



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA18/05194

Date and time of decision: 23 October 2018 11:43:00

I Sheek, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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] January 2013 and arrived in Australia [in] March 2013. On 9 August 2016 he lodged an application for a protection visa (PV).
2. On 18 June 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate accepted that the applicant has lost faith in Islam and does not practise, he is a [Occupation 1] and has a tattoo on his [Body Part 1]. The delegate did not accept that there was a real chance that threats made to the applicant in 2012 would resume on his return to Iran. The delegate concluded that the applicant would not face serious harm in Iran due to these reasons, being a failed asylum seeker or for any other reason.

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). I have also obtained under s.473BC of the Act the Department of Foreign Affairs and Trade (DFAT), DFAT Country Report, Iran, published on 7 June 2018.¹ This replaces the previous DFAT report on Iran published on 21 April 2016 and was not referred to by the delegate. It is new information. The delegate referred to the previous report, this being the DFAT Iran Country Information Report 2016, published on 21 April 2016. The DFAT report updates that before the delegate, which is now over two years old. It has been prepared specifically for the purpose of assisting in the determination of protection status. I consider that there are exceptional circumstances to justify considering this new information.
4. On 15 August 2018, the IAA received submissions and additional documents on behalf of the applicant from his representative [Mr A] of [Law Firm 1]. 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. [Mr A]'s submission of 9 July 2018 addresses the delegate's decision and findings and to that extent I have had regard to it. [Mr A] also provides the following claim, which was not before the delegate and is new information: the applicant is a bisexual man. In support of this claim [Mr A] has provided a statutory declaration from the applicant, dated 6 August 2018. In his submission [Mr A] also refers to the following country reports and media articles:
 - a) DFAT, "DFAT Country Information Report - Iran", 7 June 2018
 - b) Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), "Iran: Women, children, LGBTI persons, persons with disabilities, "moral crimes": COI Compilation", December 2015
 - c) Radio Free Europe/Radio Liberty, "Iran: Persian gay and lesbian activist urges tolerance", 17 May 2007

¹ DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226

- d) Brian Whitaker, The Guardian, "Everything you need to know about being gay in Muslim countries", 21 June 2016
 - e) Iran Human Rights Documentation Centre, "Islamic Penal Code of the Islamic Republic of Iran – Books One and Two", 8 April 2014
 - f) United States Department of State, "2016 Country Reports on Human Rights Practices - Iran", 3 March 2017
 - g) Deutsche Welle, "Passion for tattoos leads to lashings in Iran", 22 January 2014
 - h) Center for Human Rights in Iran, "Briefing: Iran's Fashion Industry is the Latest Victim of Khamenei's War on Western Culture", 8 December 2016
 - i) Independent Australia, "Iran bans spiky haircuts, tattoos and use of sunbeds because they are signs of 'devil-worship'", 5 May 2015.
5. The applicant's statutory declaration post-dates the delegate's decision. In relation to the new claim regarding the applicant's sexual orientation, [Mr A] contends that the issue of the applicant's sexuality was before the delegate and is not new information because at the PV interview the delegate asked the applicant if he were gay and "one can sense genuine reluctance in the applicant's response which is in the negative". I disagree with the contention that the issue of the applicant's sexuality was before the delegate. The applicant referred only to the perception that he would be gay because he was [Occupation 1] and wore an [accessory]. This is why the delegate asked him if he was gay.
 6. The applicant states in his statutory declaration that he has hidden his sexuality from his family and most of his friends for all of his life and continues to keep this part of his life separate from his other interactions with the Iranian community in Australia, due to the social and cultural stigma surrounding homosexuality in that community. I note that the applicant was not represented before the delegate and that both the delegate and the interpreter at the PV interview were male. The applicant reports that he was unable to discuss the matter of his bisexuality previously due to his shame and embarrassment and I accept that there may social and cultural stigmas that affect the raising of such matters. I am satisfied that there are exceptional circumstances that justify consideration of the new information. I am also satisfied that the new claim is capable of being believed and comprises credible personal information that was not known by the Minister and may affect the consideration of the applicant's claims.
 7. Turning to the country information referred to by [Mr A] in his submissions, the review material already includes the 2018 DFAT report at (a), the ACCORD report at (b), the Iranian Penal Code at (e) and the Independent Australia article at (i) therefore these are not new information. In relation to the remainder of the articles and reports at (c) to (h) above, [Mr A] has made no submissions regarding whether exceptional circumstances justify their consideration and none are apparent to me. The review material already includes a number of reports and articles relating to the issues in question and I am not satisfied that the new information provided significantly adds to it. I am not satisfied that s.473DD(a) is met in relation to the remaining reports/articles.
 8. [Mr A] has also presented an undated 18 page document entitled "LGBTQI persons and bisexuality in Iran", comprising quotes from numerous reports and country information, many but not all of which are listed at (a) to (i) above. All of the information provided is generic in nature, there is no mention in the document of the applicant or his particular situation. It is not clear whether [Mr A] is the author of this document. I am not satisfied that there are exceptional circumstances that justify consideration of this document.

9. A further attachment provided on 15 August 2018 is entitled "Screenshots" and comprises what appears to be the applicant's profile on a social media site and parts of on-line conversations between the applicant and others, in particular [Mr B] and [Mr C]. The date and relevance of these documents is unclear. I infer that they are in support of the applicant's claim to be bisexual however I consider them of little if any probative value. I am not satisfied that there are exceptional circumstances that justify consideration of the screenshots.
10. On 15 October 2018 [Mr A] provided the IAA with a report from Dr [D], consultant psychiatrist, dated [in] September 2018. Due to the date of this report I am satisfied that it could not have been provided to the delegate. Dr [D] notes that he saw the applicant [in] August 2018 for the purposes of conducting a psychiatric assessment and that the applicant reported a deterioration in his mental state since the rejection of his PV application. I accept that this may be the case. There is no indication that the applicant is undertaking any treatment for mental health issues. I conclude that the report is of little assistance in determining the applicant's claims for protection. In considering whether exceptional circumstances exist, I am not of the view that the applicant's mental state takes the case out of the usual or ordinary course so as to justify consideration of the new information.

Applicant's claims for protection

11. After his arrival at Christmas Island the applicant was interviewed by officers of the then Department of Immigration and Border Protection (now the Department of Home Affairs) on 6 April 2013 and 27 April 2013. Together with his PV application he provided a statutory declaration dated 7 August 2016. On 17 April 2018 he attended an interview ("the PV interview") with the delegate. The applicant claims:
 - He came to Australia with his then [Wife E] and her [number] children from [previous] marriages. [Her] ex-husband was a member of the [Defence Force 1] and his (the ex-husband's) brother was a member of the [Defence Force 2]. The ex-husband wanted to reconcile with [Wife E] and was angry when she commenced a new relationship. He threatened the applicant regularly and visited his workplace together with his brother from [Defence Force 2]. The applicant sought help from the authorities but they were of no assistance. He and [Wife E] considered relocating to [Country 1] and secured employment there but were unable to afford to live there. They subsequently fled to Australia;
 - Although he and [Wife E] are no longer together he fears that the ex-husband will continue to threaten him on return to Iran. The security forces including the [Defence Force 1] and [Defence Force 2] can make false accusations and detain people without evidence;
 - Having now spent several years in Australia he would be perceived to be westernised on return. He has tattoos and wears an [accessory]. This would bring him to the attention of the [Defence Force 1]. Also he currently works as [Occupation 1]. Should he return he would not be able to perform western [styled work] or [groom his own appearance] in western styles. He may also be perceived as homosexual due to his appearance;
 - Although raised as a Muslim he no longer believes in Islam;
 - He is bisexual. From a young age he has had sexual relations with both males and females. He has not told anyone in his family about this; they would not be able to accept it. He never discussed this with [Wife E] during the period that they were

married. He is active in the gay scene. Should he return to Iran he could face execution due to his sexual preferences.

Factual findings

12. 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 [date] in Tehran and is an Iranian national. He is of Azeri Turk ethnicity. He completed [education] to Year [number]. He has [number] sisters and [number] brother, all resident in Iran. He worked as a [Occupation 1] until [age]. He completed his compulsory military service in Iran from 2002 to 2004. From 2004 until his departure from Iran in January 2013 he worked for various businesses, including in [Business 1]. The applicant is currently employed as a [Occupation 1].
13. The applicant's central claim has until recently been that he fears harm from his now ex-wife's second husband. The applicant has consistently claimed that he knew [Wife E] from when she was his [particular type of relationship]. A relationship developed during 2012, at which time she was divorced from her second husband. The applicant's parents did not approve of [Wife E] as she was [divorced] with a [a number of children]. In July 2012 the applicant and [Wife E] entered into a Sigheh or temporary marriage for the period of 12 months. In his statutory declaration of 2016 the applicant stated that "We chose to obtain a Sigheh which would allow us to live as a couple and to be seen in public together".
14. In relation to the reason the applicant and [Wife E] fled Iran in early 2013, there has been some variation in the applicant's evidence. In his arrival interview the applicant stated that [Wife E]'s ex-husband was an addict [of certain drugs]. The applicant had arguments with him on [number] occasions. The ex-husband's brother [Alias 3] was a member of the [Defence Force 2]. For the last two months (prior to their departure) the brother had been threatening the applicant. In contrast with this, the applicant stated in his 2016 statutory declaration that [Mr F] was the name of [Wife E]'s second husband (not his brother). This is a significant difference in the evidence. He also stated that [Wife E] had told him that her ex-husband was in [Defence Force 1]. He would chase people who were not following the moral code. In view of this it seems implausible that the ex-husband would also have been an [addict].
15. I have further concerns regarding the applicant's evidence on the threats he claims to have received. In his 2016 statutory declaration the applicant claims that from June 2012 "[Mr F] called [Wife E] every day until we left Iran and made threats against me". He also stated that [Mr F] and his brother had gone to the applicant's workplace. When asked by the delegate how they knew where he worked the applicant responded that [Wife E] had given [Mr F] his phone number. [Mr F]'s brother had then used this (as a member of [Defence Force 2]) to ascertain the applicant's place of work. The applicant has at no point claimed that [Mr F] phoned and threatened him directly. I consider it unlikely that he would not have, if he had the applicant's phone number as stated. I also do not accept that [Mr F's] brother could have obtained the applicant's work address but not his home address or that of his parents.
16. At the PV interview the delegate queried how [Wife E] was able to take her children out of the country without the consent of their fathers. The applicant had stated at paragraph 35 of his 2016 statutory declaration that [Mr F] would not give his consent "unless we paid him approximately [amount] Iranian Rial (approximately A [amount]). This was equivalent to [period of time] wage and we could not afford it". The applicant categorically denied having made such a statement and claimed that there had been interpreter error. I do not find this response persuasive. He further told the delegate that if [Mr F] had known they were taking

his [child] from Iran they would never have been able to leave. The applicant also stated in his 2016 statutory declaration that in September 2012 he and [Wife E] had travelled to [Country 1] to see if they could move there. Despite securing employment they were unable to stay as they could not afford it. I note however that only four months later in January 2013 they departed Iran at a stated cost of \$US5,000 each or \$US20,000 in total.

17. In view of the significant variation in the applicant's evidence and the implausibility of many facets of his story I conclude that it is a fabrication. I do not accept that the applicant had to flee Iran to escape his then wife's ex-husband or that this man was connected with the [Defence Force 1] or [Defence Force 2]. I do not accept that the applicant's ex-wife's ex-husband has stated that he will come to Australia and harm the applicant. I do not accept that the applicant holds any profile of interest to the [Defence Force 1] or [Defence Force 2]. Provision of this claim in its entirety causes me concerns as to the applicant's overall credibility.
18. In his PV application the applicant states that he has been self-employed as a [Occupation 1] since 2016 and I accept that he has. I also accept that he has a [particular type of accessory] and a tattoo of [Figure 1] on his [Body Part 1].
19. The applicant has consistently identified as a Shia Muslim. In his 2016 statutory declaration he advised that he no longer believes in Islam. At the PV interview he advised that he had no problems in Iran due to his lack of belief because no-one knew about it. The delegate put to the applicant that this situation was common in Iran and the applicant agreed. In his statutory declaration of 2018 [at 17] he states that his father was devout but the applicant never had any connection with Islam and would always refuse to attend Muharram processions. The applicant further claims [at age] that "I wish to confirm that I have renounced Islam and I do not practice [sic] it in any way". The applicant does not explain what he means by this including what if any actions he has taken to renounce his former faith. I am not satisfied overall that he has renounced Islam; I conclude that he has however abandoned his former faith and that this occurred prior to his departure from Iran.
20. Despite my reservations about the applicant's credibility, I have decided to accept his recent claim, made in August 2018, that he is bisexual. I accept as plausible that he did not raise this claim previously due to cultural stigma and shame. In his recent statutory declaration the applicant provides a great deal of detail about his sex life in Iran and it would appear that he engaged in high-risk behaviours for some years, including attending a [place] known as a gay meeting place. He does not claim to have come to the attention of the authorities at any point due to this and I am satisfied that he had not. While the applicant indicates that his activities in Iran were somewhat clandestine in nature, he states that he is now able to be himself and be true to himself. This comprises being very active on the gay scene and on social media, attending [Entertainment Place 1] and [Entertainment Place 2] and having numerous short term relationships. He states that he would not be able to be true to himself in this fashion in Iran without exposing himself to certain danger and I accept that this is the case.

Refugee assessment

21. 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

22. 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.
23. I have found that the applicant is an Iranian national. It follows that Iran is his receiving country. I have accepted that the applicant is bisexual and has had sexual relations with both men and women in Iran as well as Australia. I have accepted that when in Iran he did not divulge his sexual orientation publicly, to female partners or to any members of his family. In considering whether the applicant is a member of a particular social group, he is an LGBTI individual, his sexual orientation is an innate characteristic which is fundamental to his identity. This characteristic distinguishes the group from society. He is therefore a member of a particular social group as defined at s.5L.
24. Chapter Two of the Iranian Penal Code explicitly criminalises same-sex relations for both men and women. Punishments for male homosexual acts are more severe than those given to women: men can be executed on the first conviction.² DFAT also assesses that LGBTI individuals face a high risk of societal discrimination, with ongoing traditional views about sexuality and gender restricting their participation in the community and workforce. High profile or highly visible LGBTI individuals of either sex face a high risk of violence, including from within their family, from the public or from authorities.³ International observers report that homosexual and bisexual persons who do not openly reveal their sexual orientation and keep a low profile are able to move freely within society, particularly in larger cities that offer greater anonymity.⁴ Although the applicant managed to avoid any harm due to his sexual orientation prior to his departure from Iran, he engaged in high risk behaviours such as frequenting known "gay meeting places". He has been more active in the LGBTI social scene in Australia and I am satisfied that he would continue to engage in behaviours on return which are not consistent with keeping a low profile. I conclude that he would face a real chance of being the victim of violence from individuals or of coming to the attention of the authorities.

² DFAT, "DFAT Country Information Report - Iran", 7 June 2018, CIS7B839411226; 3.90

³ Ibid; 3.100

⁴ Ibid; 3.96

25. Should the applicant come to the attention of the authorities due to high profile homosexual activities, there is a high risk that he would be subject to violence. There is also more than a remote chance that he would be charged with any of a number of crimes including sodomy. Country information however notes that prosecution of homosexual acts is relatively rare as these types of conduct are difficult to prove as they require several eyewitnesses. A confidential source is quoted as saying that it is likely that most convictions for moharebeh (“enmity against God”), a capital offence, are in practice convictions for homosexuality. During the period December 2013 to April 2015, several death sentences were handed down for moharebeh. In most of these cases, the acts that have led to this judgement have not been specified.⁵ Notwithstanding the uncertainty over how often executions occur and in which circumstances, legal provision for the use of the death penalty for consensual same-sex acts creates significant risk to those who engage in such acts.⁶
26. I have concluded that the applicant faces a real chance of harm comprising violence from individuals or the authorities or being subject to the death penalty if charged with sodomy or moharebeh. I am satisfied that the harm the applicant may face is serious harm. I am also satisfied that the essential and significant reason for the harm is his membership of a particular social group (LGBTI individual), and that it involves systematic and discriminatory conduct.
27. The harm that the applicant fears emanates from the Iranian authorities operating under laws which apply throughout Iran. As such, I find that the real chance of persecution relates to all areas of Iran. I am satisfied he has a well-founded fear of persecution for the purposes of s.5J(1).
28. As the Iranian government is the agent of harm and maintains control throughout the country, I am satisfied that protection against the persecution could not be provided by the relevant state as relevantly required by s.5LA(1). As such, effective protection measures are not available to the applicant in Iran and s.5J(2) does not apply.
29. The applicant can avoid a real chance of persecution by not practising homosexual relations or concealing his sexual orientation. Such actions would however involve an impermissible modification of behaviour. I find that s.5J(3) does not apply. I consider that requiring the applicant to modify his behaviour, either by concealing his sexual orientation or ceasing to have sexual relations with men falls within a kind of modification that an applicant cannot be required to make in s.5J(3)(c)(vi).
30. Accordingly I am satisfied the applicant has a well-founded fear of persecution in Iran for reason of his sexual orientation. I have therefore found it unnecessary to assess whether he faces a real chance of harm in relation to his other claims.

Refugee: conclusion

31. The applicant meets the requirements of the definition of refugee in s.5H(1).

⁵ ACCORD, “Iran: Women, children, LGBTI persons, persons with disabilities, “moral crimes’: COI Compilation”, December 2015

⁶ DFAT, “DFAT Country Information Report - Iran”, 7 June 2018, CIS7B839411226; 3.100

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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.