



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA17/03533

Date and time of decision: 24 May 2018 09:18:00

I Sheck, 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.

Background to the review

Visa application

1. The referred applicant (the applicant) is an Iranian national from Tehran. He departed Iran [in] October 2012 and arrived in Australia [in] November 2012. On 24 November 2016 he lodged an application for a protection visa (PV).
2. On 1 September 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate did not accept that the applicant was a genuine convert to Zoroastrianism who would seek to practise on return to Iran. The delegate considered whether the applicant would face harm in Iran as a non-practising Muslim, due to his tattoos, as a person who had posted on-line articles against the regime in Iran, as a westernised young person or as a failed asylum seeker and concluded that he would not.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material). On 3 October 2017, the IAA received submissions on behalf of the applicant from his representative, [Ms A]. Section 473DD of the Act provides that the IAA must not consider any new information from an applicant unless satisfied there are exceptional circumstances which justify considering the new information, and the new information was not and could not have been provided to the Minister or is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims.
4. [Ms A]'s submission addresses the delegate's decision and findings. As such, these elements may be regarded as argument rather than new information and I have had regard to them. She has also referred to documents in support of the points she makes in this submission, these comprising hyperlinks to case law and to websites. Most of these links are those also referred to by the delegate in his decision, with the exception of the United States Commission on International Religious Freedom (USCIRF), USCIRF Annual Report 2017, published April 2017. This report was not before the delegate and is new information. I note that paragraph 26 of the IAA's Practice Direction dated 6 February 2017 provides that hyperlinks to publicly available documents are not acceptable as new information. The report was published before the delegate's decision. [Ms A] has not provided any information as to why the report and website based information could not have been provided to the delegate. This link is referenced to support the contention that Iran is listed by the USCIRF as a country of particular concern due to its persecution of citizens who do not follow the official understanding of Shia Islam. I am not satisfied that this information may have affected consideration of the applicant's claims. Although the new information does not in any event comply with the Practice Direction, even if I were to accept it the applicant has not satisfied me as to either of the matters in s.473DD(b)(i) or (ii) and I would therefore be prevented from considering it.
5. [Ms A] also asserts that "The Canadian Immigration Authorities provides the following compilation of information concerning the treatment of atheists in Iran" and provides an extensive quote. This information also fails to comply with paragraph 26 of the IAA's Practice Direction, relevantly: "If you provide or refer to new information such as country information reports or media articles, you must provide a copy of that information or extract part(s) of the information on which you rely. You must identify the source of the information." [Ms A] has not identified the source of this information or provided a copy. I have not had regard to it.

Applicant's claims for protection

6. After his arrival [in Australia] the applicant was interviewed by an officer of the then Department of Immigration and Border Protection (now part of the Department of Home Affairs) on 18 December 2012. Together with his PV application he provided a statutory declaration dated 16 November 2016. On 20 June 2017 he attended an interview ("the PV interview") with the delegate at which his representative was present. [Ms A] provided submissions and supporting documents to the delegate on 3 July 2017. The applicant claims:
- He grew up in a strict Muslim family and adhered to Muslim practices during his childhood and early adulthood. From [a particular age] he gradually became disillusioned with Islam and questioned its authenticity. While he still believed in God he ceased undertaking Islamic practices and by 2011 he was non-practising;
 - He also started to drink alcohol and became tattooed. He was caught with alcohol, arrested and fined, he was also caught walking with his girlfriend and again fined;
 - He looked into other religions and attended a Christian house church on a number of occasions, before this was raided by the Basij. He decided to leave Iran after this event;
 - Since arriving in Australia he has been able to investigate other religions and found that the principles of Zoroastrianism of "Good Thoughts, Good Words and Good Deeds" corresponded with his personal beliefs. He now considers himself a Zoroastrian. He has had the symbol of Zoroastrianism, the Faravahar, tattooed on [a particular part of his body];
 - If he were to return to Iran he would be executed for apostasy. He has also been sharing articles on his [social media] page which are against Islam and against the Iranian government.

Factual findings

7. Based on the information provided in his visa application and identity documents, I accept that the applicant's background is as follows: he was born on [a particular date] in Tehran and is an Iranian national. He is the youngest of [a number of siblings]. His family remain in Tehran. The applicant completed primary and some secondary education, ceasing studies in [a particular year]. He worked in his [relative's business for a number of years]. During the [a particular period] he completed his military service. From [the end of his military service] until his departure from Iran he was variously employed [in various occupations] and [a business] with his brother. He departed Iran on his legally issued passport. He is currently [self-employed] in Australia, [undertaking particular work].
8. The applicant has consistently stated that he was raised as a Shia Muslim but that he grew disillusioned with Islam and started to question its teachings. From his early 20s he also ceased undertaking Muslim activities such as praying and fasting. I found the applicant's evidence in respect of this issue to be convincing and note country information which states that many Iranians have a secular attitude, rejecting all religions, Islam included.¹ I accept these claims.
9. The applicant has further claimed that he looked into other religions while in Iran however his investigations were hampered by lack of access to books or on-line information. He initially considered Christianity but then "fell in love with the religion of Zoroastrianism because the

¹ Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), "Iran: Freedom of Religion; Treatment of Religious and Ethnic Minorities COI Compilation September 2015", 1 September 2015, CISEC96CF13622

ethics of an individual are the most important things and everything is focused on that. It is a person's actions that would result in good or bad consequences, in this world and in the eternal life.” The applicant claims that he has now converted to Zoroastrianism. At his PV interview the delegate questioned the applicant about his claimed new religion and his level of knowledge was particularly unimpressive. Other than the central principle of “do good, say good, think good” the applicant displayed virtually no knowledge of Zoroastrianism, including being unable to name the Zoroastrian deity (Ahura Mazda) or prophet (Zoroaster or Zarathustra). He claimed that his knowledge was limited because there are no books available on Zoroastrianism. I do not consider this statement to be plausible and do not accept it. The delegate also asked whether the applicant had any on-line interactions with other Zoroastrians and the applicant stated that he had been unable to locate any. The review material contains screenshots of the [social media] pages of numerous associations, including the Zoroastrian Association of Victoria and the Zoroastrian Community in Australia. The delegate undertook a [social media] search of relevant associations on 31 August 2017. The applicant claimed at the PV interview that he had been interested in Zoroastrianism for three years however in view of his displayed level of knowledge and engagement with any Zoroastrian community I am not convinced that he has undergone any conversion to Zoroastrianism.

10. In her submissions to the IAA, [Ms A] contends that the applicant faces a real risk of persecution on return to Iran because of his atheism. The point must be made that the applicant has not claimed to be an atheist; indeed, he has consistently stated that he believes in God but not in formalised religions such as Islam or Christianity. I conclude that for some years the applicant has been a non-practising Muslim and that he would continue to be a non-practising Muslim on return to Iran. The applicant claimed at the end of his PV interview that his family members encourage him to return to Islam and that, should he return to Iran and fail to do so, they might report him for apostasy. The applicant has not previously made such a claim and I do not accept it.
11. The applicant also states that he was of adverse interest to the authorities in Iran due to his tattoos. The review material includes a photograph presumably of the applicant's [particular body part], which is completely covered by a tattoo of [details of tattoo removed]. The applicant further advised that he has now been tattooed with the Faravahar, the symbol of Zoroastrianism. He showed the delegate this tattoo, which is on [a particular part of his body], and stated that it had been completed three weeks prior to the PV interview. The applicant claimed that on one occasion in Iran he was slapped, kicked and sworn at by a policeman due to his tattoo, which was visible. I accept as plausible that this may have occurred.
12. The applicant has further consistently stated at his arrival interview, in his statutory declaration and at his PV interview that he has been detained and punished for contravention of Sharia laws in Iran. I accept that the applicant was detained in 2009 or 2010 for alcohol consumption and fined. The applicant has at no point claimed that he drank alcohol after that time or that he intends to do so in the future and I conclude that he would not. He further stated that he was caught walking with his girlfriend a year or so before he left Iran and was sentenced to lashes but was able to pay a fine instead. I accept that both of these events occurred.
13. The applicant further claims that he is opposed to the Iranian Islamic Government and would be harmed on return due to his actual or imputed political opinion. The applicant stated at his PV interview that he did not participate at all in the protests against the 2009 election. There are no actions in his stated background that support any desire to speak out against Islam or the Iranian government. In view of this, I reject the claim that he has any desire to do so. The applicant now states that he has posted material against Islam and the Iranian government on his [social media] page. Following the PV interview the applicant provided a number of

screenshots of his [social media] page with translations. The review material notes that the only way for the authorities to monitor an individual's activities on [social media] would be if he or she has a friend who is an agent of the authorities or if he or she has an open page.² There is no credible evidence before me to indicate that either of these situations apply to the applicant. The applicant has provided no evidence of his privacy settings. I further note that the name the applicant uses on [social media] is not the same as his legal name which appears on his identity documents. I am not satisfied that the applicant could be identified by the Iranian authorities due to his online activities or that he is of any interest to the Iranian authorities.

Refugee assessment

14. 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

15. 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.

16. I have found that the applicant is an Iranian national. It follows that Iran is his receiving country. I have considered whether the applicant would be considered a Zoroastrian on return to Iran. I have found that he did not express any interest in this religion or participate in any Zoroastrian activities prior to his departure from Iran in 2012. While country information notes that there is also a new trend, particularly among Iranian youth, of conversion from Islam to Zoroastrianism,³ I have not accepted that the applicant has converted to Zoroastrianism while in Australia. The applicant further claims that he will be considered to be a Zoroastrian due to his recently acquired tattoo of the Faravahar. The review material indicates that the representation of Faravahar is now common in young Iranians' jewellery and clothes and some even get tattoos portraying ancient Persian icons such as Cyrus or Kaveh. These patriotic

² Danish Immigration Service, 'Update on the Situation for Christian Converts in Iran', June 2014, CIS28931; p. 21

³ LSE Middle East Centre, "The Revival of Nationalism and Secularism in Modern Iran", 01 November 2015, CISEC96CF14725; p.12

symbols seem to express a combination of nationalism and secularism.⁴ I do not accept that the applicant will be imputed to be Zoroastrian due to a Faravahar tattoo or jewellery.

17. The applicant has consistently stated that he found adherence to Islamic rules and practising his religion difficult and that he became increasingly disillusioned with Islam and questioned its authenticity. The review material indicates that this is increasingly the case for young people in Iran. I have accepted that the applicant did not practise Islam for some years prior to leaving Iran. While abandonment of Islam is viewed as apostasy, and is punishable by death or other forms of harm, DFAT assesses it is unlikely that individuals would be prosecuted on such charges, or that the government would know that someone had abandoned Islam unless they publicly declared it.⁵ I am not satisfied that the applicant would publicly declare that he had abandoned Islam on return to Iran. I have not accepted that his family members would report him for apostasy.
18. I have found that the applicant was a non-practising Muslim. The country information suggests that many Iranians have moved away from “institutionalised religion” and non-practising Muslims form a large part of the population of Iranian cities, leading normal daily lives and rarely being pressured to observe Islamic precepts. Many Iranians do not regularly attend mosque or Friday prayers, even if they hold strong religious beliefs.⁶ The country information indicates that non-observance of Islam would only cause problems in certain situations, such as refusing to fast during Ramadan. The applicant has not claimed that he publicly ate during Ramadan and I am not satisfied that he would do so in the future. DFAT assesses that it is unlikely that the government would monitor religious observance, such as attendance at mosque, and says that it is generally unlikely that it would become known that a person was no longer faithful to Islam unless they manifested their new faith.⁷ I am not satisfied that the applicant would face serious harm as a person who does not believe in Islam. I am satisfied that the applicant would not face punishment from the authorities even if he were known not to observe Islam.
19. The applicant claims to fear harm due to his tattoos, which include the tattoo of the Faravahar as discussed above as well as [another tattoo] on [a particular part of his body]. In her submissions to the delegate [Ms A] contends that the applicant was constantly questioned, verbally abused and hit because of his tattoos and un-Islamic behaviour. The applicant stated in his statutory declaration that a few times the religious police questioned, verbally abused and hit him. When questioned on this at the PV interview the applicant provided one example of when this had occurred, when he was struck and sworn at by a police officer. Country information notes that tattooing is not generally considered something forbidden in Iran. Like smoking, it is *makrouh*, which means it is allowed, but it should be avoided.⁸ The latest DFAT report notes that tattoos are increasingly common in Iran and DFAT is unaware of any recent, specific report of people being targeted by security forces solely for having a tattoo. However, it is possible that a person with a visible tattoo could come to the attention of security forces and result in low-level harassment.⁹ [Ms A] addresses this in her submissions to the delegate of 3 July 2017, noting that the fact that DFAT is unaware of any reports of people being

⁴ LSE Middle East Centre, “The Revival of Nationalism and Secularism in Modern Iran”, 01 November 2015, CISEC96CF14725; p.12

⁵ Department of Foreign Affairs and Trade (DFAT) “DFAT Country Information Report Iran”, 21 April 2016, CIS38A8012677; 3.52, 3.55

⁶ Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), “Iran: Freedom of Religion; Treatment of Religious and Ethnic Minorities COI Compilation”, 1 September 2015, CISEC96CF13622; p.30, p.31

⁷ DFAT “DFAT Country Information Report Iran”, 21 April 2016, CIS38A8012677; 3.55, 3.57

⁸ Deutsche Welle (DW), “Passion for tattoos leads to lashings in Iran”, 22 January 2014

⁹ DFAT “DFAT Country Information Report Iran”, 21 April 2016, CIS38A8012677; 3.77

targeted by security forces solely for having a tattoo, does not mean that such reports do not exist. I accept this view, however consider that the review material overall, including the reference above to the increase in young people having tattoos of Persian icons, does not support the conclusion that the applicant faces a real chance of serious harm due to his tattoos.

20. In his statutory declaration the applicant contends that he held views against the Iranian regime but he did not speak out due to fear of the authorities, including the Ettela'at, the Basij, the Sepah and the police. In relation to this, the applicant has indicated that he wished to have the freedom to dress as he pleased, have tattoos, and be able to hold his girlfriend's hand in public. Country information indicates that the government of the day may be criticised robustly, both in public and online. Media organisations represent different political views and do so forcefully, provided they do not cross understood 'red lines', which include respect for the Supreme Leader, the constitutional and territorial foundations of the Islamic Republic and the place of Shia Islam in Iran.¹⁰ I am not satisfied that the applicant publicly expressed views or took any actions opposing the Iranian government or its policies while in Iran. He was not in any way politically active prior to his departure from Iran and was not a part of the Green Movement that protested against the 2009 elections. I am not satisfied that he can be identified by the Iranian authorities due to posting material adverse to the Iranian regime while in Australia. I conclude that he is not imputed with holding a political opinion opposed to the authorities. I am not satisfied that the applicant would in any event face a real chance of harm if he were to publicly air his views in Iran on the various social restrictions that he has raised.
21. It is submitted that the applicant is a member of a particular social group, this being the "post-revolution generation" that came of age from the late 1990s on. [Ms A] notes that this generation craves a western lifestyle and are modern thinkers. The review material notes that it is difficult to make an overall assessment of the treatment of what are sometimes labelled 'Westernised' Iranians. This term is of very limited usefulness in a society where up to one third of the people, middle class and above, mostly in urban areas, aspire to and try to live what could be called a modern lifestyle. However, youth in particular can experience some form of low-level harassment from security authorities, such as being subjected to searches, car checks and verbal warnings for dress or behaviour. Enforcement can be unpredictable and related to the prevailing political atmosphere of the time.¹¹ I conclude that there is no real chance that the applicant would suffer any punishment beyond a fine or a warning, should he dress or wear his hair in a "western" manner on return. He does not have a well-founded fear of persecution on this basis.
22. The applicant has also claimed that he faces harm on return to Iran due to seeking asylum in Australia. The applicant departed from Iran using his own passport. As he no longer has the passport, I accept that he would return on a temporary travel document or laissez-passer. DFAT advises that where temporary travel documents have been issued by Iranian diplomatic representatives overseas, authorities at the airport will be forewarned about a person's return because of Iran's sophisticated government systems. However, the person will generally only be questioned if they have done something to attract the specific attention of authorities; the vast majority of people questioned would be released after an hour or two.¹² I do not accept that the applicant has done anything, either in Iran or in Australia, that would attract adverse attention on return. There is no suggestion arising from the evidence that the applicant would

¹⁰ DFAT "DFAT Country Information Report Iran", 21 April 2016, CIS38A8012677; 3.60

¹¹ Ibid; 3.80

¹² Ibid; 5.34

be imputed with a political opinion that would be of concern to the authorities for any reason. I am therefore not satisfied that the applicant faces a real chance of harm on return to Iran either because he may draw the attention of the authorities because of the documents on which he would most likely be travelling, or because he has sought asylum overseas.

Refugee: conclusion

23. 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

24. 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

25. 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.

26. I have accepted that the applicant has visible tattoos and may dress and style his hair in a "western manner". Due to this he may come to the attention of security forces and be subject to low-level harassment or a fine for improper dress. I have concluded that such treatment would not amount to serious harm. For the same reasons and based on the same information, I am also not satisfied that such treatment amounts to significant harm as defined. I am not satisfied the applicant will be arbitrarily deprived of his life as a result or that the death penalty will be imposed. I am also not satisfied that any harassment that the applicant may face constitutes cruel or inhuman treatment or punishment or degrading treatment or punishment, or torture, as defined at s.5 of the Act.

27. I have concluded above that the applicant does not face a real chance of harm on the basis of being a non-practising Muslim, of being a member of the post-revolution generation, due to holding opinions opposed to Iranian government policies, or because he sought asylum in Australia. As 'real risk' and 'real chance' involve the application of the same standard¹³, I am also not satisfied that the applicant would face a real risk of significant harm for the purposes of s.36(2)(aa) for these reasons, including when considered cumulatively.

¹³ *MIAC v SZQRB* (2013) 210 FCR 505

Complementary protection: conclusion

28. 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).

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.