



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

**Decision and Reasons**

**Referred application**

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PAKISTAN  
IAA reference: IAA19/07479

Date and time of decision: 18 December 2019 16:14:00  
S Ryan, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a national of Pakistan and arrived in Australia [in] March 2013. On 5 December 2016 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 31 October 2019 and referred the matter to the IAA on 6 November 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). The applicant's 2 December 2019 submission to the IAA is made up of argument responding to the delegate's decision, and reasserting claims and evidence that was before the delegate. This is not new information and I have had regard to those matters.

### Applicant's claims for protection

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3. The applicant's claims can be summarised as follows:
  - He is a Sunni Pashtun from the Bangash tribe in the Kurram district of the area formerly known as the Federally Administered Tribal Areas (FATA) in Pakistan.
  - In August 2008 he fled his village after the Taliban attempted to forcibly recruit him. The Taliban visited his family soon after and, after his family refused to disclose his whereabouts, they burnt his family home. He and his family migrated to Peshawar and have not returned to Kurram since.
  - Whilst in Peshawar between 2008 and March 2013 he kept a low profile and lived in fear that he would be harmed by the Taliban due to having refused to join them.
  - He found a people smuggler and left Pakistan in March 2013.
  - If he returned to Pakistan he would be targeted as a person who had refused the Taliban's attempts to recruit him. He would also become known to them as a person who has returned from living in Australia and would be imputed to be a spy.
  - He could not live in any other area of Pakistan as the Taliban have networks throughout the country. He would find it difficult to find work elsewhere as he is identifiable as a Pashtun Sunni from Kurram and he would be imputed to be a terrorist or a supporter of extremists.

### Factual findings

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4. The applicant has provided copies of identity documents issued in Pakistan; including his passport, national identity card, and domicile certificate. He has not claimed in any other identity and presented consistent documentary evidence concerning his identity. I find the applicant is a national of Pakistan and accordingly I have assessed him against Pakistan as the receiving country.
5. The applicant was born in the village of [Village 1] in [Area 1] of Kurram and lived there until 2008. He undertook little schooling and worked from a young age on the family farm with his father. He and his family migrated to the city of Peshawar in August 2008, and the applicant lived with his family in Peshawar for the next five years, before leaving directly from Peshawar

to commence his journey to Australia in 2013. His wife and child, and his parents and [siblings] all remain living in the same address in Peshawar. He stated in the SHEV interview that neither he nor any member of his family has returned to Kurram since that time. I note that, by his own account, all of his family connections, including his wife and child, continue to reside in Peshawar. For the purpose of this assessment I find that Peshawar is the place to which the applicant would return.

## Passport

6. The applicant provided to the delegate his original Pakistani passport that was issued in [2013]. The annotation on page two of that passport indicates it was replacing an earlier passport. The delegate put this information to the applicant during the SHEV interview and the applicant responded that he never applied for or been issued with any other passport, and that he never travelled outside of Pakistan prior to his journey to Australia in 2013. The delegate indicated in the decision record he had concerns the applicant had not disclosed his earlier passport and considered he may have withheld this information in order to conceal previous overseas travel before his journey to Australia in 2013.
7. The Pakistani passport given to the delegate provides a serial number for an earlier passport, but provides no other information concerning the circumstances in which the earlier passport was issued. I note that the serial number for the earlier passport suggests a possibility it may have been produced at the same time as the replacement passport, as the two serial numbers are sequentially successive. Given these circumstances I am not satisfied that there is sufficiently conclusive evidence that the applicant has applied for an earlier Pakistani passport that was issued to him at another point in time. Considering the limited evidence before me, I am not satisfied the applicant was aware a previous passport was issued to him, or that he has provided false information in this respect to the delegate. I draw no adverse inference from the fact that he may have been issued two Pakistani passports, or from the answers he gave in this respect during the SHEV interview

## Financial Transactions

8. The delegate questioned the applicant at length concerning financial transactions between him and other persons, as well as the connections between his friends in Australia and his family and associates in Pakistan. I consider his responses to these questions be evasive, inconsistent and not credible. The delegate asked the applicant if he had ever sent money overseas and he responded "*a little bit, if it is my son's birthday or if they ask sometimes for help*". The delegate asked whether he had ever asked anyone in Australia to send money for him to which he responded '*no*'.
9. The delegate had earlier asked him to confirm whether any person he knows in Australia knows his family or friends in Pakistan and he repeatedly indicated that this was not the case. The delegate questioned him about his housemate, 'KRB', and he confirmed they had lived in the same house for the best part of five years, but claimed they knew little about each other's lives. The delegate then put to the applicant that KRB is from the same tribe and shares the same family name, they are from the same village in Pakistan, they have lived with each other for five years, and that KRB has repeatedly transferred substantial sums of money to the applicant's family in Pakistan. The delegate indicated that, given these facts, he was having trouble believing that the applicant was unrelated to KRB. The applicant responded that he is not related to KRB. After the interview break the applicant's representative submitted that the

applicant had forgotten to mention that KRB sent money to his family in Pakistan and that he had asked him to do this as a favour at times when he was busy with work.

10. The delegate asked whether the applicant ever sent money to 'MH' and he answered 'no'. The delegate then indicated that the Department's records concerning his financial transactions indicated he sent money to MH on three occasions in 2014 and that these transactions totalled around \$AU[sum]. The applicant has continued to assert that he has never sent money to a person named MH. The information before me concerning the financial transactions involving the applicant and KRB indicates that both sent substantial sums of money to a person named MH.
11. Regardless of the existence or otherwise of a familial relationship between the applicant and KRB, I consider he has provided incorrect or misleading evidence with regards to the extent to which he knows KRB, and to the extent to which both he and KRB have sent money to the applicant's connections in Pakistan. The applicant's claim to know little information about KRB is simply not credible given the facts laid out by the delegate concerning their circumstances, and which are not disputed by the applicant. I note the applicant had initially sought to minimise the extent to which he had sent money overseas, and downplayed any close association with KRB. The facts presented by the delegate during the SHEV interview show the applicant has regularly sent sums of money to persons in Pakistan, including some transactions containing substantial amounts of money.
12. The delegate asked the applicant many direct questions about his overseas financial transactions with people in Pakistan, and his relationship with KRB. On a number of occasions the delegate had re-stated his questions and his understanding of the applicant's responses to ensure the applicant understood the nature of the questions and that he understood the responses. Given this context, and the information he did provide, I am not satisfied the applicant's answers can be explained by his having misunderstood the delegate's questions, or by having forgotten a minor detail.
13. In light of these considerations I am satisfied that the applicant has provided misleading and inaccurate information to the delegate concerning his close association with KRB, and the extent and nature of financial transactions between himself and his family and associates in Pakistan.

#### **Adverse Profile with Taliban**

14. The applicant has claimed to have an adverse profile with pro-Taliban Pakistani militia groups (the Taliban) as a person who refused to join them. He fears he would be targeted and killed if he returned to Pakistan as a person who has resisted the Taliban.
15. Throughout his interactions with the Department of Home Affairs since arriving in Australia in 2013 the applicant has consistently claimed that he left Pakistan as the result of an attempt by the Taliban to recruit him. However for the reasons given below I consider the evidence given by the applicant concerning this event and his subsequent profile as a person of interest to the Taliban to be scant, inconsistent and unconvincing.
16. In 2008 the applicant was [a certain age] and was living with his family; made up of his parents, [and siblings]; in a Sunni Bangash community in [Area 1] in Lower Kurram. During the SHEV interview he described his family as being comparatively wealthy as they had a large amount of land and employed [a number of] of their neighbours to work on their land. Their village was made up of [a number of] houses and is [a certain distance] from the Afghan border.

17. Country information; particularly analysis from Qazi, Jane's Intelligence and Danish Institute for International Studies(DIIS); indicates that the Taliban operating in Pakistan's tribal region are a loose, fractious and often uncoordinated conglomeration of various groups, some of whom have been subsumed under the umbrella group '*Tehrik-e-Taliban Pakistan*'. These sources all describe how the recruitment tactics used by these groups varied from group to group and according to their particular goals and the demographics of the host population they engaged with. The recruitment tactics predominantly used by the Taliban's can be broadly categorised as follows; offering young recruits access to employment, social status and networks, exploitation of sectarian sentiment and local resentments against the Pakistan government and the actions of Western countries, and by providing tribes with economic endowments in return for recruits.
18. The Taliban groups are also known to have employed coercive recruitment tactics that has included the intimidation of local populations, and direct attacks on tribal leaders and local militia groups who attempted to resist them. They are also been known to target vulnerable youths and children, particularly those who are alienated or isolated from their families; in some instances kidnapping them, buying them from destitute parents, or coercing parents with threats or fraudulent promises into giving their children away. In that respect I accept that some Taliban groups do target certain individuals for coercive recruitment, although none of the circumstances described in the country information remotely match the applicant's situation in 2008.
19. Qazi's detailed analysis in 2010 of recruitment patterns used by the Taliban indicates that the Taliban groups operating in Lower Kurram were predominantly made up of the same tribal clans (Bangash Sunnis) as the population around them and that, in such situations it was common for the Taliban to recruit participants through social and monetary endowments and on the basis of shared kinship, tribal, ethnic, and religious identity. Jane's Intelligence confirms that commanders in Pakistan's tribal areas predominantly recruited youth from their own tribe and that an increasing number of young recruits came through the madrassah network of religious schools and seminaries. DIIS describes how Taliban groups in Kurram, which has a large Shia population, were able to successfully exploit anti-Shia sentiments prevalent in the Sunni tribes living in Kurram. The information before me does confirm the applicant's claim that the Taliban had control of his area in 2008, however it does not suggest that the Taliban faced any significant resistance from Sunni Bangash tribespeople in Lower Kurram, or that they had difficulty finding voluntary recruits amongst these groups.
20. Turning to the particulars of the applicant's claim to have been targeted by the Taliban for recruitment in 2008 I note a number of significant inconsistencies between the account of his interactions with the Taliban he provided in his written claims and the account he later gave in SHEV interview. In the November 2016 written statement of claims he described the Taliban calling all young adult males to attend the village mosque where they instructed him to join their ranks. He described having directly told the Taliban that he refused to join them and that the Taliban had responded that he had no choice and he should go home and prepare his belongings. His statement then describes how he then went home and separately informed his father of the Taliban's demands and that his father became worried that he had refused the Taliban's request and advised him to flee.
21. During the September 2019 SHEV interview he described a group of armed men from the Taliban approaching his village and calling all of the villagers out of their houses. The Taliban were standing in an open area and addressed the villagers as a group using a loudspeaker. The delegate asked him to confirm whether other members of his family had come out of the house and he confirmed that he, his father and his brother 'W' had been present at this event.

He described having being personally named by the Taliban as one of the people they wished to recruit, and that the leader of the group had also spoken directly to his father. During the SHEV interview he described fleeing the village after this incident but, when questioned about the specifics of his interactions with them, did not give any indication that he had directly responded to the Taliban instructions by telling them he refused to join them.

22. In his 2016 statement the applicant claims to have met with the Taliban in a mosque without his parents and that he had directly defied their request. The account he provided of the same event in the SHEV interview amounts to a substantial change in the location and nature of his interaction with the Taliban. While I am mindful that the effluxion of time can have some impact on a person's ability to recall details from incidents that occurred more than ten years prior, I consider the differences between these two accounts are significant, and are not minor details.
23. Country information confirms the Taliban did recruit young Sunni Bangash men living in Lower Kurram at the time of this claimed event, however I consider it unlikely that a person in the applicant's circumstances, a young adult man living with his parents and working on their farm, is unlikely to have been individually singled out by the Taliban for coercive recruitment against his or his parents' will. Nevertheless I am willing to accept that the applicant's family may have been one of many thousands of Sunni Bangash households in lower Kurram who were requested by the Taliban to provide a male family member as a recruit in 2008 and that the Taliban's 'requests' may have involved a degree of social pressure and intimidation from the militants and/or their supporters in his village, particularly as the conflict intensified.
24. I am also willing to accept that the family's motivations for leaving Kurram to live in Peshawar may have been in part because they did not want to provide the Taliban with one of their sons as a recruit. However I also note that the applicant's family was one of many thousands of Sunni Bangash families fleeing Kurram in 2008 as the security situation deteriorated. The United Nations High Commissioner for Refugees (UNHCR) Protection Cluster Mission report for Kurram describes the widespread displacement of families from lower Kurram to Peshawar, Kohat and other larger towns and cities during this period.
25. In light of the country information discussed above, and given my concerns with the veracity of the evidence the applicant gave with respect to this incident and other matters, I do not accept that the applicant was personally and differentially targeted by the Taliban for recruitment. Nor do I accept that either he or his father were identified by the Taliban as opponents who had rebuffed their attempt(s) to recruit him.
26. I accept the applicant and his family left Kurram in August 2008 and moved to Peshawar. However, having found that the applicant was not personally targeted for recruitment by the Taliban in 2008, I am not satisfied that his family migrated to Peshawar in the circumstances described by the applicant. I am not satisfied their house in [Area 2] was destroyed by the Taliban in 2008 in retaliation against their defiance of them, or that the family's departure (as one of many Bangash families fleeing a conflict zone) would have been interpreted by the Taliban to be an act of defiance against them. Noting the applicant did not indicate his family have sold their land in [Area 2], I am also not satisfied that his family have had no contact with any person in their village since 2008, as he has claimed.
27. I find the applicant's account of his five years of residence in Peshawar to be scant of detail, particularly with respect to his claims to have moved houses, avoided public areas and maintained a low profile in order to evade detection by the Taliban. In particular I note that he claimed during the SHEV interview that unknown persons had taped the doorbell on his house

a number of times and that he knew this to be a Taliban tactic to draw the occupants out to the street as part of a target killing. I find it telling that the applicant has first raised this incident in the 2019 SHEV interview and did not mention it in the 2016 written statement which covered his fear of the Taliban during his time in Peshawar. If it were true, that his family home in Peshawar was repeatedly targeted by persons using tactics similar to Taliban militants, it is difficult to believe he would not have understood the relevance of these events and included them in the detailed statement of claims he prepared in 2016 with the assistance of a legal representative. I consider it telling that he did not.

28. Having found that the applicant had not defied the Taliban's attempt to personally recruit him in Kurram in 2008, I am also not satisfied that, whilst living in Peshawar that he was pursued by the Taliban in retaliation. There is no other reason put forward by the applicant, or that is apparent to me, as to why he or any member of his family would have had an adverse profile with the Taliban or any other militant group. In light of these considerations I do not accept that, whilst he lived in Pakistan, the applicant or any member of his family were persons of adverse interest to the Taliban or any other militant group.

### **Refugee assessment**

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29. 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**

30. 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.

31. For the reasons given above I am not satisfied that the applicant has had a personal, adverse profile with the Taliban or any militant group for the reason that refused to join the Taliban. I am also not satisfied that the applicant currently has, or would have on return to Pakistan, an adverse, personal profile with the Taliban or any other militant group for this reason. I am not satisfied he faces a real chance of harm upon return to Pakistan on this basis.

32. The applicant claims that if he were to return to Peshawar he will be harmed for reasons of being Pashtun Bangash Sunni from Kurram who has returned from living in Australia. For the following reasons I am not satisfied that fear is well founded.
33. Peshawar is the capital city of Khyber Pakhtunkhwa Province and in its 2019 report on Pakistan, the Department of Foreign Affairs and Trade (DFAT) describe Peshawar as having a large Pashtun majority, second only to Karachi as host to the largest Pashtun community in Pakistan. Recent reports prepared by DFAT, and the Pak Institute for Peace Studies (PIPS) assess that the security situation in Peshawar, and across Khyber Pakhtunkhwa began improving significantly from around 2013 as a direct result of the Pakistan government's intensification of counter-terrorism operations in the region. While Peshawar continued to experience violent incidents in 2018, it is clear that the operational capacity of the Taliban and other terrorist groups in Pakistan has been substantially weakened by the successive phases of military operations against them.
34. The large proportion of the sporadic attacks undertaken by militant groups operating in Peshawar in recent years has been directed against Pakistani security forces. The Taliban and other terrorist groups have also continued violent sectarian attacks on religious minorities, particularly targeting Shia, and attacked foreigners in Pakistan, and Pakistani journalists reporting on sensitive issues. Militants also selectively targetted activists, candidates and members of political parties in 2018. PIPS report that Peshawar saw twelve terrorist attacks on civilians in 2018, killing 28 people and injuring another 69 people. Most of these were small scale incidents. However a significant portion of these casualties came from one incident in July 2018 when, in the lead up to the Pakistan national elections, 20 people were killed and 65 others were wounded in a Taliban attack on people attending an Awami National Party political rally in Peshawar.
35. The country information before me indicates there has been a significant downturn in violent incidents in Peshawar over the past five years, and that while the Taliban and other Pakistani militant groups remain active, those persons at an increased risk of harm in Peshawar are essentially limited to the profiles described above. DFAT's 2019 report cited local observers, including officials and residents of Peshawar, reporting an increased sense of security in the evenings due to the enhanced military presence in the city. DFAT observe Khyber Pakhtunkhwa Province saw a trend of increased security, a reduction in reported killings, and reduced fear within the community in 2018. DFAT also understands that serious crime in Peshawar has reduced significantly in line with the overall improvement in the security situation in the city.
36. The applicant claimed during the SHEV interview that there continues to be a lot of terrorist violence in Pakistan's tribal areas that is not being covered in the media. The applicant's observation in this regard is made at a very broad level, and he has not provided or sought to provide any further, detailed evidence as to how he knows this to be true. I accept that there certain limitations affecting reporting on violent incidents in some parts of Pakistan's tribal areas; particularly in areas undergoing counter-insurgency operations in border areas. However I do not consider that any limitations on media reporting on security incidents, including religious and other forms of communal violence in Pakistan, such that they may exist, operate to the extent that they erode the reliability of the assessments made by the sources discussed above. I particularly note that DFAT does not rely solely on media reporting or Pakistan government sources, and draws on a range of sources in Pakistan, including international, non-government and community sources.

37. DFAT's 2019 report describes Pashtuns in Pakistan reporting experiences of ethnic profiling, discrimination and state oppression; including enforced disappearances, extra-judicial arrests and killings, and mistreatment of Pashtuns. However the examples of such instances provided by DFAT relate to other areas of Pakistan where Pashtuns have relocated and where they are not a majority, particularly in Sindh and Punjab provinces. In this regard I give particular weight to DFAT's assessment that *"Pashtuns in Pashtun majority areas or locations where individuals have family or social connections face a low risk of official discrimination"*.
38. In this particular instance I note that the applicant would be returning to live as a member of a majority Sunni Pashtun population in Peshawar, a city in which he and his wife have significant family and other social connections. The applicant has not claimed to have had any association or involvement with any political, nationalist or militant groups of any persuasion, either in Pakistan or in Australia. He does not claim to have been suspected by Pakistan authorities of having such links. He has not indicated that he has previously come to the adverse attention of Pakistan authorities for these or any other reason, and considering his circumstances, I am not satisfied that he would on return to Pakistan.
39. Having regard to the applicant's status as a returnee from Australia, I note that DFAT's assessment does not indicate that Pakistanis, including Bangash Sunnis returning from a Western country, would be at an increased risk subject of discrimination or violence for that reason. DFAT observes that many Pakistanis have relatives living in Western countries, and that is common for Pakistanis living abroad to return frequently to visit their relatives. There are also no indications from any of the information before me, including evidence put forward by the applicant, that suggests he would be targeted by anyone in Pakistan on account of having made an asylum claim in Australia.
40. For all of the reasons given above I am not satisfied that the applicant would face a real chance of harm for reasons that he is a Pashtun Sunni Bangash who is originally from Kurram and who would be returning from Australia where he sought asylum.

#### **Refugee: conclusion**

41. I am not satisfied the applicant faces a real chance of harm on any of the bases claimed and I am therefore not satisfied the applicant has a well-founded fear 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**

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42. 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.
43. 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**

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

**Decision**

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

## Applicable law

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

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

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.