



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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IRAN

IAA reference: IAA21/09412

Date and time of decision: 27 July 2021 14:19:00

I Sheck, 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) is an Iranian national from Ahwaz, Khuzestan province. He departed Iran [in] June 2013 and arrived in Australia [in] June 2013. On 30 September 2017 he lodged an application for a protection visa (PV).
2. On 24 June 2021 a delegate of the Minister for Immigration (the delegate) refused to grant the visa. The delegate accepted that the applicant was of Arab ethnicity and was subjected to discrimination in Iran because of this. The delegate also accepted that the applicant had attended protests against the Iranian government in both Iran and Australia. The delegate concluded that the applicant would not face a real chance of serious harm in Iran due to his ethnic background, actual or imputed political opinion or for any other reason.

### Information before the IAA

3. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 18 July 2021 the IAA received a submission on behalf of the applicant from his representative, [Mr A] of [Migration agency]. Section 473DD of the Act provides that the IAA must not consider any new information from an applicant unless satisfied there are exceptional circumstances which justify considering the new information, and the new information could not have been provided to the Minister before the decision was made or is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims. The submission by the applicant's representative restates the information provided to the delegate on 18 May 2021 and addresses the delegate's decision and findings. To that extent, it may be regarded as argument rather than information and I have had regard to it.
5. [Mr A]'s submission discusses in detail a number of claims made by the applicant that were not accepted by the delegate. The first of these was that the applicant's teacher, [Mr B], had been executed by the Iranian government. On this point, [Mr A] has provided an undated online article from [a named organisation] and another from [News source]: "[Title]" dated [September] 2007. These articles confirm that [Mr B] was imprisoned in 2005 and hanged [in] 2007. The articles were not before the delegate and are new information. [Mr A] notes that "the new information in the documents is credible personal information which if known could have affected the primary decision. We believe there are exceptional circumstances for its consideration." The applicant has consistently claimed that the execution of his teacher was a relevant event which led to his departure from Iran. The delegate put to the applicant that he had stated in his arrival interview in 2013 that his teacher had been killed three months earlier. The applicant responded that he had not said this and suggested that there have been interpreter error. The delegate did not further question the applicant on this point. I consider the applicant could have provided this material to the delegate before the decision was made; however in my view the applicant had no reason to think that, without further evidence, the claim might not be accepted. Overall, I am satisfied that the new information is credible personal information which, had it been known, may have affected the consideration of the applicant's claims and that there are exceptional circumstances that justify consideration of the new articles.

6. The delegate did not accept the applicant's claim to have been detained in 2010 and again in 2012. [Mr A] has provided a letter of support from [Mr C], Executive Director of [Human rights organisation 2], dated 15 July 2021, which states that this occurred. A further letter dated 12 July 2021 from [Mr D], Chair of [Community organisation], notes that "we also understand" that the applicant was detained in Ahwaz. The two letters were not before the delegate and are new information. Given that the relevant information in these letters concerns events that occurred in 2010 and 2012, I am not satisfied that the new information could not have been provided to the delegate however I also note that the delegate did not indicate that the applicant's evidence on this matter would not be accepted. [Mr A] contends that "the letters corroborate claims before the delegate based on personal knowledge of their authors concerning the applicant and the situation in Ahwaz." I have some concerns regarding that statement. I note that [Mr C] resides in London and [Mr D] in Australia. The use of the phrase "we also understand" by [Mr D] leads me to conclude that he does not in fact have personal or first-hand knowledge of the applicant's claimed detention in Ahwaz in 2010 and 2012 but has been told that this occurred by the applicant. I am also of the view that [Mr C] is supporting information that was provided to him by the applicant. I note that the letters themselves do not in any event indicate that they have first-hand knowledge of the events in question, but attest to the honesty and trustworthiness of the applicant. I am not of the view that the new information comprises credible personal information which if known could have affected the consideration of the applicant's claims, as in the circumstances I do not consider the information regarding the applicant's activities in Iran is reliable.
7. [Mr A] also contends that the letter by [Mr D] supports that the applicant is committed to the Ahwazi Arab cause and is an active member of the Ahwazian community in Australia. Again, I am not satisfied that the information in this letter could not have been provided to the delegate. I am however satisfied that the information is first-hand knowledge of the author regarding the applicant's activities in Australia as a member of [Community organisation] therefore it is credible personal information which may have affected consideration of his claims. In considering however whether there are exceptional circumstances that justify consideration of this new material, the review material already contains a very similar letter dated 7 May 2021 from the chair of the group "[Human rights organisation 3]". I am not of the view that the new information adds in any material way to the applicant's claims which, for reasons which are set out below, I have accepted. I am not satisfied that there are exceptional circumstances that warrant consideration of [Mr C]'s or [Mr D]'s letters and have not had regard to them.
8. [Mr A] has provided a Statutory Declaration from the applicant's cousin [Mr E], who lives in Australia and describes himself as an Ahwazi [activist]. [Mr E] confirms that the applicant is his cousin. I accept, as did the delegate, that this is the case. [Mr E] notes that he and the applicant used to attend meetings and participated in anti-regime activities in Ahwaz. I am not satisfied that the information in this document could not have been provided to the delegate. For reasons set out below, I have also accepted that the applicant participated in political activities in Ahwaz. Although the Statutory Declaration comprises credible personal information I am not of the view that it advances the applicant's claims for protection in any material way. [Mr A] has asserted that there are exceptional circumstances that warrant consideration of this document but has not specified them and none are apparent to me. I am not satisfied that the requirements of 473DD(a) are met and have not had regard to this document.
9. At the interview with the delegate, [Mr A] submitted that the applicant's mental health was fragile and that if he was returned to Iran he may say something that would lead to him being harmed. Documents before the delegate confirmed that the applicant was involuntarily

admitted to [Hospital] in February 2021 due to mental health issues. A psychiatric referral dated 18 March 2021 was also submitted to the delegate. [Mr A] has now submitted a report dated 17 July 2021 from [Mr F], registered psychologist. This report was not before the delegate and is new information. It could not have been provided to the delegate as [Mr F] first saw the applicant after the delegate's decision was made. [Mr F] notes that he first saw the applicant on 17 July 2021 and diagnoses severe PTSD and depressive disorder with psychotic episodes. I am satisfied that this comprises credible personal information which if known could have affected the consideration of the applicant's claims. As the applicant has recently raised the issue of his mental health conditions and how the symptoms of this may affect his chance of serious harm if returned to Iran, I am satisfied that there are exceptional circumstances that justify consideration of this new information.

10. In addition to the documents discussed above, [Mr A] has referenced an IAA decision in his submissions. He has not provided a copy of this decision. In his submissions [Mr A] quotes, without reference to the IAA Reviewer's sources, what appears to be the Reviewer's analysis of country information relating to ethnic and religious minorities, including in particular Arabs and Ahwazi Arabs. As the IAA reference number indicates it is a 2020 decision, it predates the delegate's decision. I am not satisfied that it could not have been provided to the delegate. As it relates only to country information it does not comprise credible personal information in the relevant sense. I am not satisfied that there are exceptional circumstances that justify consideration of the IAA decision and have not had regard to it.

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

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11. After his arrival in Australia the applicant was interviewed by an officer of the then Department of Immigration and Border Protection on 19 July 2013. Brief details of his claims for protection were included in his PV application. On 18 May 2021 the applicant attended an interview with the delegate ("the PV interview") at which his representative [Mr A] was present. [Mr A] provided submissions and supporting documents to the delegate on 17 May and 18 May 2021. The applicant claims:

- He is of Arab ethnicity. Ahwazi Arabs are discriminated against, persecuted and repressed by the Iranian government. Although the Khuzestan province is rich in petrol their resources are looted by the Iranian government;
- He participated in protests in Ahwaz and was a member of an anti-government Arab group. He was known to the authorities and was constantly arrested and detained by "the Discipline Force";
- One of his teachers was also a member of the anti-government group and was arrested and subsequently executed. The applicant's two uncles and his cousin fled Iran in 2012 and sought asylum in [Country]. The applicant left in 2013. After he left his family received a summons in his name;
- Since he has been in Australia he has continue to undertake cultural and political activities for the Ahwazi cause. He has [protested] and been photographed. He has posted material on-line adverse to the Iranian government;
- If he returns to Iran he will be arrested and executed due to his political activities;
- It was submitted on behalf of the applicant that his mental health state is fragile and that if he is returned to Iran he may say something that would cause him to be harmed.

## Factual findings

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12. The applicant's evidence regarding his family, education and work history has been consistent and I am satisfied that it is as stated. Based on the information provided in his arrival and PV interviews and identity documents, I find that the applicant's background is as follows: he was born on [Date] in Ahwaz, Khuzestan province, Iran and is an Iranian national. He is of Arab ethnicity and Muslim (Shia) faith. He married [in] October 2009 and has no children. He has [sisters] and [brothers]. His mother is deceased; his wife, parents, stepmother and siblings reside in Iran. He completed primary schooling to Grade [Number]. He undertook compulsory military service from [2006] to [2007]. He was employed by his uncle as [an Occupation] from 2002 to 2012, following which he was unemployed. He has been employed in [work sector] in Australia.
13. The applicant is an Ahwazi Arab. He has stated that Arabs in Iran are discriminated against by the Iranian government and the province of Khuzestan is poorly treated, with all of the petrol produced in the province "looted". Arabs are not allowed to wear their traditional clothing or to talk in Arabic. He was taught Arabic by [Mr B], who was later executed "because he was saying things in Arabic and he kept saying things in Arabic". He was humiliated at school and humiliated on the street. Arabs are of no value to the government. They are not given jobs. If they are just standing on the street they are arrested.
14. The applicant provided no specific examples of harm that he was subjected to while growing up, due to his ethnicity. I accept that he may have been subjected to racist slurs. The current country information indicates that Arab cultural activities are tolerated, and Arabs can freely wear traditional Arabic dress. They also freely speak the Arabic language. DFAT heard anecdotally that Arabs in Khuzestan Province are afforded considerable space to express their ethnic identity.<sup>1</sup> Older articles in the review material however paint a different picture: an Ahwazi writer who now resides in Britain after fleeing Iran stated in a 2015 article: "By law, there is nothing prohibiting learning Arabic outside school hours or owning books of Arabic literature that are not sanctioned by the regime. But in reality, those who are implicated are often tried on vague trumped up charges, whose punishment could reach the death penalty."<sup>2</sup>
15. On this point, the applicant has consistently stated that his Arabic teacher [Mr B] was executed and this led to his decision to flee Iran. The applicant's representative has now provided media articles which show that [Mr B] was imprisoned in 2005 and executed [in] 2007. [Mr B] was [a] teacher and conducted Arabic language classes. I accept the applicant's claim that he was one of [Mr B]'s students. There was some confusion relating to whether the applicant had claimed that the execution occurred three months before his departure from Iran in June 2013. As pointed out by the applicant's representative [Mr A], there is no audio record of the applicant's arrival interview (including the file copy before me which was included in the review material), only the written record. I am not satisfied on the evidence before me that the applicant has claimed that [Mr B]'s execution occurred three months prior to his departure. I do however note that there was some eight years between [Mr B]'s imprisonment and the applicant's departure from Iran. I do not accept that his former teacher's imprisonment or subsequent execution were central factors in the applicant's decision to depart Iran in 2013.
16. In terms of his political and/or cultural activities as an Ahwazi Arab, the applicant claims that from the age of [age range] he spent time with his uncles, learning about the history of Ahwaz.

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Iran', 20 April 2020, 20200414083132; 3.8

<sup>2</sup> Middle East Eye, 'Iran's Ahwazi Arab minority: dissent against 'discrimination'', 28 February 2015, CXBD6A0DE2098

He attended meetings with his uncles and friends. Their group did not have a name. The applicant distributed flyers to people's houses. He attended the 2005 protests, which were a result of then President Khatami "wanting to transfer us to a different city and send the other people to Ahwaz". There was also a commemoration of these protests every year, which he also attended. Details provided by the applicant are consistent with country information on this point,<sup>3</sup> and I accept that he attended these protests as claimed.

17. The applicant also claims that he was arrested and detained in 2010 and again in 2012. In relation to the 2010 detention, the applicant claimed that he was with a group talking about history when the house was raided and he was detained. He was held for six months, beaten and questioned. In the end he went to court and after signing an agreement that he would not join any groups involved in protesting was released. Country information notes that as with the treatment of those primarily concerned with preserving and promoting Ahwazi Arab cultural heritage, the treatment of Ahwazi Arab political activists has grown especially harsh since April 2005—again, the most common manifestation is the arrest and detention of Ahwazi Arab political activists for long periods before charges are brought. Some are released without ever being charged.<sup>4</sup> In the PV interview the delegate questioned the applicant on the details of his detention and found his answers unconvincing. I have formed a different view. Although the applicant's evidence was brief he has consistently claimed that these periods of detention occurred and the narrative is plausible and consistent with country information. I am prepared to accept that the applicant was detained on two occasions as claimed. It appears that he was not charged with or convicted of any crimes on either occasion.
18. From the applicant's evidence given at the PV interview it appears that there was no specific event that prompted his departure from Iran. He states that he was fearful all of the time because of his arrests and because his uncles and cousin had left for [Country] in 2012. He felt that he was by himself. In his arrival interview the applicant stated that his father had organised everything – bought his tickets and organised the payment to the people smugglers. I accept that this was the case. The applicant departed Iran without incident. He was not subject to a travel ban. I conclude that at the time of his departure he was not of particular interest to the Iranian authorities due to his low-level political and cultural activities in Ahwaz or for any other reason. In his arrival interview the applicant stated that his mother told him a summons had been received. He has not mentioned this event again or indicated that there were any further summonses or indications that he was of interest to the Iranian authorities. I conclude that there were not.
19. Since arriving in Australia the applicant has continued to be active in the Ahwazi cause. Documents provided to the delegate confirm that he is an active member of Ahwazi community organisations. The review material includes numerous photographs of the applicant in meetings, in group events and with an Ahwazi [group]. At the PV interview the applicant advised that he was with the logistics crew for the [group], which was tasked with providing [resources] for the [members]. One of his relatives is the [group]'s [role]. He has been to [City] and participated in [protests] in 2019 and 2020. He was always holding the Ahwazi flag. [Mr A] submitted that events held [in that location] are always photographed by [people] and I am satisfied that this is the case. Footage of the events was also published on [Social media] (links to these clips were provided). I am satisfied that the applicant attended these events and could be identified by his attendance and by material published on-line as a

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<sup>3</sup> UK Home Office, 'Iran - Ahwazis and Ahwazi political groups', 11 January 2019, 20190117152034, 5.1.6

<sup>4</sup> Ibid, 5.3.5

participant. It is also submitted that the applicant posts pro-Ahwazi material on his [Social media]. At the PV interview he advised the delegate that he posted material “about poverty and hangings”. He stated that his postings are all public and invited the delegate to inspect his [Social media]. The delegate did so and noted in his decision that the applicant posts pro-Ahwazi material and pictures of himself holding the Ahwazi flag.

20. As noted by the delegate, the Basij, the Islamic Revolutionary Guard Corps (IRGC) and the police all have cyber intelligence wings.<sup>5</sup> Units such as the national police force’s Cyber Police, also known as FATA, and the Cyber Army, a unit of the IRGC, are tasked with the identification and prosecution of online activists.<sup>6</sup> I am satisfied that due to his public profile settings the applicant is able to be identified and his political views and on-line statements become known to the Iranian authorities. In terms however of whether this has occurred, the applicant has provided no evidence to indicate that the authorities are aware of him and his activities at this time. The applicant’s parents and siblings remain in Iran. He has not indicated that they have been approached or adversely affected in any way as a result of his online activities or his in person protests in 2019 and 2020. On the evidence before me, I am not satisfied that the applicant has been identified by the Iranian authorities as a political activist.
21. It has been submitted that the applicant’s mental state is fragile and that due to this he may, if returned to Iran, make statements that would lead to him being harmed. The review material indicates that the applicant suffered a mental health episode in February of this year and as a result was admitted to hospital for 13 days. He was referred to a psychiatrist on 18 March 2021 but it is unclear whether he has yet seen a psychiatrist. [Mr A] has provided me with a report from [Mr F], registered psychologist, dated 17 July 2021. [Mr F] saw the applicant on that day and undertook an assessment. The applicant has been diagnosed with PTSD and depressive disorder. [Mr F] recommends that the applicant has ongoing psychotherapy, antidepressant medication and counselling. There is nothing before me to indicate that the applicant has yet sought or received any of these treatments for his diagnosed conditions. [Mr F] has provided no prognosis. In view of this, I am unable to draw any conclusions regarding the ongoing effects of the applicant’s mental health conditions. On the material before me I do not accept [Mr A]’s contention that the applicant may make statements that would lead to him being harmed, should he be returned to Iran.

## **Refugee assessment**

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22. 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**

23. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:

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<sup>5</sup> US Department of State, ‘Iran – Country Reports on Human Rights Practices 2016’, 3 March 2017, OGD95BE926964, p.20

<sup>6</sup> Ibid

- 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.

24. I have found that the applicant is an Iranian national and Iran is his receiving country. I have considered whether the applicant would be considered to be a political activist or imputed with a political opinion adverse to the State on return to Iran. I have accepted that he participated in anti-government protests in 2005 and on the anniversaries of those protests until his departure from Iran in 2013. He also participated in Ahwazi Arab cultural events such as learning Arabic and discussing the history of the region. I have accepted that he was detained in 2010 and in 2012. Nevertheless, he was not of interest to the authorities prior to his departure. Since arriving in Australia the applicant has been an active member of the Ahwazi community. He has participated in political and cultural events and is part of the support crew for an Ahwazi [group] team. He posts pro-Ahwazi articles on his publicly available [Social media]. He has attended [protests], footage of which is available online. I am satisfied that the applicant has engaged in these activities as an expression of his genuinely held political beliefs and conclude that he engaged in this conduct otherwise than for the purpose of strengthening his claim to be a refugee.<sup>7</sup>

25. Although I am not satisfied on the evidence before me that the Iranian authorities are presently aware of his on-line and in person protest activities, the possibility that they are presently aware of his activities or may become aware at some future point cannot be ruled out, particularly if he continues to publicly post articles or to participate in protests. The applicant has claimed, and I accept, that he is committed to the pro-Ahwazi movement seeking self-determination for the area. I note that he was not asked by the delegate whether he would continue to be involved in both on-line and in-person activities to further that cause, should he return to Iran. He has also not specifically stated that he would. On the basis of his activities to date in both Iran and Australia, however, I infer that he would.

26. [Mr A] submitted to the delegate a number of relevant media articles. He contends that the applicant's situation is analogous to that of an Ahwazi activist described in a 2017 article: "During his time in the Netherlands, Diya participated in peaceful protests calling for Ahwazi self-determination and human rights, including a demonstration outside the Iranian Embassy in The Hague where he held Ahwazi national flag and took part in chants calling for freedom and human rights for Ahwazi people".<sup>8</sup> The subject of this article was arrested and convicted of a number of offences on return to Iran. I agree the situation is similar and conclude that there is a real chance the applicant would be considered to be a political activist engaged in activities against the Iranian regime, on return to Iran.

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<sup>7</sup> See s.5J(6) of the Act

<sup>8</sup> Ahwaz Monitor Information Centre, 'Ahwazi activist, denied asylum in Netherlands, gets six year sentence upon his return to Iran', 4 March 2017



27. The applicant has undertaken two public protests [in Australia]. He has posted material adverse to the Iranian government on his publicly available [Social media]. He has a history of attending protests in Iran from 2005 onwards and I have found that he would continue to do so, were he to return to Iran. Political activists who are perceived to query the constitutional and territorial foundations of the Islamic Republic are often charged and sentenced under offences such as 'propaganda against the State', which can carry lengthy prison terms such as the case discussed above. Country information indicates that Iran continues to be an extremely dangerous environment for internet users. Iranian laws heavily restrict what is acceptable speech online and specify harsh punishments for those who deliberately flout restrictions, as well as those who have inadvertently drawn the ire of authorities. The constitution provides for limited freedom of opinion and expression, but numerous, haphazardly enforced laws restrict these rights in practice.<sup>9</sup> I find that, due to his on-line and other public protest activities calling for Ahwazi rights, the applicant would face a real chance of arrest and detention on return to Iran.
28. Country information indicates that arbitrary arrest, torture and ill treatment in detention in Iran is common. It is common for detainees to be held incommunicado for days, weeks and even months after arrest.<sup>10</sup> It has been reported by international human rights organisations that a range of different types of torture is used in Iran, including threats of execution or rape, sexual humiliation, sleep deprivation, electroshock, burnings, the use of pressure positions, and severe and repeated beatings.<sup>11</sup> Torture is regularly used to extract confessions by security authorities.<sup>12</sup> I am satisfied that the harm the applicant may face is serious harm, I am also satisfied that the essential and significant reason for the harm is his expression of political beliefs, and that it involves systematic and discriminatory conduct.
29. The harm that the applicant fears emanates from the Iranian authorities operating under laws which apply throughout Iran. As such, I find that the real chance of persecution relates to all areas of Iran. I am satisfied he has a well-founded fear of persecution for the purposes of s.5J(1).
30. As the Iranian government is the agent of harm and maintains control throughout the country, I am satisfied that effective protection measures are not available to the applicant in Iran and s.5J(2) does not apply.
31. I have accepted that the applicant would continue to express his pro-Ahwazi views on return to Iran. In considering whether the applicant could avoid a real chance of persecution by denying or not expressing his political views I find that s.5J(3) does not apply. I consider that requiring the applicant to modify his behaviour, either by concealing his political beliefs, or by ceasing to be involved in freedom of expression such as it relates to Ahwazi Arabs rights or self-determination falls within a kind of modification that an applicant cannot be required to make under s.5J(3)(c)(iii). Accordingly I am satisfied the applicant has a well-founded fear of persecution in Iran for reasons of political opinion.

### **Refugee: conclusion**

32. The applicant meets the requirements of the definition of refugee in s.5H(1) and satisfies the criterion in s.36(2)(a).

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<sup>9</sup> Freedom House, 'Freedom on the Net 2020 – Iran', 20201016084814

<sup>10</sup> UK Home Office, 'Iran - Ahwazis and Ahwazi political groups', 11 January 2019, 20190117152034, 5.3.11

<sup>11</sup> DFAT, 'DFAT Country Information Report Iran', 20 April 2020, 20200414083132; 4.12

<sup>12</sup> Ibid; 4.11

## 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.