

0902978 [2009] RRTA 629 (29 June 2009)

DECISION RECORD

RRT CASE NUMBER: 0902978

DIAC REFERENCE(S): CLF2009/11330

COUNTRY OF REFERENCE: Iran

TRIBUNAL MEMBER: Jennifer Ellis

DATE: 29 June 2009

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Iran, last arrived in Australia [in] April 2008 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] January 2009. The delegate decided to refuse to grant the visa [in] April 2009 and notified the applicant of the decision and her review rights by letter dated [in] April 2009.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] April 2009 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.]

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

Visa application

20. The applicant is 27 years old having been born [in] September 1981. She first arrived in Australia as the holder of a subclass 462 visa [in] August 2007. The visa was valid until [date deleted in accordance with s.431(2) of the Migration Act as it may identify the applicant] August 2008. She departed Australia [in] February 2008 and returned [in] April 2008.
21. [In] January 2009 she applied for a protection visa. She indicated that her parents and two siblings resided in Tehran, Iran. She had previously traveled outside Iran for holidays in Malaysia and Turkey. She had completed 16 years of education including five years of university in a Bachelor degree in Spanish.
22. In her accompanying statement she stated that in May 2005 she started work in [workplace deleted: s.431(2)] in Tehran. Her workplace followed English rules and she did not have to wear Hijab and could speak to men. She met a man, [Person A] and became his girlfriend. He moved to Australia [in] May 2007. She wanted to be with him and applied for and was granted a working holiday visa. In July 2007 the Iranian government closed the [information deleted: s.431(2)] section and she lost her job. [In] August 2007 she moved to Australia. She lived with her boyfriend in Melbourne and they were very happy. Then her boyfriend found a new job in Sydney and moved there [in] November 2007. She visited him for 3 days in late November 2007. Eventually in December 2007 she moved to Sydney to be with him. She was unemployed while he worked. She told her mother about the relationship but not that they were living together. On 7 February 2008 a girl rang the applicant. She stated that her name was [Person B] and told the applicant that she was [Person A's] fiancée. The applicant told [Person A] who claimed that they had a relationship about 6 years ago but it was over. He then told her that he would continue the relationship with [Person B] until he got permanent residency and booked a ticket for the applicant to fly home to Iran.
23. The applicant left for Iran [in] February 2008. He told the applicant he would join in Iran. [Person B] then rang her and told her that [Person A] told her he would marry her soon. He told her that [Person B] was telling lies. [In] March 2008 he rang her and told her that he had got his permanent residency but he did not want to return to Iran and claimed he had broken up with [Person B] and would go to Malaysia and talk to her parents. [In] March 2008 he went to Malaysia and called her. [A few days later] he called from Iran. [In] March 2008 they went out and he told her that he could not marry her yet but asked her to return to Australia and live with him and get married in a year. [In] April 2008 he called her from Sydney and told her to come back. [In] April 2008 she returned to Sydney. A friend dropped her off at her house but [Person A] would not open the door and a friend found her a place to stay. [Person

A] later rang her and asked her to come back but she did not trust him. She continued to get calls from [Person B] She decided to move to Melbourne to get rid of him and moved [in] October 2008. She found out that he went to Iran in December 2008 and will return in January 2009 and [Person B] will move to Australia.

24. She stated that she was afraid of telling her family the truth and because she had lost her virginity it meant that she had lost her reputation and her life. She could not make a complaint about him in Iran because of the rules there and in Iran a girl could not have sex with a man before marriage. She said that she would not be able to live with her family and would not be able to rent a place as a single woman. She said there was no respect for women's rights in Iran.

Primary Decision

25. [In]April 2009 the applicant was refused a protection visa. The delegate found that the applicant did not have a genuine fear of harm and that there was no real chance of persecution occurring. The delegate stated that there was no evidence that pre-marital sex was punishable by law in Iran.

Review Application

26. [In] April 2009 the applicant applied for review.
27. By letter dated 6 May 2009 the Tribunal invited the applicant to attend a hearing scheduled [in] June 2009.
28. [In] May 2009 the Tribunal received a submission on behalf of the applicant together with other documents. It was submitted that the applicant could not return to Iran because the Islamic Guidance office would accuse her of participating in pre-marital sex and under Sharia law she would be sentenced to death by stoning and whipping. Her family would kill her before she had a chance to be dealt with by law because she had brought insufferable shame on her family. Her brother was a religious person and a member of the Basij.

Evidence at the hearing

29. The applicant appeared before the Tribunal [in] June 2009 to give evidence and present arguments. The applicant was represented in relation to the review by her registered migration agent. An interpreter was engaged to assist the applicant but she was able to give much of her evidence in English.
30. The applicant told the Tribunal that she had lived in Kharaj in Iran which was about 35 kilometres from Teheran. Her parents, younger sister (aged 26) and younger brother (aged 20) lived in Kharaj. Her sister was at home while her brother was studying at the University in Kharaj. She had not communicated with her father since March but spoke with her mother once a week. She said she had written her statement herself and did not want to change any part of it.
31. She had travelled outside Iran before to Turkey for a holiday and Malaysia where her sister had considered studying.
32. The Tribunal asked her how religious her family were and she said that her father was quite strict and had not wanted her to attend university or work at [workplace deleted: s.431(2)] but

had been persuaded to allow her by her uncle. She had worked at [workplace deleted: s.431(2)] from May 2005 to July 2007.

33. The applicant told the Tribunal that her brother was at university and had become a member of the Basij when he was in high school. Her brother did not approve of her working in a foreign country. Her brother was prejudiced and thought that he could control the lives of her and her sister.
34. The applicant told the Tribunal that she had had no contact with [Person A] since October 2008. She said she had moved from Sydney to Melbourne to isolate herself from the Iranian community. She said in the eyes of Iranian society she had committed a sin and a crime. She had come to Australia expecting to marry [Person A] and become a permanent resident.
35. The applicant said that Iranian authorities distrusted the [workplace deleted: s.431(2)] and thought that it was assisting Iranian nationals to leave Iran and eventually closed it down.
36. She said that she had told her mother that a boy in Australia had proposed marriage to her and told her that she was living in Australia with a family.
37. The Tribunal asked the applicant what she thought would happen to her if she returned to Iran. She said that maybe her father would not kill her but she was not sure. The Tribunal asked the applicant how anyone would find out that she was no longer a virgin and she said that in order to be able to get married in Iran she would have to undergo a medical examination arranged by her future husband's family. She would need a certificate. The family could then lodge a complaint against her to the authorities. She could be subject to punishment including stoning. She said her family were well known in Kharaj which was a small city and she would be dishonouring her family. She said her brother had been brainwashed by the Basij and would encourage her family to punish her. He had been involved with the Basij for 5 or 6 years; since he was about 14 or 15 years old. She said that the Basij targeted that age group so they could brainwash them before they matured. He had told the family he had joined and showed them his Volunteer card. The Tribunal asked her how her family had reacted to this and she said it was quite a normal thing to do. She said that he and fellow Basij walked the streets looking out for people who were having relationships with each other without being married or not dressing inappropriately.
38. The Tribunal discussed with her whether her family would seek to harm her given that her parents were not particularly religious and had allowed her to work at [workplace deleted: s.431(2)]. She said that whilst her father may be more moderate than other Iranian men he still would not allow her to study away from Kharaj where she would have had to stay in a dormitory and she was supposed to be setting a good example to her sister. She said that when her sister was about 15 she was discovered talking to a boy and was closely chaperoned after that and not allowed to work after she finished university.
39. The applicant told the Tribunal that her uncle was very different to her father and was well educated, travelled and believed in equal opportunities for men and women. The Tribunal put to her that her family appeared to be fairly liberal and asked her why they would punish her if they discovered she had lived with her boyfriend in Australia. She said that she had promised her father she would return to Iran in 3 years. At first her father would not allow her to go to Australia but then her uncle had persuaded him to do so.

40. The Tribunal asked her if she thought her family would seriously harm her upon her return to Iran. She said she could not say for sure but she would always have a fear that they would. She said that the loss of her virginity would mean that she would be completely disowned by her father and in Iran she needed her father's permission for everything including getting a job. She said her family would be dishonoured by her behaviour and she believed she could be subject to stoning by the authorities or harm from her brother. She said that if her family threatened her she would receive no support from State authorities and in Iran there were no services to support women like there were in Australia.
41. The Tribunal asked her if it would be possible for her to relocate to another part of Iran. She said that in Iran a woman could not rent a place by herself or even with another woman. She said her mother's sister was divorced with a daughter and had to live with her parents as a divorced woman or single parent was not accepted in Iranian society. The Tribunal asked the applicant if she could live with her uncle given his lenient views. She said that she did not think he would allow her to do that if he knew the truth because she would then dishonour his family. He was married with two children. She said that another aunt (the sister of her father and uncle) had married a Christian and been disowned by the family.
42. The applicant told the Tribunal that when she was forced to return to Iran last year her brother had been shocked when she told him that lots of Iranian girls had lived with boys in Australia without being married. She did that to find out what his reaction would be. She did not tell her family the truth about what happened in Australia. She said that her mother had told her she had to come back to Iran and get married. She told them she had a visa until 2010. They were concerned that she was 28 years old and unmarried. She was already experiencing great pressure from her family to marry as soon as possible. She said if she told any potential husband the truth that family's reputation would be ruined and the doctor who undertook any examination would tell the family.
43. The Tribunal advised the applicant that it understood that in Iran it was illegal to have sex outside marriage and that the usual punishment was 100 lashes or flogging. However the Tribunal told the applicant that however abhorrent the Tribunal considered this law to be it would appear to be a law of general application in Iran and therefore could not found a claim for refugee status. The applicant became extremely upset and stated that she had made one mistake in her life which would have terrible consequences for her. She said she was terrified of her brother who was young and had been brainwashed by the Basij. He suffered from being the youngest and already wanted to control the lives of her and her sister. When she returned to Iran she noticed that he had changed and become far more critical.

Post-hearing submission

44. [In] June 2008 the Tribunal received a further statement from the applicant in which she stated that her brother was under pressure to maintain the standards of the Basij and he and his friends would want to get rid of her because she would be regarded as sinning against God. She was in constant fear that [Person B] would tell her family about her. She asked that she be granted a protection visa.

INDEPENDENT COUNTRY INFORMATION

Pre-marital sex in Iran

45. Sources indicate that under the Sharia law and the Penal Code derived from it, sex outside marriage is punishable in Iran. In reality, however, it is not common that the punishment is meted out especially in recent years in the large cities. It appears that the usual punishment is 99 lashes or flogging for the unmarried while adultery can mean death for the married. The only report of execution found for pre-marital sex among the unmarried is one about a young girl who had been jailed several times for the offence previously.
46. The Iranian Penal Code “stipulates that the penalty for fornication is flogging (Women's Forum against Fundamentalism in Iran 2005, ‘IRAN: Official Laws against Women in Iran’). Article
47. Article 637 of the Iranian Penal Code state respectively:

Any man and woman who are not married and who commit a crime against public morality, excluding adultery, should be sentenced to flogging (99 lashes).

(Mission for Establishment of Human Rights in Iran (undated), ‘Islamic Penal Code of Iran’, mehr.org website http://mehr.org/Islamic_Penal_Code_of_Iran.pdf - Accessed 18 May 2009).
48. A 2004 publication by the Safra Project, a resource project for lesbian, bisexual and transgender Muslim women also notes that:

Generally it can be said that according to Shari.ah sexual relations are only allowed within a (heterosexual) marriage. Therefore, most sexual relations outside of marriage qualify as adultery or fornication both of which are sinful and punishable by flogging for unmarried men and women, or death for married men and women (Safra Project 2004, Country Information Reports: Iran, p 3).
49. Article 83 and 88 of the Iranian Penal Code state respectively:

Article 83: Adultery in the following cases shall be punishable by stoning:

 - (1) Adultery by a married man who is wedded to a permanent wife with whom he has had intercourse and may have intercourse when he so desires;
 - (2) Adultery of a married woman with an adult man provided the woman is permanently married and has had intercourse with her husband and is able to do so again.

Note. Adultery of a married woman with a minor is punishable by flogging

Article 88: The punishment for an unmarried adulterer or adulteress shall be one hundred lashes (Mission for Establishment of Human Rights in Iran (undated), ‘Islamic Penal Code of Iran’, mehr.org website http://mehr.org/Islamic_Penal_Code_of_Iran.pdf).
50. In her article in The Washington Post, Nora Boustany comments that:

Under Iran's penal code, girls as young as 9 can be executed by hanging or stoning for adultery or what are referred to as morality crimes (Boustany, Nora 2007, ‘33 Activist Women Arrested in Tehran: Group Was Protesting Trial of 5 Others’, The

Washington Post, 6 March <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/05/AR2007030501366.html> - Accessed 18 May 2009).

51. Similarly, a children's rights group states that:

Flogging of young people is commonly ordered for such offences against the law as mixing of the sexes, drinking alcohol, and premarital sexual relations, including against girls as young as 9 years (Global Initiative to End All Corporal Punishment of Children 2005, 'Ending legalised violence against children: Report for Middle East & North Africa Regional Consultation', p 18 http://www.endcorporalpunishment.org/pages/pdfs/Report-MidEast_NAfrica.pdf).

52. In 2007, an organization called "Against Death Penalty in the World" noted that:

Iran's interpretation of Sharia law prescribes whippings for sexual relations before marriage, lashings for drinking alcohol and amputation of hands and feet for petty thieves ('Offences punishable by death include:' 2007, Hands Off Cain website, 1 January <http://english.nessunotocchicaino.it/news/index.php?iddocumento=9000736> - Accessed 19 May 2009).

53. Several reports comment on specific incidents where the punishment was carried out for the offenders. Referring to a 16 year old Atefeh Rajabi, Iran Focus noted in August 2004 that:

The orphaned 16-year-old girl hanged in front of residents in this town [Neka] close to the Caspian Sea on August 15 suffered years of brutal violence, exploitation and torture in the hands of relatives, local officials and plain strangers, and in a country where girls are the most vulnerable members of society, she had no one to go to for help...

According to judicial records, by the time Atefeh was 16, she had been convicted five times of having sex with unmarried men. Each time she spent some time in jail and was given 100 lashes (Under Iran's law, punishment for having sex with a married man would have been far heavier.)...

Mina [one of Atefeh's friends] sobs as she recalls her friend's tormented life, but many of these horrendous experiences are everyday facts of life for girls being brought up under a rigid theocratic regime that has institutionalized misogyny in its laws and practices ('Violence, poverty and abuse led girl, 16, to gallows' 2004, Iran Focus, 31 August http://www.iranfocus.com/en/index.php?option=com_content&task=view&id=137 - Accessed 18 May 2009).

54. In 2006, Antoinette McGowan stated that:

Under Iranian law a girl over the age of nine can face capital punishment for having premarital sex. While for boys to face the same punishment they have to over the age of 16.

Last year a girl was sentenced to 100 lashes for such a crime. The judge claimed it was done because she originally lied about being raped. The boys involved only received 30 to 40 lashes a piece.

In 2004 another woman was stoned to death for having sex outside of marriage (McGowan, Antoinette 2006, 'Countries Where Sex Outside of Marriage is a Crime', Associated Content website, 18 December http://www.associatedcontent.com/article/101676/countries_where_sex_outside_of_marriage.html?cat=37 - Accessed 19 May 2009).

55. Relying on *AFP*, the International Federation of Iranian Refugees notes that:
(May 28 AFP) Police arrested some 80 people of both sexes who went on a bus trip to a scenic region and were found to have been indulging in group photography and carrying contraceptive pills. Accused of "illegal and immoral behaviour," they were in a party of some 200 who had organised a "field trip" to Fuman in northern Gilan province. Most were aged between 26 and 27 and included 33 students. No further details on the "immoral" behaviour of the youngsters were given, but under Iran's Islamic law, pre-marital sex is considered a crime. Islamic laws also lay down flogging for consuming, purchasing and selling alcohol (International Federation of Iranian Refugees 2002, *Iran Monitor* 1, 18 June, pp 1 – 2).
56. Amnesty International quotes a report by the *Boston Globe* on three men publicly flogged after they were convicted of drinking alcohol and 'illicit sex' (Amnesty International 2001, *Amnesty International News For Health Professionals: Iran – flogging for pre-marital sex and consumption of alcohol*, 16 February, *AI Bulletin* Vol 4, No. 4, ACT 84/004/2001).
57. Referring to adultery and sex related offences, the US Department of State notes that:
Adultery remained punishable by death by stoning. On July 20 [2008], the international press reported that courts sentenced eight women and one man to death by stoning for adultery and sex-related offenses. On August 5, judiciary spokesman Ali Reza Jamshidi announced that the government had suspended several stoning sentences and commuted four to lashings or prison terms. However, according to domestic human rights activists, on December 25, officials in Mashhad executed two men by stoning, including Houshang Koudadadeh, who was convicted of rape and adultery. A third convicted man, identified only as Mahmoud G., escaped during the stoning (US Department of State 2009, *Country Reports on Human Rights Practices for 2008 – Iran*, February, Section 1 (a)).

Whether State authorities provide protection from any possible harm by family members

58. Many sources indicate that no adequate protection is provided by the state for women facing harm from family members.
59. In April 2009, the UK Home Office website stated that:
23.42 According to the USSD report 2007... although spousal abuse and violence against women occurred, statistics were not available. Abuse in the family was considered a private matter and was seldom discussed publicly although surveys (e.g. Tehran University surveys) indicate levels of domestic violence are very high, women have almost no legal redress, and there is a fair amount of social tolerance of domestic violence...

23.43 UNHCR reported in their 'Comments on the Iran Country Report of April 2005' of August 2005 that the:

"UN Special Rapporteur on violence against women, Yakin Erturk, urged Tehran to adopt a national action plan to promote and protect human rights which would emphasise the elimination of violence against women. Although they had seen some advances, Iranian women still face violence in and outside the home and are blocked from defending their rights by discriminatory laws and an unfair justice system, Erturk said. 'Discriminatory laws and malfunction in the administration of justice result in impunity for perpetrators and perpetuate discrimination and violence against women,' she said. Erturk issued her criticism in a preliminary report for the world

body's Human Rights Commission – which holds its annual six-week session in Geneva in March and April – following a government-approved visit to the country.”

... she said: ‘In the family, women face psychological, sexual and physical violence’ which existing laws did little to protect against, while divorce and custody of children were difficult for abused wives to obtain. In the wider community, victims of rape face numerous obstacles in accessing justice, she said. Women risk punishment for adultery if they fail to prove rape, and can face death for killing a rapist in self-defense (Reuters, U.N. expert criticises Iran on women's rights, executions, 8 February 2005).”

23.44 According to the Special Rapporteur on Violence against Women, its causes and consequences, in his report of the Mission to Iran dated 27 January 2006:

“Violence against women in Iran is ingrained in gender inequality, which is upheld and perpetuated by two factors: (a) patriarchal values and attitudes based on notions of male supremacy, and (b) a State-promoted institutional structure based on gender-biased, hard-line interpretations of Islamic principles. While the former is a universal and historically rooted phenomenon, the latter is particular to Iran and is rooted in gender politics and policies prevalent in the country. Both factors, however, represent a male-dominated society with male-empowering laws and practices. While the official ideological underpinning of the State gender discourse rests on the premise that women in the Islamic Republic have been attributed [sic] with honour and due dignity, this very ideology has served to rationalize subordinating women, discriminating against them and subjecting them to violence. Furthermore, it is instrumental in silencing defiance and enforcing compliance.

“The ruling clergy, in their reading of the sharia that shapes both the attitudinal as well as the institutional structures, have tended towards conservative, gender-biased interpretations.

“This has been the source of divisive debates in the political arena between the hardliners and the reformists. The Sixth Majlis was reportedly a turning point for the articulation of reformist politics of gender in Iran. Within this process...some positive change has occurred in the laws and the administration of justice. However, gender-biased provisions and practices that prompt women's vulnerability to violence in the private as well as public spheres are still the norm.” (UK Home Office 2009, Country of origin information report: Iran, 21 April).

60. Quoting a number of sources on the issue of state protection for women in Iran, a 2007 RRT research response notes that:

In 2005, the United Nations Special Rapporteur (UNSP) on violence against women visited the Islamic Republic of Iran between 29 January and 6 February. The UNSP's findings on the causes and consequences of violence against women in Iran are highlighted in the following extracts...:

74. To prioritize the elimination of violence against women as a public policy issue and to prevent, investigate and punish all acts of violence against women, whether perpetrated by private or State actors, it is recommended that the Government:

Provide effective protection to women who have experienced violence by ensuring that they are able to approach the police, to secure alternative housing and to access medical care... (UN High Commissioner for Human Rights 2006, ‘Integration of the

Human Rights of Women and a Gender Perspective: Violence against Women',
United Nations Economic and Social Council, E/CN.4/2006/61/Add.3).

61. Iranian lawyer and Nobel Peace Prize Laureate, Shirin Ebadi, highlighted the discrimination against women living in Iran in a 2004 report by Amnesty International (AI). She concludes that the government "is of no help to those [women] who have actually experienced violence". The pertinent extracts follow in detail.

..."Women in Iran are terrorized. We are facing discriminatory laws as well as family violence. These laws represent the biggest problem. If laws were just, violence would diminish. That is why the fight against laws that discriminate is given priority."

She says that the laws are not adapted to today's society. Today, 63% of students in Iran are women, yet many laws violate human rights because they systematically discriminate against women.

"A man may have four wives; two female witnesses make up for one male witness; in compensation cases, the price of a woman's life is worth half the price of a man's; filing for a divorce is more difficult for a woman than for a man. One type of violence against women is forbidden, but another type is permitted", she explains.

"If a woman is killed on the street or in the house, the murderer may be prosecuted. The problem is that such violence is rarely reported to the police. If, however, the woman is killed by her husband because she is unfaithful or is caught in bed with another man, the murderer will not be punished."

...She says that she thinks the government offers some degree of protection against family violence, but it is of no help to those who have actually experienced violence.

"We have no social help. If a husband beats his wife and she reports him for violence, the incident will be investigated. He will get a fine and the wife will be allowed to file for a divorce. But what can a divorcee with small children do -- no job and no income, no house and no social help? It is not sufficient for the authorities to punish a violent husband. In reality, the woman has no alternative but to stay married." (Tin, I. 2004, 'Iran: Women are Terrorized', Amnesty International website, 29 December <http://news.amnesty.org/index/ENGMDE130492004>).

62. The UK Home Office's 2007 Operational Guidance Note: Iran states the following in relation to state protection for women in Iran:

3,10,12 Sufficiency of protection

If the claimants fear is of ill treatment amounting to persecution by the state authorities, they cannot apply to these authorities for protection.

3,10,13 Abuse in the family is considered a private matter and is seldom discussed publicly. It is difficult for many women, particularly those living outside large cities, to obtain legal redress. Iran is a highly developed country particularly in the major cities such as Tehran, Mashad or Esfahan with constitutional and legal safeguards aimed at protecting women's rights. However, Iran is also a conservative traditional society and those provisions may not always be enforced, for example, in some rural areas sufficiency of protection may not be available. Caseworkers should take into account inconsistency in application of the legal system that is part of the every day life in Iran In light of this caseworkers will need to decide whether the authorities are willing and able to provide protection on the facts of each individual claim (UK

Home Office 2007, 'Operational Guidance Note: Iran', UK Home Office website, 27 February).

63. A 2006 campaign initiated by human rights activists in Iran attempted to emphasise the discrimination faced by Iranian women. According to an article by the Middle East Media Research Institute (MEMRI), the campaign was to be officially launched on 27 August 2006 with a seminar however "Iranian security forces prevented the event from taking place". The article discusses the alleged hostile attitude of security forces towards public activities involving women and the widespread violence committed by men against Iranian women:

...In May 2006, Zohreh Tabibzadeh Nouri, advisor to Iranian President Mahmoud Ahmadinejad, was appointed head of the Iranian Center for Women and Family Affairs. Upon taking office, she declared her philosophy, saying: "I do not deny that there are gaps in the [Iranian] law when it comes to protection of women's rights... [However,] as long as I live and remain in charge of this center, I will not let anyone sign international charters [or] declarations of international conferences on women's rights, since we can [fix] the gaps and existing problems through the Islamic faith. I see no reason to follow the unsuccessful Western model."

Conversely, the prominent dissident journalist Akbar Ganji, recently released after six years in an Iranian prison, announced his intention to join the campaign for women's equality in Iran. He called on Iranian women to fight against the discriminatory laws in their country and against violence perpetrated by men against women in Iran, stating that "women's rights, and equality between men and women, are among the fundamental principles of the democratic movement." Ganji, who is currently conducting an information campaign in the West, stated that from now on, one of his campaign's major goals will be to draw attention to the status of women in Iran.

...On the Regime's Use of Policewomen against Women Demonstrators

In an article posted July 14, 2006 on the reformist Internet daily Rooz, journalist Lili Pourzand wrote against the regime's cynical ploy of exploiting women under the pretense of "involving them in society." As an example, she cites the establishment of the women-only police force used to break up demonstrations for women's rights:

"...This may be the first time that the Iranian security forces have employed women trained as police [officers] to suppress demonstrations on the street. For several years now, the Iranian security forces have been recruiting women candidates and holding special courses to provide them with military training. The Iranian authorities have presented this activity as an innovation within the male-dominated system that controls the Iranian security forces, and have carried out an intensive propaganda campaign [touting this activity] as evidence of the inclusive nature of the Iranian security forces.

"But on Monday, [June 12, 2006,] we witnessed for the first time the anti-feminist achievement of this new force: Iranian women were beaten with clubs and sticks by the women of the security forces. They were very badly injured, and then were loaded onto prison buses by the policewomen, with handcuffs on their wrists...

...Journalist Ali Afshari also commented in a Rooz article about the regime's policy of using women to oppress women. He argued that the regime's reaction to the women's demonstration stems from its fear of the women's campaign for equal status:

“The women’s protest rally on June 12 this year, which was harshly broken up by the regime, was an important and momentous occasion for a number of reasons... The regime’s reaction revealed [its] fears and vulnerability more than it demonstrated [its] power. The authorities are afraid that the huge potential inherent in women’s power may be realized, and that is why they implement security orders and [use] intimidation, arrests and fabricated criminal lawsuits against the leading activists, all aimed at stopping this movement...

“The use of the women’s police [unit] is another facet of this incident. The regime sent out women to fight [other] women demonstrating for their rights. It used the tactic of ‘women against women’ to camouflage its anti-feminist policy, and in order to observe the custom that ‘forbids a man to attack women not from his immediate family’ ...

“In fact, by using this [tactic], the regime means to show that the demonstrating women do not express a demand [by] all the women in [Iranian] society, and that the [Iranian] women themselves set out to confront this movement, which they regard as ‘stupefied by the West’ and as deviating from the tenets of Islam. By bringing women who support the regime to the [demonstration] site, the regime meant to transform the confrontation from a women’s struggle against the regime into a struggle between [two groups of] women. But [the fact that] several members of the conservative seventh Majlis objected to the violence that broke out [during the demonstration] casts doubt on the success of this policy... Beatings, clubs, handcuffs, arrests, and fabricated lawsuits will not be able to stop the clear progress of the women’s movement towards growth and development.” (Mansharof, Y. 2006, ‘Human Rights in Iran: Women’s Struggle Against Discrimination by the Regime’, Middle East Media Research Institute (MEMRI) website, 29 September).

64. In her report on the causes and consequences of violence against woman in Iran, the UN’s Special Rapporteur revealed a culture in which violence against women is propagated by attitudes of male supremacy and is ingrained in gender inequality. The UNSP’s report particularly underlines the lack of acknowledgement by authorities in viewing violence against women as a serious problem, and the ensuing lack of reporting by victims of violence:

A. Manifestations of violence against women

34. Given the ideological framework referred to above, violence against women in Iran is rarely acknowledged as a serious problem by the authorities and rarely reported by the victims. The 1999 Human Development Report of Iran indicates that domestic violence, in particular, is a hidden social phenomenon which is not discussed openly. The report concludes that no action has been taken to change prevailing attitudes or reform the pertinent laws and regulations. Although the report is outdated, the Special Rapporteur’s interviews did not indicate fundamental changes. It was particularly clear in Ilam that women feel compelled to tolerate violence, inflicted not only by their husbands but also by other family members, for fear of shame, of being ostracized, or of being divorced and for lack of alternatives to the abusive environment. The Special Rapporteur found that some of the cases of self-immolation in the city are linked to the lack of legal protection for women victims of violence, lack of shelters, difficulty in obtaining a divorce, child custody laws that favour the father and pervasive gender discrimination throughout society

35. The self-immolation incidents are also said to be related, in some cases, to honour crimes, which are particularly common in Ilam and Khouzistan province. According to statistics provided by a consultant to the governor of Khouzistan in 2003, there have been 45 cases of honour killings of women under the age of 20 in one tribe

alone. In 2001, a total of 565 women lost their lives in honour-related crimes, of which reportedly 375 were staged as self-immolation cases of women who were forced to set themselves on fire.

36. Reports also indicate that there is a worrying increase in the trafficking of girls and women. Most of the trafficking is said to occur in the eastern provinces and mainly in border towns with Pakistan and Afghanistan where women are kidnapped, bought or entered into temporary marriage in order to be sold into sexual slavery in other countries. The officials with whom the Special Rapporteur spoke informed her that measures were being taken to combat trafficking. Since 1999 about 28 “health houses” have been set up by the State-run Welfare Association to provide assistance to unmarried girls who have run away from their homes and are at risk of being trafficked. These institutions provide temporary housing, professional counselling and skills development for runaway girls. However, reports indicate that girls may be trapped in abusive situations even in these shelters. For instance, in February 2001, senior State officials were charged with trafficking girls living at the Jasmine Centre. A judge of the Revolutionary Court was among those accused.

...38 While the various forms of violence observed in intimate relations and in the community at large are a concern, the bulk of complaints received with regard to violence against women are related to incidents condoned by State agents. During the Special Rapporteur’s mission, she interviewed a number of defenders of women’s human rights, including lawyers and journalists who relayed similar experiences of being arrested without charge by plain-clothes agents allegedly from the Ministry of Intelligence and Security, detained incommunicado in secret detention centres for periods of one month or more, tortured or maltreated under detention and their house being searched periodically without a warrant. The Constitution of Iran forbids the use of all forms of torture “for the purpose of extracting confession or acquiring information” However, human rights organizations continue to report that torture and other inhuman treatment take place in various detention facilities in Iran. In this regard, the case of Zahra Kazemi, an Iranian-Canadian photojournalist, who died in custody in Iran on 10 July 2003, is of concern. The authorities initially claimed that Ms. Kazemi died of a digestive disorder and then claimed that she died of a stroke, but reports indicate that she had been subjected to torture and ill-treatment while in detention. It is reported that the Government has denied requests from Ms. Kazemi’s family and the Government of Canada to examine the body. There has been no comprehensive public investigation into Ms. Kazemi’s death and the parts of the initial inquiries that have been carried out were reportedly censored.

...41. The death penalty, particularly by stoning, has been a major area of concern. The Special Rapporteur received numerous reports of women on the death row, sentenced mainly for sexually or morally oriented offences such as adultery. At the time of her visit there were 397 women in Evin Prison, 200 of whom were sentenced for “moral crimes”, some awaiting execution. The Special Rapporteur spoke to some of these women. Their stories reflect gender biases in the attitudinal and institutional structure of the country within which they, some still children, have become labelled criminals (UN High Commissioner for Human Rights 2006, ‘Integration of the Human Rights of Women and a Gender Perspective: Violence Against Women’, United Nations Economic and Social Council, E/CN.4/2006/61/Add.3, 27 January).

FINDINGS AND REASONS

65. In order to be a refugee under the Convention, it is necessary for the applicant to be outside of her country of nationality and for her to hold a well-founded fear of persecution for at least one of the five grounds listed in the Convention. The applicant claims to be a citizen of Iran and of no other country. She travelled to Australia on a valid Iranian passport and has made claims against no other country. Therefore for the purposes of the Convention the Tribunal has assessed her claims against Iran as her country of nationality.
66. The applicant has claimed that she fears persecution for reasons of being a woman who has engaged in pre-marital sex while in Australia. Since her arrival in Australia she has been in a relationship with another Iranian national which has since ended. If she was to return to Iran she claimed that she would be punished for this under Iranian laws and be subject to harm from her family particularly her brother, and that the authorities in Iran would not protect her from this harm.
67. It is generally accepted that a person can acquire refugee status in a place where he or she has a well-founded fear of persecution as a consequence of events that have happened since he or she left his or her country. However this is subject to s.91R(3) of the Act which provides that any conduct engaged in by the applicant in Australia must be disregarded in determining whether he or she has a well-founded fear of being persecuted for one or more of the Convention reasons unless the applicant satisfies the decision maker that he or she engaged in the otherwise than for the purpose of strengthening his or her claim to be a refugee within the meaning of the Convention.
68. The Tribunal found the applicant to be a truthful and creditable witness and accepts that she came to Australia with the intention of marrying [Person A]. The fact that the relationship broke down and that she was treated badly by him has left her in a position where she fears to return to Iran because she has engaged in pre-marital sex.
69. The Tribunal has had regard to s.91R(3) and is satisfied that the applicant was involved in this activity because she genuinely believed she was going to marry [Person A] and not for the purpose of strengthening her refugee claims. On that basis, the Tribunal is satisfied that s.91R(3) of the Act does not apply to the applicant.
70. The Tribunal has considered the independent country information about the treatment of women in Iran who engage in pre-marital sex. It is clear that under Iranian law she would be subject to a penalty of flogging. Clearly such a penalty is abhorrent to Western standards and would be regarded as 'serious harm' However it would appear that such a law could be regarded as a law of general application in Iran Given this the Tribunal must consider whether such penalties arising from the operation of the law apply generally and are not discriminatory: see *Minister for Immigration and Multicultural Affairs v Darboy* (1998) 52 ALD 44.
71. Enforcement of a generally applicable law does not ordinarily constitute persecution for the purposes of the Convention, for the reason that enforcement of such a law does not ordinarily constitute discrimination. As Brennan CJ stated in *Applicant A* :

... the feared persecution must be discriminatory. ... [It] must be "for reasons of" one of [the prescribed] categories. This qualification ... excludes persecution which is no more than punishment of a non discriminatory kind for contravention of a criminal

law of general application. Such laws are not discriminatory and punishment that is non discriminatory cannot stamp the contravener with the mark of “refugee”.

72. The mere fact that a law of general application may reflect some religious value does not necessarily mean it is persecutory within the meaning of the Convention. To come within the Convention it must still be shown that the law, no matter how harsh, discriminates for a Convention reason.

73. The principle that, ordinarily, non-discriminatory application of generally applicable laws does not constitute persecution, applies whether or not a particular law is oppressive or repugnant to the values of our society. In *Applicant A* (above), Dawson J agreed with the observations of the Full Federal Court in that case that:

Since a person must establish well founded fear of persecution for certain specified reasons in order to be a refugee within the meaning of the Convention, it follows that not all persons at risk of persecution are refugees. And that must be so even if the persecution is harsh and totally repugnant to the fundamental values of our society and the international community. For example, a country might have laws of general application which punish severely, perhaps even with the death penalty, conduct which would not be criminal at all in Australia. The enforcement of such laws would doubtless be persecution, but without more it would not be persecution for one of the reasons stated in the Convention.

74. Whether a law is properly characterised as a law of general application turns on identifying those members of the population to whom it applies. In some circumstances, it may be necessary to look behind a law that is generally expressed, to establish whether the law itself is in truth discriminatory in its intent or whether it has a discriminatory impact on members of a group recognised by the Convention.

75. In *Lama v MIMA* [1999] FCA 918 (8 July 1999) Tamberlin J held that:

... it is apparent that the laws of a nation, both legislative and judicial, to a large extent reflect the values of that nation. Some of these religious or ethical values will be of an abiding nature and others will vary from time to time due to changes arising from social, scientific, educational or technological developments. However, the fact that the law of a country may enshrine particular religious values does not mean that such laws can be described as targeting members in that society who do not adhere to the religion in question. In the present case, the law does not impact on the applicant in any way different to that in which it impacts upon other members of Nepalese society. It is a law of general application and the evidence does not support a conclusion that the law is applied in a discriminatory way. Although it is unlikely that a Hindu may kill a cow, in the event that he or she does so, the prescribed penalties apply. What is governed by the law is the act of killing the cow and not the social or political or religious beliefs of the person who commits the killing.

76. In this case the law complained of by the applicant applies to all Muslims in Iran whether male or female. The Tribunal therefore finds that it does not operate in a discriminatory fashion and therefore punishment under that law will not constitute persecution for a Convention ground.

77. However the applicant has also claimed that she may be subject to serious harm from her family and in particular her brother if she returned to Iran and they discovered that she had lost her virginity. Whilst the applicant appears to have grown up in a relatively liberal household given her education and employment at [workplace deleted: s.431(2)], the

Tribunal accepts that her brother is a member of the Basij and accordingly would not take such a liberal attitude to her conduct. The Tribunal considers that there is a real chance that her brother would seek to harm her upon her return from Australia.

78. The independent country information referred to above indicates that she would not be able to complain to authorities if her brother sought to harm her and that indeed if she did so she could be subject to punishment in accordance with Iranian law. Failure of State protection can, in some circumstances constitute persecution within the meaning of the Convention, where such failure is for a Convention reason. If the State is aware of the harm and does not protect the victim an issue arises as to whether this failure can constitute persecution for a Convention reason. It has previously been held by the High Court in *MIMA v Khawar* (2002) 187 ALR 574 that the Convention test may be satisfied by the selective and discriminatory withholding of State protection for a Convention reason from serious harm that is not Convention related.
79. The Tribunal has considered whether the applicant would be persecuted for the membership of a particular social group. First the Tribunal will consider whether ‘Iranian women who engage in pre-marital sex’ can constitute a particular social group.
80. In relation to membership of a particular social group, the High Court in *Applicant S* (above) held that there were three steps in determining whether a group is a "particular social group" for the purposes of Art 1A(2) of the Convention :

"First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large."
81. Whether a supposed group is a “particular social group” in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person’s membership of the particular social group. The Tribunal accepts that “Iranian women who engage in pre-marital sex’ are identifiable by characteristics or attributes common to all members of the group which distinguishes them from society at large. Accordingly the Tribunal finds that Iranian women who engage in pre-marital sex constitute a particular social group in Iran. Iran is a rigidly theocratic state which imposes strict controls on women’s sexual and social behaviour and women whose behaviour deviates from those codes are conspicuous and women who violate those codes attract a social stigma and possible criminal penalty.
82. For the above reasons the Tribunal finds that there is a real chance that the applicant’s brother will seek to seriously harm her and that for a Convention reason, namely her membership of a social group of women who have had pre-marital sex, the Iranian authorities will not act to protect her from this harm. The Tribunal has considered whether relocation within Iran would be reasonable but given her gender, age and lack of financial support the Tribunal considers that it would not be reasonable for her to relocate within Iran.
83. The Tribunal accepts, therefore, that there is a real chance that, if the applicant returns to Iran now or in the reasonably foreseeable future, she faces a real chance that she would be subjected to persecution for reasons of her membership of a particular social group. The

Tribunal considers that this clearly amounts to persecution involving ‘serious harm’ as required by paragraph 91R(1)(b) of the Act in that it involves a threat to her liberty and significant physical harassment and ill-treatment if not a threat to her life. The Tribunal considers that the essential and significant reason for the persecution which the applicant fears is her membership of a particular social group as required by paragraph 91R(1)(a) of the Act. The Tribunal further considers that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves her selective harassment for a Convention reason.

84. The Tribunal finds that the applicant is outside her country of nationality, Iran. For reasons given above, the Tribunal finds that the applicant has a well-founded fear of being persecuted for reasons of her membership of a particular social group if she returns to Iran now or in the reasonably foreseeable future. The Tribunal finds that the applicant is unwilling, owing to her fear of persecution, to avail herself of the protection of the Iranian Government.
85. It follows that the Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Consequently the applicant satisfies the criterion set out in paragraph 36(2)(a) of the Act for the grant of a protection visa.

CONCLUSIONS

86. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

87. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*

Sealing Officer's I.D. prrt44