



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

MYANMAR

IAA reference: IAA17/02772

Date and time of decision: 6 July 2017 11:56:00

Rosie Mathlin, 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 an referred applicant, or their relative or other dependant.

Visa application

1. The referred applicant (the applicant) claims to be a stateless Rohingya Muslim formerly resident in Myanmar.
2. He arrived in Australia by boat, undocumented, [in] June 2013. [In] December 2016 he lodged an application for a Safe Haven Enterprise visa (SHEV). He was assisted by a legal representative appointed under the PAIS because he was deemed to be an exceptionally vulnerable person. The applicant was in immigration detention at the time. It appears that his bridging visa E was cancelled because he was charged with criminal offences.
3. [In] May 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the grant of the visa.

Applicant's claims for protection

4. The applicant's claims are contained in the information referred to the IAA by the Secretary of the Department of Immigration and Border Protection (the Department) under s.473CB of the *Migration Act 1958* (the Act).
5. His claims are set out in entry interviews that were conducted [in] June 2013, several weeks after the applicant's arrival in Australia; in his SHEV application, which contained very little detail at all, except the claim that he will be tortured or killed if he returns to Myanmar because of his Rohingya ethnicity; and at the SHEV interview, prior to which he was apparently given the opportunity to speak with his representative about his claims, presumably so that more information could be provided.
6. The applicant has consistently claimed to be a Rohingya and a Muslim. He states that he was born in Arakan State (now known as Rakhine State)¹ and attended school in [Town 1] until about the age of ten, when his family moved to Yangon. At the SHEV interview he said that his family left Rakhine in [year] after a big cyclone.
7. The applicant said that he attended school in Yangon for a further three years. At the entry interview the applicant stated initially that he finished school in [year], but given that he has consistently stated that he was born in [year] and started school at age 5, this does not appear to be correct.
8. In the SHEV application the applicant stated that he speaks Rohingya and speaks, reads and writes Burmese. Interpreters in the Rohingya language were used at the entry interviews and at the SHEV interview. There appeared to be some communication difficulties but it is not clear why. For example, one of two interpreters used at the SHEV interview said that the applicant was using words and he had "no clue what words they were". One of the interpreters at the entry interview said that the applicant did not appear to understand the questions being asked of him, so his answers were long and not immediately responsive.
9. The applicant stated that he has only had one job, working in a [business]. At the entry interview he said that the [business] belonged to his [sibling], while at the SHEV interview he said that it belonged to his friend. Again, the information provided makes little sense, as he said at the entry interview that he started working there at the age of 31, but also said that he

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Myanmar", 10 January 2017, CISED50AD28 at 3.8

started two years after he finished school. He said that before that he helped his parents at home; afterwards he had done religious pilgrimages, staying in different mosques in Mandalay for about a year before coming to Australia.

10. At the SHEV interview the applicant said that he left Burma because he and his wife had separated. At the entry interview he said that they married in 2003 and were together for only six months. In the SHEV application he stated that they divorced in approximately 2007. The applicant left Burma in 2013.
11. At the SHEV interview he said that he also left because there were riots in which Buddhists attacked Muslims and a lot of people were killed. He could not remember when this was and said that he was not affected. At the entry interview he stated that he had seen Buddhists and the police burning the home of a Muslim in the next village. He said that Muslims get beaten at night. He said that in every household one person has to stay awake all night in case of an attack. He said that Buddhists hate Muslims.
12. At the entry interview the applicant said that [some siblings] were in Myanmar. He indicated that [sibling 1] was in Burma. [Sibling 2] was in [Country 1], and [sibling 3], was in [Country 2]. He indicated that his father had gone to [Country 2] for medical treatment with his [sibling 4]; he provided [sibling 4] as his emergency contact in Myanmar, indicating that he was temporarily in [Country 2]. When asked whether he could provide a copy of his citizenship certificate he indicated that it would be difficult because his father had gone to [Country 2] and his relatives in Myanmar had no internet access. He said that he had come to Australia with his cousins.
13. At the SHEV interview the applicant said that he had come to Australia with his cousins and his [sibling 1,] who was living in [City 1]. He said that [sibling 2] was in [Country 1] and [another sibling] was in [Country 3]. His [sibling 4] and [other siblings] were in Myanmar.
14. The applicant said that he left Myanmar on a passport that his brother had “made” for him. The only document he had needed to provide was a photograph. He said that the passport was in his name. He had a visa for travel to [Country 4] and he had no difficulty transiting through [Country 4] on the way to [Country 5].
15. Asked at the SHEV interview why he could not return to Myanmar, he said that he had no house and no money. It was pointed out that he has relatives living there, and he said that he could not stay with his sister because her house is very small and she has a family.

Delegate’s decision

16. The delegate found that she was prevented from granting the visa under s.91WA(1) of the Act, although this appears to be an error as it refers to an applicant providing a bogus document as evidence of identity, nationality, or citizenship; or having destroyed or disposed of such documentary evidence. There does not appear to be any suggestion that the applicant has done either; rather, the delegate based on her finding on the fact that he had failed to provide documents without a reasonable explanation: s.91W(2).
17. [In] December 2016 the Department requested in writing under s.91W(1) of the Act that the applicant produce documentary evidence of his identity, nationality or citizenship. In the Primary Decision Record, the delegate referred to the s.91W(1) request having been made at the SHEV interview. However, although at the interview she asked him to provide his passport and citizenship certificate, she did not warn him that he could not be granted a visa if he

refused or failed to comply with the request. Accordingly, the oral request made at the SHEV interview did not comply with s.91W(1)(d), although the earlier written request did.

18. On 6 January 2017 the applicant's representative replied to the request stating that the applicant did not have any identity documents.
19. However, the delegate noted that the applicant stated at the entry interview that he had a citizenship certificate issued by the Myanmar government in [year], and a passport. She recorded that he stated at the SHEV interview that both documents were in the possession of his [sibling] in [City 1]. He had not provided the documents and the delegate found that the applicant had not provided a reasonable explanation for not having done so, nor had he taken reasonable steps to obtain the documents.
20. Even though the delegate found that she was prevented from granting the visa, she went on to consider the applicant's protection claims. She found that he was credible. She accepted that he was a Muslim Rohingya who was a citizen of Myanmar.
21. The delegate found that the applicant did not claim to have personally experienced harm of any kind in Myanmar. She relied on country information indicating that Rohingya who live outside Rakhine State are typically registered as Burmese Muslims, and are able to obtain national identity cards and residency documents which enable them to obtain a passport. They have higher incomes and better access to resources than Rohingya in Rakhine State and do not face high levels of discrimination in day to day life. DFAT assesses that Muslims outside Rakhine State experience moderate social discrimination and low official discrimination and a low risk of societal violence. Muslim communities in major cities generally live peacefully and outbreaks of violence against Muslims do not affect every Muslim community. She found that the applicant did not have a well-founded fear of persecution for reason of his ethnicity or religion.
22. The delegate considered whether the applicant faced harm as a failed asylum seeker, but decided on the basis of country information that he would not. Although some country information indicated that illegally departing Myanmar was an offence attracting five years imprisonment, she found that this provision had not been enforced in recent years, and in any case, she found that the applicant had not departed illegally. She thought that at most he might be questioned or monitored on return, but she found that this would not amount to serious harm.

Discussion of evidence and findings of fact

23. I have considered whether the many gaps and inconsistencies in the applicant's evidence result from some particular difficulty arising from his personal circumstances that has prevented him from providing a coherent and consistent account. The applicant said at the second entry interview that the interpreter at the first entry interview had been rude to him and this had made him scared so he "couldn't do the interview". Even if this were, unfortunately, the case, the applicant has not been able to provide a better account of his situation in any subsequent interview, with different interpreters. While, as noted above, two of the interpreters mentioned that there appeared to be communication problems, there is no apparent explanation for this. Interpreters in the Rohingya language have been used, as he requested. Although the applicant was in detention in a remote location at the time his SHEV application was prepared and at the SHEV interview, which must have created some difficulty, the quality of information at the entry interview was little better. In my observation, there has been no obvious difference in the quality of the information provided over time, or any clear indication

that the applicant was adversely impacted, in terms of his ability to present his claims, by having been returned to detention. The application was prepared with the assistance of a legal representative, and again, although the applicant's location in a remote detention centre would have presented logistical problems, no particular difficulties have been identified as the cause of the inconsistencies and deficiencies in his account. There is no information before me to establish that the applicant suffers from any medical or psychological condition or cognitive impairment that has adversely affected his capacity to present his claims.

24. The applicant has provided no identity documents. Although the delegate noted that he had stated that he was a citizen of Myanmar, in fact he stated at the entry interview and in the SHEV application that he was stateless. However, he did state at the entry interview that he had a citizenship certificate, and has consistently stated that he left Myanmar using a passport containing his photograph and identity details.
25. The applicant has provided three different accounts of the whereabouts of his passport. At the entry interview he said that he threw it in the sea on the way to Australia because everyone was doing that. In his SHEV explanation, he said that it was in a bag that got lost on the way to Australia. At the SHEV interview he said that his [sibling], who is in [City 1], has the passport. He was asked to contact his [sibling] to get the passport and said that he did not have [the] phone number. In the response to the written s.91W(1) request, the applicant's representative said that the applicant did not have identity documents, with no further explanation.
26. At the entry interview the applicant stated that he had a citizenship certificate issued by the Myanmar government in [year]. At the SHEV interview he said that document was with his [sibling 4], who he said was in Burma. (I note that in the Primary Decision Record, the delegate states that the applicant had said that the citizenship certificate was with his [sibling] in [City 1], but this appears to be an error and does not reflect what he actually said.) The applicant indicated that he might have difficulty obtaining this document from Burma, but there is nothing to indicate that he has tried to do so.
27. Although the applicant has consistently claimed that he is a stateless Rohingya Muslim who was born in Arakan (Rakhine) State and moved to Yangon with his family at the age of about ten, where he lived thereafter until his departure for Australia, in the absence of any documents confirming his identity and given the major inconsistencies in his evidence about almost every other aspect of his life, I am not satisfied as to any of his claims, including the claim that he is a stateless Rohingya or a Muslim.
28. I have considered the fact that [Town 1], where he claims to have been born, and [Town 2], where he claims to have lived in Yangon, [have large Muslim populations].² I have considered whether the applicant might be a Muslim, if not a Rohingya. According to DFAT, anti-Muslim sentiment is "widespread and entrenched", especially outside major cities, with "key areas" of official discrimination including access to public services, employment and official identification documents.³ Although the applicant claims to have had limited education and limited employment for four years only in a [business] owned by either his [sibling] or a friend, given the inconsistencies in relation to his evidence about his employment and the gap of many years in his life which are not accounted for, I am not satisfied that he has been truthful about his circumstances in Burma, and the credible information before me does not support a finding that he was denied access to education or employment for any reason on a discriminatory basis. His consistent evidence suggests that he possessed a citizenship certificate and was able

² [information deleted]

³ DFAT, "DFAT Country Information Report Myanmar", 10 January 2017, CISED50AD28 at 3.36 – 3.38

to obtain a passport. Although his statement that his brother “made” a passport for him is somewhat ambiguous, there is no explicit suggestion that it was a false passport and he said that it contained his name, personal details and photograph. The applicant’s evidence tends to suggest that the brother arranged for the passport to be issued, not that he physically made it or caused it to be made. The fact that the applicant had no difficulty leaving Myanmar and transiting through [Country 4] with the passport; the fact that country information indicates that if he had a citizenship certificate, as he has stated, he would have been entitled to obtain a passport; and to some extent his evidence that family members had travelled in and out of Myanmar to [Country 2] to obtain medical treatment for his father is consistent with the family having access to travel documents. The applicant’s own evidence about his circumstances therefore does not indicate that he has faced the kind of discrimination that the country information suggests might be encountered by Muslims.

29. The applicant has not claimed that he has ever personally experienced harm of any kind as a Rohingya, as a Muslim, or for any other reason. Although he claims that he was afraid that he would be harmed in Buddhist violence directed against Rohingya and/or Muslims, and referred to a particular episode of such violence, he was unable to state when this occurred. He said that he witnessed a Muslim’s house being burned in the next village, but does not claim to have personally encountered or witnessed any other harm directed against him personally, or Rohingya or Muslims in general. Again, the vagueness of his account means that I am not satisfied as to his basic claims, even as to his identity. DFAT advises that although there have been instances of violence against Muslim communities, it has not occurred in every town with a Muslim population and Muslims in major cities generally live peacefully.⁴ This assessment accords with the applicant’s claims as to his experience of violence directed against Muslims.
30. Although the applicant made no claims in this regard, the delegate considered whether he might face harm returning to Myanmar as a failed asylum seeker. DFAT advises that returnees may be interviewed by the authorities, but has no information to indicate how often or in what circumstances, and has no information indicating that failed Rohingya asylum seekers are subjected to harm for reason of having sought asylum overseas. DFAT also advises that while illegal departure is an offence attracting a five year prison term, the relevant provision has not been enforced in recent years.⁵ In any case, the applicant has consistently indicated that he left Myanmar traveling on a passport issued in his own name and carrying his true personal details. In these circumstances, I am not satisfied that he left Myanmar illegally.

Refugee assessment

31. 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

32. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:

⁴ DFAT, “DFAT Country Information Report Myanmar”, 10 January 2017, CISED50AD28 at 3.42 – 3.45

⁵ DFAT, “DFAT Country Information Report Myanmar”, 10 January 2017, CISED50AD28 at 5.33 – 5.38

- 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.
33. As discussed above, I am not satisfied as to the applicant's identity. Given the inconsistent, contradictory and vague evidence presented by the applicant, and in the absence of any identity documents, I am not satisfied that he is either of Rohingya ethnicity, or a Muslim. While the delegate accepted that he was a citizen of Myanmar as she thought he had consistently made this claim, in fact his evidence on this point is also contradictory, as he has claimed to be stateless, while also stating that he has a citizenship certificate and left Myanmar on a passport containing his personal details. In these circumstances, I am not satisfied as to the applicant's nationality, although I am prepared to accept that Myanmar is the receiving country for the purposes of the Act.
34. In the light of the problems with his evidence as discussed above, I am not satisfied as to the applicant's overall credibility and I do not consider that he has provided a truthful account of his circumstances. On the basis of the evidence before me, I am not satisfied that the applicant has, in the past, suffered discrimination amounting to serious harm, or any other form of serious harm, as defined, as a Rohingya, or a Muslim, or for any of the reasons in s.5J(1)(a) of the Act. Nor am I satisfied that there is a real chance that he would, in the reasonably foreseeable future, suffer serious harm for those reasons.
35. As to the circumstances he may experience on return as a failed asylum seeker, relying on DFAT's advice and the other information that was considered by the delegate, I am satisfied that he may be questioned on return, but there is no information before me to suggest that this would result in any form of serious harm. While people who departed illegally may be subject to criminal charges and imprisonment, the applicant has claimed consistently that he left via the airport using a passport issued in his name and with his photograph and personal details.
36. I am not satisfied that the applicant has a well-founded fear of persecution on return to Myanmar for any reason arising from the credible evidence before me.

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).

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. In light of my factual findings set out above, I am not satisfied there is a real risk of the applicant suffering significant harm because of his claimed statelessness, ethnicity or religion, because of the circumstances of his departure from Myanmar, or for any other reason arising from the credible evidence before me. In relation to his claim at the SHEV interview that he could not return to Myanmar because he had no house and nowhere to live, I note that he claims to have a number of family members still residing in Myanmar, not just the one sister who he claimed at the interview would not be able to take him in. In these circumstances, I am not satisfied that the applicant would be without family support in Myanmar and that he would be left homeless and destitute, although in any case I do not consider that this would constitute any form of significant harm, as defined.

Complementary protection: conclusion

41. 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).

Identity documents – request from Minister

42. Section 91W of the Act prevents the grant of a protection visa to an applicant who refuses or fails to comply with a request to produce documentary evidence of their identity, nationality or citizenship, or produces a 'bogus document' (defined in s.5(1)) in response to the request. However, that requirement will not apply if the applicant has a reasonable explanation for the failure or refusal, and either provides the relevant documentary evidence or has taken reasonable steps to provide such evidence.

Application of s.91W to this case

43. [In] December 2016 the Department requested in writing under s.91W(1) of the Act that the applicant produce documentary evidence of his identity, nationality or citizenship. The applicant was advised that if he refused or failed to comply with the request or produced a bogus document, and if the Minister was not satisfied that he had a reasonable explanation for refusing or failing to comply with the request or producing a bogus document, then the Minister must refuse to grant the visa. I am satisfied that the request complied with s.91W(1) and (2)(d).

44. [In] January 2017 the applicant's representative replied to the request stating that the applicant did not have any identity documents.
45. At the SHEV interview held [in] April 2017 the applicant was orally requested to provide documentary evidence of his identity, specifically his citizenship certificate and his passport. Although in the Primary Decision Record the delegate referred to the s.91W(1) request having been made at the SHEV interview, she did not warn him at that time that he could not be granted a visa if he refused or failed to comply with the request. Accordingly, the oral request made at the SHEV interview did not comply with s.91W(1) and (2)(d), although the earlier written request did.
46. The explanation put forward by the applicant's representative for his failure to provide documentary evidence of his identity, nationality or citizenship is merely that the applicant does not have identity documents. No reason is given for his not having them. If it were the case that the applicant was a stateless Rohingya he might not have identity documents, but this is not what is asserted in the letter. The letter does not refer to the claims made by the applicant at the entry interview and in his SHEV application that the passport was either lost or thrown away on the way to Australia. Moreover, the statement in the letter that the applicant does not have identity documents contradicts the applicant's own claims that he has a citizenship certificate, which was in Myanmar, and that he left Myanmar on a passport, which he stated at the SHEV interview was in the possession of his [sibling] in [City 1].
47. In the circumstances, I find that the applicant does not have a reasonable explanation for his failure to comply with the request under s.91W for the purpose of either s.91W(2)(c) or (3)(a).
48. There is nothing before me to indicate that the applicant has produced evidence of his identity, nationality or citizenship; nor am I satisfied that he has taken reasonable steps to do so. The applicant indicated at the entry interview that it would be difficult to obtain his citizenship certificate from Myanmar because some of his relatives were no longer living there and there was no internet. He did indicate at the SHEV interview that he would phone his [sibling] in Burma and try to obtain the certificate, but there is no evidence before me to suggest that he has done so, or that he has taken any other steps to obtain the document. As noted above, he has given different versions of the whereabouts of his passport, but at the SHEV interview he indicated that he could not get it because he did not know his [sibling]'s phone number in [City 1] and could not ask him for it. Wherever the truth lies, there is no evidence before me as to what steps, if any, the applicant has taken to obtain the documents, and I am not satisfied that he has taken reasonable steps to produce evidence of his identity, nationality or citizenship. I am not satisfied of the requirements of s.91W(3)(b).
49. Section 91W applies to the applicant. Therefore, the grant of the visa is prevented by that section.

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

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