



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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PAKISTAN  
IAA reference: IAA16/00469

Date and time of decision: 24 August 2016 11:03:49  
Fraser Syme, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicant a protection visa.

*Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (“the applicant”) claims to be a member of the Turi tribe and a Shia Muslim from the Federally Administered Tribal Areas (“FATA”), Pakistan. [In] November 2015 he lodged an application for a temporary protection visa (“TPV”). That was his second application for a TPV. In April 2016, he withdrew an earlier TPV application that he made in September 2015.
2. The delegate accepted the applicant worked as a [occupation] in his home town and that the [organisation] received two threat letters. The delegate accepted a cousin of the applicant was killed in a bomb blast in 2013 and a second cousin was killed in a bomb blast in 2015, both in the applicant’s home town. The delegate was not satisfied the applicant faced a real chance of serious or significant harm in his home town for any of the reasons the applicant claimed. The delegate had regard to an allegation the applicant had killed members of the Taliban, but was satisfied s.s.5H(2), 36(1B)&(1C) did not exclude the applicant from protection.

### Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. I received submissions from the applicant on 1 August 2016 (“the first IAA submission”) and on 9 August 2016 (“the second IAA submission”). The first IAA submission attaches the delegate’s decision. Both the first and second IAA submissions contain the applicant’s response to that decision. The second IAA submission additionally restates the applicant’s claims. I do not consider the first or second IAA submissions to be new information and I have had regard to both submissions.
5. I have had regard to new information I obtained relevant to the issue of the ‘data breach’. I considered it necessary to obtain that new information in order to determine this issue and in my view, there is insufficient information before me regarding the data breach for me to be able to properly assess the claim. For these reasons, I am satisfied there are exceptional circumstances to justify my considering that new information under s.473DD. Further, I consider that new information is not specifically about the applicant and is just about a class of persons of which the applicant is a member, namely people whose information was included in the data breach, for the purpose of s.473DE(3)(a).

### Applicant’s claims for protection

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6. The applicant’s claims are contained in the information to the IAA. They can be summarised as follows:
  - The applicant is a member of the Turi tribe and a Shia Muslim from a named agency in the FATA.
  - He worked as a [occupation] in his home town.
  - There is a lot of violence and explosions in his home town.

- About three months before he left Pakistan, the applicant participated in a protest demonstration against violence in the main city closest to his home town.
  - In June 2013, a [client] found a threat letter at the gate of the [organisation] . The letter warned to close the [organisation] and to stop [participating with] the [clients].
  - One week later, a second threat letter was put under the door of the[organisation] . The applicant's name was second on a list of people threatened with harm. The second threat letter also warned to close the [organisation] and that there would be no further warning. The applicant then hid at home for a week until he was able to arrange to depart Pakistan.
  - Two of the applicant's cousins were killed in bomb blasts in the applicant's home town. One in 2013 and a second in 2015.
7. The applicant fears harm from the Taliban or anti-Shia militants if he returns to Pakistan because:
- a. He was a [occupation]
  - b. He is a Shia Muslim
  - c. He is a member of the Turi tribe; and/or
  - d. He is from his home town
8. The applicant fears harm from the Pakistani authorities because:
- a. He applied for asylum in Australia; and/or
  - b. His personal details were released by the department in a data breach.
9. I note during the TPV interview, the applicant's former migration agent raised the issue of the applicant's mental health as something to be mindful of when assessing the applicant's claims for protection. She commented though that she was unable to provide further details or supporting evidence as to the applicant's mental health. In his second IAA submission, the applicant also raises his mental health and long-term detention as issues. The review material does not include medical records of the applicant. I therefore am uncertain as to what the status of the mental health of the applicant is, whether he is receiving treatment or the extent of what effect his mental health may have on my assessment of his claims. To give every benefit to the applicant, I am willing to accept he does have a mental health condition and I have been mindful of that in making the below findings.

### **Refugee assessment**

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10. 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

11. 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.
12. [Occupation]The applicant has claimed he fears harm from unknown persecutors because he was a [occupation] at a school which received two threat letters in June 2013. The delegate accepted the applicant was a [occupation] . I note the delegate quoted country information from the FATA research centre and media reports in Pakistan confirming [that particular organisations]sin the FATA were targeted by militant groups. But while mindful of that supportive country information, for the following reasons, I however have concerns about the applicant's claims he was a [occupation] and that he worked at a [organisation] that received threat letters. In my assessment below, I have redacted the names of the [organisations] and the towns.
13. In his entry interview (and in the application forms accompanying his TPV application), the applicant stated he worked as an [occupation] at [organisation A] in town A from 2008 to 2013. However at the entry interview, he did not raise any claims regarding any threat letters against the [organisation] at which he worked. He referred only to general violence against Shias in his home area and his suspicion the Taliban was responsible for that violence.
14. In the statement accompanying his TPV application ("the TPV statement"), he claimed he began working as an [occupation] in 2005. He further stated that as well as being a [occupation]. He did not name the[organisation] . It was in the TPV statement he first raised claims regarding the threat letters against the school.
15. The applicant provided to the delegate a photograph of a handwritten 'experience certificate' dated 10 May 2013 from [Organisation B] in town S. That certificate states the applicant [did specific duties]. It does not state the dates he worked. The certificate is signed by an unnamed[person].
16. During the TPV interview, the applicant told the delegate he worked at [Organisation B]in town S. It had 400 [clients] and 30-40 [employees]. He worked there from 2008 until 3 weeks before he departed Pakistan in June 2013. He[description of work duties]. The applicant explained how he got the job. A man in the applicant's home town, Mr I was a government [official] who then opened the [oganisaiton]. Mr I needed [employees] and offered the applicant a job, then slowly, slowly the applicant took the job. The applicant stated in his home area, having a year 10 level education was sufficient to do this job. He added that Mr I was the [head of the organisation]. The applicant became [second in charge] one month before he came to Australia

and was acting [head of the organisation] when Mr I was absent. He got that position because Mr I trusted the applicant and asked him to look after the [organisation] .

17. In the second IAA submission, the applicant states he became a [occupation] two years after he finished year 10 (which equates to 2006). Due to his lack of experience, he was not a good [employee] , but after two years, he became a popular [member of the organisation] .[Information deleted].
18. I am concerned by the number of material inconsistencies in the applicant's claims regarding his [work]. I am mindful the names of [organisations] are very close and the difference may be attributable to variations in rendering the [organisation]'s name into English. However, if the applicant worked at that [organisation] for the number of years he claimed, I consider it reasonable he would consistently state the correct location of the [organisation], not both town A and town S. I consider it reasonable he would consistently name the [organisation], not [variations] '. I further consider it reasonable if the applicant was an acting principal/second principal/deputy principal (and I accept these are all different ways of expressing the same concept) that the 'experience letter' would note the applicant held that role and that the experience letter would state the years the applicant [worked]. I am concerned too regarding the inconsistencies in the year the applicant commenced work, the evidence before me variously states 2005, 2006 and 2008. That is a variance of three years. I am concerned too regarding the inconsistencies in the number of staff 30-40 or 14-18. In relation to that, I consider it possible the evidence at the TPV interview was 13-14, not 30-40. But 13-14 is still significantly different to 14-18. Finally, I am greatly concerned by the inconsistencies in whether the applicant was an [occupation].
19. I note some of the inconsistencies I have identified are from information the applicant provided in the entry interview. That would usually be a reason to put lessor weight on those inconsistencies. However, he repeated the same inconsistent information[about his occupation] , commencing work in 2008 and working for [organisation A]in his TPV application form in April 2016. Further, his work as a [occupation] is in essence the applicant's central claim for protection and receipt of the threat letters is his claimed motivation for leaving Pakistan, I consider it weighs against the applicant that he did not raise any claims regarding the threat letters during the entry interview.
20. I am concerned too regarding the plausibility of the applicant's explanation how he obtained employment as a[occupation], that Mr I would offer him a job although the applicant had no [qualifications]. I found the applicant's evidence at the TPV interview was not persuasive on this point.
21. The applicant's evidence regarding the two threat letters also contained inconsistencies. During the TPV interview, he told the delegate there was a two week gap between the first and second threat letters, but I note elsewhere in the interview he stated it was a one week gap. His TPV statement and the second IAA submission also state there was only a one week gap between the two threat letters. I put lessor weight on the applicant stating there was a two week gap during the TPV interview. The delegate put to the applicant too an inconsistency in his evidence from his TPV statement wherein he claims he waited weeks between the second threat letter and his departure from Pakistan, whereas elsewhere in the TPV interview he waited only on week. The applicant's response was not persuasive. He claimed by weeks, he was referring to between the first letter and his departure. However, the reference in his TPV statement is clearly a reference to waiting weeks after the second letter. The applicant's evidence too was inconsistent about his reaction to the first letter. In the TPV interview he stated he did not take did not take the first letter too seriously, but took some precautions by

walking a different route to[the organisation]. In the second IAA submission, he claims he thought the first letter was a joke and it was only after he received the second letter did he take any precautions for his safety by walking home a different direction after closing the[organisation]. I consider these inconsistencies regarding the threat letters to be of a lesser nature to those I discussed above in relation to his claims he was a [occupation], but the inconsistencies regarding the threat letters also weigh against the applicant.

22. On the evidence before me, I am not satisfied the applicant's mental health sufficiently explains the multiple and material inconsistencies and implausibilities in his evidence as outlined above. I am not satisfied the applicant was a[occupation]. It follows that I reject the applicant worked at a [organisation] that received threat letters and I reject that he was named in any threat letters to any[organisation]. I reject the 'experience certificate' is a credible document and I consider the applicant providing such a non-credible document to support his claims further undermines his credibility. In making that finding, I am mindful of the information in the DFAT country report <sup>1</sup> regarding the prevalence of fraudulent documents in Pakistan. I consider the applicant has fabricated his claims to be a [occupation] and to have work at a [organisation] that received threat letters as a basis upon which to apply for protection. It follows too that I reject anyone will target the applicant for harm because he was a former[occupation]. I am not satisfied there is a real chance the applicant will be harmed by the Taliban and/or other anti-Shia militants because of his claim to be a[occupation], now or in the reasonably foreseeable future, if he returns to Pakistan.

#### *Shia and Turi from FATA*

23. The applicant claimed there was general violence in his home area and that he suspected the Taliban were responsible for that. During the entry interview and in his TPV statement he referred to his participating in a demonstration for peace. He further claimed one of his cousins was killed in a bomb blast in 2013 and a second was killed in 2015 in his home area. He provided to the delegate photographs and media reports about those bomb blasts. He fears he will be target for harm because he is a Turi and a Shia and from his home area.
24. I note the country information quoted by the delegate from the South Asian Terrorism Portal and DFAT thematic report <sup>2</sup> regarding general violence in the applicant's home area. I have had regard too to the country information in the delegate's decision from DFAT regarding the Turi tribe and the Shia religion, that most Turi are Shia and the prevalence of Turi in the applicant's home area. I have had regard too to the identity documents the applicant provided. I am willing to accept the applicant is a member of the Turi tribe, he is a Shia Muslim and he is from his claimed home area.
25. DFAT report that Shia Muslims comprise an estimated 20% of Pakistan's total population of 190 million people and that Turi Shias comprise 80% of the population in the applicant's home area. I am mindful of the country information in the DFAT thematic report, UK Border Protection Agency <sup>3</sup> and US Department of State <sup>4</sup> quoted by the delegate. From that information I note the Sunni militant group *Lashkar-e-Jhangvi* ("LEJ") are responsible for most attacks on Shias throughout Pakistan. But other militant groups, including the Taliban also

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<sup>1</sup> CIS38A801264: "DFAT Pakistan Country Information Report January 2016", Department of Foreign Affairs and Trade, 15 January 2016

<sup>2</sup> CIS38A801265: "DFAT Thematic Report - Shias in Pakistan January 2016", Department of Foreign Affairs and Trade, 15 January 2016

<sup>3</sup> Country Information and Guidance - Pakistan: Security and humanitarian situation", *UK Home Office*, 01 November 2015, OGD8F59D8D39

<sup>4</sup> Pakistan - Country Reports on Human Rights Practices 2015 ", *US Department of State*, 13 April 2016, OGD95BE926173

target Shias, including in the FATA. I am mindful too of the reports of the Pakistani authorities taking significant steps to protect Shias. The DFAT reports assess there is a low level of sectarian violence in FATA, but that the violence is greater in some areas of the FATA, including the applicant's home area, due to military activities associated with Pakistan military counter terrorism operation *Zarb-e-Azb*. DFAT further assesses there is a low level of generalised violence in the applicant's home area. The FATA research centre reports <sup>5</sup> an increase in militancy related incidents in the applicant's home area in the latter half 2015, compared to a more peaceful 2014, but that the motivation for an attack in December 2015 was uncertain and multiple groups had claimed responsibility for it. DFAT reports that December 2015 attack was possibly a response by LEJ opposed to Turis participating in the Syrian civil war. I am mindful too of the country information from OCHA <sup>6</sup> that thousands of families previously displaced by violence returned to the applicant's home area in 2014 and that his home area was identified as being 'de-notified' and safe for return.

26. On balance, the country information supports the applicant's claims of past violence in his home area. I am willing to accept militant groups, including the Taliban, targeted the applicant's home area due to the high number of Turi tribe members who reside there and because the majority of Turi are Shia. I have had regard to the applicant's claims in the IAA second submission regarding the roads in his home area being dangerous. The country information demonstrates too that the Pakistani authorities have taken significant steps to curb attacks by militant groups, and that recent military operations by the Pakistani authorities has reduced the frequency of violence in the applicant's home area, including on the roads. On the balance of the evidence before me, I consider there to be only a remote or speculative chance and therefore not a real chance the applicant will face serious harm singularly or cumulatively because he is a member of the Turi tribe, he is a Shia Muslim and/or he comes from his home area, now or in the reasonably foreseeable future, if he returns to his home area.

*Failed asylum seeker and data breach*

27. The review material includes a letter from the department dated March 2014 to the applicant acknowledging his personal details were included in a data breach. The applicant told the delegate during the TPV interview that he believed all of his information had been made available to the Pakistani government due to the data breach. He feared the Pakistani government would harm him. He did not know what might happen, but the Pakistani government are very strict about returnees. They may hurt him or torture him, he may be kidnapped and killed.
28. I accept the applicant's personal information was included in the data breach. I accept too that if the applicant returned to Pakistan, he would do so as a failed asylum seeker.
29. As noted above, I considered new information in relation to the applicant's claims regarding the data breach. That information states the personal details of some people in immigration detention were made publically available in a document on the website of the department ("the Document") for a period of approximately 14 days in February 2014 ("the data breach"). <sup>7</sup> The facts before the Full Court Federal Court in *SZSSJ* <sup>8</sup> are that the Document was accessed

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<sup>5</sup> Annual Security Report 2015 - FRC", *FATA Research Centre*, 01 January 2016, CIS38A8012181

<sup>6</sup> Pakistan: FATA Return Weekly Snapshot (from 13 to 19 May 2016)", *Office for the Coordination of Humanitarian Affairs (OCHA)*, 19 May 2016, CIS38A8012993

<sup>7</sup> P. Farrell, 'Scott Morrison ensured asylum seeker data breach probe failed, court finds', 18 September 2015 "The Guardian" (folio 165)

<sup>8</sup> *SZSSJ v MIBP* [2015] FCAFC 125

123 times. In its report to the department following the data breach, KMPG stated it was not possible to discount the authorities in another country may have accessed the Document. I therefore am open to accepting the possibility the Pakistani authorities have accessed the Document.

30. I note though the applicant's two TPV applications were made after the date of the data breach. The evidence<sup>9</sup> before me is the Document did not include anything regarding the nature of the applicants' claims. I therefore do not accept the applicant's claim that the Pakistani authorities have all of his information. I do not consider there to be any material significance to the applicant's risk of harm that his personal details were included in the data breach. I am not satisfied the data breach creates any independent or cumulative real chance applicant will face serious harm from the Pakistani authorities if he returns to Pakistan.
31. According to DFAT, the Pakistani authorities process voluntary returnees with valid travel documents the same as any other Pakistani citizen returning to that country. Involuntary returnees however, may be questioned on return so the Pakistani authorities can determine if they are wanted for any crimes in Pakistan or have been involved in people smuggling or unlawful emigration. The evidence before me is the applicant claims his Pakistani passport was lawfully issued to him and I note it is valid until 2022. He claims too that he departed Pakistan lawfully and travelled to Thailand on a valid Thai visa. There is no suggestion on the evidence before me that the applicant has committed any offences in Pakistan or been involved in people smuggling or unlawful emigration. The evidence before me also does not suggest the Pakistani authorities target returnees for harm because they applied for asylum overseas. I am not satisfied there is a real chance the applicant will face serious harm from the Pakistani authorities because he would return as a failed asylum seeker, now or in the reasonably foreseeable future if he returns to Pakistan.
32. I have had regard to all of the evidence before me and I have considered the applicant's claims individually and cumulatively, as well as considering the personal circumstances of the applicant. I am not satisfied the applicant has a well-founded fear of persecution from Pakistani authorities or from the Taliban and/or other militants for any reason or combination of reasons in s.5J(1)(a), now or in the reasonably foreseeable future, if he returns to Pakistan.

#### **Refugee: conclusion**

33. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

#### **Complementary protection assessment**

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34. A criterion for a protection visa is that the applicant is a non citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

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<sup>9</sup> The Australian Information Commissioner Investigation Report sets out the personal information included in the data breach consisted of: full names; gender; citizenship; date of birth; period of immigration detention; location; boat arrival details and reasons why the individual was deemed to be unlawful. See: Office of the Australian Information Commissioner, "Department of Immigration and Border Protection: Own motion investigation report" (November 2014) <https://www.oaic.gov.au/privacy-law/commissioner-initiated-investigation-reports/dibp-omi>



### **Real risk of significant harm**

35. Under s.36(2A), a person will suffer 'significant harm' if:

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

36. In relation to all the applicant's claims which I accepted as credible, I found above the applicant singularly or cumulatively does not have a real risk of serious harm on the basis of: his being a member of the Turi tribe; being a Shia Muslim; being from his home area; the departmental data breach and/or he will return to Pakistan as a failed asylum seeker. For the same reasons, and applying the authority in *MIAC v SZQRB*<sup>10</sup> I am not satisfied the applicant will face a real risk of significant harm if he is removed to Pakistan.

### **Complementary protection: conclusion**

37. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

### **Allegations against the applicant**

38. For the sake of completeness, I note in both a written statement to the department dated March 2013 and orally during the TPV interview, the applicant denied the allegations against him that he made comments he had killed many Taliban, had knowledge of weapons or that he hated the Pakistan Intelligence Agency. As I have found the applicant is not owed any protection obligations, it is unnecessary for me to make any findings about this issue.

### **Decision**

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The IAA affirms the decision not to grant the referred applicant a protection visa.

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<sup>10</sup> (2013) 210 FCR 505

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

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***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.

- (2) Subsection (1) does not apply if the Minister has serious reasons for considering that:

- (a) the person has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
- (b) the person committed a serious non-political crime before entering Australia; or
- (c) the person has been guilty of acts contrary to the purposes and principles of the United Nations.

### **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**

- (1A) An applicant for a protection visa must satisfy:
  - (a) both of the criteria in subsections (1B) and (1C); and
  - (b) at least one of the criteria in subsection (2).
- (1B) A criterion for a protection visa is that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*).
- (1C) A criterion for a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds:
  - (a) is a danger to Australia’s security; or
  - (b) having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.

Note: For paragraph (b), see section 5M.

- (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.

### **91W Evidence of identity and bogus documents**

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
  - (a) the applicant has been given a request under subsection (1); and
  - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
  - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
  - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
    - (i) refuses or fails to comply with the request; or
    - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
  - (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
  - (b) either:
    - (i) produces documentary evidence of his or her identity, nationality or citizenship; or
    - (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

#### **91WA Providing bogus documents or destroying identity documents**

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
  - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
  - (b) the Minister is satisfied that the applicant:
    - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
    - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
  - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
  - (b) either:
    - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
    - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

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