



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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INDIA

IAA reference: IAA17/03913

Date and time of decision: 19 December 2017 10:27:00

Belinda Mericourt, 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 an Indian national. [In] September 2017 he lodged an application for an XA-866 Protection visa. In a decision dated [in] November 2017 the delegate of the Minister of Immigration and Border Protection (the delegate) refused to grant the visa.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. No new information has been obtained or received by the Immigration Assessment Authority (IAA).
4. I have noted the request on 28 November 2017 from the applicant's representative for an opportunity for the applicant to comment in an interview or in writing on new information if the IAA makes a finding or findings that are different from the delegate's findings; and the IAA makes a finding or findings to consider new information in exceptional circumstances. Section 473DC of the Act provides that while the IAA may get any information not before the Minister and which it considers relevant, it does not have a duty to get, request, or accept new information. Subject to the requirements of the Act, the IAA must review a decision by considering the review material without interviewing the referred applicant and, other than in exceptional circumstances, must not consider new information: ss.473DB(1)(b) and 473DD. I have decided in the circumstances of this case not to invite the applicant to provide any comments in an interview or in writing as I consider there are no exceptional circumstances in this matter.

### Applicant's claims for protection

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5. The applicant's claims can be summarised as follows:
  - The applicant is a Sikh from the Punjab region of India. He is claiming protection on the basis that he will be persecuted for reasons of his religion, ethnicity and actual or imputed political opinion.
  - The applicant claims he will suffer serious or significant harm from members of the Bharatiya Janata Party (BJP) who have threatened him and harmed him in the past in an attempt to have him compel his father to reinstate a complaint made against the Indian National Congress Party (INC) which was withdrawn in 1985.
  - The applicant believes he cannot seek protection from the state authorities as when he previously lodged complaints to the police they took no action. He also believes that members of the BJP party would find him anywhere in India so he cannot safely relocate.
  - The applicant claims he will suffer serious or significant harm from the Indian authorities as a result of his poetry and songs which express anti-government opinions and are about the Punjab not being part of India. The songs have been put on [a

website] and he also uploaded his poetry and song lyrics [on social media] under an assumed name.

- He believes he cannot seek protection from the state authorities as they would be the ones harming him and for the same reasons he cannot relocate.
- The applicant claims he is at risk of harm as his personal details were released in the Department's data breach in February 2014 and these details may be linked to the publication of his Refugee Review Tribunal (RRT) decision on the RRT's website at about the same time. This would bring him to the adverse attention of the Indian authorities.

### **Factual findings**

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6. The applicant's claims as to his identity and nationality have been consistent since his arrival in Australia. He conducted interviews in Punjabi and has submitted a copy of his current Indian passport. I accept the applicant's nationality and identity are as claimed and find India to be the receiving country for the purpose of the application.
7. I accept that the applicant departed India legally as the holder of a genuine valid passport.
8. I accept that the applicant was a subject of the Department data breach in February 2014 as he was in detention on 31 January 2014.

### **Refugee assessment**

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9. 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**

10. 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.

11. Real chance is a substantial chance as distinct from a remote or far-fetched possibility.<sup>1</sup>

### *Background*

12. The applicant arrived in Australia [in] July 2009 as the holder of a [temporary] visa. He separated from his then spouse and applied for [another temporary] visa. His [first temporary] visa ceased [in] September 2011 and in August 2012 the Department informed him that his application for [another temporary] visa had been refused. He applied for a review of this decision at the Migration Review Tribunal (MRT) who affirmed the Department's decision [in] February 2013. [In] March 2013 the applicant applied for a [third temporary] visa. His application was deemed invalid by the Department. [In] April 2013 the applicant's bridging visa ceased and he became an unlawful non-citizen. [In] May 2013 he was detained by the Department and he lodged his first application for a protection visa [in] May 2013. This was refused by the Department [in] September 2013. The applicant sought review with the Refugee Review Tribunal which affirmed the Department's decision [in] January 2014. The applicant was in detention [in] January 2014 and he was subject to the Department data breach in February 2014. He lodged his current claim for protection [in] September 2017.

### **Assessment of the applicant's claims**

*Claims related to the applicant's fear of harm as a result of being threatened and harmed by BJP members who want him to convince his father to reinstate his complaint against the INC*

13. Based on the applicant's consistent evidence over time and country information relating to the particular events in 1984<sup>2</sup>, I accept that the applicant's grandfather was killed in the anti-Sikh riots in Delhi in 1984 and following this the applicant's father lodged a complaint to the police alleging responsibility of the Indian National Congress Party (INC), including INC member [Mr A]. I accept that his father was later forced to withdraw the complaint.
14. I accept that the applicant's family relocated around late 1984 / early 1985 due to fear of further violence. Country information confirms that security forces carried out operations to suppress Sikh separatism during the 1980's during which there were credible allegations of torture, extra-judicial killings and deaths in custody.<sup>3</sup> The applicant was born in Punjab.
15. The applicant claimed that in 1999 members of the Sikh community who were also supporters of the BJP, approached his father in the lead up to the general elections, to urge him to reinstate his complaint against the INC in relation to the 1984 anti-Sikh violence. He refused and then started to receive threats over the telephone.
16. In 2000 when the applicant's mother was ill and being taken to the doctor by his father on a [vehicle], they were hit by a [vehicle]. Both the applicant's parents were seriously injured and his mother subsequently died. The applicant's father heard that the [vehicle] did not have a license plate. The applicant claimed the accident was instigated by the Sikh men in an attempt to remove opposition against the BJP and that they threatened his father with further harm unless he reinstated his complaint. At this time the applicant was still studying at school.
17. The applicant's father reported the incident to the police and was told the matter would be investigated. However about two months later the case was closed without any conclusion.

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<sup>1</sup> *Chan v MIEA*, (1989) 169 CLR 379 at 389.

<sup>2</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report India", 15 July 2015, CISEC96CF12827

<sup>3</sup> *Ibid*, p.10

18. Whilst I accept the applicant's mother was killed when the [vehicle] in which she and his father were travelling were hit by [another vehicle], I note that the applicant's evidence was inconsistent about how his father came to be aware that the accident was deliberately caused by Sikh men who intended to threaten him. Both the RRT and the delegate at his October 2017 interview put to the applicant that his father travelled to [work] every day on his [vehicle] and if the Sikh men had intended to threaten him they had every opportunity to do so. It is difficult to understand why the applicant's mother would be targeted in the circumstances described, given the applicant had not provided any evidence that before the accident that the Sikh men had threatened or attempted to harm her in the past. At the RRT hearing the applicant stated that he believed this was a deliberate act because the applicant's father learned that the [vehicle] did not have visible license plates. The applicant thought the reason the [vehicle] had deliberately hit his father's [vehicle] was to pressure him into reinstating his complaint against the INC or to exact revenge for his refusal to do so. However the applicant also gave evidence that no one took responsibility for the accident or further threatened or intimidated him after the accident. Nothing further was communicated to his father until 2005. When this was put to the applicant by the RRT he suggested that some of the villagers in his father's village had joined forces with the Sikh men and provided them with information about the applicant's family members and their movements. The RRT was not satisfied with this explanation. The delegate also put his concerns about the credibility of the applicant's evidence to him at the protection interview of October 2017 and the applicant responded that his mother was a housewife and never went out rarely for medicine and therefore he considered it not to be an accident.
19. At his protection interview for the applicant raised a claim for the first time that a member of the BJP told his father in 2000 that they were responsible for his mother's death and that they would carry out further attacks if he did not reinstate his complaint against the INC.
20. I am also not satisfied that the accident was intentionally caused by members of the BJP or Sikh men, for the same reasons. That is, there were ample opportunities for Sikh men to threaten or harm the applicant's father himself given he rode his [vehicle] to work every day; there is no reason to indicate why his mother would be specifically targeted when she had never been targeted previously; and there was no evidence to suggest that anyone had taken responsibility for the accident. I place no weight on the applicant's claim in October 2017 for the first time, that members of the BJP told his father they were responsible for his mother's accident and consider this claim was fabricated in response to the RRT's findings that his evidence was not credible about why no one had taken responsibility for the accident or contacted his father for a further five years. I therefore do not find the applicant's evidence credible that this incident was anything other than a tragic accident.
21. In early 2004, the applicant relocated to Chandigarh for [work]. He lived at both his family home and in accommodation in Chandigarh. The applicant said that he and his brother started receiving threats from Sikh men affiliated with the BJP between early 2005 and 2008. They urged him to convince his father to resume the complaint made against the INC. On the first occasion he was threatened, the applicant said he would try and persuade his father. On the second, third and fourth occasions he was threatened he was also severely physically mistreated by the Sikh men who beat him and stole his [personal item] and money. His brother was subjected to similar attacks.
22. In about 2008, the applicant stated he filed a complaint against the Sikh men with [the] police who said they would make enquiries, however, no action was taken. He was unable to obtain supporting documentation from the police as all records had been destroyed in flooding in July 2010.

23. In December 2008 the applicant was [on] his way to his family home from Chandigarh. He noticed a [vehicle] following him and although he attempted to lose it, it collided with his [vehicle] and he was knocked off his [vehicle] onto the street and severely injured. The applicant said that he saw [Sikh] men armed with weapons getting out of the [vehicle] but before they could do or say anything to him, a wave of oncoming traffic approached and the [men] left. People who were travelling behind him rushed him to hospital to receive treatment for his injuries. His [body part] was badly [injured]. Following this incident, the applicant ceased working and return to his family home. He stated that he made several attempts to file complaints with the police but it had become evident the authorities were unable and/or unwilling to assist him. The applicant stated he could provide no evidence of the complaints he made to the [police] in 2008 because all the documents were destroyed in flooding in July 2010.
24. I accept the applicant had an accident on his [vehicle] in December 2008 resulting in injuries including damage and subsequent [description of injuries]. Country information indicates that more than 231,000 people are killed in road traffic accidents every year in India and that half of all these deaths are amongst vulnerable road users including motorcyclists.<sup>4</sup> I do not accept that this was a deliberate attempt to harm or kill him by Sikh men, members of the BJP or INC for the following reasons.
25. During his protection visa interview in October 2017 the applicant varied his claim stating that although he believed it may have been the BJP or INC who threatened and harmed him between 2005 and 2008 he was not sure who the perpetrators were. However, as the Nanavati Commission had been established in early 2005 to investigate the involvement of INC members in the anti-Sikh riots in 1984, he thought that BJP members or INC members were the perpetrators.
26. The applicant stated that he thinks the Sikh men did not contact his father during this period because his father was in a village and the applicant and his brother were in a more populated, public place. The RRT put to him that according to his previous evidence the Sikh men were aware of where his father lived and worked and could easily have threatened him directly. In a post hearing submission to the RRT, the applicant stated that in about 2002 the applicant's village decided not to allow outsiders or non-villagers to enter the village and this is how his father escaped being harassed or threatened during this period. In its decision, the RRT stated there are [several] main roads leading into the village. The RRT found the applicant's evidence to be 'highly implausible' that there was a guard at each entrance stopping outsiders from entering the village for a period of over 10 years.
27. I do not find the applicant's evidence credible about being threatened and harmed by Sikh men on several occasions between 2005 and 2008 and that the reason for these assaults was so he would convince his father to resume his complaints against the INC, particularly as the applicant's father himself did not experience any adverse treatment from at least 2000 until 2010, two years after the applicant's last claimed assault. The delegate noted in his decision that the Nanavati Commission of Enquiry had actually concluded in February 2005<sup>5</sup> and did not find the applicant's evidence plausible that any party would only commence their attempt to

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<sup>4</sup> World Health Organisation (WHO), "Violence and Injury Prevention – Road Safety in India", 1 January 2017, CISED50AD7404

<sup>5</sup> Justice Nanavati Commission of Inquiry (1984 Anti-Sikh Riots), "Justice Nanavati Commission of Inquiry (1984 Anti-Sikh Riots) Report, Vol 1" 9 February 2005, CISBE2467867

influence a Commission and continue to do so for three years, around five years after it had commenced, either just before or after it had already concluded.

28. Consequently, I am not satisfied that the applicant was threatened and harmed between 2005 and 2008 by Sikh men or anyone else.
29. The applicant's family assisted him to make the necessary arrangements to flee from India which including undergoing a contrived marriage with a woman who had a [temporary] visa to enable him to travel as her dependent to Australia in July 2009. As I am not satisfied that the applicant was threatened, assaulted or deliberately harmed in a [vehicle] accident prior to his departure, I consider that he did not make a decision in 2009 to flee India because he had a genuine fear of persecution or significant harm.
30. In about September 2010 the [trial] of [Mr A], an INC party member to proceed. The applicant's father was asked to attend this hearing and threatened by Sikh men. However, he did not attend for fear of reprisals from the INC. At his first protection interview in 2013 the applicant stated that his father was just threatened over the phone. Following the interview he provided a copy and translation of a complaint purportedly lodged by his father with the [police] that he was attacked by unknown persons in a [vehicle] with no visible license plates whilst he was [on] his way home in an attempt to kill him. He escaped with the assistance of passers-by. The applicant stated that following his Department interview he had contacted his father to ask for documentation to support the family's claims of harassment and attacks. This was the first time the applicant learned about the attack on his father. The RRT questioned why the applicant's father would fail to disclose this significant information given he was aware that his son had applied for a protection visa and the significance of the information. The RRT also questioned why his father had never been attacked or approached or threatened between 1999 and November 2012 given he was the only person who could reopen the complaint against the INC.
31. I had regard to country information that indicates in May 2000 the previous National Democratic Alliance (NDA) Government appointed the Nanavati Commission to enquire into the 1984 anti-Sikh riots. The Commission took a substantial volume of both oral and written evidence from witnesses, including from well-known persons over a four-year period from 2000 to the end of 2004 and published the results in February 2005.<sup>6</sup> It seems reasonable to assume that if people were being pressured to provide evidence to the Commission, or in the case of the applicant's father to reopen his complaint against INC involvement, that that pressure would have been exercised during this period, rather than after the Commission had published its findings.
32. At his protection interview in October 2017 the applicant also claimed that his father was threatened [in] August 2013 by Sikh men who wanted him to attend protests in Delhi against the INC leading up to the elections. When asked why he had only raised this for the first time four years later he stated that he had only received information regarding this incident in a document provided by his father for the first time a few days prior to the interview. The delegate put to him that given his father was aware of his protection visa application it was difficult to understand why he would only provide this information four years later and not prior to the first Department decision or the RRT hearing. The applicant stated that his father lives in hiding and does not go out in public very much and the Punjab police sometimes give you documents and sometimes not. It was only when he told his father to go to the police

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<sup>6</sup> Justice Nanavati Commission of Inquiry (1984 Anti-Sikh Riots), "Justice Nanavati Commission of Inquiry (1984 Anti-Sikh Riots) Report, Vol 1" 9 February 2005, pp7, 184, CISBE2467867

station and get all the documents related to his complaints that he received these two documents about the incidents in November 2012 and August 2013.

33. I had regard to the supporting documentation the applicant has provided over the course of his claims for protection, namely, (i) a purported report and translation from [the] police, dated [in] 2012 stating the applicant's father had made a complaint about unknown persons attacking him when he was on his way home from [a town] to his home on his [vehicle], (ii) a purported report and translation from [the] police, dated [in] 2013 stating the applicant's father had made a complaint about unknown persons attacking him and another person, beating them and [vandalizing] their [vehicle] when travelling from [another town] to his village, (iii) a purported report and translation from [the] police, dated [in] 2013 which states that their records prior to around [a date in] July 2010 were destroyed due to record-breaking rains; (iv) a copy of an IHMS internal referral form for mental health and counselling treatment following the applicant's immigration detention stating that he was psychologically affected by his 'family conflict'; and (v) a copy of an IHMS psychologist's report dated [in] May 2013 which refers to the applicant's father's 'enemies'.
34. I place no weight on the alleged report about flooding in July 2010 from [the] Police as I have found that I am not satisfied the applicant was threatened or assaulted at any time between 2005 and 2008 and did not make any complaints to the police during that period.
35. I place no weight on the alleged documents related to the complaints to the Punjab police at [a police station] made in 2012 and 2013. I consider that if the applicant's father genuinely believe that he had been threatened by members of the BJP or INC in either of these incidents that he would have informed his son with whom he has regular contact, given he is aware that the applicant has lodged an application for protection on the basis of being threatened and assaulted in order to pressure him to convince his father to reinstate his complaints against the INC.
36. I place no weight on the psychologists' reports from IHMS as supporting evidence of the applicant's claims. The [May] 2013 psychologist's report states that the applicant reported his mother passed away 15 years ago and with the 'politic' unrest in India he agreed to a contract marriage here in Australia (sic). The [other] May 2013 psychologist's report states that the applicant discussed his 'dad's enemies' and 'his mum being killed by our enemies'. As the psychologists are repeating what the applicant has said to them I do not consider these reports to be substantiating evidence of events in India.
37. The applicant has claimed that the BJP will consider himself, his brother and his father to be traitors for not attempting to assist in the conviction of INC members including [Mr A] and fears future harm as a result.
38. There is no independent country information before me support the applicant's claims that the BJP or any other individuals or parties engaged in violent means to pressure families of victims of the 1984 anti-Sikh riots to reinstate complaints, particularly after the findings of the Nanavati Commission in February 2005.
39. Having regard to all the above findings, I am not satisfied that the applicant's father was threatened or attacked in November 2012 or in August 2013 by persons who were either attempting to have him reinstate his complaint against the INC or by persons taking revenge for his not reinstating his complaint.



40. I am not satisfied that the applicant has ever been threatened, assaulted or attacked by Sikh men, members of the BJP or INC or any other person or that his [vehicle] accident was a result of a deliberate intention to harm him by Sikh men, members of the BJP or INC or any other person prior to his departure from India.
41. Given the above findings, I am not satisfied that the applicant faces a real chance of serious harm, from the BJP or any individual or party as a result of being a family member of a victim of the 1984 anti-Sikh riots, or as a result of being a family member of a person who initially laid a complaint against members of the INC in 1984 and subsequently withdrew that complaint.

*Claims related to being a person of Punjabi ethnicity and the Sikh religion*

42. I accept that the applicant is from the Punjab and he is a Sikh.
43. The DFAT Country Information Report on India dated July 2015 states that India is a diverse, multi-ethnic and multi-lingual society. The Punjabi language is spoken by about 2.8% of the population and Sikhs are estimated to be roughly 1.9% of the population and are a majority in Punjab.<sup>7</sup> DFAT assesses that there is a low level of official societal discrimination in Punjab on the basis of ethnicity, which may include some discrimination on issues such as employment, land and housing. Discrimination in these areas is typically influenced by a complex mix of caste, class, religion and language. DFAT assesses that no particular ethnic or language group is systematically targeted for such discrimination in Punjab.<sup>8</sup>
44. The applicant has made no claims for protection based solely on his Punjabi ethnicity and there is no information before me to indicate the applicant's family have ever experienced harm due to their ethnicity.
45. I therefore am satisfied there is no real chance that the applicant will suffer serious harm for reasons of his Punjabi ethnicity.
46. The DFAT Country Information Report on India dated July 2015 states that Section 15 of India's constitution prohibits discrimination against any citizen on the grounds of religion. Section 25 guarantees the right to freely profess, practice and propagate religion and section 26 guarantees every religious denomination or any sect the freedom to manage its own religious affairs. According to the US State Departments 2013 report on International Religious Freedom in India, the Central Government 'generally respected religious freedom.'<sup>9</sup> DFAT reports that although some sporadic violent incidents can occur, there is little religious based community violence in Punjab. It assesses that violent events involving religion are rare and not representative of a generally peaceful environment in Punjab. People in Punjab face a low risk of violence on the basis of their religious beliefs and whilst they may face minor levels of societal discrimination on the basis of their religion, this discrimination rarely escalates to significant levels and rarely involves the targeting of people of particular religious groups.<sup>10</sup> Many Sikhs have held high office in India and the Chief Minister and Deputy Chief Minister are both Sikhs. Some members of the Sikh community continue to resent the perceived lack of accountability for the Indian Army response to the anti-Sikh riots at the Golden Temple in 1984 and the subsequent period of separatist militancy, as well as the lack of prosecutions for those

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<sup>7</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report: India", 15 July 2015, paras, 2.6 & 2.7 CISEC96CF12827

<sup>8</sup> Department of Foreign Affairs and Trade (DFAT) "DFAT Thematic Report Indian State of Punjab", 7 December 2016, p.10, CIS38A80122951

<sup>9</sup> DFAT, "DFAT Country Information Report: India", 15 July 2015, para, 3.5, CISEC96CF12827

<sup>10</sup> DFAT, "DFAT Thematic Report Indian State of Punjab", 7 December 2016, p.11, CIS38A80122951

responsible for killing Sikhs in the wake of Indira Gandhi's assassination. This underlying tension manifests itself in strong public advocacy for greater accountability for these events, both in Punjab and in the expatriate Sikh community in Western countries, but rarely if ever translates to organised violence.<sup>11</sup>

47. The RRT made reference to country information that had been provided to it by the applicant's representative regarding harm facing the Sikh community in India. This information included extracts quoted from the main 2013 UK Home Office Operational Guidance Note on India to the effect that Sikhs who advocate for and support a separate Sikh state or Khalistan; Sikhs who challenge the power of the state government in religious matters and activists against Deras (cults) and Sikhs suspected of being militant supporters or Khalistan sympathisers face serious human rights violations and are subject to monitoring, detention and torture. The applicant's representative also referred to extracts from the April 2013 US Commission on International Religious Freedom, reporting an increase in religiously motivated harassment and violence by individuals and groups in society and by local police during the past year. More specifically, it was reported that Sikh NGOs that advocate for justice for the 1984 anti-Sikh violence report frequent harassment by both government officials and members of society and that the police often refused to investigate acts of harassment targeting Sikhs.
48. I accept that the applicant's grandfather was killed in the anti-Sikh riots of 1984 in Delhi. I accept that the applicant's father lodged a complaint in 1984 about the involvement of INC members in the anti-Sikh riots and then withdrew this complaint after being threatened at that time. I accept that the family then relocated to Punjab either at the end of 1984 or early 1985.
49. The applicant has not claimed and there is no evidence before me to suggest that he is an advocate for a separate Sikh state or Khalistan, or that he is a Sikh activist or militant supporter or Khalistan sympathiser. He has not claimed to be a member of a Sikh NGO involved in advocacy for justice for the 1984 anti-Sikh violence, or to have been involved in any demonstrations or political activities relating to this issue either in India or in Australia.
50. I am satisfied that the applicant and none of his family including his father and brother, have been involved in any Sikh separatist political activities or demonstrations since 1984 when the applicant's father lodged his complaint.
51. I am therefore satisfied that there is no chance that the applicant faces serious harm for reasons of his Sikh religion in India now or in the foreseeable future.
52. I am also not satisfied there is any real chance that the applicant will face serious harm for reasons of the combination of his Sikh religion and Punjabi ethnicity now or in the reasonably foreseeable future if he were to be returned to India.

*Claims related to persecution for reasons of actual or imputed political opinion as a result of writing anti-government poetry and songs*

53. In his submission to the RRT on 11 November 2013 the applicant stated that since his arrival in Australia he had composed [a number of] songs ([a number of] 'anti-government' and [a number of] romantic) which have been performed by known Indian singers and uploaded to [online websites]. He has also posted romantic and 'anti-government' poetry on his [social media] page under an alias. He stated that his poetry and songs are critical of Indian Government authorities, politicians, police, the INC and the BJP, as well as insinuating support for Punjabi freedom and independence / separatism. He claimed to have received a threat on

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<sup>11</sup> DFAT "DFAT Thematic Report Indian State of Punjab", 7 December 2016, p.11, CIS38A80122951

his [social media] page after posting his poetry and songs. He told the RRT that he had deleted his [social media] page after being detained at the immigration detention centre because of the bad comments he had received. He also said only his friends could access his [social media] page and so the RRT questioned how he could receive so many bad comments. He stated that his account is accessible and he thought that he would be harmed by the government if they became aware of his anti-government compositions. He was unable to provide any evidence to the RRT of the threat he received on his [social media] page. The RRT was unable to determine what the distinction was between his [social media] page and his [social media] account and was not satisfied that the postings on his page under an alias were available to view to anyone other than those permitted by the applicant.

54. The applicant provided several screenshots, copies and translations of his poetry and songs, including of their claimed publication online. He was unable to provide evidence of any threats he had received because he said he had 'blocked' people who provided adverse comments on online platforms. Whilst he claimed to have taken down his poetry and songs from the Internet as of [November] 2013 due to fear, the delegate noted that the screenshots he had provided indicated he continued to publish online since then including [in] November 2013 (just after he claimed to have taken them down) and as recently as [April] 2015. The applicant was asked at interview if he had experienced any other problems due to the publication of his poetry and songs online and he indicated he had not.
55. Based on the evidence before me, I am satisfied that the applicant has posted 'anti-government' poetry and songs on a [social media] page under an alias since his arrival in Australia. I am satisfied that two of his songs have been sung by an Indian singer and uploaded [online]. There is nothing before me to suggest that any of these postings have been under the applicant's own name. I am satisfied that the applicant did not take down his [social media] page as he told the RRT, as he has continued to post his poetry and songs on the [social media] page under his alias since the RRT made its decision. Given his [social media] page has not been taken down and his evidence is that he thought his postings had been viewed by only between about [a small number of] people, I do not accept that he is unable to provide evidence that he was threatened on his [social media] page by anyone after he posted his poetry and songs.
56. I accept that the applicant's poetry and songs are critical of the Indian Central government, the police, politicians, the INC and BJP and imply support for Punjabi separatism. Whilst I consider the chance that anyone other than close friends of the applicant will know that the alias is one that the applicant uses to be extremely remote, I gave consideration to the possibility that Indian authorities and other parties have seen the posts on [social media] and songs performed [online].
57. In her post hearing submission to the RRT the applicant's representative referred to extracts from the 2013 Freedom House report on India in relation to political censorship and the use of section 66 of the 2008 amendment of the IT Act in India 'to punish ill-defined "offensive", "menacing" or "false" electronic messages that cheat, deceive, mislead or annoy, with jail terms of up to 3 years.' The RRT accepted that s.66A of the IT Act had been widely criticised in India, particularly after it was used on four separate occasions in four separate states to arrest individuals posting comments on social networking sites. Following two of the arrests, the Supreme Court of India issued an 'advisory' stating that no person should be arrested for posting objectionable comments on social networking sites without taking prior permission from senior police officials.<sup>12</sup> There was no other information before the RRT to suggest that

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<sup>12</sup> Refugee Review Tribunal (RRT), Decision Record, 16 January 2014, pp.14-15.

s.66A of the IT Act or any other criminal provision had been used in Punjab or anywhere else in India to arrest any person for posts or comments made on social networking sites.

58. DFAT reports that a vigorous, democratic environment exists in Punjab. Opponents of the government are able to voice their opposition without fear of repercussions. Protests are often held on a range of issues, and are typically peaceful. Occasionally protests can turn violent and provoke a strong response from authorities, such as the Sikh protests in Faridkot District in October 2015. DFAT assesses that such incidents are rare in Punjab, and that political activists who strongly criticise their opponents - be they in government or opposition - face only a low risk of violence or discrimination on the basis of their political views. Whilst more than 80 Sikh prisoners have been held for long periods of time and have not been granted parole despite being eligible, DFAT understands that these persons have been convicted of serious crimes, including murder, largely during the period of active separatist militancy during the 1980s and 1990s. Some activists participate in hunger strikes to protest against policies and other perceived discrimination. Hunger strikes are a common and socially accepted form of protest in Punjab. In some cases, the government intervenes in hunger strikes, arresting the protesters and detaining them in hospital where they are force-fed to keep them alive.<sup>13</sup>
59. Overall, DFAT assesses that people in Punjab can freely express their political views without risk of harassment from authorities or other members of the Punjab community. However, people who choose to protest by undertaking a lengthy hunger strike may face arrest, detention in hospital or force-feeding. While peaceful protests are common and typically proceed without incident, DFAT assesses that large protests involving unrest, violence and damaging of property would face a risk of a strong police response. However, such violent protests and police responses are rare in Punjab.
60. The applicant has not claimed that he has engaged in any other activities deemed to be anti-government other than posting his songs and poetry [online]. He has not claimed that he intends to engage in protests, hunger strikes or any other Sikh separatist political activities should he be returned to India.
61. As I have found that there is only a very remote chance that Indian Government authorities or other parties who are not friends of the applicant would be aware that the songs and poetry uploaded [online] have been composed by the applicant, and given the above country information that people in Punjab can freely express their political views including those opposing the government, I am satisfied that there is no real chance that the applicant will suffer serious harm from Indian government authorities or member of any political party or individual as a result of his imputed or actual political opinion as expressed in his poetry and songs on the Internet, if he is returned to India now or in the reasonably foreseeable future.

*Claims related to the Department data breach and publication of the applicant's RRT decision*

62. The applicant was in Immigration Detention on 31 January 2014 and his personal details were published on the Immigration Department website in a data breach which occurred in February 2014. The Immigration Department states that information including the names of approximately 9,250 people who were in detention in Australia on 31 January 2014, their date of birth, their nationality, and details of their detention was inadvertently released on the department's website. The Department states that no details regarding protection visa applications or claims were breached when this data breach occurred.

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<sup>13</sup> Department of Foreign Affairs and Trade "DFAT Thematic Report Indian State of Punjab", 7 December 2016, p.13, CIS38A80122951

63. The Immigration Department has provided the following background information in relation to the data breach. Each month, the Department publishes a document entitled 'Immigration Detention and Community Statistics Summary' on its website ([www.immi.gov.au](http://www.immi.gov.au)). The published document includes statistics, but no identifying information. For accessibility reasons, the Department publishes the document in Adobe PDF and Microsoft Word versions. On 10 February 2014, the Department published the Microsoft Word version of the January 2014 issue of the Immigration Detention and Community Statistics Summary, dated 31 January 2014 (the Detention report). In preparing the Microsoft Word version of the Detention report for web publication, the Department inadvertently embedded the Microsoft Excel spread sheet that had been used to generate the statistics used in the Detention report.
64. The spread sheet included the personal information of approximately 9,250 detainees and was accessible through the Detention report. The Department was notified of the breach by the Guardian Australia at 9.15am on 19 February 2014. The Department removed the Detention report from its website by 10.00am on that date. The Detention report was, therefore, available on the Department's website for about eight and a half days.
65. Following this data breach the Department commissioned KPMG to conduct an assessment of the "events leading up to the disclosure of personal information of detainees, in connection with a document uploaded to its website on 10 February 2014". Similarly, the Office of the Privacy Commissioner has undertaken an independent report into the breach.
66. In assessing the consequences and implications for the applicant I accept that the data breach is a breach of his confidentiality and the duty of care that the Immigration Department has towards a person who is in Immigration detention. I note that the information about the applicant that was inadvertently published on the Immigration Department's website was limited to the applicant's full name, gender, citizenship, date of birth, when immigration detention began, the location of the immigration detention, and reasons why the applicant was deemed to be unlawful (e.g. found to be living and working unlawfully in Australia). The information was published on 10 February 2014 and remained on the Department's website until 10am on 19 February 2014. The information about the applicant was included with information about 9,249 other people also published at the same time in the same spread sheet.
67. Given the limitations on the personal information published as outlined above, I do not accept that the Indian authorities would be aware of the applicant's claims for protection as a result of the data breach itself. According to the reports, including the reporting in the Guardian Australia, which broke the story, the information that was available to be accessed did not include details as to whether detainees had lodged protection visa applications or any other type of visa application.
68. While there is no definitive information as to whether or not the Indian authorities accessed the spread sheet listing 9,250 detainees, I accept that they may have done so. If this is the case, the Indian authorities would have discovered the applicant's name, date of birth, nationality, arrival and detention details including that the applicant was in detention because he was unlawfully living and working in Australia. At the time the data breach occurred the applicant had not applied for protection and no details relating to any claims for protection have been released.
69. The applicant's RRT decision was published on the RRT website at about the same time that the data breach occurred. The applicant's name and other personal identifying details such as his location in India were redacted from this decision. Even if the Indian government or any

other person had accessed the Department's website and became aware of the applicant's personal data and that he was in detention, I find the chance that they then linked this to the RRT decision on the RRT website and identified the applicant as the subject of that decision to be so remote as to be non-existent. I am also not satisfied that the Indian authorities or any other individual would have any reason to link the applicant's personal details and the RRT decision as I have found that he was not of adverse interest to the Indian authorities prior to his departure, and there is only an extremely remote chance that the publication of his poetry and songs on the Internet under an assumed name would give rise to the applicant being identified as a person of adverse interest to the Indian authorities or to any other party or individual.

70. For the above reasons I find that the data breach does not, of itself, or together with the publication of the applicant's RRT decision on the RRT website even if somehow linked to the publication of the applicant's poetry and songs on the Internet, give rise to a real chance of the applicant facing serious harm or significant harm in India now or in the reasonably foreseeable future.

*Claims related to returning to India as a failed asylum seeker*

71. The applicant has not made any claims related to returning to India as a failed asylum seeker however, the sake of completeness I have given consideration to such a claim.
72. DFAT is not aware of any credible reports of mistreatment of returnees by Indian authorities, including failed asylum seekers. India does not have a centralised registration system in place which would enable the police to check the whereabouts of inhabitants in their own state, let alone in any of the other states or union territories within the country<sup>14</sup>.
73. I am therefore satisfied that there is no chance that the applicant will face serious harm if he is returned to India as a failed asylum seeker now or in the reasonably foreseeable future.

*Cumulative consideration of the applicant's claims*

74. I have had regard to the applicant's claims both individually and cumulatively. As discussed above, I am not satisfied that there is a real chance that the applicant will face serious harm for reasons related to his Punjabi ethnicity, Sikh Religion, family relationship to a person who lodged a complaint about the INC's involvement in anti-Sikh riots and subsequent withdrawal of the complaint, actual or imputed political opinion as a result of the publication of his 'anti-government' poetry and songs on the Internet, identification as a person who sought protection and the reasons for his claim for a protection as a result of the Department data breach and/or publication of his RRT decision, or as a result of being a failed asylum seeker.
75. I am satisfied that when having regard to these claims cumulatively there is no real chance that the applicant will face serious harm having regard to the extensive examples of serious harm in s.5J(5) of the Migration Act, on his return to India now or in the reasonably foreseeable future.
76. I am therefore not satisfied that the applicant has a genuine fear of persecution or that there is a real chance that he will face serious harm for any reason, if he was to be returned to India now or in the reasonably foreseeable future.

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<sup>14</sup> Department of Foreign Affairs and Trade, DFAT Country Report: India, 15 July 2015, para 5.21 CISEC96CF12827

## Refugee: conclusion

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

## Real risk of significant harm

79. 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.

80. Real chance and real risk involve the same standard.<sup>15</sup>

81. As discussed at length above, I am not satisfied that the applicant suffered harassment, threats, or harm from Sikh men, BJP members or supporters, INC members or supporters or any other person, as a result of being a family member of a person who lodged a complaint about INC involvement in the anti-Sikh riots of 1984, who then withdrew his complaint. Although I accept that the applicant's mother was killed in a tragic accident when the [vehicle] she was riding with her husband was hit by [another vehicle], I am not satisfied that she was murdered or that the accident was intentionally caused for the purpose of pressuring the applicant's father to reinstate his complaint about INC involvement or for any other reason. I also accept that the applicant himself was involved in a [traffic] accident when he was riding his [vehicle] and this resulted in serious [injuries]. However, I am not satisfied that this accident was intentionally caused by a person or persons for reasons related to either the BJP or INC wishing to take revenge on the applicant's father's family members or as a way of threatening the applicant's father who was refusing to reinstate his complaint about INC involvement in the anti-Sikh riots of 1984.

82. I am therefore not satisfied that there is a real risk that the applicant will suffer significant harm, having regard to the examples in s.36(2A) above, from any person as a result of being a family member of a person who withdrew his complaint about the INC and refused to reinstate his complaint at any time in the following 33 years, if he is returned to India now or in the reasonably foreseeable future.

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<sup>15</sup> *MIAC v SZQRB* (2013) 210 FCR 505

83. Based on country information as cited above, I am not satisfied that there is a real risk that the applicant will suffer significant harm as a result of his Punjabi ethnicity and/or Sikh religion if he is returned to India now or in the reasonably foreseeable future.
84. I accept that since his arrival in Australia, the applicant has posted his poetry and songs on [social media] under an assumed name, and that his poetry and songs are critical of the Indian central government, politicians, police, BJP and INC, police and Indian authorities. I accept that the applicant's songs have been uploaded onto [a website] where they have been sung by an Indian singer (not the applicant). However, based on relevant country information that people in the Punjab are able to freely express their political opinions whether they are in opposition to the government or other political parties without risk of violence, detention or harassment, I am satisfied that there is no real risk that the applicant will face significant harm (having regard to the definition of serious harm in s.36(2A)) for reasons of his actual or imputed political opinion which is critical of the government and implies Punjabi separatism, if he is returned to India now or in the reasonably foreseeable future.
85. I accept that the applicant's personal details were released during the Department data breach in February 2014 and that his redacted RRT decision was published on the RRT website at about the same period of time. However, I am not satisfied that there is a real risk that the two will be linked or linked to the applicant's songs and poetry by Government authorities or any other party or person, or that his claims for protection will be known. I am therefore not satisfied that there is a real risk that the applicant will suffer significant harm as a consequence of the data breach and/or the publication of the RRT decision if he is returned to India now or in the reasonably foreseeable future.
86. There is no information before me to suggest that there is a real risk that the applicant will face any harm, including significant harm if he returns to India as a failed asylum seeker.
87. Having regard to the applicant's claims cumulatively, I am not satisfied that there is a real risk that the applicant will face significant harm as a result of being a Punjabi Sikh, who is a family member of a person who lodged a complaint in 1984 about the INC involvement in anti-Sikh riots and then withdrew that complaint, as a result of any revenge sought by the BJP or INC as a consequence of his father's withdrawal of that complaint, who has published 'anti-government' poetry and songs on the Internet under an assumed name and had his songs sung by another person and uploaded to [the internet], who is a failed asylum seeker, who was subject to a the Department data breach and whose RRT decision was published on the RRT website, or for any other reason, if he is returned to India now or in the reasonably foreseeable future.

### **Complementary protection: conclusion**

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

### **Decision**

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





## Applicable law

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### **Migration Act 1958**

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

...

**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.