



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

NEPAL

IAA reference: IAA18/04730

Date and time of decision: 21 June 2018 15:29:00

M Anderton, 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) claims to be a Nepali citizen who feared harm on the basis of his political opinion. On 18 May 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790.
2. On 6 April 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate was not satisfied that he had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in Nepal.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. No further information was obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He was born in [Town 1], [District 1] moved to [Town 2] in 2004 and then moved to Kathmandu in 2007/2008. His religion is indicated as Hindu Buddhist. He completed a Bachelor [degree]. He is married with children, who live in Kathmandu.
 - In his arrival interview the applicant said he left Nepal because his life was threatened, but he did not know by whom, but thought it could be the Maoist party. He was pro King party and was accused of spying on the Maoist party. He had been involved in the Communist Party and working for the Democratic Party. He as associated with the support of the King and helped to support him come to power. He was arrested in 1990 by Nepal police for a month because he was involved in a political movement. He was injured on the leg once in a protest. He no longer supported the King's party but supported the Democratic Party and the democratic process of a multiparty state, like Australia.
 - According to his 2017 statement, the applicant worked as a [occupation] between 1990 and 1995; was employed by Nepal Communist Party (UMLNCP) [in a certain role] between 1995 and 1997. He was a member of the Nepal Communist Party (NPC) at the time.
 - Between 1997 and 2003 he was elected member of the [District 1] Government Committee. He was responsible for [community] work. Between 2003 and 2008 he was advisor on [a] project, mainly as a volunteer, but sometimes was paid to attend meetings.
 - The Communist Party of Nepal (Maoist) (CPMM) tried to disrupt the work of the [District 1] committee and insisted the applicant resign and support them. He refused to and was accused of being a spy and reactionary. In 2004 CPNM members attacked the applicant in his home, broke his leg and left him unconscious and kicked him out of the house. His family was forced to move to [Town 2] for security reasons.

- In 2004 he resigned from the NCP because he supported the King and he opposed the country becoming a federated secular state. After the monarchy was abolished he became a target of the CPNM and other political parties that supported the republic. They planned to attack him so he was forced to move to Kathmandu. He became and still is a critic of the constitution.
- He had many threats against him and two or three different groups tried to attack him in Kathmandu. Sometimes he visited [Country 1] as it was safer, but he discovered that he was being followed because people knew where he had been in [Country 1]. So he left Nepal in 2012 when the CPN Maoists were influential. Being pro monarch he had no choice other than to leave. Most of the political parties have wings in [Country 1] and many have lost their lives due to Nepalese political affiliation.
- He fears he will be targeted by the government and other political parties.
- He was hopeful about political stability following the new constitution and election. However, intimidation, political chaos and terrorist acts continued and there were many instances of murder of pro-monarch supporters on the eve of the election.

Refugee assessment

6. 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

7. 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.
8. I accept the applicant is a citizen of Nepal of Gurung ethnicity. At the protection interview, he also claimed he was of Janajati, Gurung ethnicity and was a Buddhist and Hindu. He confirmed he celebrated both religions. He speaks Nepali, Gurung and English. I accept the applicant is married with [children] and his family continue to live in Kathmandu. I accept the applicant has completed tertiary education and worked as a [occupation].

9. The applicant made no claims of harm based on his religion or ethnicity. The applicant's claims centre on his political affiliations, a 2004 attack on him in his home, and threats and fear of harm from Maoists or other political parties.
10. According to his statement, the applicant's first political affiliation was in 1995 when he was employed by the Nepal Communist party (UMLNCP) as [in a certain role]in [Town 1] and he was a member of the Nepal Communist party (NCP). Then between 1997 and 2003 he claimed he was elected to a full time position as member of the [District 1]Government committee. In 2004 he resigned from the NCP and supported the monarchy.
11. He claimed he was attacked at home in 2004 in [Town 1] by CPNM members because he had refused to resign from District committee and support them, so they thought he was a spy. As a result, he moved to[Town 2]. After the monarchy was abolished he became a target of the CPNM and other parties who planned to attack him so he moved to Kathmandu. He claimed he received many threats from different groups who tried to attack him. He visited [Country 1] often to be safer, but eventually left Nepal in 2012 as it was not safe in [Country 1] either.

Credibility

12. I have considered the applicant's arrival and protection interview and statement. I have listened to the recording of the applicant's account at the arrival interview and I consider it relevant to note that it is apparent that the applicant understood the questions, and that he had every opportunity to put his case. While in some parts towards the end of the interview it was difficult for the interviewer to hear the interpreter, it was evident that the applicant understood and spoke English. Throughout the interview the applicant responded in English and also wrote down spellings of places he referred to. At times he gave his account in English, which was easily understood. I consider the applicant was given a meaningful opportunity to present his claims in both of his interviews and in his statement.
13. I found the applicant's evidence evasive, vague and confused. For instance in his protection interview, the applicant had difficulty remembering when he moved from [Town 1] or lived or visited [Country 1] and explaining his employment. The applicant claimed he could not remember everything because of depression and referred the delegate to his application for answers to the interview questions. However, I am not prepared to accept his explanation as there is no medical evidence of a poor memory or depression.
14. In his protection interview, I consider the applicant's account of harm was also vague and lacked details and not spontaneous. The delegate had to ask the applicant a number of times about harm suffered. For instance, when asked about any harm he faced as a member of the district committee, the applicant responded with general statements about Maoists being everywhere and hampering the work. The delegate asked again and the applicant referred to a threat to resign from the committee and join them. The delegate asked a third time about the kind of harm or threat. The applicant referred to letters or warnings. I note the applicant had not ever mentioned receiving threatening letters. It was not until the fourth question about harm suffered that the applicant referred to being attacked and his leg broken. I consider if the applicant had suffered such harm, he would have been able to provide more free flowing evidence about this. I consider the applicant needed significant prompting before he made claims of being attacked, which suggested that he was not recalling a lived experience.

15. Further, his account of the alleged 2004 attack was vague and not free flowing or spontaneous. For instance, when asked how his leg was broken, the applicant hesitated and did not respond. It was only after the delegate prompted him that the applicant said they had weapons and hit him. He did not elaborate on how many were there, the type of weapons or circumstances of the attack.
16. His account of why he joined the communist party and later supported the monarchists also lacked details and was unconvincing. His initial responses to questions about why he joined the communist party were about why he joined the monarchist party. Eventually, the applicant stated he joined the communist party because he thought they would remove poverty and provide education. Later he resigned and supported the monarchists because he liked the statements from the King and trusted him to deal with problems. I consider the applicant provided little knowledge or understanding of either party or the reasons why he joined them. This is particularly so with the communist party, given his claim that he worked for the communist party for a number of years and was on the district committee. His explanation of what he did on the district committee was general and lacked any details. He said he got information to present to the district committee for different things [details deleted], but did not elaborate any further. While his statement claimed he worked full time in community [work], he did not mention any community [work] he was involved in.

Inconsistencies

17. His evidence was also inconsistent. For instance, the applicant stated he was attacked at home in 2004 because he refused to resign from the district committee and join them. However, according to the applicant's statement he was member of the district committee until 2003, so he was no longer on the committee in 2004. When the anomaly was put to him at the protection interview, I consider the applicant avoided a response to the issue and then added a new claim that they thought he had given information to the government because the army had destroyed the Maoists centre. I consider the applicant added a new claim or reason to try to explain the mistake. Then when asked again if he was still on the district committee when he was attacked, the applicant said he thought it was just at the end of being a member or just after the committee was dissolved. I consider the applicant was uncertain and shifted his account in response to the delegate's concerns. I consider the applicant was changing his account in response to the delegate's concerns and not recounting a true event.
18. His account of his employment was also inconsistent. For instance, at the protection interview he stated the district committee position was not paid a salary but given an allowance for attending meetings. He stated the position was a low level entry position in which 5 members of the committee elected him. However, his statement makes it clear the position was a full time politically elected position. The years of his various employments were also not consistent. The applicant claimed he was unemployed from 2004 or 2005 and lived and supported by friends. On another account he was unemployed from 2004 and his wife and children were supported by her family. On another account he had income from [another business] and his wife was a [occupation].
19. While I place no weight on the slight year differences, I consider he has given inconsistent accounts about whether positions were fully paid full time positions and whether he was employed or how he supported himself and the family from 2004/5.
20. I do not accept the applicant was without income or unemployed for 8 years prior to his departure from Nepal. The applicant gave inconsistent responses about who supported the

family. Further, I note the applicant had a wife and [children], and at least one of his children was at a boarding school in Kathmandu, when the applicant arrived in Australia. Further, the applicant claimed to have travelled to [Country 1] a few times, which would require money. Given his employment experience, his education, qualifications and the need to support his family, and travel to [Country 1] I do not accept as credible that the applicant was unemployed and supported by friends or his wife for such a period.

21. At the protection interview the delegate noted the applicant had not mentioned attacks on himself in his arrival interview. The applicant claimed that at the arrival interview he was stressed, blank and only had a short time so did not include all his claims. I accept caution is needed in relying on omissions at early interviews. However, the applicant's arrival interview was conducted nearly three weeks after his arrival. Further, I consider that his failure to mention such key aspects of his claim is concerning, particularly given he has limited claims. Further, the interview was lengthy, nearly three hours long. I consider it is odd that he would mention a leg injury in relation to a protest, but not mention that he had also been attacked at home and his leg broken. Further, in his arrival interview when he mentioned travel to [Country 1], he noted it was for work and to do project work, he did not mention it was to avoid harm. I consider these omissions and inconsistencies further reinforce my view that the applicant was not recounting true events.

Documents

22. I have considered the applicant's citizenship certificate, Election commission identity card identifying him as 'Member of Area 2 of [District 1] ' in 1997, his September 2012 police clearance and December 2012 letter from [Association 1] from the Maoist Nepal. Country information indicates there is a prevalence of fraudulent or fraudulently obtained documents in Nepal.
23. I accept the applicant is a Nepalese citizen and that the police clearance notes there is no adverse record against him.
24. The 1997 election identity card notes the applicant was elected to the post of 'member of the [District 1] '. It does not mention the district committee. It is inconsistent with the applicant's claims that he was a member of the district *committee*. Further, the election commission identity card did not appear to be on official letterhead or have security features. I place little weight on the election identity document.
25. The [Association 1] from Maoists letter was dated after the applicant had arrived in Australia, which is odd and leads me to believe it was obtained to enhance his protection claims. Further, the [Association 1] letter is not consistent with the applicant's claims. It indicates the applicant was compelled to leave his home country in March 2004. However, the applicant did not depart Nepal for Australia until September 2012. It may be this was a mistake and reference to the applicant's departure from his home town [Town 1] in 2004, so I place little weight on this. However, there are further inconsistencies in the letter. The letter indicates after the applicant left in 2004, his family members received threatening calls so the family members moved to Kathmandu. However, the applicant's claims indicate the threats were to the applicant, not his family, and the applicant and his family all moved to Kathmandu. Further, the letter made no mention of the applicant being attacked or hiding in [Country 1]. I consider it is odd that the letter would not mention such a key event as the applicant being attacked in his own home. Rather it mentions only repeated death threats. Given these inconsistencies, the date of the letter and the prevalence of fraudulent documents, I place no weight on the letter.

Factual findings

26. Essentially the applicant's claims centre around political involvement with or support for Communist, Royalist parties and also the multi-party democracy in Nepal. He claimed to have been attacked and threatened by the Maoists a number of times which forced him to move from [Town 1] to [Town 2] to Kathmandu and [Country 1], prior to coming to Australia.
27. I accept the applicant has had some low level political interest and been on the local government district committee until 2003. As discussed above the applicant's evidence about his employment history was unsatisfactory. His evidence about whether it was paid full time employment was inconsistent and his account of his duties was vague and not spontaneous. His account of why he joined the communists was vague and lacked details. As discussed below, his account of the King protests were also unsatisfactory. However, given his tertiary level of education, I consider it is plausible that he held such position. I accept he had an interest in politics and was employed at the government district committee until 2003. Further, at interview the applicant reiterated that his position was at a low level. It was evident in his arrival interview that he more recently, in the last year (ie. 2012) supported the Democratic Party or return to multiparty state democracy, 'like Australian politics.'
28. Given country information, I accept that there was much political turmoil during the civil conflict until 2013. I accept the applicant may have been asked for donations by Maoists as this was not uncommon during the civil war. I accept the applicant may have moved from Begam to Kathmandu in 2004/5 when his committee job was dissolved by the government. I accept that he was interested in low level politics and that his political affiliations have changed. I accept that since 2012 he supports the Democratic Party or multiparty democracy and he no longer supports the Royalists.
29. The applicant claimed he was attacked at home, threatened and attacked a number of times. As discussed above, I consider the applicant's account of attacks and harm was vague, not spontaneous, lacked details and inconsistent. I do not accept the applicant was attacked at home or that he moved to [Town 2] due to such an attack. I do not accept his leg was broken in an attack or that he was attacked at home. I do not accept that he was accused of being a spy, reactionary or considered a traitor or threatened.
30. Further, I do not accept the applicant was threatened or targeted by Maoists in Kathmandu. His account of why or how they tracked him down or had his phone number lacked credibility. His account lacked any description of the nature, extent and circumstances of the claimed threats.
31. While the applicant claimed he was attacked several times, he described one attack which lacked details and was general, saying he was hit in [a public area] and fled with friends. Further, from the description of the claimed attack, there was no indication of the motive or that they were Maoists. He provided no further description of the claimed other attacks or attempted attacks.
32. The applicant also claimed in his arrival interview that he was detained for a month in 1990 by police because he was involved in a political movement. He also claimed that many were arrested and they were not allowed to visit friends when there was a demonstration and his leg was injured once. As discussed above, in his protection interview the applicant claimed his leg was broken when he was attacked at home by the Maoists. I consider the applicant gave two different accounts of his leg injury. I do not accept the applicant was arrested for a month as he has not mentioned that since the arrival interview. Further, while in his

statement he mentioned events in 1990, such as his attendance at university, he did not mention he was arrested or detained. I consider if he had been so arrested he would mention it in his statement and/or during the protection interview. Further, his clear police certificate suggests he does not have an arrest record.

33. The applicant also claimed to have attended protests in support of the King (or anti-protests). I consider his account in the protection interview in this regard was vague and lacked details. For instance, when asked how he supported the King, the applicant said it was just a thought that came to him. He then added there was a protest, but they were doing the anti-protest to support the King. When prompted for more details the applicant added they use different kind of strategies, get involved and have different statements in favour of the King. I consider the applicant's responses were general and lack specificity. When asked if he attended one or more protests, the applicant reiterated it was a protest and they went for the campaign. I accept the applicant may have attended a protest. However, I do not accept he was a high profile supporter, demonstrator or political worker or opponent for the King. I consider if the applicant had attended protests in support of the King and spent his time supporting the King, he would have had more information and detail about that, particularly given his claims that he was political and was targeted or considered a spy by the Maoists. If the applicant had been so targeted, it is odd that he had so little information about the protests he attended, when, where and what happened.
34. I do not accept that the applicant was unemployed or living in hiding to avoid harm. Further, I do not accept the applicant moved around to [Country 1] or friends' places or hotels in Nepal from 2008 as this is not consistent with his initial claim that he lived at the same address in Kathmandu for 8 or 9 years from 2002 until October 2012. I consider the applicant later changed and added claimed movements to avoid harm to enhance his protection claims.
35. Further, I consider it highly unlikely that the applicant would move cities and leave his wife and [children] behind at home, if he had been attacked at home and felt threatened.
36. Having listened to the interview and the applicant's poor account, I consider the applicant has embellished his claims and he was making up his account as he went along.
37. I accept the applicant was a [occupation] and worked for the district area committee 1997 – 2003 and provided advice about [community] projects. I accept he has had some low level political interest and involvement. Further, I consider it was evident that the applicant's political affiliations changed according to the prevailing political climate. For instance, initially he was with the communists, then he supported the King when he was appointed and since then and more recently he supported the democratic process and multiparty system. However, I do not accept the applicant is or was high profile political opponent or that he was specifically targeted. I accept that he, like many others, was pressed for political donations. I accept that his employment ceased as a member of the district committee as it was dissolved in 2003. However, I do not accept he was targeted or attacked.
38. Having considered the evidence, I consider the applicant has fabricated his claims of threats, attacks to him or against him and the family. I do not accept he was attacked or targeted or had to hide or was unemployed due to fear of harm. I do not accept he faced or faces any harm from Maoists or political parties or opposition groups.

Persecution

39. While I accept the applicant has had some low level political involvement in the past and he supported the monarchy, I have not accepted that he was targeted by Maoists or threatened or attacked. Country information indicates that the monarchy was abolished in 2008 and Nepal became a republic. While Maoists formed government, it was short lived, resigning in 2009. Country information in the review material noted there were no reports documenting violence by Maoists against pro-monarchy parties in recent years. I do not accept the applicant faces any harm as a result of his past pro Monarchy support or his political affiliations.
40. Further I do not accept he is a critic of the constitution as the applicant also noted in his arrival interview that he was no longer a supporter of the monarchy, but a supporter of the multi-party democracy.
41. I accept the applicant supported the monarchists in the past and also supports the Democratic Party and process and multiparty state and may continue an interest or low level involvement in politics. I accept there is a diverse array of political parties in Nepal and there has been considerable instability in recent years. US Department of Commerce in 2013 reported the incidents of extortion had decreased significantly in recent years. Further, with the end of the 2015 Constitutional crisis, the political situation changed significantly. In June 2015 the four major political parties agreed to proceed with negotiations and focus on federalism, form of government, elections and judiciary. I consider the political and security situation in Nepal has significantly improved since 2013 as there have been elections, a new coalition Government and constitution in 2015. Further, DFAT notes Nepal's lively political environment provides an opportunity for diverse political parties and views and an individual's membership of a political party, along with their ability to be identified as a member or be politically active, is general respected. DFAT assesses while there was some violence in the aftermath of the New Constitution (2015), the overall risk is low. Further, I note the applicant supports the return to democracy and multiparty state, which is what has occurred in Nepal.
42. Having regard to the country information, the applicant's past political affiliations and involvement, support for democracy and his low level political interest I do not accept he faces a real chance of harm from Maoists or opposition groups or political groups. I do not accept he was or will be viewed as a spy or traitor. It is evident from the country information that Nepal provides for diverse political views and parties and persons so involved are generally respected.
43. Having considered the country information and the applicant's circumstances, I do not accept that the applicant faces a real chance of any harm on the basis of any of the reasons claimed or at all.

Refugee: conclusion

44. 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

45. 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

46. 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.
47. I have considered the applicant's circumstances whether he faces a real risk of significant harm upon return to Nepal.
48. As discussed above, I have not accepted the applicant's claims about threats or attacks or harm from Maoists or any opposition groups. I have not accepted he faces a real chance of any harm on the bases claimed or at all. For the same reasons and applying the authority in *MIAC v SZQRB* [2013] FCAFC33, I am not satisfied the applicant will face a real risk of harm of if removed to Nepal.

Complementary protection: conclusion

49. 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

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.