



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

MYANMAR

IAA reference: IAA21/09813

Date and time of decision: 22 October 2021 17:11:00

K Allen, 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 a Burmese Muslim from [Village 1], [Town 1] in Mon State in Burma. On 20 September 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. On 31 August 2021 a delegate of the Minister for Immigration (the delegate) made a decision to refuse the grant of the visa on the basis that the applicant was not owed protection.

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 27 September 2021 the delegate's legal representative provided the IAA with submissions, a statement from the applicant containing submissions, submissions on new information and a news article. To the extent that the submissions contain argument in relation to the delegate's decision, I have had regard to those submissions in making this decision.
5. The submissions contain new information from Dr Nick Cheeseman from the Australian National University dated 31 August 2021 which was obtained by the applicant's representative when they sought advice on the question of citizenship in Myanmar. The advice quoted is directly relevant to the delegate's conclusions about the applicant's citizenship. Given the date of the advice, I am satisfied that it was not and could not have been provided to the delegate. Further, given that it is expert information provided to support submissions about the delegate's findings, I am satisfied that there are exceptional circumstances to justify considering the new information.
6. Attached to the submission is an article about Ashin Wirathu dated 10 September 2021 ("Who is Ashin Wirathu, a vitriolic monk freed by Myanmar's military", TRT World). The applicant's representative has submitted that the delegate relied on outdated DFAT country information which simply said that DFAT was not aware of what happened to Ashin Wirathu. The delegate's failure to conduct some basic research to ascertain the current whereabouts and activities of Ashin Wirathu reveals a failure to engage with the central, determinative question before him – the situation for Muslims in 2021, since the February 2021 military coup, as opposed to the situation for Muslims in 2019 under the previous government as described in a DFAT Report from early 2019. I am satisfied that the information about Ashin Wirathu could not have been provided at the primary stage, because he was released from prison in September 2021, after the delegate made his decision. Given its relevance to the delegate's finding, I am satisfied that there are exceptional circumstances to justify considering the new information.
7. I have also obtained my own information from the Department of Home Affairs which was collated by Country of Origin Information Service Section on 14 September 2021 in relation to the treatment of non-Rohingya Muslims following the coup d'état on 1 February 2021. The delegate did not consider the change of government in his decision. This new information includes: "The Excuse of (Il)legality in Discriminating and Persecuting Religious Minorities: Anti-Mosque Legal Violence in Myanmar", Kyaw, N, Asian Journal of Law and Society, Volume

8, Issue 1, February 2021, 20210909154845; US Department of State, “International Religious Freedom Report for 2020 – Burma”, 12 May 2021, 20210513161123; Bertelsmann Stiftung, “BTI 2020 Country Report: Myanmar”, 29 April 2020 20200429141448; Reuters, “Setting aside divisions, Myanmar's ethnic groups unite against coup”, 12 February 2021, 20210212182503; Burma Human Rights Network, “Mosque Fire Latest in Tatmadaw’s Campaign Against Religious Minorities”, 24 June 2021, 20210910152239; Kamruzzaman, M, “Rights body accuses Myanmar junta of harassing Muslims, setting mosque on fire”, Anadolu News Agency, 25 June 2021, 20210910150538; Tyson, A S, “Myanmar protesters bridge religious divides to counter military coup”, The Christian Science Monitor, 26 March 2021, 20210910172147; Freedom House, “Freedom in the World 2021 – Myanmar”, 3 March 2021, 20210315190106. Given the change in the political situation since the applicant departed Myanmar and his fear of harm on the basis of his religion, I am satisfied that there are exceptional circumstances to justify considering the new information.

Applicant’s claims for protection

8. The applicant’s claims can be summarised as follows:

- He was born in Myanmar in [year]. He does not know if his birth was formally registered or not. It was a home birth.
- His father was a poor [occupation 1]. As far as he knows the family did not own any land. They lived in a one-room shack built on the communal land of the village. In around 2002 their shack was bulldozed by the authorities with no compensation because the government wanted to build a bridge.
- Their poverty and lack of connections made it impossible for them to get the documentation they needed to receive government services. These were denied because they were Muslims. He tried repeatedly to get necessary papers but could not afford the bribes and was never successful.
- He was forced to do child slave labour for the military every year from the time he was 12 or 13.
- The only work he could get was casual agricultural labour, with no employment rights or benefits and regular wages.
- The denial of basic services, health care, travel rights, any education and normal legal protection made survival extremely difficult. The endless religious persecution was the reason that he and his siblings had to flee Myanmar.
- In 2010 he left the country by swimming across the river into Thailand and then he met up with his brothers in [Country 1] where he worked without documentation until 2012 when he was registered and issued with UNHCR documentation. In 2013 he travelled to Australia.

Refugee assessment

9. 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

10. 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.

11. The applicant claims to be a Burmese Muslim from Myanmar. He states that his sister told him he was born in [year] but he has no documentation. Both his parents have died so he is reliant on his older siblings for information. They have moved out of Myanmar and variously reside in [Country 1] and [another country]. He does not claim to have been educated and he does not claim to have ever owned land or his own home. He claims he is essentially illiterate. He survived in Myanmar by doing ad hoc farming work for other villagers until he was able to escape to [Country 1] to join his brothers. The applicant claims that he is a practising Muslim and that he attends Friday prayers at mosque in Australia. He claimed to have had issues with his religious practice in Myanmar and was told to remove his headwear when going to pray.

12. Country information¹ confirms that Muslims in Myanmar are subject to abuse and harassment and that laws and practices are in place that effectively discriminate against Muslims on the basis of their religion. I note the establishment of Muslim free villages, restrictions on Madrasas and the rebuilding of mosques and the influence of ultra-nationalist Buddhist movements and that anti-Muslim sentiment in Burma is widespread and entrenched. Based on his account of his life and religious practice, I accept that the applicant is Muslim and that he practised Islam when he lived in Myanmar. I also accept as plausible that he faced discrimination in Myanmar on the basis of his religion.

13. The delegate raised some concerns about the applicant's credibility in particular placing weight on the fact that the applicant had provided different dates of his father's death. I understand that the applicant has provided differing dates, but I note that he has otherwise provided a reasonably consistent account of his life in Myanmar and his claims. In his submissions to the IAA he explained that he has sometimes been confused when trying to explain his background and family circumstances, but he has done his best to explain everything truthfully. He has never had any schooling. He was raised in a poor family from a poor, rural village. Their life was governed by the seasons, not the time of day or the calendar. He is illiterate and has never had to fill out complicated forms or answer

¹ Department of Foreign Affairs and Trade (DFAT), "Country Information Report, Myanmar", 18 April 2019, 20190418091206; Burma Human Rights Network, "Persecution of Muslims in Burma", 4 September 2017, CISED50AD5558

complicated questions before he left Myanmar, and he gets very anxious when dealing with the authorities based on his past experiences. His current representative also noted that he did not have representation at any of his interviews with the Department. I accept that the applicant has been generally credible, and I accept that he was born and lived in Myanmar and that he is a Muslim of Burmese ethnicity as claimed.

14. The applicant states that whether or not he is theoretically entitled to be a citizen of Myanmar, he has always been treated by the government there as stateless and this is because he is a Muslim. He claims that his family were not paid compensation when their home was destroyed to build a bridge. He claims that their poverty and lack of connections made it impossible for them to get the documentation they needed to receive government services. He claims he tried repeatedly to get necessary papers but could not afford the bribes and was never successful.
15. Country information² states that a person can apply for a Citizenship Scrutiny Card (CSC), which replaced the National Identity Card, once they are 10 years old. After getting the card, they should renew it at ages 18, 30 and 45. CSCs are very important. They may help to do basic things like travel, go to high school and university, open a bank account, register marriage, vote, and buy and sell land. The card records personal information, including name, sex, religion, race, father's name and identification number. The applicant is not sure his family were ever listed on a Household Registration List (HRL). Country information³ states that household registration is required for the issuance of identity documentation, school enrolment (particularly at the secondary and higher levels), accessing services (including health, electricity and water), marriage and travel permission. If a person is found to be unregistered, the penalty is a maximum of seven days detention at the police station, during which time the person must prove they belong to a household and be registered on their HRL. The applicant does not claim to have done any of the things a person with documentation should be able to do apart from his travel out of Myanmar. The delegate asked the applicant about his travel from [Village 1] in Myanmar to [Country 1]. The applicant claimed that he caught a bus to the border at Myawaddy, swam across the river and found his aunt [in] Thailand. His brother sent money to his aunt and organised for a people smuggler to pick him up and take him through Bangkok to the border with [Country 1] and into [Country 1]. The applicant claimed that on the trip from [Village 1] to Myawaddy the bus was searched by the authorities multiple times. The applicant stated that he managed to avoid being identified as undocumented as he bribed the bus driver to allow him to pretend to be a ticket inspector on the bus. In this way he was not required to produce identity documents and evaded detection by the authorities. While the applicant's account of his travel may seem unlikely, I have no reason to doubt his account noting that country information states that bribery and corruption are common features of life in Myanmar.
16. The applicant's representative provided advice from an expert on Myanmar in relation to the interpretation of the *Citizenship Law 1982*. It is opined that unless both of the applicant's parents were citizens of Myanmar, he would not be a citizen. It is an unreasonable leap of logic to say that because the Bamar are the majority ethnic group in Myanmar, therefore both of his parents were nationals/citizens of Myanmar and therefore he is a citizen of Myanmar by birth under s.5 of the Citizenship Law. Under the Law there are three categories of citizenship, full, associate, and naturalized. S.43 of the Law would appear to open the way for the child of a citizen in any of these three categories and a foreigner to apply for

² Smile Education and Development Foundation & Justice Base, "Access to documentation and risk of statelessness",

1 December 2017, CISED50AD8574; DFAT, "DFAT Country Information Report Myanmar", 18 April 2019, 20190418091206

³ Ibid.

citizenship. However, there are a number of legal and practical difficulties that arise should the foreign parent be stateless or in any case be unable to produce documentation so as to verify their legal status. It is virtually impossible to register the birth of a child or acquire citizenship documentation without producing identity documents for both parents. The administrative processes follow the law in assuming that information and documentation of both parents will be available and lack the flexibility that would be needed to cope with the omission of one parent's information. It is submitted that as both of the applicant's parents are now deceased and they did not have citizenship, nor documents to prove they were citizens, it would not be possible for the applicant to prove he is a citizen or to acquire citizenship. Having regard to all these factors, and my acceptance of the fact that the applicant was born and resided in Myanmar, I find that he was technically eligible for citizenship and I find Myanmar to be his receiving country. I am satisfied that the applicant does not have a right to enter and reside in any other country. However, I also accept that, at a practical level, the applicant will have difficulties on his return to Myanmar to demonstrate his eligibility for citizenship or to acquire documents to prove his citizenship.

17. Since February 2021 the political situation in Myanmar has changed significantly. The country is now under control of the Tatmadaw (the Burmese military). There are media reports⁴ that the military has killed almost 1,000 people in a running crackdown on dissent, a local monitoring group says, with thousands more arrested. Tens of thousands of civil servants and other workers have either been sacked for joining protests or are still on strike in support of a nationwide civil disobedience campaign. A coronavirus outbreak has overwhelmed the healthcare system, with many hospitals empty due to a work boycott by pro-democracy medical staff. The country information before me indicates that most of this violence is occurring in major centres such as Yangon and Mandalay as and that the military is targeting people actively engaged in dissent such as protestors, politicians and journalists. The country information before me does not report that violence is particularly occurring against Muslims in Mon State.
18. The delegate had regard to DFAT's assessment that a prominent Buddhist nationalist monk, Ashin Wirathu, who has led an anti-Muslim campaign since the 2012 violence in Rakhine State was banned from preaching from March 2017 for spreading hate speech with the potential to incite violence and he was imprisoned. Wirathu was a leading member of the Ma Ba Tha. In May 2017, the Ma Ha Na also imposed a ban on Ma Ba Tha activities, and the group were ordered to disband and remove its anti-Muslim propaganda from across the country. In response to the ban, the group rebranded as the Buddha Dhamma Parahita Foundation. In July 2018 the Ma Ha Na again ordered the group to cease its activities. DFAT is not aware of any recent activities of the group. The applicant's representative has submitted that since the delegate's decision, after the military coup d'état, Ashin Wirathu, was released from prison. It is submitted that this indicates that the military junta gives its full support to extremist, genocidal views which in the past have led to bouts of gross violations of human rights against Muslims. It has been submitted that Ashin Wirathu and his followers have been given carte blanche to resume their hateful preaching and to unleash violence on Muslims such as the applicant.
19. I have had regard to the fact that the applicant would be returning to Myanmar at a time of crisis where the Tatmadaw is in control of the country. Given the relatively recent change in

⁴ Including: Reuters, "Setting aside divisions, Myanmar's ethnic groups unite against coup", 12 February 2021, 20210212182503; Burma Human Rights Network, "Mosque Fire Latest in Tatmadaw's Campaign Against Religious Minorities", 24 June 2021, 20210910152239; Kamruzzaman, M, "Rights body accuses Myanmar junta of harassing Muslims, setting mosque on fire", Anadolu News Agency, 25 June 2021, 20210910150538; Tyson, A S, "Myanmar protesters bridge religious divides to counter military coup", The Christian Science Monitor, 26 March 2021, 20210910172147.

country conditions there is limited reporting before me of the treatment of Muslim returnees. The country information before reports that the military raided the Muslim quarter of Mandalay soon after the coup, claiming to be hunting terrorists. In March 2021, two Muslim members of the National League for Democracy were reported to have died in custody. In June 2021, the military was reported to have raided mosques and to have been responsible for an arson attack on a mosque in Yangon. In February 2021 an issue of the Asian Journal of Law and Society reported that although Islam is constitutionally enshrined, its adherents in Myanmar suffer from legal disabilities due to their uncertain citizenship status and they are frequently discriminated against. Muslims are legally and socially treated as second-class citizens according to the current Myanmar Citizenship Law. This double-minority status of most Muslims in terms of both religious affiliation and ancestral origin has made them vulnerable in Myanmar. Overall, it would appear that the Tatmadaw has engaged in the targeting of Muslims outside of Rakhine State since the coup and they have been taking any support they can get to consolidate their position.

20. I accept that the applicant departed the country illegally and would be returning through a major airport. There are three international airports in Yangon, Mandalay and Naypyidaw. I am satisfied that the applicant would be returning without Burmese identity documents. DFAT reported on the return process prior to the coup. It found that Myanmar's Ministry of Labour, Immigration and Population is responsible for conducting interviews of returnees, with the exception of Rohingya returnees who are managed by the Ministry of Social Welfare, Relief and Resettlement. DFAT is not aware of how often these interviews are conducted and what, if any, information is passed to government security agencies. It is reported that refugees from Thailand (primarily Karen) who return to Myanmar via a formal assisted voluntary returns process undergo 'national verification', which can take up to a year, before being issued a CSC which allows them to exercise rights and access services in Myanmar. Despite the guarantee of citizenship through the formal return process, DFAT assesses the majority of refugees from Thailand prefer to return informally due to range of factors, including a continued mistrust amongst camp populations of the Myanmar government, and the lengthy process of verification, which can lead to family separation. In these circumstances, even under the old government it would be foreseeable that if the applicant was able to return, he might face significant delays in being issued with CSC if he was indeed found to be eligible. DFAT also reports that returnees to Myanmar who departed the country illegally are technically subject to up to five years imprisonment for having illegally crossed a border, and DFAT is aware of, but unable to verify, reports of this provision being enforced in recent years. In that context it is possible that the applicant could face imprisonment for his illegal departures, although there is limited information before me about the frequency and circumstances in which such a provision would be applied, nor is it clear how the Tatmadaw would enforce such a provision or whether they would recognise the applicant as being a citizen to whom the law applies.
21. I have had regard to reporting that the Tatmadaw has a poor record in terms of dealing with ethnic and religious minorities. In 2018 a UN Fact-Finding Mission found sufficient evidence of violence perpetrated by the Tatmadaw in northern Rakhine State to conclude that war crimes, crimes against humanity, and potentially, genocide occurred. There are recent reports that the Tatmadaw have targeted non-Rohingya Muslims in Islamophobic attacks including a lethal attack on sleeping Muslims at a mosque during Ramadan and setting a mosque on fire. DFAT reports that the Tatmadaw act with impunity and there are credible

reports that the Tatmadaw use torture to extract confessions from political prisoners including ethnic minorities and that detainees face physical mistreatment⁵.

22. Given the views reportedly expressed by the Tatmadaw about foreigners and Muslims, and the recent reporting of attacks against Muslims since the coup, I am satisfied that there is more than a remote chance that the applicant would face harm in the return process. I am satisfied that it would be open to the authorities to detain and investigate the applicant on the basis of his illegal departure and lack of documentation. As the applicant would be returning as an undocumented Muslim failed asylum seeker, I am satisfied that there is more than a remote chance that he would be adversely targeted by the Tatmadaw and the authorities in that process and that he faces a real chance of ongoing detention and physical mistreatment. I find that this amounts to serious harm. I am satisfied that the harm is essentially and significantly for reasons of the applicant's religion and that it is systematic and discriminatory conduct and that the harm amounts to persecution.
23. Section 5J(3) of the Act provides that a person does not have a well-founded fear of persecution if the person could take reasonable steps to modify their behaviour so as to avoid a real chance of persecution. However, certain modifications that are not permitted, including modifications which would conflict with a characteristic fundamental to the applicant's identity or conscience. I find that requiring the applicant to modify behaviour such as concealing his religion would conflict with characteristics fundamental to his identity. I find that s.5J(3) does not apply.
24. As the harm would be inflicted by the current government, I find that effective protection measures are not available, and that the harm relates to all areas of Myanmar. I am satisfied that the applicant has a well-founded fear of persecution within the meaning of s.5J.
25. In light of the above findings, it is unnecessary to consider whether the applicant faces a real chance of harm on any other basis and I make no finding on any remaining claims.

Refugee: conclusion

26. 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*.

⁵ DFAT, "DFAT Country Information Report Myanmar", 18 April 2019, 20190418091206

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.