



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA20/08761

Date and time of decision: 15 December 2020 18:41:00

C Wilson, 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 national from Tehran. He arrived in Australia as an unauthorised maritime arrival [in] March 2013. He applied for a Safe Haven Enterprise Visa (SHEV) on 20 April 2016.
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused the application on 25 August 2016. The delegate accepted the applicant had tattoos, worked as a [musician] and dance instructor in Tehran, and had shown interest in learning about Christianity and the Freemasons. The delegate did not accept the applicant had demonstrated he was of adverse interest to the Iranian authorities, and found that the chance that he would be was too remote to amount to a real chance or real risk of harm.
3. The delegate's decision was affirmed by the IAA on 15 December 2016.¹ The applicant sought judicial review and on 16 October 2020 the decision was quashed by the Federal Court and remitted to the IAA for review.

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. The applicant's representative provided a written submission on 14 September 2016 and 18 November 2020 containing legal argument and comment on the delegate's decision.
6. Following the court remittal the applicant provided a further written submission and new information comprising country information, a letter from a Minister at [a] Church, and screenshots from the applicant's social media accounts.
7. The new country information provided by the applicant includes: the Department of Foreign Affairs and Trade (DFAT) *Country Information Report Iran* dated 14 April 2020; Human Rights Watch report *Iran - Bloody Crackdown on Dissent* dated 14 January 2020; Amnesty International reports *Iran's 'year of shame'* dated 24 January 2019 and *Iran: Hundreds arrested in vicious crackdown on Ahwazi Arabs* dated 2 November 2018; and a report of the UN Secretary-General on the *Situation of human rights in the Islamic Republic of Iran* dated 31 October 2017. The reports are not credible personal information but they do all postdate the delegate's decision and could not have been provided. Section 4733D(b)(i) is met. I am satisfied there are exceptional circumstances to justify considering the 2020 DFAT report as it replaces the 2016 DFAT report relied on by the delegate and provides updated country information on Iran. I am not satisfied there are exceptional circumstances to justify considering the 4 other reports provided as new information. Most of them are two to three years old and some of their information on the treatment of dissenters and protestors is also covered in the 2020 DFAT report.
8. The letter from minister [Mr A] is dated 28 December 2016. It is a letter of support for the applicant, commenting on his good character and engagement with Christianity. I accept this letter could not have been provided to the delegate because it post-dates the decision, but I am not satisfied information from the minister could not have been provided before the

¹ IAA16/00714

decision was made. I am satisfied it is credible personal information and I accept it may have affected the consideration of his claims. I am concerned however by how dated this letter is, having been written 4 years ago. The representative submits the exceptional circumstance to justify considering this letter is that it is evidence of his claims. I am not persuaded by this submission. There is no explanation why he did not provide this evidence from the minister to the delegate. This is not evidence or circumstances that have only arisen since the delegate's decision, but evidence concerning the applicant from 2016. Having regard to how dated the letter is and the lack of satisfactory explanation of why he did not provide this information to the delegate, I am not satisfied there are exceptional circumstances to justify considering this letter.

9. The new information in the form of social media screenshots is from the applicant's [social media] accounts. The material ranges from mid-2013 to 2020 and has been provided to support his claims to be westernised, politically active, interested in the Freemasons, and associated with the LGBTI community. I accept this material is credible personal information that may have affected the consideration of his claims as it supports his claims to be non-conformist and westernised. Some of the material also covers the period since the delegate's decision and could not have been provided to the delegate. I am also satisfied there are exceptional circumstances to justify considering this material given the long period of time since the delegate's decision and the evidence contained therein of his ongoing and evolving interests that are highly relevant to his claims.

Applicant's claims for protection

10. The applicant's claims can be summarised as follows:
 - The applicant is a single man from Tehran, raised in a Muslim family. Religion was forced on them by the state, but his family were never religious. His parents were Muslim, but believed in Zoroastrianism rather than Islam.
 - The applicant was interested in music and learnt how to play [instruments], and also learnt to compose music. His music teacher was a person of adverse interest to the authorities and the applicant may have been monitored because of his association with him.
 - From 2004 he started working as a [musician] at parties and weddings. He also owned shops selling [products], and worked as [an Occupation] [doing a job task].
 - In 2008 the Basij or Sepah raided a private party the applicant was working at, confiscated his equipment and arrested him. He was not taken to a police station but to a house. He was insulted for being un-Islamic. His family had to pay 10 million Toman for his release and to avoid being lashed. He was made to sign a document stating he would not work as a [musician] again.
 - In 2009 he worked as a [musician] at a friend's birthday in a private house. The party was raided by the Basij and the applicant was arrested and taken to a Basij building. He was questioned, beaten and subjected to lashes. He was told if they caught him playing music again they would cut his fingers off. He was released after his family paid money. He continued to work as a [musician] but only for family.
 - He attended the protests in 2009 because he was dissatisfied with the Islamic Republic of Iran. He was beaten twice by the authorities at the protests but was not arrested.

- In 2010 he rented a studio to offer Iranian dance classes. He did this because music and dance were very important to him. He only invited people he knew to the classes, to limit the risk.
- Four or five months after starting the dance class the Basij came to the studio. They beat and insulted him, saying he looked like a woman or gay prostitute. They cut his long hair and cut his beard off. They saw a tattoo on his [arm]. They threatened to throw acid on him next time because of the tattoo. He told them the image was [deleted]. If they had known it was [western inspired] they might have found him to be an apostate. They did not see his other tattoos, which include [western] images.
- He was curious about Christianity in Iran and asked a Christian friend at university if he could attend Christian classes. He went to two classes but then stopped going because he thought he was being followed.
- In mid-2012 the Iranian authorities closed his [product] shop. They said it was because [of a reason] and because he did not have women working in his shop.
- After the shop was closed, and because of his fear he was being followed, he decided he needed to leave Iran.
- Since being in Australia he has engaged with Christianity and was baptised. He doesn't like organised religion and struggles with calling himself a Christian but he does believe in God.
- He was affected by the data breach and fears the Iranian authorities will know he has sought asylum in Australia and will harm him for this reason. They will accuse him of being a spy.
- If he is returned to Iran he will suffer serious and significant harm from the Basij, Sepah, and the Iranian government because he is non-conformist with his tattoos, passion for music and dance, and his interests in Christianity and the Freemasons. Because of his interests in Christianity, the Freemasons, the Illuminati and Western culture he will be viewed as anti-Islamic or an apostate. He will also be targeted for his actual and imputed political opinion as being against the Iranian government because of his past protest activity, seeking asylum in Australia, and his pro-Western tattoos and views.

Refugee assessment

11. 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

12. 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.
13. I accept the applicant is a national of Iran, based on the identity documents he provided to the Department. The applicant lived in Tehran in Iran and his parents and siblings still live there. I find Iran is his receiving country and Tehran is the place he is likely to return to.
14. The applicant is a single man from Tehran who says he left Iran because he could not freely work as a [musician], had a few adverse interactions with the Iranian military including the Sepah and the voluntary paramilitary Basij, and because of fears he was being followed after he attended some Christian classes. He fears returning now because he believes he will be targeted for his cumulative profile due to his tattoos, interest in music and dance, western hairstyle, interest in fashion, consumption of alcohol, interest in the Freemason, interest in Christianity, anti-Islamic opinion, anti-regime opinion and activities, being perceived to be gay because of his appearance and association with the LGBTI community, and being perceived as a Zoroastrian.
15. The applicant claims to fear harm for reason of his membership of the particular social group 'artists and musicians'. He claims that on two occasions, when working as a [musician], the parties were interrupted by the authorities. On both occasions he was fined, but the second time he also received lashes and was threatened his fingers would be cut off if he was caught again. I find the applicant's claims about being arrested twice whilst working as a [musician] are credible. His accounts were detailed and credible, and consistent from his earliest interaction with the Department, that is, his arrival interview in 2013. They are also consistent with country information. Censorship in Iran impacts the music industry, with western music banned and musicians requiring a licence to perform. Western music is generally considered to be religiously offensive.² Musicians playing at weddings and other private parties could avoid punishment from the authorities through the payment of bribes or by notifying the security forces in advance and paying a fee. However, musicians caught multiple times by the authorities could have their instruments confiscated in addition to the fee increasing each time.³
16. DFAT reports that artists and musicians are tolerated in Iran as long as their work observes 'red lines'. The red lines include criticism of the Supreme Leader, the Islamic Revolutionary Guard Corp, the Islamic system of governance, and anything else considered to violate Islamic values and principles. Most artists and musicians in Iran are reportedly able to perform their works without significant obstacle, with the exception of solo female artists, but artists who cross red lines are more likely to attract adverse attention, harassment, arrest and prosecution.⁴ As someone who participated in protest activity in the past in Iran and has posted anti-regime material on his social media pages, it is plausible the applicant may cross a red line. However,

² DFAT, Country Information Report Iran, 21 April 2016; US Department of State, 2013 Country Report on Human Rights Practices, 27 February 2014.

³ Immigration and Refugee Board of Canada, Iran: Update to Response to Information Request on 8 January 1996 on treatment of musicians playing "modern music", especially by the more militant religious leader, 1998.

⁴ DFAT, Country Information Report Iran, 14 April 2020.

the applicant is not a high profile [musician] in Iran. There is no evidence before me that he has a profile or made a career in music in Australia. I accept he has an interest in western music and worked as a [musician] in Iran at private parties, but on the evidence before me I'm not satisfied he has a significant enough profile as a [musician] to attract adverse attention for this reason alone.

17. The applicant says his family are Muslim, but are not active believers in Islam. He says his parents are more interested in Zoroastrianism. He claims Islam is forced on them by the state in Iran. I accept there is some truth in this, as Iran is a theocracy with Islamic beliefs and customs enshrined in law. Shia Muslim is the official state religion, and legislation and policy heavily favours Shias whilst discriminating against other religious minorities. Under Iranian law a Muslim who leaves the faith or converts to another religion can be charged with apostasy, which can be a capital crime. Actual death sentences for apostasy are rare however, and are usually politically motivated.⁵
18. The applicant has shown interest in other religions including Zoroastrianism and Christianity, and I accept the applicant no longer identifies as a Muslim or practices that religion. He does not claim to be an atheist. He says he believes in God, just not organised religion. His secular views are reportedly not uncommon in Iran. DFAT reports secularism is widespread in the major cities in Iran and among younger and wealthier Iranian.⁶ Less than 30% of Iran's Muslim population attend mosque weekly, a number significantly less than other Muslim countries, and increasing numbers of people neither pray nor attend mosque at all.⁷
19. What may set the applicant apart from other secular Muslims in Iran however is his interest in other religions, movements and organisations. Even in Iran, but more so since being in Australia, he has explored his interests in Christianity, the Freemasons and the Illuminati. He spoke convincingly at the SHEV interview of his knowledge and interest in these matters. He does not claim to be a Freemason, in fact he said he would be scared to join them because they are a powerful organisation. He appears to be interested more in the symbolism and conspiracy theories regarding the Freemasons than in joining the organisation, but this difference may be irrelevant to the Iranian authorities. Regarding Christianity he displayed a reasonable understanding of the religion and admitted to being baptised, but also expressed a disinterest in organised religion. He said he joined Christianity whilst in detention because he enjoyed the use of music and singing in the worship, and found Christians to be 'happy, chatting, talking, and play music...nice and pleasant'. There is no evidence before me that the applicant is currently attending any church, and his evidence to the delegate demonstrated an interest and enjoyment of Christianity rather than a genuine conversion. I accept the applicant is genuinely interested in Christianity, and the Freemasons, but he is not a genuine Christian convert or member of the Freemasons, and is therefore not likely to bring adverse attention to himself merely because he is interested in them.
20. I accept that in addition to his abandonment of the religion of Islam, the applicant's lifestyle in Australia could be considered 'un-Islamic' and immoral to the Iranian authorities. Aspects of his lifestyle that may be considered un-Islamic include his long hair, alcohol consumption, association with the LGBTI community, and interest in western fashion and music. The applicant's social media contains many posts that would be of concern to the Iranian authorities and would give him a profile as anti-regime and anti-Islamic. These include the following: posts that are pro-protestors and overtly anti-regime; posts sharing or liking

⁵ DFAT, Country Information Report Iran, 14 April 2020.

⁶ DFAT, Country Information Report Iran, 14 April 2020.

⁷ Al Monitor, Iran's Ramadan Behind the Canvas, 30 July 2013; Qantara, A Tsunami of Atheism, 7 February 2013; Tezcür, Azadarmaki and Bahar, Religious Participation among Muslims: Iranian Exceptionalism, 2006.

information about Freemasons; posts showing him consuming alcohol; and posts that are pro-LGBTI. I note these posts cover a long period of time, from his arrival in Australia in 2013 to 2020. I do not find they were done to strengthen his claims for protection but rather as an expression of genuinely held beliefs and real activities. I note the information from DFAT that the Iranian authorities do not comprehensively monitor Iranian's online activity and have little interest in activities conducted outside of Iran, including posting social media comments critical of the government.⁸ I consider it unlikely the applicant's social media posting in Australia has come to the attention of the Iranian authorities at this time.

21. The applicant claims to fear harm in Iran because of his tattoos, which include the following: [a tattoo] on his forearm; [various other tattoos on his body]. Apart from the words [the] tattoos are quite large. The applicant admits he had these tattoos done whilst still in Iran, and that he received verbal harassment from the Basij when they noticed some of his tattoos at his dance studio in 2011. The Basij did not see the tattoos on [other parts of his body].
22. There are reports of men being harassed or discriminated against in Iran on the basis of their appearance, for example having westernised appearance, long hair, or visible tattoos. However DFAT reports however that it is common to see young men on the streets of Tehran fitting such a description. Even men with full arm sleeve tattoos have been seen in Tehran. DFAT assesses that when men are harassed for their appearance, including tattoos, it is likely due to overzealous enforcement by individual security authorities or the person has already come to the attention of the authorities for other reasons.⁹ The applicant says the Basij were interested in the tattoo [on] his forearm, but he told them it was a picture of [deleted], and they enquired no further. Had they done more research to find out who the image was of, and had they noticed [a] tattoo on [another area], an image which is linked not only to the US government but also to [detail deleted], they may have uncovered the applicant's peculiar interests. I accept the issue with the tattoos is not that he has them, but rather what they represent and how they could be interpreted and form part of an imputed (and actual) pro-western and anti-regime and anti-Islamic political opinion. Whilst his tattoos did not lead to persecution in the past in Iran, I accept that may be because the full extent of his tattoos was not viewed by the Basij nor was the significance of them understood on that occasion.
23. I accept the applicant's description of himself as non-conformist is a fair description. Individually his interests in liking western music, having tattoos and long hair, posting anti-regime material on his social media, being baptised as a Christian, abandonment of Islam, being interested in the Freemasons and the Illuminati, being interested in western fashion, drinking alcohol, engaging with the LGBTI community, or generally enjoying an 'immoral' lifestyle may not be known to the Iranian authorities or give him a profile such as to attract adverse attention. But I consider that cumulatively these interests and attributes amount to a non-conformist who would stand out from other young men in Tehran. Even though tattoos, and western hairstyles and fashion, are becoming more common and accepted in Tehran, the applicant's tattoos are extreme and political in nature. Whilst I don't accept he is of ongoing interest because of past negative interactions with the Basij and Sepah, I accept those interactions are illustrative of how he could come to their attention again in the future. That is, previously he was harassed when working underground as a [musician] and then as a dance teacher. DFAT reports there is a level of tolerance by the Iranian authorities for 'immoral behaviour' when it is done behind closed doors. However, even when that is the case, the police and paramilitary groups such as the Basij can be tipped off, for example, when people are holding mixed-gender parties and consuming alcohol. In June 2019 the authorities set up

⁸ DFAT, Country Information Report Iran, 14 April 2020.

⁹ DFAT, Country Information Report Iran, 14 April 2020.

a designated telephone number for residents in Tehran to report immoral behaviour, including mixed-gender parties and immoral Instagram posts.¹⁰ In Iran the applicant was already living a lifestyle and showing interest in matters that can be considered un-Islamic or 'immoral'. I accept those interests and beliefs have only further developed in Australia, and whilst he may have hidden aspects of himself to avoid harm in the past, such as by teaching dance in private and restricting his [musical] work to family, I accept he is now unlikely to adhere to Islamic norms of conduct and blend in on return to Iran. I am satisfied that cumulatively the applicant would have a profile as someone non-conformist with Islam and the Iranian regime, and I rely on the country information before me to find such a profile would attract adverse attention from the Iranian authorities.

24. I have considered whether the applicant could take reasonable steps to modify his behaviour so as to avoid a real chance of harm. Whilst he could take some steps to avoid adverse attention, such as cover his tattoos at all times, cut his hair short and dress more traditionally, I consider the modification required to conceal his true religious and political beliefs is impermissible under s.5J(3). I find s.5J(3) does not apply to the applicant.
25. For these reasons I am satisfied there is a real chance that cumulatively the applicant's appearance, tattoos, interests and beliefs including his anti-regime political opinion will bring him to the adverse attention of the authorities in Iran and that he would face harm as a result. I accept the essential and significant reason for the persecution the applicant fears would be his cumulative profile as a person with an actual and imputed political opinion as anti-regime and anti-Islamic. I accept the harm he faces could include detention and significant physical mistreatment, and that the persecution involved systematic and discriminatory conduct. As the state is the agent of persecution I find issues of state protection do not arise in this case. I also find the real chance of persecution relates to all areas of Iran.
26. Given these findings it is not necessary to consider the remainder of his claims.

Refugee: conclusion

27. 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*.

¹⁰ DFAT, Country Information Report Iran, 14 April 2020.

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.