding in her [Body Part 2] and needed surgery. She felt very bad as a result of this and did not know what to do and prayed to get well. She explains that when she woke up from the surgery she still had her [specified sensory function] and was surprised and amazed and believed that it was a gift from God and, although she still has some problems as result of the surgery, she is grateful that she did not lose her [specified sensory function]. As a result of this experience, which she considers to be miracle, she attended church and Bible study more often and told the congregation what happened to her and took her interest in Christianity more seriously and was eventually baptised in December 2016. She stated that “He” selected her to be “His” child and to be here and saved her. I found the reasons for the applicant’s more serious engagement with Christianity after her accident and surgery to be convincing. At the protection visa interview the applicant provided the delegate with a copy of her baptism certificate which confirms that she was baptised [in] December 2016 at [Church 1]. The applicant also provided medical documents which confirm that she suffered a [specified injury] due to a fall in October 2016 and had surgery shortly thereafter.

19. The applicant provided a letter from the [church leader] at [Church 1] dated [in] April 2018. The Pastor confirmed that the applicant had been attending that church since 2013 and since that time has continued to attend the church regularly. She also confirmed that the applicant was baptised [in] December 2016 and began to actively serve the church in [specified ministry]. It notes the applicant established friendships with both their church leaders and church members. The Pastor has personally met the applicant in 2013 and has continued to see her regularly at church serving and growing in her new faith. The letter from the applicant’s psychologist also noted that the applicant reported that she found “the respect and peace in connecting with Christianity” and she has been able to overcome a lot of her fears and anxieties partly due to the impact of her faith on her ways of thinking and life views.
20. I also note that the applicant was able to answer general questions about Christianity and explain the significance of Easter and I have accepted the submission that the interpreter at the protection visa interview was not familiar with Christian terminology and have given more weight to the new translation provided to the IAA of some of the responses provided by the applicant. The new translation of her evidence indicates that the applicant provided an accurate understanding of the significance of it Easter and expressed it in appropriate Christian terminology such as references to “resurrection” and explained that “every fruit we plan, everything you plant in this worked you will harvest in the other world”.
21. Having considered the evidence before me, I am satisfied the applicant has genuinely converted to Christianity.
22. I am satisfied that the applicant has attended church and was baptised in Australia otherwise than for the purpose of strengthening her claims for protection and I find that s.5J(6) of the Act does not apply
23. In her statement the applicant claimed that, if she is forced to return to Iran, she will want to continue to practise Christianity and I have given weight to her regular attendance at church in the last two years and her participation in Church activities. I am satisfied that the applicant will continue to practise her Christian faith and I am satisfied there is a real chance she will seek to engage in communal worship if she were to return to Iran.
24. I accept the applicant’s claim that she was stalked by an Iranian man in Australia who wanted to marry her as she has provided a copy of the Intervention Order made against him which detailed her concerns against him. I accept that he told her that he informed the Iranian authorities about her Christian conversion but there is no other credible evidence before me to

indicate that he actually did so. I am not satisfied on the evidence he has informed the Iranian authorities about the applicant's Christian conversion or will do so in the reasonable foreseeable future.

25. The applicant claims that in Iran the punishment for converting to Christianity is execution. Country information before me indicates that the official religion of Iran is Shi'a Islam and, a child born to a Muslim father is considered to be Muslim. Under Iranian law, a Muslim who leaves his or her faith or converts to another religion can be charged with apostasy. Though this is not an everyday occurrence, authorities continue to use religiously-based charges including Muslim-born converts to Christianity. DFAT assesses that those accused of religiously-based charges are also likely to face charges related to national security. They are unlikely to have adequate legal defence, and are likely to be convicted.<sup>4</sup>
26. Country information before me indicates that 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. As a result of these prohibitions, Iranian Christians who are not members of the recognised ethnic minority churches generally practise in underground 'house churches'. Iran nevertheless has a significant and growing unrecognised Christian population and a high percentage of unrecognised Christians in Iran are Farsi-speaking converts from Islam. Authorities have interpreted the growth in house churches as a threat to national security: official reports and the media have characterised house churches as 'illegal networks' and 'Zionist propaganda institutions'. Authorities have periodically cracked down on house churches, focusing particularly on the leaders of churches that actively broadcast, proselytise, or seek out new members. Security forces have reportedly increased the frequency of these crackdowns under the Rouhani administration, although probably not as a result of any direct instruction from the government. The judiciary has handed down long sentences in relation to house church activities: in July 2017, the Revolutionary Court convicted eight Christians of 'acting against national security through the establishment of a house church' and 'insulting Islamic sanctities', and sentenced the group to between ten and 15 years' imprisonment. According to international observers, as of December 2016 approximately 90 Christians were in detention or awaiting trial because of their religious beliefs and activities. Human rights observers have reported that authorities have subjected Christians in detention to severe physical mistreatment, including beatings and solitary confinement as an attempt by authorities to get information or confessions out of them or to recant. Those Christians whose cases are brought to court tend to be convicted on political rather than explicitly religious charges and sentences issued to Christians tend to range between one year and eight years.<sup>5</sup>
27. In 2018 DFAT further noted that international observers advise that Iranians who convert to Christianity outside the country are unlikely to face adverse attention from authorities upon return to Iran, provided they have not previously come to the attention of authorities for political activities conducted in Iran, maintain a low profile and do not engage in proselytisation or political activities within the country. DFAT assesses that small, self-contained house church congregations that maintain a low profile and do not seek to recruit new members are unlikely to attract adverse attention from authorities beyond monitoring and, possibly, low-level harassment. Members of larger congregations that do engage in

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<sup>4</sup> UK Home Office, "Country Policy and Information Note: Iran: Christians and Christian converts", 27 February 2017, OG6E7028813; DFAT, "DFAT Country Information Report – Iran", 7 June 2018, CIS7B839411226

<sup>5</sup> UK Home Office, "Country Policy and Information Note: Iran: Christians and Christian converts", 27 February 2017, OG6E7028813; Austrian Centre for Country of Origin and Asylum Research and Documentation, "Iran: House Churches; Situation of Practising Christians; Treatment by Authorities of Christian Converts' Family Members", 14 June 2017, CISED50AD4620; DFAT, "DFAT Country Information Report – Iran", 7 June 2018, CIS7B839411226

proselytisation and have connections to broader house church networks are more likely to face official repercussions, which may include arrest and prosecution.<sup>6</sup>

28. Other sources indicate that any gathering of Christians, including social gatherings, such as birthday or engagement parties, is also perceived by Iranian security officials as a potential underground church activity and threat against national security. Christian Today reported in October 2016 that three Iranian men who converted to Christianity to Islam are appealing against criminal convictions for drinking alcohol (communion wine) and have also been charged with acting against national security.<sup>7</sup> Finnish Immigration Service report on Christian converts in Iran, dated 21 August 2015, citing various sources stated no research data on the return of Christian converts to Iran is available, but the common perception is that they will get into trouble mainly if they try to proselytise or otherwise make their religious views public.<sup>8</sup> Mansour Borji of the Christian rights group, Article 18, has stated that the publicly available figures on Christian arrests and detentions are significantly lower than actual numbers, as many arrestees fear negative government reactions if they come forward.<sup>9</sup>
29. I am satisfied that Christian converts in Iran who do not modify their behaviour (by acting discreetly and secretly in their worship and maintaining a low profile) and who attend illegal house churches face more than a remote possibility of being subject to monitoring, a raid by the Iranian authorities, arrest and subsequent detention during which there is a real chance they will be subjected to torture or significant physical abuse. For these reasons, I am satisfied that there is a real chance the applicant would face monitoring, harassment, arrest, detention and torture or significant physical abuse for expressing her religious faith by attending an underground house church in Iran. I am satisfied that such harm would amount to significant physical harassment, significant physical ill-treatment, and a threat to her liberty and would amount to serious harm. I am satisfied that this harm is systematic and discriminatory conduct carried out by the Iranian authorities against Christian converts from Islam for the essential and significant reason of their religion.
30. Country information indicates that an extensive network of police, security, and intelligence services exercises effective control over almost all areas of the country.<sup>10</sup> For this reason, I consider the real chance of persecution relates to all areas of the receiving country and do not consider there to be effective protection available to the applicant. I also consider that the applicant cannot reasonably be expected to renounce her religious conversion or conceal her Christian beliefs to avoid a real chance of persecution.
31. I am satisfied the applicant's fear of persecution on the basis of her conversion to Christianity is well-founded.
32. As I have found that the applicant has a well-founded fear of persecution in respect of her conversion to Christianity, I have not considered her other claims for protection.

### **Refugee: conclusion**

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

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<sup>6</sup> DFAT, "DFAT Country Information Report – Iran", 7 June 2018, CIS7B839411226

<sup>7</sup> UK Home Office, "Country Policy and Information Note: Iran: Christians and Christian converts", 27 February 2017, OG6E7028813

<sup>8</sup> Ibid.

<sup>9</sup> The International Campaign for Human Rights in Iran, "The Cost of Faith: Persecution of Christian Protestants and Converts in Iran", 1 January 2013, CIS25475

<sup>10</sup> DFAT, "DFAT Country Information Report – Iran", 7 June 2018, CIS7B839411226

## 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**

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.