



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA20/08321

Date and time of decision: 4 June 2020 08:10:00

M Currie, Reviewer

Decision

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

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be an Iranian citizen of Persian ethnicity who says he is a convert to the Christian faith. He arrived in Australia in July 2013 and lodged an application for a Temporary Protection Visa (TPV) in August 2017. In April 2020, a delegate of the Minister for Immigration found that Australia did not owe protection obligations to the Applicant. This finding was largely due to the delegate concluding that the applicant's two central claims, (1) that he was homosexual/bisexual and (2) that he had converted to Christianity, were not true. On 4 May 2020, the applicant's matter was referred to the Immigration Assessment Authority (IAA).
2. My task is to consider the applicant's claims for protection afresh. As this is a *de novo* decision, I am not bound by any earlier findings by the delegate.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 25 May 2020, a migration agent sent an email to the IAA on behalf of the applicant. The email to the IAA contained four attachments. A Submission to the IAA; a Psychological Assessment of the Applicant by a Clinical Psychologist; a Letter from the Pastor of a Christian Church and an explanation for why new information should be considered by the IAA.
5. The Submission to the IAA argued that the applicant was a genuine, practicing Christian and that he was homosexual. These arguments were consistent with the reasons the applicant had argued before the department. I have considered the Submission to the IAA.
6. The explanation for new information document indicates that the Psychological Assessment and the Letter from the Pastor of a Christian Church are new information. The document argues that the applicant was not afforded natural justice by the delegate and that the Pastors letter corroborates evidence of the applicant's Christian practice and engagement with his church. The Psychological Assessment is said to provide information relevant to the consideration of the applicant's claims. I have considered the arguments and advanced in the new information document.
7. The Psychologist Assessment was prepared by a qualified Clinical Psychologist who has many years of experience preparing reports of this kind. The Psychological Assessment indicates that this applicant has been diagnosed with Post-Traumatic Stress Disorder and Depression. The Psychological Assessment postdates the delegate's decision and related to an assessment conducted after the s.65 decision was written; it could not have been provided earlier. It contains credible personal information about the applicant and his mental health. I am satisfied that there are exceptional circumstances to justify considering the Clinical Psychologists Assessment, and I have done so.
8. The Letter from the Church Pastor provides a series of detailed answers to issues raised by the delegate with the Pastor in a phone call. The issue of the applicant's attendance at Church and his religious faith are central to the assessment of the claims before me. The letter provides credible personal information about the applicant and his circumstances which may have affected the consideration of the applicant's claims. I consider that there are exceptional

circumstances to justify consideration of the Letter from the Church Pastor and I have considered it.

9. Finally, I note that this applicant had previously submitted a post-interview submission to the Department, and a large volume of country information, principally related to the treatment of homosexuals and Christians and converts in Iran. This Departmental Submission and the Country Information are before me and I have considered it.

Applicant's claims for protection

10. The applicant's claims can be summarised as follows:

- He was born in [year], and lived with his large family in Isfahan Province of Iran. His family practices the mainstream Shia faith of Iran and his father is very conservative and religiously strict. His father operated a [business]. They lived in [Town 1], a small rural town with a population of around [number].
- Around 2003, when he was [age], the applicant commenced an illicit homosexual relationship with another boy in his school. The relationship lasted about a year. From that age he knew he was homosexual. The relationship was secret, and people thought they were just good friends.
- Around 2008, he commenced a second homosexual relationship with an employee at this father's [business] (E1), where they both worked. This relationship was casual, and lasted around five years (until he departed Iran). The applicant and E1 routinely engaged sexual encounters at the [business] during times when other employees were not present. This relationship was secret.
- Around 2010, the applicant commenced a casual heterosexual relationship with a woman he knew from working at the [business] (W1). This relationship was conducted in parallel with his relationship with E1. Though this was a heterosexual relationship, due to Iran's conservative social mores, this relationship was also secret. Though the applicant was happy to engage in the heterosexual relationship with W1, he prefers men. He considers himself to be bisexual.
- In 2010, the applicant obtained a Passport. He wanted to leave Iran. In 2012 he travelled to [Country 1] on a tourist visa, and hoped to make his way to Australia. He was unable to obtain transport on to Australia. His father was sick at this time, and so the applicant returned to Iran to care for him.
- Upon his return, the applicant resumed employment in his father's [business], and his relationship with E1. In late April, while the applicant and E1 were engaging in a tryst, E1's father (F1) visited the [business] and discovered them. F1 was outraged; he threatened to report them to the authorities. The applicant and E1 fled. F1 caused such a scene that the applicant's own father came outside. Due to F1's shouted accusations, the applicant's father had a heart attack.
- The applicant fled to Tehran, and stayed with his brother, who was sympathetic and had long suspected he was a homosexual. The applicant's father, died of his heart attack. The family blamed him for his father's death. A maternal uncle also died of a heart attack around this time, and the applicant is also blamed for his uncles death.
- With his brothers assistance, the applicant was able to retrieve his Passport from the family home, and depart Iran. He left via the Tehran International Airport. He travelled to Australia.

- In 2014, after he was released from detention, the applicant commenced attending English classes at a Persian Christian church. After spending some time at the church in order to attend the classes, the applicant came to view the Christian faith and Christians favourably. In time, he converted to Christianity. He was baptised in 2015. He has attended church since that time
- The Persian church espoused conservative social positions, reflecting the position of the mostly Persian attendees. The Church was opposed to homosexuals and believed homosexuality was a sin. Though he had kept his homosexuality a secret, over time he became uncomfortable with these teachings from the Persian church. In 2017, he commenced attending a church which was more tolerant of homosexual's homosexuality. He still attends.
- The applicant is a small business owner. Many of his clientele are from the Persian Community. He keeps his homosexuality secret from Persians since he believes if this became publically known he would lose clients and be shunned within the community.
- In 2017, the applicant began a homosexual relationship with an Australian man who he met at a homosexual club in [Suburb 1]. The relationship lasted two years but was mostly a secret, known only to very close (non-Persian) friends. Throughout his time in Australia the applicant has engaged in brief casual relationships with women.
- In 2019, the applicant was speaking on the phone to a cousin in Iran about his life in Australia. He discussed his homosexuality and his Christian conversion with his cousin. Later he found out that his cousin was recording the conversation at the behest of the authorities in Iran. The applicant's family was visited by the authorities after the call. The authorities maintain an interest in the applicant due to his homosexuality and his Christian conversion.
- If returned to Iran the applicant would continue to practice his Christian faith. He would espouse Christianity openly and would evangelise. He would operate a 'house church' from his home.
- The applicant fears that his renouncement of Islam and conversion to Christianity would lead to him being considered an Apostate in Iran and of interest to the theocratic Iranian regime. Furthermore, since he has publicly manifested his new faith through proselyting Christianity both in Australia and Iran he would be of further interest to the Iranian regime.
- He fears that his Homosexuality/Bisexuality, would lead to persecution in Iran due to the conservative social mores which prevail in that country.
- He believes his Christian conversion and his homosexuality would be viewed as a demonstration of anti-regime sentiment in Iran. He believes that he would be imputed with adverse political opinion by the Iranian regime.
- He fears that his attempt to seek asylum in a Western country would lead to persecution in Iran

Factual findings

11. As part of his TPV Application this applicant has provided a range of identity documents to the Department. This includes copies of Iranian Birth Certificate and an Iranian National Identity Card issued in his name. He has provided accredited translations for both documents. He has also provided a copy of the Biodata page from his expired Iranian Passport. These documents provide consistent information about this applicant and his identity. The information in the

documents is consistent with the verbal identity claims he has made since his arrival in this country. The applicant has established his identity to my satisfaction. I accept that he is an Iranian citizen of Persian ethnicity who was born and lived in the Isfahan Province of Iran. For the purposes of this decision, I find that Iran is his receiving country.

Mental health

12. This applicant has provided a copy of letter from a Clinical Psychologists dated March 2020 which indicates that in the lead up to the applicant's Protection Visa Interview the Psychologist was of the view that the applicant *"seems to be suffering from depression and severe anxiety and panic attack symptoms"* and that as a consequence the applicant *"may have difficulty recalling information accurately and consistently at the time of the review"*.
13. As discussed above, I have accepted a copy of a Psychological Assessment for this applicant from a different Clinical Psychologist which was dated May 2020. The Psychological Assessment indicates that the applicant has be diagnosed with Post Traumatic Stress Disorder (PTSD) and Depression.
14. I have considered the material from the two psychologists throughout this decision. I accept that the applicant suffers from PTSD and Depression.

Christian, homosexual/bisexual

15. This applicant's central claims all revolve around his assertion that from a young age he has been a homosexual. He says that as a homosexual he cannot live in Iran. According to the applicant his homosexuality manifested itself when he was a teenager, and though he has also engaged in sexual relationships with women, he prefers men. He says that he:
 - Had his first homosexual encounter with a male school friend around the age of [age]. He says that this relationship lasted about a year, until his friends family moved to Tehran.
 - His second homosexual relationship commenced in 2008, with another employee his father's [business]. This relationship was causal, and lasted until his departure from Iran in 2013.
 - His third homosexual relationship occurred in Australia, and commenced in 2017 and ended in 2019.
 - During is Protection Visa Interview the applicant indicated that he had identified a male member of his church with whom he was interested in dating, who he was seeking to establish a relationship with.
16. Like the delegate, I have some doubts about this applicant's claims about his homosexual behaviour. I note that the applicant did not disclose his homosexuality in 2013 when he first came to this country. He says that this was due to his fears of exposure.
17. I also have some concerns about the applicant's account of how his homosexuality came to be known. While his account of being discovered with E1 is plausible, it seems considerably less likely that his exposure in Iran, even in these circumstances, could lead to the death of his father, and of his uncle in the way described. I found the applicant's attribution of these deaths to his exposure to be unconvincing.
18. I note that though the applicant says he was engaged in a homosexual relationship in Australia for two years, he only knew the first name of his paramour. Furthermore, he could not provide

any further details about his homosexual partner in Australia other than to say he lived in [Suburb 2]. He could not provide any other independent evidence in support of this relationship. Though at interview he said he would provide photographic evidence to the delegate, he failed to do so.

19. I found the applicant's account of his cousin recording his phone conversation, and subsequent betrayal to the authorities in Iran to be entirely unconvincing.
20. To my mind, all these factors weigh against the applicant's claim that he is a homosexual. Turning next to his Christian claims I note several areas of concern.
21. The applicant concedes that he first attended a Persian Christian church in 2014 in order to participate in English lessons which were conducted there. However, after his initial exposure to Christian teachings, and Christian persons (who ran the lessons) he became interested in Christianity itself. He says that Christianity provides him with peace and calm. He was baptised at the Persian church in February 2015 and thereafter attended the Persian Church. He has provided a copy of a Baptism Certificate, in his name from this period. I accept he was baptised in 2015.
22. The applicant says that the Persian church was socially conservative, and opposed homosexuality. He did not disclose his homosexuality to members of the church. Over time he became dissatisfied with the Persian Church's position on homosexuality. He searched for a church with a more tolerant position. Eventually around 2017, he identified [Church 1] and started attending services there. He has continued to attend services at [Church 1] since that time. He has provided a copy of a Membership Card for [Church 1] in his name, dated June 2017. The applicant has also provided a copy of two letters from the Pastor of [Church 1] which also attest to his regular presence at the church since early late 2016, and of his participation in church activities. The letters also indicate that the applicant had disclosed his homosexuality to church members, including the Pastor. Finally the Letter from the Church Pastor provided to the IAA gives further details of this applicant's engagement with [Church 1].
23. I note that during interview, when the applicant was asked about his faith, he gave answers that were, in my view, rather superficial. He said that church made him calm and peaceful. His answers did not appear to demonstrate any engagement with the actual theology of Christianity. He was able to outline the major festivals of Christianity.
24. The delegate clearly had doubts about the applicant's Christian claims. I also have some concerns. However, I accept that the applicant has attended Christian churches regularly since 2015. He is baptised and had engaged with the Christian community of his church. On the evidence before me, the applicant did transfer his attendance to a church that tolerates homosexuality around 2017 and has openly discussed his homosexuality with members of that church over the last three years. While I have a number of doubts about these applicant's claims, I am willing to accept that the applicant is a homosexual, and that he is a practicing Christian.

Refugee assessment

25. 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

26. 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.
27. I have accepted that this applicant is a homosexual and a Christian. He cites each of these reasons as why he could not safely return to Iran.

Homosexual

28. Country information before me, including a large volume of information which was provided by the Applicant to the Department, indicates that in Iran there is a strong social taboo against homosexuality. Amnesty International reporting provided by the applicant indicates that homosexual activity is illegal, and, depending on the nature of the act committed, homosexual acts can be punished by the death penalty.¹ The Islamic Penal Code allows for stoning as a method of execution². Homosexuality can be treated as a mental health issue in Iran, and persons can be forced to undergo non-consensual medical treatments³. Punishments for male homosexual acts are more severe than those given to women⁴. Senior Iranian officials and politicians, including the Head of State have publicly decried homosexual behaviour and use derogatory statements about homosexuality⁵. Many Iranian leaders have publically denied that homosexuality exists in Iran and seek to suppress homosexuals according to an *Iranian Railroad for Queer Refugees* report provided by the applicant⁶.
29. Human rights organisations claim that individuals charged with sexual crimes often undergo summary trials that do not adhere to principles of fairness. Judges overseeing sodomy cases often ignore strict evidentiary guidelines laid down by the Penal Code, use questionable investigative methods, and rely on evidence that should be inadmissible. Convictions

¹ Department of Foreign Affairs and Trade (DFAT), "Country Information Report: Iran 14 April 2020", 20200414083132; *Iranian Railroad for Queer Refugees*, 'Iranian Queer Watch Report', September, 2018

² Amnesty International, "Amnesty International Annual Report 2017-18", Iran, NGED867A612

³ Amnesty International, "Amnesty International Annual Report 2017-18", Iran, NGED867A612

⁴ DFAT, "DFAT Country Information Report: Iran June 2018", CIS7B839411226

⁵ DFAT, "DFAT Country Information Report: Iran 14 April 2020", 20200414083132 & DFAT, "DFAT Country Information Report: Iran June 2018", CIS7B839411226

⁶ *Iranian Railroad for Queer Refugees*, 'Iranian Queer Watch Report', September, 2018

frequently rely on confessions obtained through torture and extreme psychological pressure, and courts have convicted defendants of sodomy charges based solely on 'knowledge of the judge' despite the existence of exculpatory evidence and a lack of inculpatory evidence. While the severity of sentencing for sexual crimes (including same-sex relations) varies considerably between courts, sentences tend to be heavier in small towns and peripheral regions than in major cities because of the more conservative values that prevail in these areas⁷.

30. The actual number person's executed in Iran for homosexuality is hard to determine. Iranian statistics do not make it clear and reporting about these issues is can be disguised by references to other crimes⁸.
31. DFAT assesses that LGBTI individuals face a high risk of societal discrimination, with ongoing traditional views about sexuality and gender restricting their participation in the community and workforce. High profile or highly visible LGBTI individuals of either sex face a high risk of violence, including from within their family, from the public or from authorities. Notwithstanding the uncertainty over how often executions occur and in which circumstances, legal provision for the use of the death penalty for consensual same-sex acts creates significant risk to those who engage in such acts⁹.
32. I have considered all of the information before me. The weight of evidence before me suggests that in Iran, homosexuals face pervasive and systematic discrimination under Iranian law. The Government is responsible for this discrimination and actively engages in the persecution of homosexuals. The persecution involves serious harm to the person, up to and including death.
33. I conclude that the applicant's homosexuality is an innate or immutable characteristic of his person. Section 5J(3) of the Act states that 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, however, certain modifications are not permitted. Country information indicates that there is some scope for homosexuals to avoid detection in Iran, by keeping a low profile which would avoid a real chance of persecution. This appears to be how the applicant lived prior to coming to Australia. However, to do this would require him to conceal an innate or immutable characteristic which is impermissible under s.5J(3).
34. Section 5J(2) of the Act states that a person does not have a well-founded fear of persecution if effective protection measures are available to the person in the receiving country. Section 5LA of the Act stipulates that effective protection measures are available if they could be provided by the relevant state, or a party or organisation that controls all or a substantial part of the state, and are willing and able to offer such protection. These bodies are considered to be able to offer protection if the person can access it, if the protection is durable and, in the case of a relevant state, consists of an appropriate criminal law, a reasonable effective police force and an impartial judicial system.
35. Having considered the above country information, for the purpose of s.5LA of the Act, I am not satisfied that effective protection measures are available to the applicant in Iran as the Iranian authorities are unwilling to protect the applicant from serious harm arising from his homosexuality. In fact, the authorities would be the agent of persecution. I am satisfied that

⁷ DFAT, "DFAT Country Information Report: Iran 14 April 2020", 20200414083132 & DFAT, "DFAT Country Information Report: Iran June 2018", CIS7B839411226

⁸ DFAT, "DFAT Country Information Report: Iran 14 April 2020", 20200414083132 & DFAT, "DFAT Country Information Report: Iran June 2018", CIS7B839411226

⁹ DFAT, "DFAT Country Information Report: Iran June 2018", CIS7B839411226

the reason the Iranian authorities are unwilling to offer effective protection measures to the applicant is his homosexuality.

36. I am satisfied the Iranian state's unwillingness to provide the applicant with effective protection amounts to systematic and discriminatory conduct on the basis of his membership of the particular social group of "homosexuals in Iran". Furthermore, his homosexuality would be the essential and significant reason for the persecution.
37. I am satisfied the applicant has a well-founded fear of persecution in Iran.
38. Having made this finding, I am not required to consider the applicant's other claims for protection.

Refugee: conclusion

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

Decision

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

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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