



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

MYANMAR
IAA reference: IAA20/08515

Date and time of decision: 22 July 2020 11:58:00
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 Muslim from Myanmar. She departed Myanmar in 2010 with her parents and arrived on Christmas Island [in] October 2012. On 23 November 2016, she lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 19 June 2020, a delegate of the Minister for Immigration (the delegate) refused to grant the SHEV.
2. The applicant claimed initially to be a stateless Rohingya but following an invitation to comment on adverse information, she confirmed that she was a documented Myanmar national of the Indian/Burmese ethnic group. She claimed to fear harm in Myanmar because of her Muslim religion and because she may not be able to obtain new citizenship papers should she return.
3. The delegate found that the applicant is a documented citizen of Myanmar. The delegate considered country information about Muslim citizens in Myanmar and was not satisfied that the applicant faced a real chance or real risk of relevant harm should she return.

Information before the IAA

4. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. On 20 July 2020, the applicant (through her migration agent) provided a submission and attached information to the IAA. Parts of the submission refer to and make argument in respect of the delegate's decision and information that was before the delegate. I am satisfied that this is not new information.
6. Part of the submission refers to the applicant's parents, who have a separate matter currently before the IAA. The applicant in the present matter has made a separate SHEV application and did not ask in that application to be included in her parents' application as a member of the same family unit. The delegate did not consider the applicant as part of her parent's application and produced a separate decision record for the applicant's parents. The applicant has said that she agrees with and relies on aspects of her parents' evidence in relation to past history and citizenship status and to that extent, I am satisfied that those parts of the submission that refer to those issues are also relevant to the applicant. I have not considered those parts of the submission that refer only to the parents' individual claims.
7. The submission attaches new information, comprising a 2019 report from the United Nations Human Rights Commission, a 2014 report from the United States Commission on International Religious Freedom, and a 2016 decision of the Administrative Appeals Tribunal (AAT). The applicant has not explained why this information could not have been given to the Minister before the delegate made the decision. The two reports appear to contain general, and not personal, information, while the AAT decision does not refer to the applicants or to any person said to be related to, or associated with, the applicant in any way. The profile of the person in the AAT decision is only generally similar, in that the person is also a Muslim from Myanmar and I am not satisfied that it is credible personal information in the relevant sense. The applicant has not satisfied me as to the matters in s.473DD(b). The United States report has been replaced by a later version which is in the review material and which provides a more

recent analysis of the situation in Myanmar. The United Nations report is said to focus on the situation of ethnic minorities in Myanmar's Rakhine, Chin, Kachin and Shan States; to highlight the situation of the Rohingya; the armed conflict between the Arakan Army and the Myanmar forces; and the situation in northern Myanmar. The report also documents violations and abuses under international human rights law and violations of international humanitarian law, and provides a brief overview of the situation of the Karen. The applicant is from Yangon and is no longer claiming to be Rohingya. She does not claim to have any links or associations with any of the separatist groups or the armed conflict in other parts of Myanmar. She does not claim to belong to any ethnic group other than "Indian Burmese". I consider that the United Nations report is of limited usefulness in considering the applicant's personal situation. The AAT decision (which is dated 2016) relates to a person of the Muslim religion from Myanmar and has regard to that person's particular circumstances. Such decisions, while informative, are not binding and I have considered this matter having regard to the applicant's particular and individual circumstances and the more recent country information that is before me. Having regard to all of the above, I am not satisfied that there are exceptional circumstances to justify considering this new information.

8. The applicant attended a SHEV interview, provided a response to an invitation issued under s.57 of the Act, and attended a post-response interview. She has provided a submission to the IAA with the assistance of a registered migration agent. I am satisfied that she is aware of the issues that arose in her application, the concerns held by the Minister, and that she has had a real and meaningful opportunity to address these concerns and further explain her claims. I have decided not to seek further information or comment from the applicant, by way of interview or otherwise.

Applicant's claims for protection

9. The applicant and her parents claimed initially to be stateless Rohingyas but as noted above, they later amended these claims. The applicant's claims, incorporating the corrected information provided after the s.57 invitations, can be summarised as follows:
 - They family are not Rohingyas. They had made that claim on the advice of other persons.
 - The family are Muslims of Indian Burmese ethnicity. In Myanmar they had citizenship scrutiny cards (CSC) and other official documents, including passports. They obtained these by paying bribes.
 - The applicant was born and lived in a township in Yangon district prior to coming to Australia.
 - In about 2001, the applicant's father was involved in a dispute about collecting money to build a mosque without official permission. He was detained by the authorities and beaten. The family had to pay bribes to get him released.
 - The authorities used to come and search the family house for weapons.
 - The applicant was harassed for being Muslim and for wearing headscarves. She was hit by her teachers. Other students would not be her friends.
 - As a Muslim, she cannot marry anyone from outside the religion.
 - The applicant fears harm because of her religion and ethnicity. Although she held Myanmar documents, these have been lost and she will not be considered as a citizen if she returns.

- She has no way of supporting herself in Myanmar, particularly as she is a single woman with no one there who can protect her.
10. The applicant has not raised any claims to fear harm arising from any association or imputed association with her parents or their own personal profiles and claims, beyond those noted above. The delegate did not consider any such claims and the applicant made no submission to the IAA in relation to any such claims and I do not consider that such claims do not arise on the material before me.

Refugee assessment

11. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

12. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
13. The applicant claims to be an Indian Burmese Muslim who previously held Myanmar documentation, including a passport. She has not claimed that these documents were false or fraudulent, although she does claim that the family paid bribes to an official in order to get them (considered further below). There is no other information before me indicating that these documents were false or fraudulent, or that the Myanmar authorities did not recognise these documents as legitimate. There is no information before me indicating that the applicant has a right of return or residency in any other country. I am satisfied that the applicant held legitimate Myanmar documentation and I find that Myanmar is the receiving country for the purposes of this review.
14. The applicant lived in Yangon with her family. She has not claimed that she has any property or intention to return to anywhere other than Yangon should she return to Myanmar. I find that she will return to Yangon should she return to Myanmar.

15. The applicant relies on her parent's evidence that even though they had official documentation, in practice they were not recognised or treated as citizens in Myanmar. They claim that they may not be able to obtain new documentation should they return, and that they may not be recognised as citizens. Information before me¹ indicates that Myanmar citizenship is granted to members of the 135 officially recognized national ethnic groups. There are three types of citizenship: Full Citizenship Status; Associate Citizenship Status; and Naturalized Citizenship Status. Full Citizenship Status is granted to persons born in or outside of Myanmar if: they belong to one of the 135 recognized ethnic groups; have previously been granted citizenship; both their parents are citizens; they have one citizen parent and the other is an associate citizen; or they have one citizen parent and the other parent is naturalized. The applicant claims to have had a CSC and a passport. Although the applicant no longer has these documents, she said this was because they had been lost. She does not claim that these documents have been rescinded, cancelled or subjected to other official government action.
16. The applicant said that she had a CSC and I have found above that this was a legitimate document. The information before me indicates that these are issued to persons who have been recognised as citizens. I also note that the applicant's sister completed university education in Myanmar and was employed as Account and Sales Consultant. According to the Australian Department of Foreign Affairs and Trade (DFAT)², 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. The fact that the applicant's sister held a CSC and completed her studies also indicates to me that the family was recognised as having citizenship status and rights.
17. I note the applicant's submission as to "Indian Burmese" being excluded from citizenship but the evidence before me is that she was granted official citizenship documents and these were not obtained through any fraudulent means. The evidence indicates that the Myanmar government recognised the applicant as a citizen (regardless of how she may have been treated or felt) and there is nothing in the information before me to indicate that this has been rescinded or lost.
18. In terms of the type of citizenship, the 1982 Myanmar citizenship law defines a citizen as someone whose parents each have a form of citizenship. Those who do not meet this qualify for either associate or naturalised citizenship, with fewer rights than full citizens. The change from a single citizenship category to three is said to have created much room for discrimination. Policy and paperwork have changed many times since 1982 and each change has relegated Muslims closer to second-class status. For example, after the 1982 law took effect, most Buddhists who had been issued with the old national registration certificates changed them to the CSC, but most Muslims were unable to make the change. Those who did get CSC with the ethnic designation "Bengali" or "mixed blood" now find that their children are unable to access citizenship.³
19. The applicant and her parents have provided a copy of their Household Registration List (HRL), which lists their ethnicity as "Indian Bamar". They also said that they previously held CSC and passports. Having regard to the information above, this indicates that they were granted full citizenship status, notwithstanding their religion or ethnicity. While the information above indicates that some Muslim persons applying for citizenship have been unable to obtain full

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

² Department of Foreign Affairs and Trade (DFAT), "Country Information Report – Myanmar", 18 April 2019, 20190418091206.

³ Frontier Myanmar, "For Muslims across Myanmar, citizenship rights a legal fiction", 11 January 2018, CXBB8A1DA20591.

citizenship, there is nothing in the reporting before me that indicates that Muslims who have already been granted citizenship and are renewing or replacing documents have had their citizenship refused or downgraded. Given the amount of scrutiny that the citizenship issue in Myanmar has faced (as evidenced by the reports before me), I would expect that such refusal or downgrading would be reported if it was a common or systematic occurrence.

20. I accept that the applicant's family had to pay bribes to an official in order to obtain the citizenship documents. I note from information before me that local sources told DFAT⁴ 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. I do not accept that such bribery supports the applicant's submission that it indicates "severe and ongoing discrimination that is also not indicative of full citizenship rights". Nor does the demand for payment before issuing documents support the submission that "clearly, a person afforded full legal protection as a citizen ... would not be in a position of having to bribe government officials or middle operatives to obtain ID documents". I consider that such demands can exist as informal discrimination, regardless of whether the person is afforded or recognised for full citizenship.
21. Having regard to all of the above, I am satisfied that the applicant has been recognised by the Myanmar authorities as a Myanmar citizen. I am not satisfied that there is a real chance that she will be considered to be a non-citizen, be denied replacement citizenship documents or that her citizenship will be downgraded from the level previously granted. I am not satisfied that there is a real chance that she will suffer any harm as a result of her citizenship status, should she return to Myanmar.
22. The applicant claims to have experienced harassment and bullying as a Muslim, including stone throwing, name calling and abuse when wearing her headscarf, and being hit by her teachers. She claims that the family home was searched by the authorities who were looking for weapons, but she has not claimed that weapons were ever found or that she was ever involved with, or suspected of involvement with any armed groups. She has not claimed that any members of the family were ever arrested, questioned or charged over any real or imputed involvement in armed groups or with weapons. She said that the authorities only searched Muslim houses, but there is no information to indicate that the family was singled out for such searches for any other reason.
23. The applicant also claims that her father was detained and beaten in around 2001, when he was involved in the attempted construction of a mosque and there was a dispute about official permission. He was released after the family paid a bribe. This was a single incident which occurred nearly 20 years ago and the applicant has not claimed that she or any other member of her family was ever detained, threatened, harassed or subjected to any other adverse interest because of this incident, including in the 10 years they remained in Myanmar following the incident. She has not claimed to have suffered any adverse interest from the authorities or any other group or person for any other reason arising from her association (real or imputed) to her father and I am not satisfied that she faces a real chance of harm for such reasons.

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

24. The United States Commission on International Religious Freedom⁵ has reported that outside of Rakhine state, non-Buddhist minorities, including Christians, Hindus, and Muslims, have reported discrimination in employment. It also referred to reports that the authorities unduly restricted religious practice and travel, destroyed religious property and texts, denied or failed to approve permits for religious buildings and renovations. DFAT⁶ also reports 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 applicants no longer claim to be Rohingya, are not from Rakhine State, and there is no apparent reason that they would need to go to or travel through there.
25. 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). As I have noted above, 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. DFAT⁷ also reports that Muslims are underrepresented in the public sector; there are no Muslim members of parliament, and Muslims have been excluded from a range of government jobs, including as public school teachers and health personnel. Businesses owned by Muslims have reported issues in procuring government contracts without a Buddhist interlocutor.
26. The applicant attended secondary school and then worked in a government run [facility]. Although she claims that she obtained that work through a friend, she has not claimed that she was denied, or prevented from accessing, work because of her religion or ethnicity. She also confirmed that her sister had attended university but she herself had been unable to do so for financial reasons. She has not claimed that she was denied, or prevented from accessing, university education because of her religion or ethnicity. On the applicant's evidence, she has never been denied, or prevented from accessing, accommodation, work, health or other services in Myanmar. I am not satisfied that there is a real chance that the applicant would be prevented from finding work or accommodation, denied access to services such as education, or prevented from making a livelihood enabling her to subsist, because of her ethnicity and religion.
27. The applicant claimed that as a Muslim, she will be unable to marry anyone outside the religion. She confirmed that this is a requirement of her religion and is not a law, rule or requirement imposed by the Myanmar authorities. She has not claimed that she needs, wants or intends

⁵ United States Commission on International Religious Freedom, "International Religious Freedom Report for 2017-Burma", 29 May 2018, OGD95BE927522.

⁶ DFAT, "Country Information Report – Myanmar", 18 April 2019, 20190418091206.

⁷ DFAT, "Country Information Report – Myanmar", 18 April 2019, 20190418091206.

to marry outside her religion but even if she did wish to, I am not satisfied that she faces a real chance of harm from the Myanmar authorities for any reason arising from this.

28. I accept that her family paid a bribe in order to obtain the citizenship documents and accept that she may need to do so in order to obtain new documents. I accept that the applicant was harassed and subjected to stone throwing, name calling and abuse for wearing headscarves. The information before me indicates reports of harassment and anti-Muslim sentiment continuing in Myanmar, including against non-Rohingyan Muslims, and I accept that the applicant may face further instances of harassment and discrimination, including informal discrimination by some officials, because of her religion and ethnicity. I have considered the level and type of harassment and discrimination she suffered in the past, and while past harm is not necessarily indicative of the risk or level of future harm, the applicant have not claimed to have been engaged in any activities since leaving Myanmar that may lead to her having any other adverse profile should she return. I am satisfied that any harassment or discrimination she may face, including any bribes she may be asked to pay, will be commensurate with what she and her family experienced in the past. I am not satisfied that if such harassment or discrimination occurs, it would amount to serious harm as defined in s.5J of the Act. It does not amount to a threat to the person's life or liberty; significant physical harassment or ill-treatment; significant economic hardship that threatens the person's capacity to subsist; denial of access to basic services, where the denial threatens the person's capacity to subsist; denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist or any other serious harm. I am not satisfied that the applicant faces a real chance of serious harm for any reason arising from her ethnicity or religion.
29. The applicant claims that if she returns to Myanmar she would be a single woman with no protection, and would be unable to support herself. The applicant has said that she has a grandmother and other relatives in Myanmar with whom she maintains social media contact. She has not claimed that she is estranged from, or otherwise unable to continue contact with, these relatives should she return. She has been educated and was employed before leaving Myanmar and I have found above that she will not be denied, or prevented from accessing, employment should she return. I am not satisfied that the applicant will be a single woman with no family support or protection or that she would be unable to support herself. I am not satisfied that she faces a real chance of harm for these reasons should she return to Myanmar.
30. The applicant claimed initially that she departed Myanmar illegally but has now claimed to have departed on her lawfully issued passport. DFAT⁸ reports that it is aware of a small number of voluntary returnees entering Myanmar via international airports in 2017 and 2018, but it has not received reports of questioning or adverse treatment toward returnees by government officials following their return to Myanmar. Returnees 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. The applicant did not depart illegally and I am not satisfied on the evidence before me that there is more than a remote chance that the applicant will be suspected to have done so and will face harm as a result. I have found above that the applicant does not have any other adverse profile with the Myanmar authorities and I am not satisfied that she will be suspected or imputed with any political, criminal or other profile that may give rise to adverse interest by the authorities as a returned-asylum seeker should she return to Myanmar.

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

Having regard to all of the above, I am not satisfied that the applicant faces a real chance of harm as a returned asylum-seeker.

31. The applicant does not have a well-founded fear of persecution in Myanmar.

Refugee: conclusion

32. 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).

Complementary protection assessment

33. 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

34. 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.
35. 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.
36. I have found above that the applicant may face low to moderate levels of official and societal discrimination on the basis of her ethnicity and religion. I have also found that any discrimination she may face based on that profile would not amount to serious harm. I have found that the applicant would not be prevented from finding work or accommodation, denied access to services such as education, or prevented from making a livelihood enabling her to subsist, because of her ethnicity and religion. I accept that if the applicant was exposed to low or moderate levels of official or societal discrimination, it may be challenging and may cause some distress and frustration. However, when having regard to the applicant's particular circumstances, including her past experiences living in Myanmar, her otherwise low profile, her status as a citizen, her ability to access education in the past and the country information considered above, I do not accept that such discrimination, should it occur, would amount to significant harm as defined. I am not satisfied that it would amount to the arbitrary deprivation of life or the death penalty. I am not satisfied that it would amount to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment as contemplated by the Act.
37. The applicant claims that her religion prohibits her marrying anyone outside that religion. She has not claimed that she has any intention or desire to do so, nor has she claimed that she fears

she will be subjected to any particular harm that could, or would, amount to significant harm as defined. Even if she was to marry outside the religion (which I do not accept she will need or want to do), the information before me does not indicate that persons who do so face a real risk of harm that may amount to the arbitrary deprivation of life or the death penalty, torture, cruel or inhuman treatment or punishment or degrading treatment or punishment as contemplated by the Act.

38. I am not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Myanmar there is a real risk she will suffer significant harm arising from her ethnicity and religion.
39. I have found that there is not a real chance that the applicant will face any harm for any other reason or reasons should she return to Myanmar. As “real chance” and “real risk” equate to the same threshold⁹, and having regard to the evidence and findings I have set out above, I am not satisfied that the applicant faces a real risk of harm, let alone significant harm, for any other reason or reasons, should she return to Myanmar.

Complementary protection: conclusion

40. 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.