



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA21/09185

Date and time of decision: 21 June 2021 09:43:00

M Brereton, 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 a 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. He departed Iran legally [in] May 2013 and arrived on Christmas Island [in] May 2013. On 23 September 2017, he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 13 May 2021, a delegate of the Minister for Immigration (the delegate) refused to grant the SHEV.
2. The applicant claimed to fear harm because he is a homosexual or bisexual man, because of an imputed political opinion and his participation in the Green Movement protests, because he is a non-practising Muslim, and because he will be a returned asylum-seeker who has been in the West.
3. The delegate accepted the applicant's claims as to identity and origin. The delegate did not accept that the applicant is a homosexual or bisexual man, or his claimed history in that respect. The delegate accepted the applicant's other claims but having regard to country information, was not satisfied that he faced a real chance or real risk of relevant harm should he return to Iran.

Information before the IAA

4. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. On 8 June 2021, the applicant provided the IAA with a statutory declaration and some attachments. Parts of the statutory declaration refer to the delegate's decision and make argument in respect of that decision and I am satisfied that those parts are submission and are not new information.
6. Part of the statutory declaration refers to the interview with the delegate on 6 April 2021 (the interview) and the delegate's finding that the applicant's evidence about his relationship and interactions with the tutor was simplistic and lacking in detail. The applicant submits that he thought his written statement was sufficient and, if the delegate had concerns or questions, they could have asked, and the applicant would have answered. He then provides some further detail about his interactions with the tutor. To the extent that this is new information, I am not satisfied that the applicant could not have provided it at the interview or before the delegate made the decision (s.473DD(b)(ii)). However, I am satisfied that it is credible personal information. Further, the delegate did not accept the applicant's claims in relation to the tutor (based partly on the lack of detail) and I am satisfied that this new information, had it been known, may have affected the consideration of his claims (s.473DD(b)(ii)). There is no apparent reason why the applicant could not have provided this further information during the interview. However, I note that after asking whether the applicant had attempted to contact the tutor since leaving Australia, the delegate said that they had no further questions around this subject 'at the moment' and moved on. They did not return to this subject or ask further questions about the applicant's experiences in Iran. Given the relevance of this evidence to the applicant's central claims and issues of credibility, I am satisfied that there are exceptional circumstances to justify considering this information.
7. The attachments are a screen shot of a website called '[Site 1]' which, according to its metadata, was taken on 8 June 2021, and a media article dated May 2021, reporting the death

of a homosexual man in Iran. These attachments were not before the delegate and I am satisfied that they are new information. There is no day of publication for the media article, but I am satisfied from the context of the article that it was published in around mid-May at the earliest. I am satisfied that both attachments post-date the delegate's decision and could not have been given to the Minister before that decision was made (s.473DD(b)(i)).

8. The [Site 1] screen shot appears to be the dating website that the applicant discussed with the delegate during the interview. The review material contains some screen shots from this website which were provided after that interview. The earlier screen shots show an unidentified person (not the applicant, based on comparison with photographs in the review material) and a brief online chat said to be between the applicant and a former partner, which does not identify the applicant. The screen shot now provided does not contain any information identifying the applicant, or any indication that he is active on this application in any way. It does not provide any additional information to that which was before the delegate, and I am not satisfied as to the matters in s.473DD(b)(ii). Further, in any event, for the reasons given below, I accept that the applicant identifies as a bisexual man and that he has used this website. The new screen shot does not provide any additional evidence or add to the applicant's claims in this regard, and I am not satisfied that there are exceptional circumstances to justify considering it.
9. The media article reports the killing of a homosexual Iranian man by his family. It refers to official discrimination as well as family/community discrimination, honour killings and the situation facing homosexual men in Iran. It is recent information that relates to the applicant's claimed profile and fears should he return to Iran. I am satisfied that this is credible personal information that, had it been known, may have affected the consideration of his claims. I am satisfied that there are exceptional circumstances to justify considering it.

Applicant's claims for protection

10. The applicant's claims can be summarised as follows:
 - He was born into a Muslim reformist family in Tehran, Iran.
 - His family did not pray, and he did not like the Islamic restrictions at school.
 - When he was a young student, he began a homosexual affair with his tutor. This continued for many years. He battled with his feelings and then in 2008, he met a girl he liked. He ended the affair with his tutor, but the girl rejected him after he confessed to her about the affair.
 - In 2009, he attended Green Movement demonstrations. After the elections, he received letters from the authorities demanding that he report to them. He was scared that his affair might be discovered and did not report.
 - In 2012, he met his tutor again and the affair resumed. However, his tutor's wife discovered them and threatened to report them. The applicant was fearful and told his father what had happened, and with his father's help he left Iran.
 - His father told him that his tutor has been arrested and imprisoned.

Refugee assessment

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 claims to be a citizen of Iran. At his entry interview on 21 June 2013 (the entry interview), he said that he left Iran on a false passport, but in his statement in his SHEV application, he claims, and I accept, that the people smugglers told him to say this. He said that he departed Iran on a lawful passport, but this was disposed of during the journey to Australia. He has provided copies and translations of an Iranian National Identity Card, driver’s licence, and Military Completion Card. He has been assisted by Farsi (Persian) interpreters during his engagements with the Department of Home Affairs. He has not claimed, nor is there any evidence indicating that, he has any right to return to, or reside in, any other country. I accept his claims as to identity and origin and I find that he is a citizen of Iran from Tehran, and that Iran is the receiving country for the purposes of this review.
14. The applicant claims that he had a homosexual affair with his tutor over several years. He did not raise this claim in his entry interview. He first raised it in his SHEV statement in 2017 and provided further information during the interview. He claims that it started at a young age (when he was in middle school) and continued off and on over some years until he undertook compulsory military [service]. After he completed this service, he met a girl and began to experience feelings for her. He told the tutor that he wanted to ‘break up’ and developed a relationship (including a sexual relationship) with the girl. The applicant decided to tell her about the incidents with the tutor, but after he did so, she rejected him. The applicant does not claim to have had any other relationships or sexual encounters between 2009 and 2012, when he met the tutor again by chance. The applicant claims that the relationship with the tutor rekindled in early 2012 and they went to [Country 1] for a holiday, travelling separately but meeting up there. After they returned, the tutor invited the applicant to his home while

his wife and children were supposed to be away, but the wife came home unexpectedly and caught them. The wife said she would report them to the authorities and the applicant was terrified. He went home and wanted to kill himself. His father found him and saw how distressed he was, so he confessed to his father, who helped him leave Iran. His father has told him that the tutor was later arrested and is now in prison.

15. The applicant provided the delegate with two reports considering the long-term effects of child sexual abuse. Although these reports focus on Australian experiences (and, I acknowledge, do not consider religious or cultural attitudes present in Iran), I consider that they are still informative. The first report¹ presents the results of studies of abuse victims and indicates that there was 'considerable instability and change' between the responses given by victims at 18 years of age, and then three years later at age 21. While there was no evidence to suggest that these responses were influenced by the psychological state of participants at the time, it does indicate that using different ages for retrospective reporting is likely to provide different results. Children who have been sexually abused are more likely to have been targeted by the perpetrator specifically because of their particular vulnerabilities and are more likely than other children to be re-victimised both as adolescents and adults. There are also indications that sexual abuse by clergy and other powerful authority figures (as relevant here) may have particularly devastating effects. Clergy-perpetrated sexual abuse 'can catastrophically alter the trajectory of psychosocial, sexual, and spiritual development' and the damaging impact of such abuse, which commonly occurs around the ages of 11–14 years (as relevant to the applicant) has been attributed to the way in which it undermines the victims' trust, sense of self, sexual identity, and social and cognitive development. There is also increasing evidence that children who have been abused, and in particular sexually abused, have greater difficulties with interpersonal relationships and especially trust compared with non-abused individuals. This can lead to greater difficulties in interpersonal, and particularly intimate relationships, among adults who were sexually abused in childhood. This may include increased instability in relationships, more sexual partners, an increased risk of sexual problems, and greater negativity towards partners.
16. The second report² opines that when a child is not able to avoid the abusive situation physically, he must learn to avoid the memories and feelings about the abuse psychologically. Thinking about the abuse triggers the feelings that are attached to the memories, so the child learns ways to not remember or think about the abuse. There are multiple strategies children develop to do this and these may include attachment to the perpetrator, sex with other people, avoidance of relationships, and suicidal ideation.
17. The delegate asked the applicant about his sexuality in Australia, how he feels about it, how he expresses it, and questions about relationships the applicant has had here. I agree with the delegate that the applicant provided little detail which would, in normal circumstances, tend to cast some doubt on the claims. However, the applicant's evidence should not be considered on the basis that he is simply a homosexual or bi-sexual man. In my view, the applicant's experiences as a minor go some way to providing explanations for his limited evidence. This is also consistent with his submission to the IAA, which states that the applicant liked the tutor but 'had a naggy feeling about him' because the relationship started when the applicant was a child and vulnerable, and part of him blames the tutor for taking away the applicant's

¹ Judy Cashmore and Rita Shackel, Australian Institute of Family Studies, Child Family Community Australia, 'The long-term effects of child sexual abuse', CFCA Paper No. 11 2013, <https://aifs.gov.au/cfca/sites/default/files/cfca/pubs/papers/a143161/cfca11.pdf>.

² 'Dealing with the effects of childhood sexual abuse', <https://livingwell.org.au/information/dealing-effects-childhood-sexual-abuse/>

childhood. As the applicant got older, the relationship became more comfortable, because he knew the tutor so well.

18. The applicant's evidence indicates that he was initially disturbed by the tutor's actions but eventually developed an attachment to him. He was unsure of his sexual orientation and stopped seeing the tutor during his compulsory military service, following which he developed a relationship with a girl. He did not seek any other relationships after she rejected him and eventually re-connected with the tutor. He told the delegate that he has not had any long-term relationships in Australia but has met people through a nightclub and a gay website. He had a brief relationship with a man here, but the man wanted to go to clubs and other events, and the applicant prefers to remain at home.
19. While I acknowledge the delegate's concerns in the decision record about aspects of the applicant's testimony regarding his sexual identity, I am of the view that the applicant's experiences are consistent with the information on child sexual abuse survivors, and this information also supports aspects of the applicant's claims. Having regard to all of the circumstances, including the applicant's age, and the identity/position of the tutor, I do not find the applicant's evidence not credible. I accept that the applicant had the homosexual experiences with the tutor as he has claimed. I also accept that the applicant has had some homosexual experiences in Australia, and that he prefers relationships with men to relationships with women. It follows that I am satisfied that the applicant has engaged in same sex relationships before and since his arrival in Australia, and I am satisfied that s.5J(6) of the Act does not apply to his conduct in Australia.
20. The applicant believes that the tutor's wife identified the tutor and the applicant to the Iranian authorities, and that the authorities will identify the applicant at the airport and imprison him should he return. He said that his father told him that the tutor has been imprisoned, but the applicant does not have any other evidence of this. His statutory declaration to the IAA states that he did not attempt to contact the tutor because he had no means of doing so. His father was the one who told him that the tutor was in prison, so he thought there was no point in asking him to contact the tutor. The only other person he could have contacted was the tutor's wife but, as she was the one who reported them, that would only 'complicate' matters.
21. I accept that the applicant's father may have told him that the tutor was in prison, but the applicant said (when asked by the delegate) that the Iranian authorities have not come looking for him or asking about him in connection with the tutor. I consider it is implausible that if the tutor was imprisoned for having sex with the applicant, the authorities made no efforts to at least locate the applicant and obtain his evidence. I am not satisfied on the evidence before me that the authorities are aware of the applicant or that he is of any adverse interest to the authorities for any reason connected with the tutor. I am not satisfied that the applicant is on any list, or that he will be identified at the airport, or that there is a real chance he will be subjected to any harm as a real or imputed homosexual because of the incidents with the tutor.
22. The applicant also claims to have an adverse political profile because of his participation in the Green Movement protests. According to information before me, after the June 2009 presidential election in Iran, up to 3 million supporters of the defeated reformist candidate took to the streets of Tehran to protest the official verdict that Mahmoud Ahmadinejad had been re-elected in a landslide. These protests became known as the 'Green Movement', after the reformist's campaign colour. In response, the government despatched security forces, including the paramilitary forces. These forces beat thousands of protesters and arrested

hundreds, while snipers killed dozens. By early 2010, the government had succeeded in quashing public displays of opposition.³

23. The applicant does not claim that he was involved in organising or leading the protests. He told the delegate that people went out onto the streets and he went with them. However, he was questioned by security forces who spoke to him badly and slapped him. He was released and allowed to go home but a few weeks later, he received a summons demanding that he present himself to the security police for questioning. He has provided a copy and translation of a document purporting to be this summons. He told the delegate that he was scared about what would happen and did not go to the office. The delegate asked if anything else happened and the applicant said no.
24. The Australian Department of Foreign Affairs and Trade (DFAT)⁴ assesses that the Green Movement represented a major challenge to the Iranian republic, but it is likely that those who had a more active role and a higher profile would face continuing official attention and harassment. DFAT assesses that given the time that has elapsed, it would be 'highly unlikely' that those arrested at the time for simply participating in the Green Movement protests (as was the case with the applicant) would remain imprisoned or be the subject of continuing surveillance or harassment. DFAT's assessment is supported by other information in the review material, which also indicates that while organisers and agitators risked serious punishment in the past, persons who were not otherwise of ongoing interest or who have not started up a 'new activity' are unlikely to find themselves under scrutiny from the authorities.⁵
25. I accept that the applicant was questioned, slapped and then issued a summons in the immediate aftermath of the demonstrations in 2009. He did not attend the office as directed, but he remained in Iran until 2013 without any further summonses, visits, harassment, or enquiries from the authorities. He also obtained a passport and travelled on holiday to [Country 1] in 2012. He was able to exit and return to Iran without any questioning or adverse interest by the authorities. Having regard to his low-level involvement as a demonstrator (among up to three million other demonstrators), and the lack of any ongoing interest shown by the authorities in the four years he remained in Iran, I am not satisfied that he will be of any interest to the authorities now, or in the reasonably foreseeable future, for any real or imputed political opinion, his attendance at the 2009 demonstrations, or his failure to answer the summons. I am not satisfied that he faces a real chance of harm for this reason.
26. I have found that the applicant is not known to, or of any interest to, the Iranian authorities because of the incidents with the tutor or for any real or imputed political opinion. However, I accept that the applicant is attracted to males and females and that he identifies as bi-sexual, but with a preference for men. Chapter 2 of the *Iranian Penal Code* explicitly criminalises same-sex relations, including where consensual in nature. Penalties for males include flogging, but can also lead to the death penalty, even on first conviction. DFAT reports that Iran does not publish official statistics or details relating to executions, which makes it difficult to estimate how many individuals have been executed for same-sex acts, and whether those acts were consensual. There are also numerous media reports relating to the execution of men who have engaged in same-sex acts, although, in many cases, the media has reported that these acts involved non-consensual sexual encounters, including against minors. The issue is further

³ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report – Iran', 14 April 2020, 20200414083132.

⁴ DFAT, 'DFAT Country Information Report – Iran', 14 April 2020, 20200414083132.

⁵ International Campaign for Human Rights in Iran (United States), 'Former Reformist Member of Parliament Arrested Upon Return to Iran', 27 July 2015, CXBD6A0DE10786; 'Protesters from 2009 election sentenced in absentia', Radio Zamaneh (Netherlands), 15 July 2014, CX323256; 'Rude Homecoming For Iranian Dissidents', Esfandiari, G, Radio Free Europe/Radio Liberty, 29 April 2014, CX320500.

complicated as the Penal Code does not recognise rape as a separate crime: it treats heterosexual and homosexual rape as forms of adultery and sodomy, respectively. Moreover, in an actual male-on-male rape case, the victim faces substantial risk in filing a complaint, as if the alleged rapist succeeds in arguing that the act was consensual, the victim could be executed for being the passive partner to an act of sodomy. International organisations report that the Iranian authorities are aware of the negative international reactions that large-scale persecution and severe punishment of homosexual individuals creates. Where courts find offenders guilty in same-sex relations cases, reporters observe that, in most cases, they generally refrain from imposing the death penalty and instead order floggings.⁶

27. In Iranian society, there is a strong societal taboo against homosexuality, particularly among older, more conservative Iranians — one local source said it was impossible for Iranians, as Muslims, to accept homosexuals. While official rhetoric against homosexual individuals and practices has reduced since the Ayatollah Khomeini era, high-level officials have continued to issue derogatory statements about homosexuality. The government censors all materials related to Lesbian, Gay, Bi-Sexual, Transgender and Intersex (LGBTI) issues, including blocking websites or content within sites that discusses such issues. Non-government organisations are unable to work openly on LGBTI issues. The law does not prohibit discrimination based on sexual orientation and gender identity, and no criminal justice mechanisms exist to prosecute those accused of committing hate crimes against LGBTI persons. It is not possible for an LGBTI person to seek state protection, as doing so would be an act of self-incrimination and leave them vulnerable to arrest and prosecution.⁷
28. Local sources told DFAT that younger Iranians, particularly in more progressive parts of major cities, are increasingly more tolerant, but that, on balance, homosexuality is not openly discussed, and gay people face severe discrimination. This includes abuse and harassment from family members, work colleagues, religious figures, and school and community leaders. Ostracism from one's family is common, particularly in the case of conservative families.⁸
29. However, international observers report that homosexual and bi-sexual persons who do not openly reveal their sexual orientation and keep a low profile are able to move freely within society, particularly in larger cities that offer greater anonymity. It is not uncommon in Iran for people of the same sex to live together, although this is not necessarily associated with homosexuality. The rise of social media means activities such as dating now largely take place online in chat rooms, dating sites and via social media platforms rather than in established locations. There are two 'gay friendly' parks in Tehran, and although these are patrolled by the police, there are no reports of recent arrests. There are no gay bars in Iran.⁹
30. Information provided by the applicant reports that in larger cities, the authorities do not pursue a policy that aims to fight homosexuality 'with fire and sword' but, according to some sources, the authorities would intervene immediately once there is activism or if they believe that some activities might give Iran a bad name abroad. All of the investigative services are mandated to pursue homosexual activities, but the Basij¹⁰ is the most active. The majority of arrests relating to homosexuality take place at private home parties, initially on grounds of illegal alcohol consumption, dress code violations and 'debauchery'. Some interviews with persons accused of homosexual behaviour indicate that the authorities use harsh measures

⁶ DFAT, 'DFAT Country Information Report – Iran', 14 April 2020, 20200414083132.

⁷ DFAT, 'DFAT Country Information Report – Iran', 14 April 2020, 20200414083132.

⁸ DFAT, 'DFAT Country Information Report – Iran', 14 April 2020, 20200414083132.

⁹ DFAT, 'DFAT Country Information Report – Iran', 14 April 2020, 20200414083132.

¹⁰ The Basij Resistance Force is a volunteer paramilitary organisation operating under the command of the Islamic Revolutionary Guard Corps.

during arrests and interrogations. Intimidation, blackmailing, incommunicado detention, rape, torture, coercion to sign (false) confessions and extrajudicial punishments such as flogging are widely practiced during detention and interrogation. In most cases, authorities try to press the detainee to make a confession of homosexual conduct and/or to reveal the identity of other homosexual persons. The general social attitude towards LGBT persons is 'don't ask, don't tell' but due to social stigma, homosexual persons have a greater fear of how they are treated by their immediate surroundings than of their treatment by the authorities. If a family member reports a person as being homosexual, this could result in the person's dismissal from work or university. For LGBT persons, it is easier to keep a low profile in the large cities. The authorities are not inclined to offer protection to LGBT persons who feel discriminated by members of society.¹¹ Other information notes that the difference between being transgender and gay is not well understood in Iran, even within the medical profession, and there have been reports of gay men being pressured into gender reassignment surgery as a way of 'regularising' their legal position and avoiding the risk of execution.¹²

31. The media article provided to the IAA¹³ gives a disturbing report of a young homosexual man in Khuzestan, Iran, who asked for an exemption from military service due to his homosexuality (which is considered a psychological disease). His half-brother discovered this paperwork and relatives took the young man to a remote village and murdered him. The article notes that there have been no arrests. Although tragic, this article does highlight a number of differences between the applicant's profile and the victim. The victim's sexuality was apparently known by some of his immediate family, some of whom had threatened him previously about it. His half-brother became aware of it through seeing official paperwork. The victim's social media profile included photographs of the victim in makeup and dressed in a manner that might appear flamboyant to conservative Iranians.
32. The applicant claims, and I accept, that his father was the only member of the family who was aware of what had happened with the tutor. The applicant's father has since passed away. The applicant said that he is too shy to discuss his sexuality with his mother or siblings. There is no evidence before me indicating that he has any close friends in Iran who are aware of his history with the tutor, or his sexuality now. He told the delegate that he is shy and does not discuss this aspect of his life with his family or others, and I find that he will not discuss it should he return to Iran. However, I cannot discount completely that his family may become aware, particularly should he commence a relationship in Iran.
33. The applicant claims that in Australia, he attends a gay nightclub occasionally and has also used a gay website on a few occasions. In a post-interview statutory declaration dated 18 April 2021, he referred to walking with boyfriends, going to nightclubs, holding hands in public, and having romantic dinners. He is not otherwise involved in the gay scene, does not attend LGBTI functions or activities, and does not publicly display his sexuality here. He said that he is looking for a partner to be with and to love and has had one relationship in Australia. He does not go out often and said that he prefers staying in.

¹¹ Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), 'Iran: Women, children, LGBTI persons, persons with disabilities, "moral crimes": COI Compilation', 1 December 2015, CISEC96CF14191. See also: Human Rights Watch, 'Iran: Discrimination and Violence Against Sexual Minorities', <https://www.hrw.org/news/2010/12/15/iran-discrimination-and-violence-against-sexual-minorities>; United States Department of State, 'Iran 2016 Human Rights Report', 3 March 2017, OGD95BE926964.

¹²'Everything you need to know about being gay in Muslim countries', <https://www.theguardian.com/world/2016/jun/21/gay-lgbt-muslimcountries-middle-east>.

¹³ 'Alireza Fazeli Monfared wanted to live as a free gay man in the West. His family in Iran beheaded him days before his dream came true, say activists', <https://www.insider.com/alireza-fazeli-monfared-iran-gay-man-beheaded-family-honor-killing-2021-5>.

34. Although the applicant has not presented publicly and openly as a homosexual or bi-sexual man in Iran in the past, he claims to have done so (albeit to a limited degree) in Australia, such as by holding hands in public. He does not specify whether the romantic dinners were at public venues or at home, but I am prepared to accept that he has presented publicly, at least to a degree.
35. The applicant claims, and I accept, that he wants to have a relationship and that he prefers men. I accept that if he returns to Iran, there is more than a remote chance that he will seek a relationship and I am satisfied that there is at least a chance that the applicant may display some aspects of his sexuality in Iran, albeit at the low-level that he had demonstrated in Australia. Even if his lifestyle and presentment remained at the low-level that he has displayed in Australia, I cannot discount the possibility that his family, the authorities, or others, in Iran may become aware of, or suspect, his sexuality, particularly given the information indicating the limited 'gay-friendly' venues in Iran.
36. Having regard to the country information cited above, I am satisfied that if the applicant's sexual identity was discovered or imputed in Iran, there is a real chance that he will face serious harm in the form of arrest, imprisonment, and severe physical mistreatment such as flogging, or that he may be sentenced to death. I am satisfied that that the essential and significant reason for the harm is the membership of a particular social group, being a man who engages in same-sex relationships. I am satisfied that the persecution is systematic and discriminatory and that, as the Iranian state is the agent of harm, the real chance of serious harm relates to all areas of Iran. I am further satisfied that s.5J(2) and s.5J(3) of the Act do not apply. I consider that effective protection measures are not available to the applicant as the harm would be inflicted on the applicant by the Iranian authorities. I am also satisfied that requiring the applicant to conceal his true sexual identity would constitute an impermissible modification of behaviour under s.5J(3)(c) of the Act.
37. Having regard to the above, I am satisfied that the applicant has a well-founded fear of persecution in Iran.

Refugee: conclusion

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

Decision

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

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

Applicable law

Migration Act 1958

5 (1) Interpretation

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.