



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

MYANMAR
IAA reference: IAA19/06709

MYANMAR
IAA reference: IAA19/06710

Date and time of decision: 1 July 2019 15:40:00
D Corrigan, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

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 applicants (the applicants) arrived in Australia [in] April 2013. On 23 June 2017, they lodged applications for a Safe Haven Enterprise Visa (SHEV).
2. In a decision dated 31 May 2019, a delegate of the Minister refused to grant the visa. The delegate found that the applicants were Myanmar citizens who did not face a real chance of serious harm or significant harm on account on their Islamic religion or because they would be returning as failed asylum seekers. The delegate also found that the applicant wife did not face a real chance of serious harm or significant harm on account on being a female.

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. The IAA received a written submission from the applicant's representative and recent statutory declarations of both applicants. To the extent that they discuss the findings of and other matters before the delegate this is not new information for the purpose of s.473DC(1) of the Act.
5. Contained within these documents is some new information. The submission states that the applicant husband (the applicant) was born and lived in Yangon his entire life and that the applicant wife also has consistently claimed that she was born in Yangon. However, in their SHEV application (prepared with the assistance of a registered migration agent) and in the SHEV interview they did not claim this; instead claiming that they were born in towns in Mon State and this appears to be a mistake by the representative. I am not satisfied that this new information is credible, personal information which was not previously known, and had it been known, may have affected the consideration of the applicant's claims. Nor am I satisfied that this new information could not have been provided to the delegate before he made his decision. I am also not satisfied that that there are exceptional circumstances to justify considering this new information.
6. In the submission, it is argued that the IAA needs to consider exercising its discretionary power to invite the applicants to give oral evidence at an interview. I have listened to the SHEV interview and I am satisfied that the applicants were given a meaningful opportunity to put forward claims and evidence and I note that the applicants were represented in the preparation of their SHEV application. I consider that their claimed confusion and my consideration of new information set out above or any different factual findings I may have about their credibility do not support the exercise of that power. I also note that the IAA has a statutory requirement to pursue the objective of providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3. I have therefore decided not to get any new information under s.473DC.

Applicants' claims for protection

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

- He is a Burmese Muslim from [location], Myanmar. He was born in [year] and his ancestors are Rohingya. When he was very young, his father was kidnapped and taken for labour and killed at the hands of the military and his family were afraid and would hide from them.
- He was not allowed to attend school because he was a Muslim. When he was around 10 years old, he was playing with a chicken. A soldier took it away from him and when he asked him to give it back, he was bashed in the head with the butt of a gun.
- The army would visit his house and take whatever they wanted. In 2002, 7-8 soldiers visited his house and seized all of his family's belongings, including livestock and savings. His mother was pushed and kicked and they threatened that they would return, kill everyone and take everything. The applicant and his brother left the house the same day and arranged to travel to [Country 1].
- He did not have any identity documents in Myanmar as he was not a citizen. His parents tried to apply for citizenship but were rejected because they are Muslim. He fears being killed by the authorities because he is stateless. He does not have any identity documents and has nowhere to stay. He has nothing, no opportunities and he is afraid.

8. The applicant wife's claims can be summarise as follows:

- She is a stateless Burmese Muslim who grew up in [a city] in Mon State with her parents and [siblings]. She has not been in contact with her family for many years but believes they still remain in Myanmar.
- She experienced discrimination in Myanmar because she was a female Muslim. She could not attend school or medical facilities because she is a Muslim. She was afraid to walk around as she would be sworn at. She tried many times to seek employment but was rejected because she was a Muslim.
- In 2011 a man attempted to rape her. She believes he may have had connection to the military. She started shouting and some people came to help so the man ran away. After this she was afraid and no longer left the house. She told her brother and he went looking for the man. The man refused to fight him and he lied to her brother. A week later 5-6 men, including her attacker, attacked her brother and caused him to be permanently [disabled]. She believed that she had put her family in danger and may do so again in the future so she decided to leave Myanmar. She travelled to [Country 1] with a friend.
- She does not have any identity documents because she is not a Myanmar citizen. Her parents and tried to apply for citizenship but were rejected because they were Muslim. She did not attempt to apply for citizenship because she thought she would also be unsuccessful because she is a Muslim.

Refugee assessment

Well-founded fear of persecution

9. 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.

Country of reference

10. The applicant has claimed in his entry interview and in his SHEV application that he is stateless. He has provided an UNHCR identity card from [Country 1] in his name but no other documentation. The applicant had applied for a Refugee and Humanitarian visa in March 2012 with this card as his identification. In that application he refers to his birth date coming from a Family Population List; however he gave evidence at the SHEV interview that he and none of his family ever had identity documents. The applicant has claimed that application was written by an agent and he was not aware of what was contained within it. I have taken into that the applicant could not read and write English at that time and his lack of education and did not have an interpreter and that his brother was in Australia. However, the application is in his name and was proposed by his brother who is an Australian citizen and I am not satisfied that this is an adequate explanation. Nor am I satisfied that his agent at the time of the March 2012 visa application misunderstood his reference to a list of family members given to him by his mother to be a Family Population List and I note he has not provided any evidence to support this assertion. I find that this matter detracts from the credibility of his claim.
11. I note that the applicant's parents were married and had [number] children and that country information indicates the importance of household registration lists in Myanmar as persons can be detained if they are found to be unregistered.¹ The delegate put to the applicant for comment that a brother of his had been contacted in [Country 2] and had stated that his brothers were Myanmar nationals. In response, the applicant told the delegate that he was a Myanmar citizen and repeated this several times, contrary to what he had said in his entry interview and his SHEV application. He also stated that his family members are all citizens of Myanmar. I have taken into account the applicant's claims that he was confused during the interview and that he was not well and was stressed and had a headache. However, there is no supporting evidence of his not being well and he did not raise any issue with the delegate as to how he was feeling and I am not satisfied that he was unwell and I do not find this and his claimed confusion to be satisfactory explanations. I find that this further detracts from the credibility of his claim.
12. I also note from the referred materials, that a brother's application for an Offshore Humanitarian visa from 2005, declared on three occasions that he (the brother) was a Myanmar citizen. The applicant has argued that he thinks this was due to a misunderstanding because they were born in Myanmar but I do not consider this a satisfactory explanation and the applicant has not provided any evidence of his brother which

¹ Department of Foreign Affairs and Trade (DFAT), "Country Information Report, Myanmar", 18 April 2019.

supports the applicant's speculation. I consider this matter strongly indicates that the applicant is a Myanmar citizen and further detracts from the credibility of his claims.

13. Based on the above, I find that the applicant is a Myanmar citizen and national and that Myanmar is his receiving country.
14. The applicant wife has claimed that she is stateless and she has not provided any documentation. At the SHEV interview, when asked whether she was a citizen of Myanmar, she stated "no" because she did not have a National Registration Card and that she was not able to get a passport or go to school. After, she asked for clarification as to what a citizen meant, she stated she was born in Myanmar and so was a citizen. She claimed never to have heard of a Household Registration List nor knew if the authorities ever came to the family house to check a list. I do not find it plausible or credible that she would have no such knowledge of this document given its importance in Myanmar (including that as persons can be detained if they are found to be unregistered and that it is required to obtain a Citizenship Scrutiny Card to obtain services such as electricity and water)² and given that she left Myanmar as an adult at around the age of [age].
15. Given all the evidence before me, I find that the applicant wife is a Myanmar citizen and national and that Myanmar is her receiving country.

Muslim and Muslim female claims

16. Given my findings that the applicants are Myanmar citizens, I do not accept their claims that they do or did not have any documents because they are not citizens or that their parents tried to apply for citizenship but were rejected.
17. The applicant has given generally consistent evidence about the events that led to his departure from Myanmar in 2002. I accept that when he was very young, his father was taken by the military to do forced labour and that he never returned. I accept that the army had targeted Muslims in his village and would visit his house and take whatever they wanted. I accept that in 2002, 7-8 soldiers visited his house and seized all of his family's belongings, including livestock and savings. I accept that his mother was pushed and kicked and they threatened that they would return, kill everyone and take everything. I accept that the applicant and his brother left the house the same day and arranged to travel to [Country 1].
18. The applicant wife has given generally consistent evidence about the events in 2011 that led to her departure from Myanmar. I accept that she was subject to rape attempt by a man who may have had connection to the Burmese military. I accept that after this incident, she was afraid and no longer left the house. I accept that she told her brother and he went looking for the man. I accept that the man refused to fight him and he lied to her brother. I accept that a week later 5-6 men, including her attacker, attacked her brother and caused him to be permanently [disabled]. I accept that she then decided to leave Myanmar.
19. In making my findings, I have taken into account all of the country information referred to by the delegate and the representative. However I have given the greatest weight to the most recent report of the Department of Foreign Affairs and Trade (DFAT) because it is very recent, highly authoritative and it has been prepared with regard to the current caseload for decision-makers in Australia. It is also based on DFAT's on the ground knowledge and discussion with a range of sources in Myanmar and takes into relevant open source reports.

² DFAT, "Country Information Report, Myanmar", 18 April 2019; T. Gibson, H. James & L. Falvey, "Rohingyas - Insecurity and Citizenship in Myanmar", TSU Press, 1 August 2016

DFAT have stated that Muslims outside of Rakhine State can generally access a similar level of government services to other religious minorities. There are credible reports of discrimination against Muslims but they assess that that these incidents generally represent informal discrimination by mostly Bamar Buddhist public officials, rather than formal policy. DFAT assesses that Muslims outside of Rakhine state face moderate levels of official and societal discrimination and a low risk of societal violence on a day-to-day basis, on the basis of their religion. They assess that women in Myanmar face moderate levels of societal discrimination and a moderate risk of gender based violence, particularly domestic violence.³ I have also taken into account the other country information referred to by the delegate in her decision

20. Given the whole of the country information before me and that they are Myanmar citizens, I do not accept that the applicants were prevented from attending school or accessing health and other government services or that they would not be able to do so upon return. The events that I have accepted occurred to the applicant and his family occurred many years ago and given the very long passage of time, I do not accept that the applicant faces a real chance of any harm on account of them. Similarly, the events that the applicant wife and her brother experienced are also a long time ago and occurred when she was a single woman. Whilst I have taken into account that the applicant would not be with her all the time (such as when he is working) and she has lost contact with family members in Myanmar, I note that she would be returning to Myanmar as a married woman and I am not satisfied that she faces a real chance of any harm on account of these events. I accept that she suffered verbal abuse as a Muslim female when she went outside but these events also occurred a long period of time ago and I do not accept that such treatment amounts to serious harm. I note the applicant wife has not claimed to have experienced or to fear domestic violence. The applicant wife has not given any further details about her past attempts to obtain employment and the rejections and taking into account their particular circumstances and the overall weight of the country information. I note the applicants do not have any children to support and I do not accept that the applicants would not be able to subsist and obtain work and accommodation and access services. I do not accept that they would be prevented from practising their religion or going to mosque. Taking all of the country information into account and their particular circumstances, I accept that both applicants face a real chance of official and societal discrimination (including verbal abuse) on account of being Muslims (and in the applicant wife's case due to being a Muslim female) but I find that this would not amount to serious harm. I find that they do not face a real chance of serious harm on account of these claims.

Rohingya/Bengali claims

21. In his SHEV application (prepared with the assistance of a registered migration agent), the applicant said he was of Burmese ethnicity (in answer to question 32 and in his statutory declaration) and at the start of the SHEV interview he also stated that he was a Burmese Muslim. In the SHEV application, asked what languages he spoke, read and wrote, he answered that he only spoke Burmese and a little English and did not at all mention Rohingya or Bengali. Whilst he later claimed that his mother said their ancestors were Rohingya and that he spoke Rohingya a little and understood it more and that he could also speak Bengali, this was substantially inconsistent with the information he had provided in his SHEV application. I do not accept that his lack of education and English or claimed confusion or lack of representation at the SHEV interview satisfactorily explain these inconsistencies. Given this, I do not accept that the applicant is a Rohingya or Bengali or would be perceived

³ DFAT, "Country Information Report, Myanmar", 18 April 2019.

to be one (or an undocumented/stateless Rohingya/Bengali) upon his return or that he and the applicant wife would face a real chance of any harm on account of these claims.

Failed asylum seekers, returnees from a Western country and illegal departure

22. DFAT have advised that as far as they are aware, the act of having applied for asylum overseas does not, in itself, result in harmful or differential treatment upon return to Burma.⁴ DFAT have also stated they are aware of a small number of voluntary returnees entering Myanmar via international airports during 2017 and 2018, but has not received reports of questioning of or adverse treatment toward returnees by government officials following their return to Myanmar. 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.⁵ There are no other reports before me that indicate returnees are being prosecuted for this reason.
23. Taking into account the country information considered as a whole and their particular circumstances, I find the applicants do not face a real chance of any harm on account of these matters.

Overall assessment

24. Considering the applicants' profile on a cumulative basis (including their being Muslims and failed asylum seekers and returnees from a western country who departed illegally and the applicant wife being a Muslim female), I find that they do not face a real chance of serious harm. Their fear of persecution is not well-founded.

Refugee: conclusion

25. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

Complementary protection assessment

26. Under s.36(2)(aa) of the Act, a criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

27. Under s.36(2A), a person will suffer 'significant harm' if:
 - the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture

⁴ DFAT, "Burma: Country Information Request MMRCI150717155751716 – Returnees to Burma", 2 September 2015.

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

- the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
28. I have found that the applicants would not face a real chance of serious harm on account of their being Muslims and failed asylum seekers and returnees from a western country who departed illegally and the applicant wife being a Muslim female. Even when considering their profile cumulatively (including their being Muslims and failed asylum seekers and returnees from a western country who departed illegally and the applicant wife being a Muslim female), I find that they do not face a real risk of significant harm.
29. I do not accept that the treatment the applicants may face upon return (societal and official discrimination including verbal abuse) amounts to significant harm even when considered cumulatively. I am not satisfied that there is a real risk that the applicants will be arbitrarily deprived of their lives, be subject to the death penalty or be subject to torture. Nor does the evidence before me indicate that there is a real risk that they will be subjected to cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied the applicants faces a real risk of significant harm for any reason.

Complementary protection: conclusion

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

Member of same family unit

31. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include spouses.
32. As neither of the applicants meets the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

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.