



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

**Decision and Reasons**

**Referred application**

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ALBANIA  
IAA reference: IAA19/07258

ALBANIA  
IAA reference: IAA19/07259

Date and time of decision: 24 October 2019 12:35:00  
C Wilson, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

*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

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### Visa application

1. The referred applicants are a father (the applicant) and his infant daughter. The applicant claims to be a Catholic from Albania. The applicant arrived in Australia [in] May 2013 as an unauthorised maritime arrival. His daughter was born in Australia.<sup>1</sup> On 13 February 2017 he applied for a Safe Haven Enterprise Visa (SHEV).
2. A delegate of the Minister for Home Affairs (the delegate) refused the application on 30 September 2019. The delegate found the applicant's claims to have been threatened by a powerful well-connected person in Albania because he'd had an affair with that person's wife were not credible.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 22 October the applicant's representative provided written submissions which contained both legal argument and new information.
5. I have identified the following in the submissions as new information: information regarding Albania from the Smart Traveller website; that according to the Guardian, Deutsche Welle and Vice, Albanian gangs produce and distribute drugs in Europe and channel money into the Albanian corrupt political system; that according to a former ASIO Director there is a heightened threat of terror attack globally against Commonwealth interests by groups or individuals motivated by the conflict in Iraq and Syria; an article from January 2017 said some Albanian villages had Islamic State flags raised and a significant number of foreign fighters had been recruited from the Western Balkans, including 1000 fighters from Albania; and a quote reportedly from the Albanian government that 'there is no doubt that radicalisation, violent extremism, and terrorism are difficult challenges, to which no country is immune'. There is also new information on numbers of migrants from Albania, sourced from the Reuters article, which I have considered below.
6. The new information is provided in small extracts and there are no references or copies of the sources of the information. Most of the information could not be characterised as credible personal information that may have affected the consideration of the applicant's claims. Most of it appears to pre-date the delegate's decision and no explanation has been given why it was not provided earlier. It has not been clearly identified by the applicant as new information as required by the Practice Direction, and there are no submission on why there might be exceptional circumstances to consider it. Taking into account the lack of explanation from the applicant about why it was not provided earlier, the lack of referencing or provision of the source of the information, the brevity of the information, no identified exceptional circumstances by the applicant, and the lack of direct relevance to the applicant's core claims, I am not satisfied there are exceptional circumstances to justify considering this information. I find s.473DD(a) is not met and therefore I must not consider this information.

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<sup>1</sup> The daughter is also a fast track applicant as she is the child of a person who is a fast track applicant within the meaning of s.5(1)(a) of the Migration Act: Instrument IMMI 16/049.

7. The representative also provided new information in the form of five reports. The first is an article from Reuters dated 19 October 2019: 'Albania migration trends change, 52 percent mull leaving'. Given the publication date I accept it could not have been provided before the decision was made on 30 September 2019. The article discusses the large exodus of migrants from Albania to Italy, Greece, Britain, Germany and the USA. People were said to be migrating for better education and opportunities. There is no argument from the applicant why there are exceptional circumstances to justify considering this article, and none are apparent to me. It is not relevant to the applicant's expressed reasons for fleeing Albania. I am not satisfied there are exceptional circumstances to justify considering this article, and therefore I must not consider it.
8. The Politico article 'Albania gets religion' is dated 15 October 2019. I accept it could not have been provided before the decision was made on 30 September 2019. The article discusses how there has been a revival of religion post-1990, since the collapse of the communist regime. I acknowledge the applicant has indicated that in addition to targeting him for having an affair, his religion as Catholic would exacerbate the threat from the Muslim husband. I consider this article does not add to or sufficiently relate to this claim to amount to exceptional circumstances to consider it. The applicant has not identified any exceptional circumstances to justify considering it, and none are apparent to me. In the circumstances I am not satisfied there are exceptional circumstances to justify considering this article, and therefore I must not consider it.
9. The Washington Post article 'Albania, concerns over the Islamic State's emergence' is dated 11 Jun 2016. I do not accept it could not have been provided before the decision was made on 30 September 2019, given it was published three years earlier. The article does contain some credible personal information, in that it identifies and speaks of the circumstances of a few Muslim clerics and imams. I consider it unlikely however that this credible personal information, had it been known, may have affected the consideration of the applicant's claims. Even if I could be satisfied of this, I note there are no submissions before me on why I should be satisfied there are exceptional circumstances to justify considering this article. The applicant has not explained why this information could not have been given before the decision was made. He was represented by the same agent before the delegate. Even though the article reports on some radical Muslims I consider the article has limited relevance to the applicant's core claim that he was targeted for an affair with a married Muslim. Taking into account the date of the article, its limited relevance to the applicant's claims, and the lack of any explanation on why there may be exceptional circumstances, I am not satisfied there are exceptional circumstances to justify considering this article, and therefore I must not consider it.
10. The applicant provided a report 'Violent extremism in Albania: A national assessment of drivers, forms and threats' by the Institute for Democracy and Mediation, dated October 2018. There is no explanation why it was not provided earlier, and I do not accept it could not have been provided before the decision was made on 30 September 2019. The report contains country information on the issue of extremism, and conclusions and recommendations. It is not credible personal information, as it is about the broader issue rather than identified or identifiable persons. I find the report is not credible personal information that may have affected the consideration of the applicant's claims. I find s.473DD(b) is not met and therefore I must not consider this report.
11. The final report provided is the 'European Islamophobia Report' dated 2015. There is no explanation why it was not provided earlier, and I do not accept it could not have been provided before the decision was made on 30 September 2019. There are small sections of

the report that identify persons, such as politicians and researchers, but I am not satisfied these sections can be characterised as credible personal information that may have affected the consideration of the applicant's claims. I consider it would be farfetched to say that even if I accept the applicant was targeted by his lover's family for reason of his Catholic religion in addition to the affair, that the personal information on the issue of Islamophobia in this report may have affected the consideration of his claims. I find the report is not credible personal information that may have affected the consideration of the applicant's claims. I find s.473DD(b) is not met and I must not consider this report.

12. I acknowledge the applicant did not attend an interview with the delegate and has provided limited information or evidence, to support his claims. I have considered whether in the situation where he did not attend an interview, if I should exercise my discretion under s.473DC to get new information from him by way of interview or by inviting him to give new information in writing. I note the applicant was represented by a migration agent before the delegate and the Authority. The representative submits he explained to the applicant when he refused the interview that this 'will not be beneficial to his case'. The applicant was on notice from the delegate's decision that his claims had been disbelieved. Apart from providing country information on review, the applicant has not attempted to provide a statement from himself or other supporting evidence. I note there has been no request from the applicant to be interviewed by the Authority. I have no duty to assist the applicant to make a fuller or better case. In circumstances where I am not under any duty to get or request new information, and there has been no request from the applicant's representative to invite new information from the applicant, I have decided not to exercise the discretion under s.473DC(3).

### **Applicants' claims for protection**

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13. Only the applicant made claims for protection. His infant daughter was included in this application as a member of his family unit, and no claims were presented on her behalf.
14. The applicant's claims can be summarised as follows:
  - The applicant is a Catholic from [City 1], Albania.
  - He had an affair with a Muslim woman [Ms A] he met on a beach in June 2011 when she was there with her [children]. When they met up for the first time she told him her husband [Mr A] was [an occupation] who was connected to the LSI Party of Ilir Meta, and that he was also involved in organised crime. They commenced a relationship regardless.
  - In June 2012 [Ms A's] husband discovered text messages between the applicant and [Ms A]. [Mr A] called the applicant many times and threatened to kill him. The applicant considered complaining to the police, but a friend in the police advised him not to because [a police manager] was a friend of [Mr A's].
  - The applicant stayed in hiding from August to December 2012 and then left Albania in fear for his life in late April 2013.
  - Shortly after he left Albania persons have attempted to shoot at his brother when he was driving the applicant's car. In June 2015 brothers of [Mr A] and [Ms A] beat his brother 'to death'. His brother is now in Australia.

- The applicant's family supported the Democratic Party and the applicant was a member of the Youth Democratic Party [Branch 1]. As Catholics they are in the minority in Albania.
- The applicant will be killed in a revenge killing for reason of the affair with [Mr A's] wife, but [Mr A] and his family also want to harm him for his political and religious beliefs.
- The applicant could not seek asylum in another European country because they are not far enough away from Albania, and also there is an agreement with the Albanian government that prevents this.

## Refugee assessment

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15. 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

16. 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.
17. I accept the applicant is an Albanian citizen, based on the copy of his passport that he provided to the Department. The applicant lived all his life in Albania in the city of [City 1], and his parents continue to live there. I find Albania is his receiving country and [City 1] is his home area and the place he would return to.
18. The applicant claims he will be killed if returned to Albania, because the husband of a woman he had an affair with has threatened to kill him. He claims the husband [Mr A] is well connected politically and criminally. He claims he is also being targeted by [Mr A] and his family because of his religion as Catholic and political support for the Democratic Party, when [Mr A's] family are Muslim and associated with the LSI Party.
19. I have considered the limited information the applicant has provided about his alleged affair. The applicant was on notice from the delegate's decision that his claims had not been

believed, yet he provided no more detail, explanation or evidence on review. I note no documentary evidence, such as photographs or texts or other messages, has been provided. I find his explanation of how he met his lover [Ms A] to be unconvincing. I find it unlikely that he commenced an affair after meeting her on a beach when she was there with her [children], and after she had forewarned him her husband was politically and criminally connected. I find it unlikely he was threatened by [Ms A's] husband [Mr A], as there is no evidence of the threats and no evidence the applicant was harmed in the following 10 months before he left Albania. If [Mr A] was as powerful and well-connected as claimed, I do not accept he could not have found the applicant. Although the applicant claims to have been in hiding since June 2012, I do not accept this. His SHEV application gives only one address in Albania as being the address he lived at from birth until April 2013. He has also disclosed that he worked in his father's [business], and I consider he could have been located there.

20. The applicant claimed he looked for ways to leave Albania as soon as possible, but this does not appear to be the case. The applicant held his passport from 2009 and could have left Albania much earlier if he was in fear for his life from June 2012. I consider the fact that he remained in Albania, at his parent's home and working in his father's business, indicates he was not in hiding and was not in fear of harm from [Mr A]. The applicant's own travel history indicates he did not have a fear of harm in Albania in 2012 or 2013. He travelled to [two countries] in 2012, as evidenced by his passport. He has also indicated he has travelled to [two other countries], although he has not given dates for this travel and I cannot read clearly all the stamps in his passport to ascertain when this travel was. But when he travelled to [the first two countries] he voluntarily returned to Albania. The applicant says nowhere in Europe is safe because Albanians who want to harm him can also travel there. I consider if he genuinely feared harm from [Mr A], any other European country would have been safer than staying at home or with friends in Albania whilst continuing to work in his father's [business]. I also do not accept the representative's claim that Albanians are unable to seek asylum in European Union countries. No country information was provided to support this assertion. I note country information found by the delegate indicates there was a spike in applications for asylum by Albanians in European Union countries in 2011, which shows Albanians were able to make asylum claims.<sup>2</sup>
21. The applicant has provided inconsistent information regarding his brother. He claimed his brother was beaten to death by [Mr A's] brothers in July 2015, yet has also claimed his brother is now in Australia. He said in his SHEV application there were three incidents against his brother, but has provided little detail of what actually occurred. No evidence has been provided from the brother, who is now reportedly in Australia. If his brother was threatened, beaten and shot at in Albania because of the applicant's affair, he could have provided a statement and medical evidence in support of this. Considering the lack of detail or supporting evidence regarding incidents he alleges his brother suffered, I have concluded the alleged attacks on the brother did not occur.
22. I note also no evidence was provided from the applicant's partner in Australia, who was also his partner in Albania.<sup>3</sup> Although it is not clear how long she had been his partner in Albania, she would have been a witness to the alleged threats and the applicant's need to hide, if such events occurred in the 10 months prior to him leaving Albania. The lack of supporting evidence from such a witness may indicate there is no such evidence to give.

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<sup>2</sup> 'Albanians Charged Over Fake Asylum Claims', Balkan Insight, 05 December 2011.

<sup>3</sup> See Entry Interview, question 23.

23. The applicant declined the invitation to attend an interview with the Department. His representative said the applicant was too unwell to attend an interview, and in support of this provided a report from a psychologist [Psychologist A] dated 15 August 2019. [Psychologist A] gave an opinion that the applicant was suffering from depression, anxiety, post-traumatic stress disorder, and social anxiety. [Psychologist A] believed the applicant had been affected by anxiety since his early teens, but the trauma he experienced in Albania had contributed to the other conditions. In his opinion the applicant could not attend an interview because these conditions had affected the applicant's memory and would prevent him from appearing as a credible witness in an interview with a government official.
24. If the applicant has mental health conditions now, I consider there is insufficient medical evidence before me to know the cause or duration of the conditions. I note in his Entry Interview [in] July 2013, which I have listened to, the applicant was engaged in the interview and appeared to have no difficulty in answering questions. There was no indication of memory loss or any anxiety in being interviewed. He did not raise any mental health concerns at that time, and there was nothing in his behaviour to indicate any. I note also the applicant claimed in his SHEV application to be working as [an occupation] in a [company] in Australia.<sup>4</sup> I consider this indicates the applicant's mental health conditions may be a recent development or not as severe as presented in [Psychologist A] report, since they have not prevented him from working. I note [Psychologist A] was not the applicant's treating psychologist, and nor is there evidence the applicant had sought any treatment prior to August 2019. In fact, [Psychologist A] did not even meet the applicant in person. His report is based on being provided a copy of the applicant's SHEV application and interviewing the applicant over Skype on [two dates in] August 2019. [Psychologist A] sets out the applicant's claims about events in Albania in the report and appears to have accepted them on face value. I have concerns about the reliability of this report, taking into account [Psychologist A] did not meet the applicant face to face, only interviewed him twice, and was not his treating psychologist. Accordingly I give this report limited weight as evidence the applicant currently suffers from mental health issues. I do not accept it is evidence his mental health conditions now are a result of any claimed events in Albania. I give it no weight as corroborative evidence of the applicant's claims regarding the affair and alleged threats in Albania.
25. I have considered the submission that the applicant would not have undertaken the journey to Australia if he did not fear for his life. I do not accept this necessarily follows. The applicant had friends also travelling to Australia<sup>5</sup> and may have come for other reasons. For reasons given above, I consider that if he was fleeing for his life from Albania he could have left his home country earlier.
26. On the basis of the limited and unpersuasive evidence before me, I find the claimed affair and claimed threats from [Mr A] are not credible. I find the applicant does not face a real chance of harm from [Mr A] or his family or anyone connected to him if he returns to Albania, because I find the affair and threats did not happen.
27. The applicant also raised his religion and political beliefs as a reason he feared harm in Albania. He did not express a fear of harm generally because of his religion or politics, but claimed it gave [Mr A] and his family more reason to target him as they were of different religion and different political persuasion. If his claims regarding [Mr A] were genuine, I consider it unlikely [Mr A] would want to harm him for reason of his religion and political beliefs. The primary reason would appear to be because the applicant was having an affair

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<sup>4</sup> See his SHEV application dated 13 February 2017 and his daughter's birth certificate date [date].

<sup>5</sup> See the Entry Interview, question

with his wife. If the difference in religion and politics was a reason, I consider [Mr A] and his family may have targeted the applicant's family, who he says were Democratic Party supporters and Catholics. For reasons given above, I have not accepted the brother was attacked and there is no evidence the applicant's parents were harmed. The representative raises the issue of blood feuds or traditional vendettas in Albania, but there is no evidence that is the case here.

28. There is no claim or evidence the applicant suffered harm or discrimination in Albania because he was Catholic or a supporter of the Democratic Party. No country information was provided with the SHEV application to support the claim that Catholics are targeted for harm in Albania. There was also no evidence or further information to support the applicant's claim he was a member of the Youth Democratic Party [Branch 1], and nothing to indicate he was ever harmed or threatened for this reason. He claims his family support the Democratic Party, but there is nothing to indicate any harm or threats have occurred to them before or since he left Albania for this reason. On the limited information before me, I do not accept the applicant faces a real chance of harm in Albania for reason of his religion and/or political beliefs.

#### **Refugee: conclusion**

29. The applicant IAA19/07258 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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30. Under s.36(2)(aa) of the Act, 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**

31. 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.
32. I have not accepted the applicant had an affair with a woman whose husband was politically and criminally connected and who threatened to kill him. It follows I find the applicant does not face a real risk of significant harm for this reason, when I find the claimed events did not occur.



33. I have not accepted the applicant faces a real chance of harm for reason of his religion and/or political beliefs. 'Real chance' and 'real risk' has been found to equate to the same threshold. For the same reasons given above I find the applicant does not face a real risk of harm for reason of his religion and/or political beliefs if he is returned to Albania.
34. I have considered whether the applicant faces a real risk of harm for reason of the claimed gun violence coupled with corruption in Albania. The representative raised a number of deaths that he said occurred between June and September in Shkodra. Incomplete dates were given for these incidents, with only the day and month and not the year. Considering he refers to a death on 1 September, when the submissions were dated 21 August 2019, it appears at least one incident occurred in another year. I note an incident that he claimed<sup>6</sup> occurred on 30 August 2019, that is the shooting at a journalist's house whilst her children were sleeping, in fact occurred on 30 August 2018.<sup>7</sup> I consider the information from the representative may not be reliable evidence of a spate of recent killings in 2019, but even if some of them did occur over the last four months, they occurred in another city. The applicant's home area in [City 1], not Shkodra. The lack of mention of any incidents of violence in [City 1], even if close to Shkodra as claimed, indicates [City 1] may not be a place where 'killings are happening everyday' as claimed in the submissions.
35. The US Department of State acknowledges corruption is an issue in Albania, but also reports Albania has taken steps to address its problems. The Albanian authorities have undertaken an internationally monitored vetting of judges and prosecutors, and have dismissed a significant number of officials for unexplained wealth or ties to organised crime. They have also introduced the use of body cameras and electronic payment of traffic fines, to improve police accountability. Corruption in the police and government officials remained a problem, but there has been significant progress in pursuing and prosecuting cases, at least for low level public corruption.<sup>8</sup>
36. Taking into account the information before me, I am not satisfied that the level of violence and corruption in the applicant's home area is such that he has a real risk of significant harm. I find the applicant does not face a real risk of significant harm in being caught up in violence associated with criminality and corruption in his home area.

#### **Complementary protection: conclusion**

37. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant IAA19/07258 will suffer significant harm. The applicant does not meet s.36(2)(aa).

#### **Member of same family unit**

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38. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1).

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<sup>6</sup> In the submissions to the Authority dated 20 October 2019.

<sup>7</sup> US Department of State, *Country Reports on Human Rights Practices for 2018 – Albania*, 13 March 2019, section 2.a.

<sup>8</sup> US Department of State, *Country Reports on Human Rights Practices for 2018 – Albania*, 13 March 2019.

For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include children.

39. I rely on the birth certificate to find the infant IAA19/07259 is the child of the applicant. I also find she is under 18 years of age. I find she is the dependent child of the applicant as defined in r.1.03 and is therefore a member of his family unit.
40. As none of the applicants meets the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

## **Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

## Applicable law

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

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

In this Act, unless the contrary intention appears:

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

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

...

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

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

...

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

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

...

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

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

...

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

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

...

#### **5H Meaning of refugee**

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

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

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

...

### 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.