



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

INDIA

IAA reference: IAA19/06428

Date and time of decision: 9 April 2019 14:40:00

M Anderton, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The applicant is a Sikh from Haryana, India who arrived in Australia by boat in October 2013. He applied for a Safe Haven Enterprise Visa (SHEV) on 13 January 2017.
2. The applicant's claims revolved around his membership of the Indian National Lokdal Party in 2012 and fear of harm from the parents of a Hindu girl, with whom he was in a relationship, because their families belonged to two different parties and religions.
3. On 26 February 2019 the delegate of the Minister for Home Affairs refused the visa because she was not satisfied the applicant was a refugee or that there was a real risk of significant harm upon return to India.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material).
5. No new information or submissions was received.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - He belongs to the Sikh religion.
 - He joined the Indian National Lokdal Party (NLP) in Haryana in 2012. He did not join the BJP or RSS because they put pressure on the party workers and they do not honour party workers.
 - In 2012 the applicant started a relationship with a Hindu girl, [Ms A]. [Ms A]'s father was a member of the ruling BJP party, which was in opposition to NLP. [Ms A]'s family members in the BJP party, being the ruling party, are more influential.
 - Due to both families belonging to two different parties and religions, there was a big conflict. When [Ms A]'s parents found out about the love affair, they became furious with the applicant and his family and threatened to kill them.
 - [Ms A]'s family member have been threatening him and his family with harm and have gone to their house a few times looking to hurt them.
 - The applicant's resistance to join the BJP and RSS party led to him being beaten a number of times by workers of those parties and [Ms A]'s family members.
 - In December 2012 the applicant reported the incidents to the police, but they could not file a complaint against workers of the BJP or RSS or provide protection because they were the ruling party. The applicant and his family were in fear of their lives if they remain in India. The BJP and RSS are still ruling parties, have control of the local authorities and are very influential in India and will find the applicant wherever he goes and he will not be safe.

In post interview submissions it was submitted that due to the immigration data breach the Indian government and political party may have known of the applicant's attempt to seek refuge in Australia and they would have knowledge of his ground of seeking protection which would bring disrepute and dishonour to the country and as such the political parties will further scrutinise the applicant and his family and result in harm or being killed.

Refugee assessment

7. 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

8. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
9. The applicant claimed to be a citizen of India and provided his Indian birth certificate and his parents' Indian Voter identity cards. I am satisfied the applicant is an Indian citizen and the receiving country is India.
10. The applicant claimed he was in a relationship with a Hindu girl, [Ms A]. He claimed to fear harm from [Ms A]'s father and [Ms A]'s father's political party because the applicant was from a different party and religion. The applicant claimed he and his family were assaulted by the [Ms A]'s family and people from the RSS party.
11. However, for the following reasons I consider the applicant was not a credible witness and has fabricated his claims.

Political affiliation

12. The applicant's claims about his political affiliation and role were inconsistent. In his statement the applicant and his father joined the National Lokdal party in 2012. However, in

his interview the applicant was not a member, but he helped his father since he left school (which would have been in [year]).

13. Further, when asked how long his father had been a member of the party, the applicant had difficulty recalling, but said it had been many years, which was not consistent with his statement claims they had both joined in 2012. Further, it was odd that the applicant had never voted, given his statement claims that he joined the party.
14. The applicant said his memory was not perfect due to his past detention and it had been a while ago. I have placed little weight on the differences in timing of when the father joined the political party. However, I do not accept that a poor memory or lapse of time accounts for such a fundamental difference in account of the applicant joining and membership of the party to not being a member, but assisting his father. Further, I consider the differing accounts of helping since [year] or joining the party in 2012 are significant differences in account. Further, the applicant's account of his involvement or assistance for his father was vague and lacked details. Further, there was no medical evidence that the applicant had a poor memory. Rather, I consider the reason for the poor and inconsistent accounts was because the applicant was not recounting a lived experience.

Assaults

15. Secondly, the applicant's account of when the claimed assaults and his reporting to police occurred, how many times he made police reports and the police response was not consistent. At interview the applicant said he was attacked at home in May and three months later he was attacked on the way home from temple. However, in his statement the applicant claimed the threats were made at his house and he was beaten by workers of the parties and [Ms A]'s family members, but he did not mention an assault on the way back from temple.
16. Further, in his statement the applicant claimed he reported his beatings to police in December 2012. However, in his protection interview the applicant claimed to have reported the assaults to police on two occasions, in May and in November. Further, in his statement the applicant said the police would not file a complaint about the attacks because of the influential power of the ruling party. However, in the protection interview the applicant said they would not file the complaint about an attack on the way from temple because the police believed the applicant had done something wrong and accused him instead.
17. In his protection interview the applicant claimed he was assaulted in May 2012 by the girl's brothers and three months later (ie. August) he was assaulted by 6 or 7 others who he believed were from the RSS party. However, at interview the applicant's claims about when he reported the second assault to police were inconsistent. On one account he reported it a few weeks after he recovered. However, earlier the applicant had claimed he reported the assault in November, which was three months after the second assault, not a few weeks.
18. While I place little weight on the minor differences between November or December police reportings, the applicant's account differed in the number of times he reported to police and whether he reported the second assault a few weeks or three months after the assault and the police response.
19. Thirdly, the applicant's account of the claimed assaults was vague, lacked details and was not free flowing, but told in a hesitant and piecemeal way. The delegate spent much time asking the applicant to describe the circumstances of the assaults and elaborate. However, the applicant gave one word or short responses.

20. Further, the vague assault accounts were inconsistent and lacked credibility. For instance, in respect of the first assault, initially the applicant claimed he became unconscious. Then changed the account saying he was almost unconscious. Initially he claimed the attackers left when his father and brother came. However, when asked why his family had not come out of the house sooner, given the beating had gone on for 45 minutes outside the house, the applicant said his father and brother were also beaten. When the delegate noted the inconsistent accounts, the applicant said he pleaded for their help and he was bleeding and almost unconscious so did not remember. I consider the applicant was making up his account as he went. Further, it is not credible that his family or neighbours did not notice for 45 minutes that the applicant was being attacked at home.
21. Further, in respect of the second assault claims, I consider that the applicant would have been assaulted in a crowded area near the temple lacked credibility. The applicant said in India people do not get involved in others' problems. However, I do not consider it credible that his attackers would choose such a public place for a beating. Further, his claim that when he regained consciousness he texted his brother who came to get him lacked credibility. This is particularly so, given the applicant's claim he was beaten for 30 minutes. I find it difficult to believe that no one would come to his aid or that authorities were not called or involved in such public circumstances and during such a lengthy beating.
22. Further, while the applicant initially claimed his brother took him home after the assault, later the applicant changed his account and said he went to the hospital and was given some treatment.
23. The applicant was adamant his attackers were from the RSS. However, at the same time he claimed he did not know who they were. I consider the applicant's claim that he knew the persons to be RSS and were sent by the family is at odds with his claim he did not know who they were.
24. Further, according to his own evidence when he asked the attackers why they attacked, they did not tell him. I consider if the applicant believed the attackers were RSS and linked to [Ms A's] family, then it is odd that he would ask them why they attacked him, as on his evidence he already knew the reasons.
25. Further, the applicant claimed his brother was hit 1 to 2 years prior and his father was attacked in 2018 by the same people. However, the applicant's account was particularly vague and lacking in details. I do not accept his explanation that his family do not tell him much as they don't want to upset him as the applicant had his father's medical discharge report. Further, I find it difficult to believe that the applicant would not have more information about the father's assault, or about the other claimed visits or assault of his brother, given it related to the applicant and was a key part of his claim.
26. Further, the applicant could not explain why he knew they were the same people other than that they have no other enemies. I consider the applicant's rationale that they were the same people attacking and visiting lacked credibility.
27. The applicant provided a clinic discharge report certifying that the applicant's father sustained "multiple blunt injuries" to [his body], and underwent treatment [in] January 2018. While I am prepared to accept that the document is genuine, and that the applicant's father was injured as described, the letter does not state how the injuries were sustained. On the evidence, I am not satisfied that his father or brother was assaulted or that attackers visited the applicant's home.

28. I note also that apart from the clinic discharge evidence of his father's injuries, the applicant has not provided any documentation of the applicant's claimed assaults.
29. Having listened to the applicant's account of the assaults, I do not accept that his poor account was due to a poor memory. Rather, I consider his vague, piecemeal, hesitant, changing and inconsistent account was because he was not recounting a lived experience, but making it up as he went.
30. Further, I consider the applicant's account of his relationship with [Ms A] lacked details and was inconsistent. For instance, in his statement he claimed the relationship with [Ms A] commenced in 2012, but in his application form he claimed the relationship commenced [in] March 2010 and ended [in] October 2012. In his protection interview the applicant claimed the relationship commenced in 2011 and progressed to boyfriend/girlfriend four or five months later and lasted 1.5 to two years. Further, his account of when the relationship ended changed in the protection interview. Initially the applicant claimed he reduced the number of times he saw [Ms A] after his beating in May 2012. Later he claimed he stopped the relationship in May 2012. I consider the applicant's account of when his relationship commenced, ended and its duration was inconsistent in many respects and find it difficult to believe that he would not remember such key markers given it was the crux of his protection claims.
31. Further, the applicant's account of how he found out about [Ms A]'s father's political connections lacked credibility. The applicant claimed that in May 2012 he asked [Ms A] the name of her father. The applicant then asked his own father about [Ms A]'s father, who told him of the political connection. I consider that the applicant had not known or asked about [Ms A]'s father directly from [Ms A] is lacking in credibility, particularly given his claims they had been together for 1.5 to 2 years. That it would take him that long to know or ask about [Ms A]'s father's name is not credible. Further, having listened to the interview, I consider the applicant was making up his account as he went along in response to the delegate's questions about this.
32. I do not accept the applicant was in a relationship with a girl whose father had political connections. I do not accept the applicant was in a relationship with a girl whose family disapproved or threatened or harmed him or his family. I do not accept that workers from the RSS or BJP or anyone threatened or harmed the applicant or his family.
33. While I accept the applicant's own father may have some political affiliation by way of support for the National Lokdal party, I consider the applicant has fabricated his claims about his own political involvement.
34. According to the country information in the review material, the National Lokdal party was the major opposition party in Haryana in the 2014 election. There is no information before me that members of the party were targeted. Further, DFAT noted India had a diverse political landscape and elections tend to be peaceful broadly free and fair, reflect the will of the electorate and result in regular transfers of power at central and state levels. While the risk of political violence between rival supporters increases during elections, especially if tightly contested, general elections are generally peacefully conducted. Further, other than the [Ms A] family claim (which I have not accepted), the applicant made no claims that his father faced harm as a result of his political support for National Lokdal party.
35. I do not accept the applicant was a member of National Lokdal party, assisted his father or the party or that has been or will be involved in political activity in the future. I do not accept

the applicant has or will have an imputed political opinion or faces any harm due to his father's support of National Lokdal party or that there is a real chance he faces any harm as a result.

36. I do not accept the applicant or any his family was threatened or assaulted by anyone. I consider the applicant has fabricated his claims in that regard. I do not accept he faces any harm from RSS, BJP (or their workers) or ruling parties, [Ms A's] father, family or anyone.

Religion

37. I accept the applicant is a Sikh. The applicant claimed Sikhs were discriminated against, particularly as a result of the 1984 riots. He provided country information about the 1984 riots and that Sikhs feel they have not received justice after many investigations failed to give them justice, and about RSS and BJP.
38. I accept historically there were human rights abuses against Sikhs in India, particularly in 1984. There are also reports that Hindu nationalist groups, such as RSS, have increased their influence under BJP and critics accuse them of being hostile to ethnic and religious groups, particularly Muslims. The country information provided by the applicant relates to historical Sikh riots and deaths.
39. The Indian constitution provides for religious freedom and federal law provides minority community status to six religious groups, including Sikhs. I note that there are large Sikh minorities in Haryana, the applicant's home province. DFAT assessed that Sikhs in India generally face a low level of official and societal violence and discrimination. DFAT also noted that sources agree that since the late 1980s and early 1990s Sikhs have lived peacefully in India and the majority of Sikhs do not experience societal discrimination or violence, although Sikhs who advocate for independent Khalistan may be subject to attention by authorities. However, the applicant confirmed at interview that he was not politically active and did not intend to be upon return to India either. The applicant did not claim any interest in independent Khalistan.
40. Further, I note according to Amnesty 2017-2018 report in the review material that investigation teams into the 1984 Sikh massacres were set up, charges filed and the Supreme Court was examining the decisions of closed cases. Further, while the more recent country information in the review material refers to violence against Muslims, it does not indicate targeting of Sikhs and indicates they have constitutional and legal safeguards for protection. Further, The US Department of State report does not refer to violent incidents against Sikhs and Amnesty and Human Rights Watch (in the review material) does not report that Sikhs are ill-treated on the basis of their religion or for any reason.
41. Further, the applicant did not claim he had any difficulty in practising his religion and his father was a priest at the temple. When asked if he had been harmed due to his religion, the applicant confirmed he had not been harmed, but the Sikhs had not received justice for what was done to them in 1984. Further, I note the applicant attended high school until grade 10 and thereafter did carpentry work and he did not claim to have faced discrimination in the past. On the basis of his personal circumstances, and country information, I do not accept the applicant faces any harm upon return on the basis of his religion.

Other

42. I note at interview, the delegate referred the applicant to some photographs of persons and asked him about their relationship to him. Initially in the interview, the applicant had claimed that his sister was unmarried and still lived in the village in India. However, it was evident from the discussion about the photographs that the applicant's sister was married and her husband had come to Australia on the same boat as the applicant. The applicant claimed he did not want to get anyone into trouble. I consider this was another example of the applicant not being truthful. However, I do not consider this information otherwise relevant to the consideration of this application.

Failed asylum seeker, data breach

43. I accept the applicant will return as a failed asylum and that he was a subject of the immigration data breach. In post interview submissions it was submitted the Indian government and the political party that he had been avoiding may have known about his attempt to seek refuge in Australia. It was submitted they would have knowledge of his ground of seeking protection that would have brought disrepute and dishonour to the country. The representative provided a chart which indicated that the data breach information of asylum seekers had been accessed by unknown persons in India and the USA. It was submitted there was a high chance the political parties may be aware of the applicant's whereabouts and reasons why he is in Australia, which will mean they will further scrutinise the applicant and his family and continue to harm them.
44. However, for the following reasons, I do not accept there is a real chance of any harm upon his return for these reasons. Firstly, the data breach did not disclose the applicant's claims. In any event the Indian authorities will be aware he was a failed asylum seeker upon return by virtue of his return circumstances on a temporary travel document travelling from Australia. However, they will not be aware of his claimed reasons for seeking asylum.
45. Secondly, I have not accepted that any political party has threatened, harmed or had an interest in the applicant. I do not accept they would be interested in the applicant and the data breach as I do not accept he has any political or other profile. I do not accept the authorities or any political party would be concerned that he claimed asylum as claiming asylum is not uncommon. I do not accept that they would have any interest in him upon return.
46. According to his arrival interview the applicant left India by ship in January 2013. The applicant's application indicated he found an agent to assist his travel via Indonesia and Malaysia, but he did not provide any fraudulent documents. The application did not indicate if he had a travel document. The applicant however has Indian identity documents (Indian birth certificate) and will be returning on a temporary document. DFAT noted they are not aware of any credible reports of mistreatment of returnees, including failed asylum seekers.
47. I do not accept the applicant faces a real chance of any harm from authorities or political parties on the basis of being a failed asylum seeker or a subject of the immigration data breach.

Refugee: conclusion

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

Complementary protection assessment

49. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

50. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
51. I have considered the applicant's circumstances whether he faces a real risk of significant harm upon return to India.
52. As discussed above, I have not accepted the applicant's claims of threats, assaults or harm from [Ms A's] father, family, RSS, BJP (or workers) or ruling party or anyone. I have not accepted he faces any harm on the basis of his religion or his father's political affiliation or as a failed asylum seeker subject to the data breach. I have not accepted he faces a real chance of any harm on the bases claimed. For the same reasons and applying the authority in MIAC v SZQRB [2013]FCAFC 33, I am not satisfied the applicant will face a real risk of significant harm if removed to India.

Complementary protection: conclusion

53. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.