



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

**Decision and Reasons**

**Referred application**

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MYANMAR  
IAA reference: IAA20/07902

MYANMAR  
IAA reference: IAA20/07905

CAMBODIA  
IAA reference: IAA20/07903

MYANMAR  
IAA reference: IAA20/07906

MYANMAR  
IAA reference: IAA20/07904

Date and time of decision: 13 March 2020 14:53:00  
C Wilson, Reviewer

**Decision**

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In respect of the referred applicant (IAA20/07902) the IAA remits the decision for reconsideration with the direction that:

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

In respect of the other referred applicants (IAA20/07903; IAA20/07904; IAA20/07905; IAA20/07906) the IAA remits the decision for reconsideration with the direction that:

- the other referred applicants are members of the same family unit as the above-named applicant and satisfy the criteria in s.36(2)(b)(i) of the *Migration Act 1958*.

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

## Background to the review

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### Visa application

1. The referred applicants (the applicants) are a family group of father, mother and three young [children]. The first applicant, the father, claims to be a stateless Rohingya from Rakhine State, Myanmar. The second applicant, the mother, claims to be from Cambodia but stateless. The third applicant was born in [Country 1], and applicants four and five were born in Australia.
2. The first three applicants arrived in Australia as unauthorised maritime arrivals [in] August 2013. On 5 July 2017 they applied for Safe Haven Enterprise visas (SHEV).
3. A delegate of the minister for Home Affairs (the delegate) refused the application on 14 February 2020. The delegate did not accept the applicant was a stateless Rohingya, but accepted he was a Muslim from Myanmar. The delegate did not accept the applicant faced a real chance or real risk of harm as an ordinary Muslim in Myanmar.

### 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).
5. No further information has been obtained or received.

### Applicants' claims for protection

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6. Only the first applicant (hereafter 'the applicant') put forward a statement of claims. His wife relied on her membership of the family unit of the applicant. It was indicated on the children's forms that they were making their own claims for protection, but no claims were provided beyond the statement that they relied upon their father's statement of claims. The father's statement contained claims of why he feared returning to Myanmar, but did not include particularised claims advanced on behalf of the children, nor any engagement with the issue of which country was their receiving country, given the different nationalities of their parents. The delegate proceeded on the basis the children had not made their own claims and considered them as members of the family unit of the applicant. In the absence of any submissions or new information from the applicants on this issue, I have done the same for this review.
7. The applicant's claims can be summarised as follows:
  - The applicant was born in [Location], Maungdaw Township, Rakhine State, Myanmar. He is a Rohingya Muslim and claims to be stateless.
  - He went to school for [number] years at a government primary school. His parents had to pay bribes to allow him to go, but could not afford to keep him at school after year [number].
  - From the age of [age] he was occasionally taken by the Na Sa Ka<sup>1</sup> to their camp and forced to do manual work such as cleaning and gardening. Rohingya people were often

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<sup>1</sup> Na Sa Ka is the Burmese acronym for the Border Area Immigration Control Headquarters.

forced to do such work. He was also beaten around 4 times in 2003 or 2004 by the Na Sa Ka.

- He left Myanmar in around 2004 when he was [age] because there was no future for him in Myanmar and he feared being attacked by the military.
- He went to [Country 2] and lived in a refugee camp, but had no legal status there. He tried living in [Country 3] for a year. In 2007 he entered [Country 1] illegally. He met his wife there and they married and had one child.
- He left [Country 1] for Australia in 2013 because he had no legal right to remain in [Country 1] and his children could not be educated there.
- He fears returning to Myanmar because he fears he will be arrested, beaten, tortured or killed by the government, military, police or Burmese Buddhists because he is a stateless Rohingya Muslim. Most of his family have fled Myanmar. He cannot relocate because he is easily identifiable as a Rohingya Muslim and will be targeted wherever he goes in Myanmar.
- He also fears harm because of the data breach. The authorities in Myanmar will know he sought protection in Australia and he will be at greater risk of harm because they will impute him with an anti-government opinion.

## **Factual findings**

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8. The delegate accepted the applicant was a Muslim from Myanmar, but did not accept he was a stateless Rohingya. The delegate considered the applicant had likely concealed his true citizenship status and withheld identity documentation. The basis for this finding appears to be because the applicant failed to attend the SHEV interview to speak to his claims, he failed to provide documentation from Myanmar, and his Nikah (unofficial marriage certificate) from [Country 1] included a number suggesting he had an UNHCR card that he was concealing.
9. The applicant and his family have not engaged with the Department, or the IAA, since lodging the SHEV applications in July 2017. The applicant failed to attend the SHEV interview in 2019, failed to respond to a request sent on 9 August 2017 for documentary evidence of his identity, nationality or citizenship, and the applicant's wife failed to attend an interview in 2019 to confirm her identity. Such behaviour may indicate they are concealing information, but it may also indicate they are disengaged because of literacy or language issues, or may have moved address or changed other contact details and failed to notify the Department.
10. I have considered the applicant's Nikah. It is not an official document, but was issued by an organisation called 'Central Rohingya Ulama Organisation'. Under the names of the applicant and his wife is something called an 'NRC number'. The number is identical for both of them. The delegate has interpreted this number as the number from a UNHCR card, which is plausible as the format of the number with letters and numbers is suggestive of the UNHCR card numbering system. The applicant said in his Entry Interview and in his SHEV application that he did not register with the UNHCR. The delegate found that he must have, because he has this number, and that he must be concealing this information because his UNHCR card may show his 'true identity'. Noting the number was put under both the applicant and his wife's names, I consider it is possible the number actually belonged to his wife, also an asylum seeker from Cambodia living in [Country 1]. I acknowledge it is also possible the applicant did register with the UNHCR even though he claims not to have. I am not satisfied the inclusion of this number on an unofficial Nikah is sufficient evidence to find he lied in his application about contact with the UNHCR or that he is concealing his 'true identity'.

11. The applicant did not respond to the Department's request in 2017 to provide documentary evidence of his identity, nationality or citizenship. In his application he said he did not have birth certificate of national identity card, because such documents were not issued to Rohingyas in Rakhine State. He said the family had a household registration, but that it was left behind and lost when the military took over their house. Taking into account country information regarding citizenship in Myanmar and the widespread burning or seizing of property in Maungdaw township, these explanations are plausible. The Department of Foreign Affairs and Trade (DFAT) advises full citizenship in Myanmar is available only to people belonging to one of the officially recognised 'national races' or one of the ethnic groups considered to have settled in the country prior to 1823. Rohingyas do not fall in within the national races or ethnic groups, and are typically not recognised as citizens in Myanmar.<sup>2</sup> A person claiming to be stateless may have little or no documentation, precisely because they are stateless. Alternatively they could claim to have little or no documentation, when they in fact do, because they are fabricating the claim to be stateless. I have taken this into account and weighed it against the limited evidence that is before me.
12. The applicant has consistently claimed to be of Rohingya ethnicity. At his arrival interviews on 9 September 2013 and 29 October 2014 he spoke through a Rohingya interpreter. I have listened to a recording of the arrival interview, and the applicant and interpreter spoke with ease. There was no suggestion from the Rohingya interpreter that she had any difficulty communicating with the applicant in the Rohingya language. There were no misunderstandings, unexpected responses to questions, or requests for clarification. I note also the applicant used a Rohingya translator when applying for the SHEV and compiling his statement of claims. When using a Rohingya interpreter he has given detailed information, indicating he is fluent in the language.
13. I have considered the concerns in this case, particularly that the applicant has not engaged with the Department, may have concealed a UNHCR card, and has not provided any identity documents or other evidence of his citizenship status in Myanmar. The applicant has also failed to address these concerns, raised by the delegate in the decision, for the review with the IAA. I note however the applicant claims to have minimal education. He was assisted by a migration agent to lodge his SHEV application but did not have ongoing representation. He claims his family in Myanmar have mostly left, or at least fled their home, and he cannot get documents such as a household registration list. The applicant claims to have left Myanmar in around 2005, after which time he lived in a refugee camp in [Country 2] and then spent periods in [Country 3] and [Country 1] as an undocumented asylum seeker. These claims have been consistent and they are plausible. In those circumstances it is not surprising he had no documents from Myanmar, and the only document he did have was something attesting to his marriage in [Country 1].
14. What I have before me is a consistent and plausible claim to be stateless Rohingya Muslim from Rakhine State, and a fluency in the Rohingya language that supports this claimed ethnicity and origin. I also have the doubts and concerns raised by his failure to engage with the Department and provide more information, with the inference that he is concealing information or his 'true identity'. However, apart from doubts and inferences, there is no actual evidence to suggest he has another ethnicity, nationality or identity. On all the information before me, I consider the explanation that he speaks fluent Rohingya because he is Rohingya is the most likely scenario. I find his language and consistent and plausible claims outweigh the doubts raised by his lack of engagement or documentation. I accept he is

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<sup>2</sup> DFAT, Country Information Report Myanmar, 18 April 2019; TSU Press, Rohingyas – Insecurity and Citizenship in Myanmar', 1 August 2016.

Rohingya from Rakhine State in Myanmar, and I accept, based on his ethnicity, his claim that he is stateless.

15. The second applicant claimed she was born in Cambodia, but claims she is stateless. She claims she left Cambodia with her parents as a child age about [age] and may be stateless because of her [ethnicity] and because she doesn't have any identity documents issued by the Cambodian authorities. There is no information before me to indicate persons of [her] ethnicity are denied citizenship in Cambodia; in fact country information indicates they are recognised under the country's constitution.<sup>3</sup> I do not accept that because she does not presently hold a passport or identity card for Cambodia that this means she is not a citizen or national of Cambodia. She indicated her parents live in Cambodia (at least as at July 2017), which suggests they had a right to return there. The applicant was born in Cambodia and has family living there, and there is nothing to indicate her Cambodian nationality was renounced or lost when she left the country at age [age] or since. I find on the information before me that she is most likely a Cambodian citizen. In relation to her husband and children, there is no evidence they have taken steps to acquire Cambodian citizenship as her spouse or children. Even if they could acquire Cambodian citizenship, I accept they do not presently possess it.<sup>4</sup>

## Refugee assessment

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16. Under s.36(2)(a) of the Act a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee. 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

17. 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.

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<sup>3</sup> Minority Rights Group International, State of the World's Minorities and Indigenous Persons 2012 – Cambodia, 28 June 2012.

<sup>4</sup> See *FER17 MICMA* [2019] FCAFC 106.

18. For the reasons given above, I accept the applicant is a stateless Rohingya Muslim from Rakhine State. There is no evidence before me to indicate the applicant had legal status in [Country 1] or any of the other countries he resided in after departing Myanmar. I find Myanmar is his receiving country as his country of former habitual residence. I find Rakhine State is the area he lived in Myanmar and is the area he is likely to return to.
19. The Rohingya in Myanmar have suffered severe discrimination and violence in recent years. DFAT assesses that official and societal discrimination on the basis of ethnicity against Rohingya in Rakhine State is high, endemic and severe. They typically lack citizenship, face severe restrictions on their freedom of movement, and are subject to systematic extortion and harassment.<sup>5</sup>
20. Human Rights Watch have reported large scale violent attacks against Rohingyas since Myanmar's independence. Large numbers of Rohingyas have fled the country to escape the violence. Security forces in Myanmar have reportedly engaged in torture, indiscriminate killing, and mass rapes during outbreaks of violence in 2012 and 2016. Violence began in Rakhine state in 2012 as a localised conflict between Rohingya Muslims and Rakhine Buddhists, and quickly escalated. The security forces, along with the Rakhine civilians, reportedly committed human rights violations against the Rohingya and Kaman Muslim populations across Rakhine state in 2012 and 2013. The violence included the burning of houses, and extrajudicial and indiscriminate killings. The violence decreased between 2014 and late 2016, although the situation remained extremely fragile and with significant impact on the rights of the communities.<sup>6</sup>
21. In October 2016 an insurgent group in Rakhine state called the Arakan Rohingya Salvation Army (ARSA) attacked Border Guard Police facilities in Maungdaw township. In response the security forces launched a major 'clearance operation', leading to widespread arson attacks against Rohingya villages with over 1,500 buildings destroyed between October and December 2016. A UN Fact-Finding Mission reported serious human right violations perpetrated by the security forces, including arbitrary arrests, ill-treatment, torture, forced disappearances and sexual violence during this time. The ARSA launched more attacks on a military base and security outposts in August 2017. The security force response was disproportionate, attacking almost the entire Rohingya population across Maungdaw, Buthidaung and Rathedaung townships. Médecins San Frontières conservatively estimated that at least 9,400 people died in Rakhine state between 25 August and 24 September 2017, including 730 children under the age of 5. The main cause of death was said to be gun violence followed by burning people to death in their homes, severe beatings, sexual violence, and landmines. A UN Fact-Finding Mission in March 2017 found sufficient evidence of violence by the military in northern Rakhine State to conclude that war crimes, crimes against humanity and potentially genocide had occurred. In late 2018 there was an increase in the frequency and severity of armed clashes between the military and the insurgent group the Arakan Army. As at the time of the DFAT report these clashes were ongoing, with reports of human rights violations against Rohingya civilians continuing. DFAT assessed in 2019 there remained a high risk of further violence for the remaining Rohingya in Rakhine State, predominantly from the security forces.<sup>7</sup>

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<sup>5</sup> DFAT, Country Information Report Myanmar, 18 April 2019.

<sup>6</sup> DFAT, Country Information Report Myanmar, 18 April 2019.

<sup>7</sup> DFAT, Country Information Report Myanmar, 18 April 2019; US Department of State, Human Rights Report 2014 Burma, 25 June 2015.

22. Having regard to the extreme violence suffered by Rohingyas in Rakhine State since 2012, and the assessment by DFAT that a high risk remains, I am satisfied the applicant faces a real chance of serious harm for reason of his ethnicity if he is returned to his home area in Rakhine State.
23. I have considered whether the applicant's real chance of persecution extends to all areas of Myanmar. DFAT advises there are Rohingyas living in Myanmar outside of Rakhine State, particularly in Yangon, although the actual numbers are unclear. They typically register as 'Burmese Muslims' or 'Bamar Muslims', rather than Rohingya, and generally have a better standard of living than Rohingyas in Rakhine State. Some have been able to obtain citizenship or at least bribe an official to obtain an identity card in the Kaman ethnicity (one of the officially recognised ethnicities). DFAT assesses Rohingyas outside of Rakhine State may suffer only moderate levels of societal and official discrimination, compared to the severe levels suffered in Rakhine State. However, the applicant's situation is unlikely to be analogous to an established Rohingya living as a 'Burmese Muslim' or with a fraudulently obtained Kaman identity card in Yangon. There is no evidence he has any links to anyone in Yangon who could help him obtain documentation. There is no evidence the applicant has any fluency in the language spoken in Yangon, that is, Burmese. His ethnicity would likely be uncovered upon returning to Myanmar. As someone who left illegally he will be questioned at the airport, and even if he were not imprisoned for this,<sup>8</sup> he may be at risk of being detained and returned to Rakhine State by the authorities for reason of his ethnicity. I consider he would need to conceal his status as a Rohingya from Rakhine state to avoid discrimination and physical harm or mistreatment on return to Myanmar. Such a concealment would be difficult, but also an impermissible modification under s.5J(3). For these reasons I find his real chance of persecution extends to all areas of Myanmar.
24. I have considered whether the applicant could access effective protection in Myanmar. I find the authorities cannot offer him protection in circumstances where they are an agent of persecution of Rohingya Muslims. There is no non-state party or organisation in Myanmar that could offer the applicant effective protection.
25. Given these findings I have not needed to consider the applicant's other claims, such as the impact of the data breach or an imputed political opinion.
26. In summary, I am satisfied the applicant faces a real chance of harm that amounts to serious harm because it may include significant discrimination and physical mistreatment, or even a threat to his life. I accept the essential and significant reason for the persecution would be his ethnicity, and that it would involve systematic and discriminatory conduct. I accept he cannot access effective state protection and nor can he take reasonable steps to modify his behaviour to avoid persecution. I accept his fear of persecution extends to all areas of Myanmar. I find his fear of persecution is well-founded.

### **Refugee: conclusion**

27. The applicant meets the requirements of the definition of refugee in s.5H(1). The applicant IAA20/07902 meets s.36(2)(a).

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<sup>8</sup> The penalty for leaving Myanmar illegally is a term of imprisonment up to 5 years: DFAT, Country Information Report Myanmar, 18 April 2019.

## Member of same family unit

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28. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include spouse and dependent children.
29. I rely on the Nikah, birth certificates and consistent claims regarding the family to find the second applicant is the spouse of the applicant, and the third, fourth and fifth applicants are his children. I am satisfied his children are dependent children as defined in r.1.03 as they are all young children under the age of 18. I find the applicant's wife (IAA20/7903) and children (IAA20/07904, IAA20/07905, IAA20/07906) are members of his family unit.
30. As IAA20/07902 is a person mentioned in s.36(2)(a), IAA20/07903, IAA20/07904, IAA20/07905, IAA20/07906 meet s.36(2)(b)(i).

## Decision

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In respect of the referred applicant (IAA20/07902) the IAA remits the decision for reconsideration with the direction that:

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

In respect of the other referred applicants (IAA20/07903; IAA20/07904; IAA20/07905; IAA20/07906) the IAA remits the decision for reconsideration with the direction that:

- the other referred applicants are members of the same family unit as the above-named applicant and satisfy the criteria in s.36(2)(b)(i) of the *Migration Act 1958*.

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

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

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

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

...

### 5J Meaning of well-founded fear of persecution

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

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

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

### 5K Membership of a particular social group consisting of family

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

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

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

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

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

#### **5L Membership of a particular social group other than family**

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

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

#### **5LA Effective protection measures**

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

...

#### **36 Protection visas – criteria provided for by this Act**

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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