



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

MYANMAR
IAA reference: IAA21/09452

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IAA reference: IAA21/09451

Date and time of decision: 10 August 2021 12:55:00
K Allen, Reviewer

Decision

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

- each of the referred applicants 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 a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicants (the applicants) claim to be stateless people from Mon State in Myanmar. The family is comprised of a husband (applicant 1) and wife (applicant 2) who met and married in [Country 1]. On 11 July 2017 they lodged a combined application for Safe Haven Enterprise Visas (SHEVs).
2. On 30 June 2021 a delegate of the Minister for Immigration made the decision to refuse the grant of the visas on the basis that the applicants were not owed protection.

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. On 3 and 9 August 2021 the applicants' representative provided the IAA with submissions and new information as well as submissions about the new information. To the extent that the submissions amount to argument in response to the delegate's decision and argument as to why the new country information is relevant and should be considered, I have had regard to those submissions in making this decision.
5. The applicant's representative also provided a number of pieces of country information about current conditions in Myanmar relating in particular to the change of government as a result of a military coup in February 2021. It is noted by the representative that the delegate made the decision to refuse the applicants' visas without reference to the change of government or relevant country information. The representative has submitted that all of the new country information could not have been provided to the Department before the decision under review was made as it is all information available and published after 30 June 2021. I am satisfied that this is the case. I am also satisfied that the fact that the delegate failed to consider that there had been a military coup and change of government in Myanmar amounts to exceptional circumstances to justify considering the new information.

Applicants' claims for protection

6. Applicant 1's claims can be summarised as follows:
 - He was born in [City], Mon State, Myanmar in [Year 1] to parents of [Ethnicity 1] and [Ethnicity 2] ethnicity and he is a Sunni Muslim. His father was [an Occupation 1] and his mother was a home maker. In 1995 he went to live and study at [a] School in Mawlemyaing, Mon State and he remained living in Mawlemyaing until he departed Myanmar in 2005.
 - His family are stateless in Myanmar. His parents did not receive birth certificates. He and his siblings did not receive birth certificates.
 - Muslims are discriminated against and often not recognized as citizens in Myanmar. He faced constant oppression and harassment because of his religion.
 - In 2005 he visited family in [Village], in Karen State as his aunt was dying. He stayed without approval and was discovered by the police and handed over to the military.

- The next morning, he and other detainees were taken by the soldiers to a rubber plantation where they were required to work to clear the forest. He was there for about three days.
- On the third day he was able to escape with another Muslim man. They were able to hitch a ride to [City] in a car. From there they went to [Location] and crossed a shallow river to [Country 2] at low tide. He eventually travelled to and settled in [Country 1].
- He found illegal work in [Country 1] and registered with the UNHCR. In 2010 his aunt, who was living in Australia, sponsored him for a refugee visa to Australia but his offshore protection visa application as refused.
- He met his wife in [Country 1] in around June 2012 and married in September 2012. They used a broker to arrange their travel to Australia.
- He cannot return to Myanmar as he fears he will be killed as he is stateless and has no proof of his identity.
- In 2014 the situation in Myanmar became even worse for Muslims. The monks came to his father's village and started to make problems and attack Muslims. His father fled with his daughter to [Country 2]. After they fled, the government went to the area they had lived in Myanmar and produced household registration lists and family lists in the area. His father missed this opportunity to be registered because they had fled Myanmar. Later his father returned to Myanmar but still has no identity documents. He entered Myanmar without passing through any legal checkpoints.

7. Applicant 2's claims can be summarised as follows:

- She was born in [Year 2] in [Town], Mon State to parents of [Ethnicity 3] ethnicity and she is a Muslim. Her father was [an Occupation 2]. He passed away in 2006. Her mother and two siblings are currently living in [Country 2].
- Her family are Muslims and stateless and have not been issued with any identity documents.
- Her mother ran a [shop] in their house. She frequently had to go out to buy things for her mother's store. She needed to get the recommendation letter to move about and faced constant abuse from authorities at the checkpoints.
- She faced abuse from Burmese people because of her religion. Buddhists abused and harassed them in the street. Due to the way she was dressed, it was obvious to people that she was a Muslim.
- In 2011 her mother's land was forcibly acquired by the government for [Amount] to build a [factory]. They no longer had a house or any belongings so around November 2011 they left Myanmar and moved to [Country 1] illegally using a broker.
- She fears that if she returns to Myanmar she will be living with no security, no status and no safety and will face significant discrimination and oppression.
- Without documentation she does not know if she would be allowed to re-enter and fears she will be detained at the airport and investigated. If she is detained she is afraid she will be arrested, tortured, even killed.

Refugee assessment

8. Under s.36(2)(a) of the Act a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee. 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

9. 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.
10. The applicants claim to have been born and lived in Myanmar until applicant 1’s departure in 2005 and applicant 2’s departure in 2014. They have variously claimed to have been Myanmar citizens and that they are stateless and undocumented. They did not claim to have ever applied for documentation such as birth certificates or citizenship cards (CSCs). They did not indicate that they had been refused documentation. Country information¹ states that a person can apply for a CSC once they are 10 years old. After getting the card, they should renew it at ages 18, 30 and 45. CSC are very important. They may help to do basic things like travel, go to high school and university, open a bank account, register marriage, vote, and buy and sell land. The card records personal information, including name, sex, religion, race, father's name and identification number. The applicants did not claim to have been listed on a Household Registration List (HRL). Country information² states that household registration is required for the issuance of identity documentation, school enrolment (particularly at the secondary and higher levels), accessing services (including health, electricity and water), marriage and travel permission. If a person is found to be unregistered, the penalty is a maximum of seven days detention at the police station, during which time the person must prove they belong to a household and be registered on their household list by the head of the household. Applicant 1 stated that his father was employed in various roles including as [an

¹ Smile Education and Development Foundation & Justice Base, “Access to documentation and risk of statelessness”, 1 December 2017, CISED850AD8574; Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report Myanmar”, 18 April 2019, 20190418091206

² Ibid.

Occupation 1] and as [an Occupation 2]. He stated that he attended [a] school in Myanmar and provided evidence of his education. He claims to have illegally travelled to [Country 1] in 2005, registered with the UNHCR in [Country 1] during 2008, and obtained a registration card. He has not adequately explained how he was able to do these things without documentation. Applicant 2 claims that her family owned land in Myanmar and that her mother ran a [shop] out of her house. She also claims that her mother was paid compensation by the government when the land was compulsorily acquired. She has not explained how this occurred without documentation. Given their accounts of their lives in Myanmar, I consider that the applicants had documentation in Myanmar such as CSC's and that they were listed on their HRL. I do not find it plausible that they both lived in Myanmar for most of their lives and did not even attempt to apply for some form of identification. Considering the applicants' accounts of their lives, including that they were able to own property, work and enrol in school, I am satisfied that they had identity documents such as registration on an HRL and CSCs while living in Myanmar. I find that the applicants are nationals of Myanmar and I find Myanmar to be their receiving country. In the absence of any information before me to suggest otherwise, I am satisfied that the applicants do not have a right to enter and reside in any country apart from Myanmar.

11. Applicant 1 has provided inconsistent and implausible accounts of the status of his family in Myanmar. For example, in his Offshore Protection Application made in 2010, he claimed that both of his parents had died. In his SHEV application of 2017, he stated that his father had temporarily moved to [Country 2] but had then returned to Myanmar. In his SHEV interview of 2021, he stated that his father was living in [Country 2]. I consider that the applicant has attempted to conceal his family status in order to enhance his claims for protection. I consider it likely that he still has family living in Mon State and that he may still be registered on the HRL. However, given that the applicant has been absent from Myanmar for a significant period of time, I cannot be certain that the applicant remains registered on his HRL. Applicant 2 claims that she no longer has family living in Myanmar and that her mother and sisters live in [Country 2] having moved after their land was acquired. I accept the applicant's account of this as being plausible and I accept that she may no longer have a current CSC and that she may no longer be registered on an HRL.
12. The applicants have provided a consistent and plausible account of their lives as Muslims in Myanmar. Country information³ confirms that Muslims in Myanmar are subject to abuse and harassment and that laws and practices are in place that effectively discriminate against Muslims on the basis of their religion. I note the establishment of Muslim free villages, restrictions on Madrasas and the rebuilding of mosques and the influence of ultra-nationalist Buddhist movements and that anti-Muslim sentiment in Burma is widespread and entrenched. I accept that the applicants are Muslims and that they practised Islam when they lived in Myanmar. The applicants have provided accounts of the discrimination and harassment that they faced over the course of their lives in Myanmar including in school, at checkpoints and in their interactions with the authorities. While I have significant doubts about applicant 1's claims of having been detained by the army as a porter and having escaped, I do accept the applicants' other claims of having faced discrimination. I note however they were able to live and work in Myanmar and I do not consider that the treatment they faced as Muslims amounted to serious harm.

³ US Department of State, "Human Rights Report 2020 Burma", 30 March 2021, 20210331120647; DFAT, "Country Information Report, Myanmar", 18 April 2019, 20190418091206; Burma Human Rights Network, "Persecution of Muslims in Burma", 4 September 2017, CISED50AD5558

13. The applicants claim they departed Myanmar illegally by crossing the border into [Country 2] and they have never claimed to have held valid travel documentation. Myanmar shares land and river borders with [Country 2] and there is frequent reporting of minorities escaping the Myanmar regime by crossing into [Country 2]⁴. In the absence of any information to the contrary, I accept as plausible the applicants' claims to have departed Myanmar illegally in 2005 and 2014 respectively.
14. Since February 2021 the political situation in Myanmar has changed significantly and the applicants' representative provided a range of reporting on the change of government. The country is now under control of the Tatmadaw (the Burmese military). There are media reports⁵ that the military has killed almost 1,000 people in a running crackdown on dissent, a local monitoring group says, with thousands more arrested. Tens of thousands of civil servants and other workers have either been sacked for joining protests or are still on strike in support of a nationwide civil disobedience campaign. A coronavirus outbreak has overwhelmed the healthcare system, with many hospitals empty due to a work boycott by pro-democracy medical staff. "The country has fallen into chaos and is close to complete collapse," Manny Maung of Human Rights Watch told AFP⁶. The country information before me indicates that most of this violence is occurring in major centres such as Yangon and Mandalay as and that the military is targeting people actively engaged in dissent such as protestors, politicians and journalists. The country information before me does not report that violence is particularly occurring against Muslims in Mon State.
15. I have had regard to the fact that the applicants would be returning to Myanmar at a time of crisis where the Tatmadaw is in control of the country. Given the recent change in country conditions there is no current reporting before me of the treatment of returnees and I have been unable to locate any reporting. I have therefore had regard to information about the treatment of returnees under the previous government and reporting about the Tatmadaw and their behaviour towards minorities. The applicants departed the country illegally and would be returning through a major airport. There are three international airports in Yangon, Mandalay and Naypyidaw. It is plausible that the applicants would be returning without current identity documents.
16. DFAT reports⁷ that Myanmar's Ministry of Labour, Immigration and Population is responsible for conducting interviews of returnees, with the exception of Rohingya returnees who are managed by the Ministry of Social Welfare, Relief and Resettlement. DFAT is not aware of how often these interviews are conducted and what, if any, information is passed to government security agencies. It is reported that refugees from [Country 2] (primarily Karen) who return to Myanmar via a formal assisted voluntary returns process undergo 'national verification', which can take up to a year, before being issued a CSC which allows them to exercise rights and access services in Myanmar. Despite the guarantee of citizenship through the formal return process, DFAT assesses the majority of refugees from [Country 2] prefer to return informally due to range of factors, including a continued mistrust amongst camp populations of the Myanmar government, and the lengthy process of verification, which can lead to family separation. In these circumstances, it is foreseeable that if the applicants were able to return, they may face separation and significant delays in being issued with CSC like returnees from [Country 2]. DFAT also reports that returnees to Myanmar who departed the

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

⁵ Including, SBS, "Six months after the military coup, here's what's happening in Myanmar", 1 August 2021; The Guardian, "Myanmar junta accused of crimes against humanity six months on from coup", 31 July 2021; The Washington Post, "How Myanmar's Coup Puts Democracy on the Back Burner Again", 2 August 2021

⁶ SBS, "Six months after the military coup, here's what's happening in Myanmar", 1 August 2021

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

country illegally are technically subject to up to five years imprisonment for having illegally crossed a border, and DFAT is aware of, but unable to verify, reports of this provision being enforced in recent years. In that context is possible that the applicants could face imprisonment for their illegal departures, although there is limited information before me about the frequency and circumstances in which such a provision would be applied, nor is it clear how the Tatmadaw would enforce such a provision.

17. I have had regard to reporting that the Tatmadaw has a poor record in terms of dealing with ethnic and religious minorities. In 2018 a UN Fact-Finding Mission found sufficient evidence of violence perpetrated by the Tatmadaw in northern Rakhine State to conclude that war crimes, crimes against humanity, and potentially, genocide occurred. There are recent reports⁸ that the Tatmadaw have targeted non-Rohingya Muslims in Islamophobic attacks including a lethal attack on sleeping Muslims at a mosque during Ramadan and setting a mosque on fire. DFAT reports that the Tatmadaw act with impunity and there are credible reports that the Tatmadaw use torture to extract confessions from political prisoners including ethnic minorities and that detainees face physical mistreatment⁹.
18. Given the views reportedly expressed by the Tatmadaw about foreigners and Muslims, I am satisfied that there is more than a remote chance that the applicants would face harm in the return process. I am satisfied that it would be open to the authorities to detain and investigate the applicants on the basis of their illegal departures and their lack of current documentation. As the applicants are undocumented Muslim failed asylum seekers I am satisfied that there is more than a remote chance that they would be adversely targeted by the Tatmadaw and the authorities in that process and that they face a real chance of ongoing detention and physical mistreatment. I find that this amounts to serious harm. I am satisfied that the harm is essentially and significantly for reasons of the applicants' religion and that it is systematic and discriminatory conduct and that the harm amounts to persecution.
19. Section 5J(3) of the Act provides that a person does not have a well-founded fear of persecution if the person could take reasonable steps to modify their behaviour so as to avoid a real chance of persecution. However, certain modifications that are not permitted, including modifications which would conflict with a characteristic fundamental to the applicants identity or conscience. I find that requiring the applicants to modify behaviour such as concealing their religion would conflict with characteristics fundamental to their identity. I find that s.5J(3) does not apply.
20. As the harm would be inflicted by the current government, I find that effective protection measures are not available, and that the harm relates to all areas of Myanmar. I am satisfied that the applicants have a well-founded fear of persecution within the meaning of s.5J.
21. In light of the above findings, it is unnecessary to consider whether the applicants face a real chance of harm on any other basis and I make no finding on those remaining claims.

Refugee: conclusion

22. The applicants meet the requirements of the definition of refugee in s.5H(1). The applicants meet s.36(2)(a).

⁸ Andalou Agency, "Rights body accuses Myanmar junta of harassing Muslims, setting mosque on fire", 25 June 2021; Myanmar Now, "As Ramadan begins, soldiers attack sleeping Muslims at Mandalay mosque", 15 April 2021.

⁹ DFAT, "Country Information Report, Myanmar", 18 April 2019, 20190418091206

Decision

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

- each of the referred applicants 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.