



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

INDIA

IAA reference: IAA19/07112

Date and time of decision: 16 October 2019 17:18:00

S Ryan, Reviewer

Decision

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 a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a national of India and arrived in Australia on [in] November 2012. On 6 February 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV). A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 29 August 2019 and referred the matter to the Immigration Assessment Authority (IAA) on 4 September 2019.

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).

Interview with the Department

3. On 29 July 2019 the Department of Home Affairs (the Department) sent the applicant an invitation to attend an interview to be held on 21 August 2019 to give evidence in relation to his SHEV application. The letter was sent to the address that had been advised by the applicant in May 2018. The applicant did not attend the 21 August 2019 interview or respond to repeated attempts by the Department to contact him by phone the following day. The delegate refused to grant the SHEV application on 29 August 2019.
4. The IAA wrote to the applicant on 4 September acknowledging that the decision to refuse his application for a SHEV visa had been referred to the IAA for review. A courtesy copy of this letter was sent to the applicant's email address. The applicant responded to the email sent by the IAA on the same day to confirm receipt and updated his postal address to a different address. He wrote to the IAA on 23 September 2019 advising that he had not received the Department's invitation to attend an interview or the decision refusing his application and that he had been told by the Department that they had used his previous postal address for notification. He claimed to have contacted the Department by phone in February 2019 to advise them of his new address. He has not provided any evidence of having made this phone call, and I note the Department has written to the IAA indicating it has no records or notes to indicate that the client contacted the Department in February 2019 to advise of his new address. The record showing the history of contact by the applicant with the Department notifying changes to his contact details suggests the applicant was familiar with this process and indicates the Department has consistently recorded his contact with them and changed his contact details accordingly. Nonetheless it is not apparent from the referred materials that the Department has made adequate records of its attempts to contact the applicant after he failed to appear at the scheduled SHEV interview; it appears that this has been limited to describing these actions in brief, incomplete terms within the decision record itself.
5. I take into account that the applicant has elsewhere responded to correspondence the Department sent to him regarding the assessment of his SHEV application in that he responded to the Department's request for evidence of his identity sent in 2017. The applicant also responded immediately to correspondence sent electronically by the IAA to his email address, as well as correspondence sent by the IAA in relation to its review of the Department's decision. Given he has otherwise been responsive when contacted with regards to the assessment of his SHEV application, I do not consider it can be clearly established that the applicant was aware of the Department's invitation to attend the SHEV interview. Regardless

of the reasons for this, I am satisfied that the applicant did not have an opportunity to raise claims and discuss these with the delegate in a face to face interview, and to provide explanations in relation to the dispositive issues that would have arisen through the interview process.

6. In light of these matters I decided to exercise my discretion under s.473DC of the Act to obtain further information from the applicant through the form of an in-person interview. The applicant attended an interview with the IAA on 8 October 2019.

Country Information

7. The delegate refused the SHEV application without having regard to any country information as she found the applicant does not hold a well-founded fear of harm in India on account of either of his claims; being harmed by money lenders or the family of his former girlfriend. Given these circumstances, I have obtained new country information to assist in this assessment; The Australian Department of Foreign Affairs and Trade (DFAT) Country Information Report on India published in November 2018. Key aspects of the information in this report that relate to the applicant's claims were discussed with him during the IAA interview. This information is from a credible source, is recently published, and contains information that is specific to the claims raised by applicant. Having regard to all the circumstances, I am satisfied that there are exceptional circumstances to justify considering this new country information.
8. During the interview with the IAA the applicant provided the following reports that had not been considered by the delegate; ET Bureau report "*Why Gujarat..*" published in January and the Immigration and Refugee Board of Canada report "*India: Police Communication..*" published in May 2013. The reports both predate the delegate's decision, however for the reasons given above, I am satisfied it was not and could not have been provided to the Minister before the delegate made the decision. The applicant also provided new information concerning the existing claims he had put forward in the SHEV application. Most notably he stated that his former girlfriend had become pregnant and had an abortion while they were together.
9. With regard to the new information provided by the applicant at the interview with the IAA, I am satisfied it is credible personal information, which was not previously known and, had it been known, may have affected the consideration of the applicants' claims. Having regard to all the circumstances of this case, I am satisfied that there are exceptional circumstances to justify considering the new information before the IAA.

Applicant's claims for protection

10. The applicant's claims can be summarised as follows:
 - He was born and raised in a small village in the Gujarat province of India and he follows the Hindu religion. His father died in 2001 and he lived with his mother. He has never been married and does not have any children.
 - He left India to avoid being harmed by money lenders from his village. They have attempted to force him to sell the family's land and have assaulted and harassed him after he refused.
 - He cannot get protection from the Indian authorities, as the money lenders are connected to a powerful political figure and pay money to corrupt police.

- He cannot live in any other part of India as the money lenders pursuing him can exert their power anywhere in India.
- He also fears being extorted for money, harmed and/or killed by the family of his former girlfriend. They claim he dishonoured them because he had sex with her, and then refused to marry her and broke off the relationship.

Factual findings

11. The applicant has provided certified copies of original identity documents, namely his Indian Election Commission Identity Card and Indian birth certificate. The applicant has presented consistent evidence in relation to his identity throughout the entry interviews and protection application process, and has provided a range of credible biographical information. I accept that the applicant was born in the village of [Village] in the state of Gujarat in India, and is a national of India and accordingly I have assessed him against India as the receiving country.

Entry Interview.

12. The applicant gave evidence in the SHEV application and in the interview with the IAA that his mother is alive, and that she lives in hiding to avoid the money lenders. He also claimed that the money lenders slapped him on one occasion in 2011, but did not otherwise mention being physically harmed by them. This is inconsistent with evidence he gave during the Entry Interview conducted by the Department in December 2012 in which he stated his mother was deceased, and that he was repeatedly beaten by many people involved with the money lenders.
13. In the written statement provided in February 2017 he acknowledged there were discrepancies between the SHEV statement and the account of his circumstances he provided during the Entry Interview. He characterised the differences as being minor mistakes relating to the answers he provided regarding his employment history and his family. He claimed that his memory at the time of the Entry Interview was not great as he was *'tired and sick from the boat journey from [Country] to Australia'*.
14. I note that the Entry Interview is not intended to provide a full exploration of a persons' claim to asylum, although it does in part seek to elicit a person's reasons for departing their country, as well as other matters that may be regarded as pertinent to a protection claim. In the present case the interview was conducted more than three weeks after the applicant had endured an undoubtedly difficult journey between [Country] and Australia. There is no audio recording of the Entry interview before me and I note that the written record of this interview is not a transcript of the interview. Nonetheless, the record indicates the interviewer began by putting the applicant on notice that one of the purposes of the interview was to give him an opportunity to provide any reasons why he should not be removed from Australia. He was further cautioned that he was expected to provide true and correct answers, and that if any of the information he provided at any future stage was different from what he provided during that interview, this could raise doubts about the reliability of that information.
15. I have taken into consideration the purpose of the Entry Interview and that the interviewer may have instructed him to provide brief responses. Nevertheless I note that the interviewer asked him a number of open follow up questions about the applicant's interactions with the money lenders. I consider the applicant has provided highly specific information concerning his circumstances in India, his journey from India to Australia, as well as his reasons for departing India in 2012. It is not apparent from the detail in these answers that he was

suffering memory loss, tiredness, or other ill effects from the boat journey to Australia. There is no evidence before me suggesting the applicant has suffered prolonged effects from that journey, or that he had health issues at the time of the Entry Interview that may have affected his capacity to give evidence.

16. I consider the discrepancies between the evidence he has given in the Entry Interview and his later statements with regard to his mother and the physical harm he has received from money lenders are significant and highly material to his claims. Considering the matters that he did raise during the Entry interview, I do not accept these can be described as minor discrepancies, or that the inconsistencies can be plausibly attributed to the context or conduct of the Entry Interview, or the applicant's health, or his lack of understanding of immigration and refugee assessment processes.

Mother

17. During the October 2019 interview with the IAA the applicant reiterated that his mother was alive and remained living in India with her brother's family. In the 2017 SHEV application the applicant contended that the Department's record of the answer he gave concerning his mother being deceased was the result of misinterpretation. He denied having provided this answer and speculated that it was possible the interpreter misunderstood the answer he gave with regard to his mother's whereabouts.
18. The inconsistencies between his statements at the Entry Interview and his later claims for protection were raised with him during the interview with the IAA and he has provided additional explanations for this. During the interview with the IAA he indicated "*I was informed my mother doesn't live where she was and was told she might have died*". He claimed that he later found out this was untrue and so provided true information concerning her status in the SHEV application. The IAA pointed out that he had given a highly specific account of the circumstances of his mother's death during the Entry Interview and also pointed out that this explanation is at odds with the explanation he gave in his written statement in which he asserted that he had not stated his mother had died during the Entry Interview and that the record of this answer is the result of misinterpretation. The applicant responded that he had provided a speculative answer about his mother "*maybe she passed away*" and that this answer had been misinterpreted as a more definitive answer. I note this explanation is discordant with the earlier explanation he had given in the same interview with the IAA in which he indicated he had told the interviewer that his mother was deceased during the Entry Interview because he had been (incorrectly) informed by another person that this was the case. I note that his claim to be unaware of his mother's whereabouts is contradicted by evidence he has provide elsewhere where he indicated his mother moved from their family home to live with her brother in 2011 and remains living there. His evidence suggested he was aware of this arrangement, but chose not to live with his uncle for other reasons.
19. The applicant has provided three differing and unconvincing accounts of the answers he gave regarding his mother's circumstances during the 2012 Entry Interview and I consider each to be inconsistent with the others. In light of this, I prefer the only contemporaneous account of the Entry Interview, the written record that has been made by the Department. This records the applicant as having stated that his mother passed away on an unspecified date after having suffered injuries during a gas explosion. I am satisfied this is the case.

Debt

20. The applicant claims he is the legal owner of farming land in [Town], that he is held personally responsible for debts incurred by his father, and that he has been harassed, threatened and harmed by money lenders.
21. I consider his evidence in this regard to be highly inconsistent and implausible and I consider it telling that the applicant has not provided any independently produced evidence corroborating any aspect of this claim. He indicated during the interview with the IAA that he had not understood the significance of providing evidence of the matters relating to his debts or his family's land as he was not aware these would be relevant to his application. I note the applicant has demonstrated an ability to provide personal documentation from India, having provided a number of identity documents and that he had the assistance of a legal professional in preparing the SHEV application. While I take into account he is no longer assisted by a legal representative, I note he has researched and provided to the IAA country information he claims have corroborative value with respect of his claims. In light of these matters I do not accept his claim that he did not understand the significance or relevance of providing documentary evidence in support of his claims.
22. The applicant has provided inconsistent information concerning the reasons his father borrowed from money lenders. In the written statement provided with the SHEV application he indicated that his father was [an Occupation] who had borrowed money against the family's land in [Town] as he needed to pay for medical treatment for his [specified] conditions. When asked during the interview with the IAA in October 2019 as to the circumstances that led to the family's debt he provided a substantially different account. He indicated his father had borrowed an unknown amount of money (either [amount], [amount] or [amount] lacs) when he was around [age] years old (approximately the year 2000) in order to finance the development of the farming land so that it could be used for agricultural purposes. He also indicated the family had used the money to pay for his education. The IAA put to the applicant that this is a substantially different account than was given in the earlier written statement. The applicant responded that his father had only become [an Occupation] after taking the loan, and that in addition to using the money on the farm, he had also used the money from the loan to pay for medical services and to pay for the applicant's education, and to get a house. I do not find this explanation to be persuasive, noting the 2017 written statement describes his father's occupation as [an Occupation] and made no mention of his father farming land in [Town]. The written statement clearly indicates that his father's reasons for taking the loan were due to the cost of his [medication] and the [surgery] which affected his ability to work as [an Occupation].
23. During the IAA interview the applicant confirmed his earlier statement that his father passed away in 2001, and that he and his mother had no contact with the money lenders for a further five years and made no payments during this period. According to the applicant the money lenders first approached them in 2006 when they had become worried about the unpaid debt and asked them to resolve it. The applicant advised that the money lenders were three brothers who were landlords in the village and that by 2006, the interest charged on the unpaid loan meant the debt had become a substantial amount. I find this aspect of the applicant's claim difficult to believe, considering the applicant's description of the lenders as locals who were powerful, politically connected and forceful, and part of a group forcing people to give them land for little return. Given this, it is difficult to believe that, as local money lenders from the same village, they were unaware of the death of the applicant's father in 2001 and that they made no contact with the applicant's family despite not having received any payments from them for five years. It is also difficult to believe that in 2006, despite the

high interest incurred on the loan now making the debt a substantial amount of money, the lenders were willing to accept the applicant's family's offer to pay a little bit of the debt and to leave them undisturbed for another five years.

24. According to the applicant the money lender returned to the applicant's house in 2011 demanding they settle the full amount of the debt and when the applicant's mother refused they became abusive and threatening. He gave evidence during the interview with the IAA that by 2011 the money they owed had increased to around [amount] lak rupees and that the money lenders insisted they either sell the land or pay the full amount quickly. The family offered to make small repayments instead and the money lenders were unhappy with this offer and began threatening his mother. The applicant intervened and insisted that the money lenders deal directly with him, and at that point he got into a verbal altercation with them, and was slapped. He threatened to report them to the police and they ridiculed him, saying that they control the police. He reported the matter to the local police who took no action and later sought advice from a lawyer and was told to settle the matter out of court as the money lenders were very strong. From this point the money lenders became more aggressive and would loiter around their house and follow them whenever they left the house. The applicant's mother left to live with her brother in [another town] and the applicant left to live in a share house in Ahmedabad. Their house in the village was vacant and the farming land was unused. The applicant claims the money lenders found him soon after he fled to Ahmedabad and threatened him and left to live in Mumbai. He remained in Mumbai for a period of around 18 months before he was found he had been located by the money lenders who stalked his house and his workplace. He fled to Delhi and made arrangements to leave India.
25. I have strong concerns with key aspects of the applicant's claims. He has claimed his family holds crucial paperwork that is evidence of their rights over the land and that the money lenders cannot take control of their land without his personal approval as the legal owner. He has claimed the money lenders are part of a powerful, politically connected syndicate with a focus on acquiring land and who are capable of corrupting legal processes and locating him and harming him in any part of India. He has not provided any independently produced evidence of any part of this, or any reasonable explanation for why he has not provided this evidence with the SHEV application. If these claims were true I find it difficult to believe that the money lenders could not have either coerced the applicant or his mother to hand over the document, or use their influence over corrupt officials to contrive the transfer of the land the applicant's approval.
26. Regardless, it is also apparent that it has been within the applicant's power to resolve these matters by selling the family's land, which by his own account has risen considerably in value and exceeded the value of the loan in 2011. Given the applicant claims to fear being harmed or killed by these persons, it is difficult to understand why the applicant did not sell the land at that point or at a later point. I note the applicant has indicated the money lenders proposed this course of action in 2011. When asked by the IAA whether he considered selling the land the applicant responded that he had been advised by his uncle that there was no need to sell the land and that he should make small repayments and that if he were to sell the land there was no point living in village. While I accept that the applicant and his family may have preferred not to sell the farming land, I note that the money lenders had already forcefully rejected those repayment terms. I do not accept the applicant's claim that they needed to retain the land in order to stay in the village, noting the applicant's evidence that he and his mother abandoned the house in the village soon after and that both the house and land have since been unoccupied and unused since 2011.

27. The applicant has claimed his mother is currently in possession of the land title documents the money lenders require in order to commercially develop their land, and that she has successfully hidden from them for an extended period by residing in a family house close by to the home village. I consider the applicant has provided non-credible evidence with regard to his mother's true circumstances. Even if I were to accept that she was alive and living near Ahmedabad, I do not consider that it is plausible the money lenders would be not interested in locating his mother or that they would be incapable of doing so easily. I note the applicant has described the money lenders as a powerful, wealthy and politically-connected criminal syndicate capable of using their influence to find and harm persons with impunity in any part of India.
28. I consider the applicant has given inconsistent evidence with regard to the harm inflicted on him by the money lenders. During the 2012 Entry Interview he gave evidence that the money lenders threatened, harassed and beat him every day to intimidate him into paying back the loan. This is not consistent with the evidence he has given subsequently where he claimed in the SHEV application and the interview with the IAA that they harassed him and his mother, acted in a threatening manner. He described one incident in 2011 where he got into a verbal altercation with the money lenders and was slapped. His evidence did not otherwise suggest that the money lenders had beaten him, or that he was subjected to regular attacks involving physical violence from them.
29. Overall, considering the insubstantial, inconsistent and implausible evidence the applicant has provided in support of this claim, and in the absence of any independently produced corroborative evidence, I am not satisfied that the applicant is personally responsible for an unresolved loan that has been made against land that he or his family owns. I am not satisfied he has been pursued by money lenders for these reasons.
30. I have considered the DFAT country information report, as well as the country information put forward by the applicant that describes the prevalence of administrative and judicial corruption in India, including in relation to land rights. Considering the above findings, and noting the general nature of these reports, I do not regard to them to be of any evidentiary assistance in assessing this case.

Former girlfriend

31. I am willing to accept that the applicant's may previously have been in a relationship with his former girlfriend. I accept that it can be difficult to produce independent, corroboratory evidence of such personal matters and I do not attach any adverse inference from its absence. Nevertheless, for the reasons that follow I consider that the applicant has otherwise embellished or fabricated his claims to fear harm from his former girlfriend's family on account of their previous relationship.
32. In the SHEV application he gave evidence that he met his former girlfriend in 2009, that they had a sexual relationship and that afterwards she told her family that the applicant had forced her to have sex. He claimed the family threatened to kill him if he did not marry her, give them \$30,000 dollars and buy a home for her. He claimed that, if he returned to India, he will be killed by his former girlfriend's family because they want to punish him for dishonouring them. Additionally, during the interview with the IAA the applicant gave evidence that his former girlfriend belongs to lowest caste and the applicant belongs to a high caste and it is forbidden for them to marry. He indicated that the family had punished his former girlfriend by preventing her from marrying anyone and that, if he returned to India, they would seek to punish the applicant by killing him.

33. I consider the evidence provided by the applicant with regards to this claim to be scant and insubstantial. The applicant provided very few details with regard to the timing of these claimed events, particularly with regard to the point at which they began a physical relationship, when the former girlfriend's family discovered this and began threatening and attempting to extort the applicant, and the point at which he breaks off their relationship. As noted by the delegate, it appears that the applicant has remained in Ahmedabad for a period of more than two years after he began a relationship with his former girlfriend. The applicant does not describe any specific instances in which the family of his former girlfriend have harmed him or threatened him, or indicate why he thinks they would be capable of locating him if he were to move to another area in India.
34. During the interview with the IAA the applicant was asked why he believed, given the substantial passage of time since they had been in a relationship, his former girlfriend's family would continue to be interested in harming him. The applicant gave evidence that the family of his former girlfriend continued to wish to harm him as they were a very conservative family and the affair was conducted in offence of their morals. He stated his former girlfriend had become pregnant while they were together and that she had an abortion. The IAA put to the applicant that he had not previously mentioned her pregnancy and asked if he could explain the reasons why he had not mentioned this earlier. He responded that, when preparing his SHEV application his legal representative was operating under time limits and that he was advised that the land was the main issue and the issue with his former girlfriend was a secondary issue. He claimed to have been unsure of the importance of her pregnancy in the context of his protection claims. I note that the 2017 statement prepared by the applicant described their sexual relationship, and included evidence that his former girlfriend had told him not to use protection whilst having sex, and that he had feared she was attempting to coerce him into marrying her by attempting to get pregnant. Given the evidence he did provide in that statement, it is simply not plausible that, if it were true, he would be unsure of the relevance of including a claim that his former girlfriend had become pregnant and had an abortion. I consider the omission of these important facts from his earlier evidence to be significant, and I consider it strongly points to these claims having been fabricated at a later date. For these reasons I do not accept the applicant's former girlfriend was pregnant and had an abortion.
35. Considering overall the scant and inconsistent evidence the applicant has put forward in support of this claim, and having regard to my earlier finding that he has made non-credible claims to fear harm from money lenders, I am not satisfied that the applicant has been threatened by his former girlfriend's family, or that he fears being harmed by them.

Refugee assessment

36. 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

37. 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.

38. For the reasons given earlier I am not satisfied the applicant has been pursued by money lenders for an unresolved debt. I am also not satisfied that the applicant fears harm from his former girlfriend's family. For the same reasons I am not satisfied that the applicant would face any chance of harm from money lenders or from the family of his former girlfriend if he were to return to India. The applicant has not claimed to fear harm on any other bases and there is no other information before that indicates he may face a real chance of any harm for another reason.

Refugee: conclusion

39. I am not satisfied that the applicant faces a real chance of persecution. 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

40. 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.

41. I have concluded above that the applicant does not face a real chance of any harm on any of the bases claimed. As 'real risk' and 'real chance' involve the application of the same standard, I am also not satisfied that the applicant would face a real risk of significant harm for the purposes of s.36(2)(aa) on these grounds.

Complementary protection: conclusion

42. 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

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.