



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

MYANMAR
IAA reference: IAA20/08155

Date and time of decision: 8 May 2020 14:46:00
M Brereton, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

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 stateless Muslim from Myanmar. He departed Myanmar illegally in 2010 and arrived on Christmas Island [in] May 2013 aged[age]. On 2 August 2017, he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 8 April 2020, a delegate of the Minister for Immigration (the delegate) refused to grant the SHEV.
2. The applicant claimed to fear harm as a stateless Muslim. He claimed that he had faced attacks and abuse and fled with his uncle.
3. The delegate accepted the applicant's claims as to identity, religion and origin but found the applicant to be not credible in relation to his claimed statelessness or his fear of harm in Myanmar. The delegate considered the applicant's profile as a Muslim citizen of Myanmar and was not satisfied that he faced a real chance or real risk of relevant harm.

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) (the review material).
5. On 29 April 2020, the applicant provided a submission and statutory declaration to the IAA. A migration agent assisted with the submission but is not otherwise acting for the applicant. The submission refers to issues that were before the delegate and makes argument in respect of the delegate's decision and to that extent, is not new information.
6. The statutory declaration was not before the delegate and is new information. It is said to provide further clarification to the applicant's evidence, including correcting some points raised during the interview with the interviewing officer (not the delegate who made the decision) on 8 November 2019 (the interview), which the applicant claims he was not aware of until he received the delegate's decision. The applicant was not assisted by a representative or a support person at the interview. The declaration does not make any new claims and most of the new information provided as clarification is responding to the findings of the delegate. I am satisfied that this information could not have been provided to the Minister before the delegate made the decision and in all of the circumstances I am satisfied that there are exceptional circumstances to justify considering this statutory declaration.
7. The applicant's statutory declaration states: "I wish to be able to explain what I have said in this statement in person to the reviewer of the Department decision and request that I be given an opportunity to do so before a decision is made on the review of my application." Under s.473DB(1) of the Act the IAA must review a fast track reviewable decision referred to it under s.473CA by considering the review material provided to the IAA under s.473CB without accepting or requesting new information and without interviewing the referred applicant. The IAA does not have a duty to get, request or accept any new information whether the IAA is requested to do so by a referred applicant or by any other person, or in any circumstances: s.473DC(2). If the IAA does decide to accept or get new information, it is only able to consider that information in exceptional circumstances. The applicant attended an interview and he was also given limited assistance in preparing his submission and declaration to the IAA. He has responded to the issues raised by the delegate and it is not apparent what further

explanation that the applicant intends to provide if interviewed, or how any new information may satisfy s.473DD. I have decided not to exercise my discretion to invite the applicant to give further information or comment, by way of an interview or otherwise.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:
- He is a Muslim who was born in [Yangon], Myanmar.
 - His father is of the Pashu ethnicity and his mother is of the Bengali ethnicity. They came from Mon State but moved to Yangon before the applicant was born.
 - His parents are not citizens of Myanmar and told the applicant that he could not claim to be a citizen.
 - He went to a government school for four to five years but stopped going because he was treated badly. He was attacked, assaulted and called "kalar", which is an offensive term directed at persons of Muslim descent.
 - Some of his friends were attacked for wearing Muslim clothes and his parents told him not to do so.
 - He fled Myanmar at the age of [age] in 2010 with his uncle. He went because as a Muslim he had no rights, could not travel freely, could not work and was oppressed. He and his family had words of hatred directed at them by their neighbours. He left illegally, smuggled over the border in the boot of a car.
 - He has never had a Myanmar identity card because he left as a child.
 - He cannot return because he is not a citizen and would not be safe as a Muslim.
 - He will be imprisoned, tortured and killed by the government. He could also be targeted by Buddhists because his clothing and appearance identify him as a Muslim.

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 has been consistent in his claims to be a Muslim who was born in Myanmar and he utilised an interpreter in the Burmese language during the interview. He has not provided any documentary evidence in support of this claim but has consistently claimed that his family does not have any identity documents. There is no evidence or information before me that indicates the applicant may be from another country or that he has a right of return to, or residence in, any other country.
12. Although claiming birth in Myanmar, the applicant claims he cannot obtain citizenship and is stateless. In his statutory declaration to the IAA he states:

I consider that I should be a citizen of Myanmar. This is because I was born in Myanmar and therefore I believe I should have a right to citizenship under the law. However, the government in Myanmar does not provide me with the rights of citizenship in practice, due to its discrimination against my religion. This is why, despite being born in Myanmar, I was unable to hold identity documents. I therefore am not an official citizen of Myanmar in practice, and am therefore stateless. This difference has not been easy for me to explain myself.

I do not have copies of my Household Registration List and Citizen Scrutiny Card. My parents could also not provide me copies of these documents. I do not know if these documents ever existed or have been lost during the years since I left Myanmar when I was [age] years old. I contacted my parents about two weeks after the interview with the Department (in late November 2019) and asked for copies of any identity documents, but when my parents asked the government for any identity documents they were refused because of their religion.

I am unsure how I was enrolled in school without identity documents (or whether these enrolment documents were later lost), nevertheless I only attended school until I was about [age] years old, as I stopped going because I was treated badly for being a Muslim.

I reiterate that I was only [age] years old when I left Myanmar and it is therefore understandably difficult for me to remember clear details regarding registration issues, because these matters would naturally have been dealt with by my parents.

13. According to the Australian Department of Foreign Affairs and Trade (DFAT),¹ administrators throughout Myanmar are required to compile and register births and deaths and move people to and from household lists. As such, households are required to report any changes, including relocations and marriages. Households are also required to present a copy of their list to authorities upon request. These lists are issued and updated by the Ministry of Immigration and Population and the Ministry of Home Affairs. 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

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Myanmar", 18 April 2019, 20190418091206.

detention at the police station, during which time the person must prove they belong to a household and be registered on their household list by the head of the household. It is unclear what would happen if a person was not claimed by a household head, and DFAT does not have any information on how often or how consistently penalties for incorrect registration are applied.

14. Other information² notes that the household list provides identification of residential status including: date of the record, name of state, township, city, village, street, where the house is physically located, room number, building number and personal information including: name, date of birth, gender, father's name, relationship with the household head, occupation, registration number, ethnicity, nationality and religion. A household list must be presented when applying for an identity card, birth certificate, school enrolment, travel permits and other documents.
15. A 2017 report³ notes that birth registration is a key component in preventing statelessness. It is often the first legal document that an individual acquires, allowing them to access other services such as education and health. The same report also notes that while many people could access some education with only birth certificates, a household list was often required. I note that this appears to be more prevalent in terms of higher education, which the applicant did not seek to undertake in Myanmar.
16. I consider it is significant that the applicant departed Myanmar at the age of [age] and in my view it is plausible that he is unable to explain how he and his family could live without documents, how he was able to attend school for a period or whether such documents existed but have now been lost or destroyed. I am not satisfied that the applicant is concealing the existence of such documents or that this affects his credibility in any way. Nevertheless, the applicant's parents have lived and worked in Yangon all of his life and he has not claimed that they have ever been harassed, arrested or imprisoned by the authorities for not possessing a household list or other documents. When asked if the authorities ever came to the house to check documents he said that they did but his parents paid money and the authorities went away. He has not provided any evidence of this bribery beyond this assertion and while there is DFAT information before me (cited below) that Muslims may be required to pay informal fees to update documents, DFAT does not indicate that undocumented Muslims can avoid household list scrutiny through bribes.
17. The applicant's statutory declaration indicates that at his request, his parents asked the authorities for identity documents but were refused "because of their religion". The fact that his parents approached the authorities casts some doubt on the claim that they know they are stateless and have no right to such documents. DFAT⁴ notes that Muslims in Yangon and Mandalay often experience delays and are required to pay informal fees for routine government processes, such as updating household lists. As the periods of time and payments vary depending on the individual applicant and township officer processing requests, DFAT assesses that these incidents generally represent informal discrimination by mostly Bamar Buddhist public officials, rather than formal policy. Although he believes that his parents were refused documents, I consider that it is equally plausible that his parents were unable to obtain

² TSU Press, "Rohingyas - Insecurity and Citizenship in Myanmar", 1 August 2016, CIS38A80121535.

³ Smile Education and Development Foundation and Justice Base, "Access to documentation and risk of statelessness", 1 December 2017, CISED50AD8574.

⁴ DFAT, "DFAT Country Information Report Myanmar", 18 April 2019, 20190418091206.

documents because of financial issues or informal discrimination, and I am not satisfied that this is corroborative of the claim that the family is stateless.

18. During the interview the applicant said that his parents live in his grandmother's house in Yangon. The interviewing officer asked him if his grandmother was still alive and he said no. The interviewing officer asked who owns the house and the applicant said it was his grandmother's. The interviewing officer asked how his grandmother could have owned a house if she was not a citizen and the applicant said he did not know whether his grandfather or grandmother bought it and he only knows it was owned by his grandmother.

19. The applicant's statutory declaration states that:

While I understand that only citizens can own property in Myanmar what I meant was that my grandparents have lived in that house for a very long time. Although I think of this house as 'my grandmother's house' I do not know what the ownership arrangements are in relation to the house. I do not know if they pay rent or purchased the house. As mentioned, I was [age] years old when I left Myanmar so I was not familiar with the arrangements for the property.

20. It is plausible that the applicant does not know whether his grandmother owned the house but noting that his grandparents lived there for a very long time and his own parents and brother still live there, I consider it more likely that his family owns the house.

21. The delegate noted that the applicant's uncle (who came to Australia with him) told the then Department of Immigration (the Department) that the uncle and his sons were citizens of Myanmar. The source of that information is not in the review material. The applicant submits that:

As noted in my interview with the Department I was always told by my parents that our family was not eligible for citizenship due to our religion. I believe that my uncle and cousin are also stateless. I have not seen their citizenship papers.

I have heard that some people can pay for citizenship in Myanmar but I am not aware of my uncle or cousin doing so. I also consider that an assessment of my claim should be independent from these relatives.

22. I have not seen citizenship papers for his relatives or any evidence as to how they may have obtained that citizenship. I have not given any weight to the citizenship status of these relatives.

23. I have carefully considered all of the issues set out above. The applicant's claims that his family has no documents are not persuasive when considered against the evidence suggesting that they own a house and that they have not been arrested or unable to work and subsist in the past, despite the authorities visiting this house. While I accept that the applicant believes the family has never held documents, I am not satisfied that this is the case. I am not satisfied that the applicant is undocumented and stateless. I am satisfied that the applicant and his family are documented Myanmar nationals and I find that Myanmar is the receiving country for the purposes of this review.

24. The applicant arrived in Australia as a single man but since his arrival he has married an Australian permanent resident and had two children. He made no claims in his application or at the interview that his Australian family will not return to Myanmar with him or to fear harm for any other reason arising from his Australian family. The delegate did not consider this issue

and the applicant has not made any submission to the IAA in relation to his Australian family. I am satisfied that the applicant is not making any claims in relation to his Australian family or any potential separation. Having regard to all of the circumstances, I do not consider that any such claims arise on the material and I have not considered those matters further in this assessment.

25. I accept that the applicant is a Muslim. DFAT⁵ confirms that anti-Muslim sentiment is prevalent in Myanmar, especially outside of major cities. The situation is particularly bad in Rakhine State, where Rohingya Muslims have suffered high levels of discrimination and extreme violence, leading many to flee the country. Even non-Rohingya Muslims in Rakhine State face a high level of discrimination and a moderate risk of violence. The applicant does not claim to be Rohingya, is not from Rakhine State, and there is no apparent reason that he would need to go or travel through there.
26. According to the 2014 census the largest Muslim populations are in Yangon and Mandalay regions and Mon State. In 2014, there were 345,612 Muslims in Yangon Region (comprising 4.7% of the population). Local sources told DFAT that Muslims in Yangon and Mandalay often experience delays and are required to pay informal fees for routine government processes, such as updating household lists. As the periods of time and payments vary depending on the individual applicant and township officer processing requests, DFAT assesses that these incidents generally represent informal discrimination by mostly Bamar Buddhist public officials, rather than formal policy. Students from religious minority groups, particularly Muslims, experience unequal access to secondary and tertiary education and Muslim university students without CSC are only permitted to attend classes and sit examinations. They are unable to graduate or receive qualifications. Myanmar Muslims have also experienced a range of limitations on their ability to practise their faith freely and in recent years, authorities have blocked the rebuilding of mosques and *madrassas* that have been damaged, destroyed or sealed. Requests for new religious buildings were delayed and even when approved, some decisions were reversed. DFAT advises that reduced tolerance for Islamic faith activities has been, at least in part, propagated by a rise in anti-Muslim sentiment at both the official and societal level. In its most extreme form, this has resulted in violent incidents against Myanmar's Muslim community.
27. The Burma Human Rights Network (BHRN)⁶ notes violent incidents against Muslims involving Buddhist extremists and details the breadth of violence, other serious incidents and discrimination that have occurred over the last several years. A wave of violence began in Rakhine State in 2012 and spread to other areas of Myanmar throughout 2013 and 2014. Violence abated for a period but there was another wave of religious violence in the north and east of the country in 2016. Since then, BHRN opines that while the outright violence has decreased in frequency and ultra-nationalist groups like the Ma Ba Tha are less vocal, persecution has continued in an institutionalised manner across the country.
28. The United States Department of State (USDOS)⁷ has likewise noted an increase in religious-based violence in 2012-2013, particularly in Rakhine State, that has led to the displacement of Muslim populations. Societal discrimination against the country's Muslim populations and rising Myanmar-Buddhist nationalism, including the 969 group and the Buddhist Organization to Protect Race and Religion, which denigrated Islam and called for a boycott of Muslim

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

⁶ Burma Human Rights Network (BHRN), "Persecution of Muslims in Burma", 4 September 2017, CISED50AD5558.

⁷ United States Department of State (USDOS), "Human Rights Report 2014 Burma", 25 June 2015, OG2B06FAF35.

businesses, contributed to a wave of violence against mosques, Islamic schools, Muslim households, and Muslim-owned businesses.

29. The information above indicates that there have been outbreaks of religiously motivated violence in Myanmar and in Yangon itself in past years and I accept that incidents and clashes involving Muslims continue to occur. However, the reports before me do not indicate that violence towards Muslims has continued to occur with frequency in Yangon and other non-conflict areas in Myanmar. The information before me does confirm instances of discrimination and some restrictions on religious freedoms (specific examples being the closures of *madrassas* and large public prayers), the persistence of hate speech, and the serious and negative impact of Buddhist nationalist groups. However, while I accept that occasional violent incidents do occur most years, I am satisfied from the reports that violent incidents have been infrequent in Yangon and the surrounding areas over the last several years.
30. DFAT's overall assessment in 2019 was 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. This is consistent with the BHRN reporting and I accept DFAT's assessment that a person with the applicant's profile as a Muslim outside Rakhine State would face a low risk of societal violence. I find there is no more than a remote chance of the applicant facing violence or related harm now or in the reasonably foreseeable future on the basis of his ethnic and religious profile as a Muslim in his home area of Yangon.
31. DFAT reports that societal and official discrimination against Muslims (and other ethnic and religious minorities) may manifest in a range of ways. The level of discrimination is most acute for Muslims (principally Rohingya Muslims) living in Rakhine State but I accept that there are reported examples of official and societal discrimination outside of these areas, including urban areas like Yangon. I also note that USDOS reported in 2015 that multiple sources noted that restrictions against Muslims and Christians impeded their ability to pursue higher education opportunities and assume high-level government positions and that Muslims were unable to invest and trade freely. While hate speech and anti-Muslim rhetoric persists in Myanmar, there are indications of improvement in the country. For example, in its 2019 report, DFAT confirmed that the Ma Ba Tha nationalist group was ordered by the authorities 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 but in July 2018, the central Buddhist authority again ordered the group to cease its activities. DFAT is not aware of any recent activities of this group. More generally, although there is discrimination and barriers for Muslims outside of Rakhine State, the reports before me do not indicate that Muslims outside Rakhine (such as Yangon) are unable to access sustainable employment, education, health care or other basic services.
32. Turning to his personal circumstances, the applicant would be returning to his family home in Yangon (where incidents do occur, but anti-Muslim sentiment is less prevalent). His past experience of harassment, bullying and name calling at school and in public is consistent with the country information before me. I accept that this occurred and may have caused the applicant some frustration or upset. I accept that he may face similar experiences now or in the reasonably foreseeable future if he returns to Myanmar. I also accept that while he may have felt scared wearing his religious clothing while travelling to and from the mosque, neither he nor his family were ever prevented from practising their faith in the past. I note that the applicant's family has maintained a stable residence in Yangon for many years and he has not claimed that they have been subjected to serious harm because of their religion since he left Myanmar.

33. Having regard to all of the above I am not satisfied there is a real chance the applicant would be denied or unable to access employment, accommodation, health care or other basic services in Myanmar because of his religious and ethnic profile. I accept that Muslims living outside of Rakhine State in Myanmar may face challenges. I accept that as a Muslim, the applicant will likely face some societal and official discrimination because of that profile, including difficulties, delays and financial impositions in obtaining official documents should he return to Myanmar. However, I am not satisfied any societal or official discrimination he may face would prevent him from finding or accessing employment, accommodation, education, identity documentation, or basic services. While I accept the situation in Yangon may be frustrating for him, I am not satisfied that any societal or official discrimination he may face (including name calling, or harassment) on the basis of his profile as a Muslim would threaten his life or liberty, involve significant physical harassment or ill-treatment, would deny him the capacity to earn a livelihood, cause him significant economic hardship, deny him access to basic services, threaten his capacity to subsist, or otherwise constitute serious harm, even when considered in a cumulative sense.
34. Having regard to all the information before me, I am not satisfied there is a real chance that the applicant will face violence, discrimination or any other conduct amounting to serious harm, for reasons of his profile as a Muslim, or on any related basis, the Myanmar authorities or from Buddhists, now or in the reasonably foreseeable future should he return to Myanmar. I find the applicant's fears in this regard are not well-founded.
35. I accept that the applicant departed Myanmar illegally at the age of about [age]. DFAT⁸ reports that it is aware of a small number of voluntary returnees entering Myanmar via international airports in 2017 and 2018, but has not received reports of questioning 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 states it is aware of, but unable to verify, reports of this provision being enforced in recent years. As noted, the applicant departed Myanmar at the age of about [age] and at his entry interview the applicant said that even minors are arrested; however, there is no information before me indicating that minors, or persons who departed as minors but are now adults, have been charged, detained or mistreated for departing illegally. I consider that if this was a common or regular occurrence, it would be reported on. I am not satisfied on the evidence before me that there is more than a remote chance that the applicant will face harm for having departed Myanmar illegally.
36. Having regard to all of the above, I am not satisfied that the applicant faces a real chance of violence or related harm on the basis of his profile as a Muslim in Yangon, or arising from his departure from Myanmar and his failed asylum claim. I am not satisfied that he faces a real chance of any other harm that would constitute serious harm as a Muslim in Yangon. The applicant does not have a well-founded fear of persecution for any reason in Yangon, should he return to Myanmar.

Refugee: conclusion

37. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

⁸ DFAT, "DFAT Country Information Report Myanmar", 18 April 2019, 20190418091206.

Complementary protection assessment

38. 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

39. 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
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
40. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
41. I accept that the applicant is a Muslim. I accept that the applicant may face some official and societal discrimination for reasons of his ethnic and religious profile, but I have found that any discrimination or harassment would not amount to serious harm. I accept that if the applicant was exposed to official or societal discrimination on return to Myanmar, including bullying or name calling, or difficulties obtaining documentation, it may be frustrating for him but having regard to the applicant's circumstances, and the country information considered above, I am not satisfied any discrimination or harassment he may face would include amount to a threat to his life or liberty or torture. I am not satisfied that it would include or amount to cruel or inhuman treatment or punishment or degrading treatment or punishment, or that it would otherwise constitute significant harm as defined, singly or cumulatively.
42. I have found above that the applicant would not otherwise face a real chance of harm for any reason in Myanmar should he return to Yangon. As "real chance" and "real risk" equate to the same threshold,⁹ and for the same reasons as given above, I am not satisfied that the applicant faces a real risk of significant harm for any reason in Myanmar.

Complementary protection: conclusion

43. 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 applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

⁹ *MIAC v SZQRB* (2013) 210 FCR 505.

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

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.