

1514881 (Refugee) [2016] AATA 3790 (20 April 2016)

**DECISION RECORD**

**DIVISION:** Migration & Refugee Division  
**CASE NUMBER:** 1514881  
**COUNTRY OF REFERENCE:** Albania  
**MEMBER:** Suzanne Carlton  
**DATE:** 20 April 2016  
**PLACE OF DECISION:** Adelaide  
**DECISION:** The Tribunal affirms the decision not to grant the applicant a protection visa.

Statement made on 20 April 2016 at 10:46am

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. The applicant is a [age]-year-old man from Albania. According to the applicant, he fled persecution from his family because he converted from Islam to Christianity.
2. He fled to [Country 1], where he lived with a [Country 1] man with whom he was forced to have sex. He now claims that he identifies as a homosexual. His family have become aware of his homosexuality and he fears persecution from his family on this basis as well.
3. He fears if he returns to Albania, he will be harmed by his family because of his religious beliefs and his membership of a particular social group, being homosexual men. He fears that the authorities of his country cannot or will not provide protection from the feared persecution.
4. This is an application for review of a decision made by a delegate of the Minister for Immigration [in] October 2015 to refuse to grant the applicant a protection visa under s.65 of the *Migration Act 1958* (the Act). The applicant had applied for the visa [in] August 2015.
5. The issue in this case is whether the applicant is prevented from grant of a protection visa by s.91WA of the Act.

### HISTORY OF THE APPLICATION FOR REVIEW

6. The applicant arrived in Australia [in] October 2012 using an electronic visitor visa issued to Mr N the holder of a [Country 1] passport, which the applicant used to enter Australia. The passport was, on the applicant's evidence, altered to include the applicant's photograph in the place of Mr N's photograph.
7. When the applicant's electronic visitor visa was about to expire, he applied for and was granted an onshore visitor visa in the name of Mr N using the [Country 1] passport of Mr N. That visa was valid until April 2013.
8. When the applicant's first onshore visitor visa was about to expire, he applied for and was granted a second onshore visitor visa in name of Mr N using the [Country 1] passport of Mr N. That visa was valid until July 2013.
9. When his second onshore visitor visa was about to expire, the applicant applied for and was granted a student [visa] in name of Mr N using the [Country 1] passport of Mr N. That visa was valid until April 2014.
10. When his [student] visa was about to expire, he applied for a [another subclass] student visa, again in the name of Mr N using the [Country 1] passport of Mr N. He was granted an associated Bridging visa A.
11. The [second subclass] visa was refused [in] June 2014 and the associated Bridging visa ended the following month. Following that, the applicant was without a visa in any name.
12. The applicant has given conflicting information about whether it was May 2014 or May 2015 when he sought to renew his Australian driver's licence, issued in the name of Mr N. Suspecting his false identity was about to be exposed, he fled the [name] offices, abandoning the [Country 1] passport issued in the name of Mr N and [state] driver's licence issued in that name.

13. Within a few weeks after that incident, he contacted an Albanian man he knew in [city] and paid him to get a driver's licence. The driver's licence was issued in the name of Mr B, but contained the photo of the applicant.
14. The applicant appears to have obtained some identity documents in his actual identity issued in May 2015 and has provided evidence that he sought immigration legal assistance [in] June 2015. However, he was located by [state] police during a road stop [in] June 2015. The applicant continued to claim to be Mr B, but eventually acknowledged to [state] police his actual identity. All criminal charges against him were dropped [in] July 2015, at which point the applicant was taken into immigration detention pursuant to section 189 of the Act.
15. [In] August 2015 the applicant made this claim for protection and an associated application for a Bridging visa E. The Bridging visa was refused [in] August 2015 and that decision was affirmed by the Tribunal on 9 September 2015.
16. The applicant was interviewed by a delegate of the Minister in relation to his protection claims in September 2015 and the delegate made the decision to refuse the application for protection [in] October 2015.

### RELEVANT LAW

17. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, he or she is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.
18. Section 36(2)(a) provides that 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.
19. A person is a refugee if, in the case of a person who has a nationality, they are outside the country of their nationality and, owing to a well-founded fear of persecution, are unable or unwilling to avail themselves of the protection of that country: s.5H(1)(a). In the case of a person without a nationality, they are a refugee if they are outside the country of their former habitual residence and, owing to a well-founded fear of persecution, are unable or unwilling to return to that country: s.5H(1)(b).
20. Under s.5J(1), a person has a well-founded fear of persecution if they fear being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, there is a real chance they would be persecuted for one or more of those reasons, and the real chance of persecution relates to all areas of the relevant country. Additional requirements relating to a 'well-founded fear of persecution' and circumstances in which a person will be taken not to have such a fear are set out in ss.5J(2)-(6) and ss.5K-LA, which are extracted in the attachment to this decision.
21. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of the visa if he or she is a non-citizen in Australia 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 being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion'). The meaning of significant harm, and the circumstances in which a person will be taken not

to face a real risk of significant harm, are set out in ss.36(2A) and (2B), which are extracted in the attachment to this decision.

### **Circumstances preventing the grant of the visa**

22. Under s.65(1) of the Act, the Minister (or the Tribunal on review) must refuse to grant a visa if the grant is prevented by s.91WA. Section 91WA(1) requires the Minister to refuse to grant a protection visa to an applicant who provides a bogus document as evidence of their identity, nationality or citizenship, or has destroyed or disposed, or caused the destruction or disposal of, documentary evidence of their identity, nationality or citizenship. However, that requirement will not apply if the applicant has a reasonable explanation for the provision, destruction or disposal, and either provides relevant documentary evidence or has taken reasonable steps to provide such evidence: s.91WA(2). Section 91WA and the definition of 'bogus document' are extracted in the attachment to this decision.

### **Mandatory considerations**

23. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal has taken account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and relevant country information assessments prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

### **CONSIDERATION OF CLAIMS AND EVIDENCE**

24. For the following reasons, the Tribunal has concluded that the decision should be set aside and substitutes a decision to refuse to grant the first named applicant a Protection (Class XA) visa.
25. In making its findings, the Tribunal is mindful the applicant is [age] years old at the time of the hearings and previously owned and operated his own [business] in Albania. The Tribunal is mindful too that whenever evidence is received in a language other than the applicant's first language or through an interpreter there is always room for differences in meaning and nuance. During the hearings, on occasions where there was any concern regarding the clarity of the interpreting, the Tribunal and the applicants raised that with the interpreter and clarified it at that time. The Tribunal is satisfied the standard of interpreting at both the hearings was reasonable. The Tribunal considers the applicant was able to communicate effectively, understood the Tribunal proceedings and participated in a meaningful way.
26. The Tribunal finds the applicant is a national of Albania:
- a. The applicant provided his Albanian National Identity Card, issued in 2009 and valid until 2019. He also provided a birth certificate and family book registration. These latter two documents were said to be issued in May 2015. The applicant claims to be a national of Albania and spoke through an Albanian interpreter throughout both hearings. While the applicant entered Australia using the [Country 1] passport of Mr N, the applicant concedes he is not Mr N and that he is not entitled to that [Country 1] passport.
  - b. The applicant also was apprehended by [state] Police and claimed then to be the Albanian national named on the driver's licence found in his possession, Mr B. The applicant concedes he is not Mr B and that he is not entitled to that driver's licence.

- c. The Tribunal accepts the evidence before it that the applicant is the person depicted in the Albanian National Identity card presented and that he is an Albanian national.

27. The Tribunal is satisfied the applicant has no right to enter and reside in any other country for the purpose of s.36(3). It finds the applicant's claims should relevantly be assessed against Albania for the purposes of ss.36(2)(a) and (aa).
28. The Tribunal accepts that 'applicants for refugee status face particular problems of proof as an applicant may not be able to support his or her statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule.' The Tribunal also accepts that 'if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt. (The United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status*). The Handbook further states:  

The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.
29. The Tribunal acknowledges, while it may have regard to the Handbook, the Handbook is not binding. The Tribunal must bear in mind that if it makes an adverse finding in relation to a material claim made by the applicant but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that it might possibly be true (see *MIMA v Rajalingam* (1999) 93 FCR 220). However, the Tribunal is not required to accept uncritically any or all of the allegations made by an applicant. Further, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out, see *Randhawa v MILGEA* (1994) 52 FCR 437.
30. The delegate considered credibility to be an issue, as did the Tribunal.

#### **s.91WA – the first named applicant**

31. An issue in this case is whether the grant of the visa to the applicant is prevented by s.91WA, which was introduced into the Act with on 18 April 2015 and applies to all review applications undecided at that date. Section 91WA(1) makes it a basis to refuse a protection visa if an applicant provides a bogus document as evidence of identity, nationality or citizenship. However, if the applicant has a reasonable explanation for the provision of the bogus document and provides evidence of identity, then the applicant will not be prevented from being granted a protection visa: s.91WA(2). Section 91WA and the definition of 'bogus document' are extracted in the attachment to this decision.
32. The delegate made no findings in relation to section 91WA.
33. The applicant attended a hearing by videolink from [an] Immigration Detention Centre ([name]) on 27 January 2016. His [representative] attended the hearing by telephone. During that hearing, the Tribunal discussed with the applicant his protection claims, which are set out more fully below. The hearing was required to be adjourned to another time after exceeding the time set aside for it.
34. The adjourned hearing was held on 29 March 2016. In its invitation to the applicant for the adjourned hearing, the Tribunal stated that it considered section 91WA to be an issue for further discussion, specifically providing:

The presiding member wishes to inform you that in undertaking the review in this matter, he will be considering a new issue arising under recent amendments to the Migration Act.

Section 91WA has recently been inserted into the Migration Act and applies to this review.

It provides that the Minister (and therefore the Tribunal) must refuse to grant a protection visa to an applicant for a protection visa if the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship. This will not apply if the applicant has a reasonable explanation for providing the bogus document.

At the hearing, the presiding member intends to raise the following matters:

- You have told the Department that you entered Australia by providing to passport control a [Country 1] passport in a different name. You obtained that passport in circumstances indicating it was not lawfully issued to you. You produced a boarding pass in that name to the Department.
- You subsequently produced that passport to the Department in the course of applying for two student visas and two further visitor visas and you obtained the two further visitor visas and one student visa in that name.
- You have subsequently admitted that is not your true identity.

Please be prepared to address this new issued at the hearing.

35. At the adjourned hearing, I confirmed that the applicant understood the application of 91WA to his matter. The applicant agreed that he did.
36. The applicant acknowledged that he had purchased the [Country 1] passport in the name of Mr N whilst he was in [Country 1]. He agreed that the passport had a photo of the applicant substituted for the original photo of Mr N. Included with the purchase of the [Country 1] passport was an Australian electronic visitor visa in the name of Mr N and a plane ticket to [Australia], also in that name, the applicant said.
37. The applicant agreed that he provided those travel documents to border security upon his arrival in Australia. He also agreed that he applied for two further visitor visas and two students visa on the basis of that [Country 1] passport over the subsequent two years. Finally, he agreed that he provided a driver's licence in the name of Mr B to the [state] Police and that he had purchased that driver's licence and understood that it had a photo of the applicant substituted for the original photo of Mr B.
38. The applicant claims that the identity depicted on the Albanian national identity card provided is his true identity.
39. The Tribunal reasonably suspects the applicant has obtained the [Country 1] passport because of a false or misleading statement. The Tribunal considers that suspicion is reasonable because without making a false or misleading statement, the first named applicant could not have possession of Mr N's [Country 1] passport. Further, the passport appears to have been altered by someone who did not have the authority to do so. The applicant is not Mr N and is not a national or citizen of [Country 1]. The Tribunal further finds the applicant has made a false or misleading statement by presenting the [Country 1] passport as evidence of his identity upon entering Australia and in relation to visas applied for since entering Australia.

40. The Tribunal is mindful the applicant provided the [Country 1] passport to enter Australia for the purpose of immigration clearance. He also supplied the [Country 1] passport to the Department for the purposes of three subsequent visa applications.
41. I consider the [Country 1] passport to be a bogus document because I reasonably suspect that it purports to have been but was not, issued in respect of the applicant. I further reasonably suspect that the [Country 1] passport was fraudulently altered.
42. At the time of making the application under review, the applicant did so in his own identity, not the identity of Mr N.
43. I have carefully considered the scope of s91WA and in particular, whether the provision of the bogus document falls within that scope. I am not aware of any judicial guidance available to me on the correct construction of section 91WA of the Act.
44. The wording of s.91WA does not state expressly to whom a bogus identity document must have been provide, or the purpose for which it must have been provided, or when it must have been provided. On this literal interpretation therefore, s91WA is not limited to circumstances where a bogus document is provided in relation to a current and/or previous protection visa application and will encompass the provision of the bogus document. I consider that on a literal interpretation, s91WA has a board scope and would apply to the provision of the bogus identity document at the time of entry as well as the time of subsequent visa applications.
45. As a matter of statutory construction, I note that both section 91V and 91W fall within the same subdivision of the Act, but in their own terms, expressly link the act or omission to a current protection visa application. The fact that the language used in section 91WA makes no such express link between the production of the bogus document and the current application for a protection visa provides a strong textual basis to conclude that s91WA is intended to have a broader scope than those other provisions and is expressly not subject to the same limitations.
46. I am conscious that an alternate view is that the context of section 91WA and the content of the extrinsic material may give rise to an interpretation that section 91WA applies only where a bogus document is provided in relation to a current and/or previous protection visa application.
47. In this regard, I note that section 91WA falls within subdivision AL of Division 3 of Part 2 of the Act: 'Other provisions about protection visas'. Its placement could mean that a protection visa application needs to be made in order to bring the person within the ambit of s91WA. The reference to an 'applicant for a protection visa' may imply that s91WA is concerned with the provision of a bogus document in connection with, or in relation to, a protection visa. A stricter interpretation again would limit the application of the section only to the current protection visa application made by the applicant.
48. While I have considered these alternate constructions, in the absence of judicial guidance, I have proceeded on the basis of what I consider to be the preferable interpretation of the provision based on its literal meaning and broadest scope of section 91WA. In comparing the language used in 91WA to that used in 91V and 91W, I give weight to the absence of any express language in 91WA limiting the provision of a bogus document other than to be for the purpose of establishing identity, nationality or citizenship to conclude that Parliament intended no limitation on the application of its provisions as to who, when or in what context a person subsequently applying for a protection visa provided a bogus document as to their identity, nationality or citizenship.

49. I add, for the sake of completeness, that I have examined the explanatory memorandum (EM) relating to section 91WA in considering its scope. The construction of s91WA set out in the paragraph above may reflect a general description of s91WA in the EM to be an 'integrity measure', but as this is obvious, I consider it provides no assistance in interpreting the provision. I note that in parts, the EM mentions 'the provision of bogus documents by a protection visa applicant *for the purposes of their application*' (*emphasis added*), but as this language is not then replicated in the text of the enactment, I place no weight on its inclusion in the EM.
50. For those reasons, the Tribunal therefore finds the [Country 1] passport is a bogus document and that the applicant has provided a bogus document as evidence of his identity, nationality and citizenship.
51. It follows the Tribunal must have regard to whether the applicant has a reasonable explanation for providing that bogus document and whether he has provided evidence of his identity.
52. It is convenient to first address the second of those issues. As noted above, I am satisfied that the applicant has now provided evidence of his identity in the form of his national identity card.

**Am I satisfied the applicant has a reasonable explanation?**

53. I am conscious that 'reasonable' is a word to be given its ordinary meaning. In context and as an adjective, it informs on the nature and quality of the explanation that is required. In its statutory context, it requires an assessment of the nature and quality of an explanation for having provided a bogus document.
54. The applicant's explanation for providing the bogus document was to enable him to enter Australia in order to seek protection. He explained that he used the bogus document initially, out of fear for his safety and subsequently, because it was his only form of identification.
55. As to why he did not apply for protection at the earliest possible time, rather than waiting until he had been taken into police custody and then, immigration detention after being onshore for almost three years later, he explained that he did not know how to go about seeking protection.
56. I note that the applicant was nevertheless able to figure out how to apply for two onshore visitor visas and two onshore student visas during this three-year period, again providing the bogus document in relation to each of these applications, and that he evidenced an awareness that he needed to retain a lawful immigration status.
57. My concern with the applicant's explanation for having provided a bogus document in order to enter Australia is that he did not seek Australia's protection once safely onshore, instead waiting until he was in detention to seek that protection - almost three years later.
58. I do not accept that the applicant did not know how to seek protection through the Department of Immigration given that he made four other visa applications to the Department before he sought protection. I do not accept to be true the applicant's explanation that he engaged in the conduct abovementioned out of fear for his safety. In these circumstances, I do not find his explanation for having provided the bogus passport at the border to be reasonable.



59. The applicant's explanation for having provided a bogus document in order to make four onshore visa applications was that he had no other form of identification and that he did not know he could make other forms of visa application, such as protection.
60. Again, the fact that he did make the four onshore visa applications indicates that he did understand and could obtain the necessary knowledge to make other types of visa applications, including protection. As to the bogus document being his only form of identification, his subsequent provision of his national identity card indicates that evidence of his actual identity was available to him. In these circumstances, I do not find his explanation for having provided the bogus passport to the Immigration Department whilst applying for onshore visas to be reasonable.
61. As I am conscious that the construction and application of s91WA is not beyond doubt, I have made findings in respect of each provision of bogus documents.
62. For the reasons given above, s91WA(1) applies to the applicant. Therefore, the grant of the visa is prevented by s91WA.

### **DECISION**

63. The Tribunal affirms the decision not to grant the applicant a protection visa.

Suzanne Carlton  
Member

**ATTACHMENT - Extract from *Migration Act 1958***

**5 (1) Interpretation**

...

***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.

...

***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.

...

***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.

...

**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 their 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

...

- (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.

...