



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

**Decision and Reasons**

**Referred application**

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PAKISTAN  
IAA reference: IAA20/07823

Date and time of decision: 26 February 2020 08:55:00  
N Becke, 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 from Kurram Agency, Khyber Pakhtunkhwa Province (KPP), Pakistan, and a citizen of that country. On 14 November 2016 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 29 January 2020 a delegate of the Minister for Immigration (the delegate) refused to grant this visa.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information has been obtained or received.

### Applicant's claims for protection

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3. The applicant's claims can be summarised as follows:
  - In [Year] he was born in a village near Parachinar, Kurram Agency, KPP. He is an ethnic Pashtun and a Sunni Muslim.
  - Due to the poor security situation and the conflict between the Pakistan military and Taliban, he could only attend school until the end of Year [number].
  - In 2005 he spent a year working in [Country 1] and when he returned to Parachinar, he got married and purchased a taxi to support his family.
  - Most of his passengers were people who were unwell and needed to be taken to the hospital in Parachinar, around [distance] drive away.
  - In June 2011 the Taliban called and told him that he must transport their wounded personnel to hospital because his taxi would not be searched by the authorities. He said 'no' and ended the call.
  - One month later his son was sick and so he and his wife decided to take him to the hospital in Parachinar. Around 25 minutes after they set off, the taxi came under fire. His wife was killed and he received a superficial wound in his leg.
  - A week later he received another call from the Taliban who told him that they had in fact been targeting him. He ended the call.
  - He went into hiding, staying at various relatives' houses in his village and in hotels in Peshawar. He did not leave Pakistan because his children were very young and needed him.
  - In June 2013 he departed Pakistan legally from Islamabad, using a passport issued in his own name.
  - He fears the Taliban will find out he has returned because he is a person of adverse interest to them and they have a lot of power in his area.
  - The Pakistani authorities cannot protect him because they have no control over the extremist groups and are also targeted by them.
  - For these reasons, he will be unable to relocate to any other part of Pakistan.

- In February 2014 the Department of Home Affairs ('the Department') accidentally released his personal information on the internet ('the data breach').
- He fears the Taliban or other extremists will impute him to be against their ideology for seeking asylum in a Western country, and seriously harm or kill him.

### **Refugee assessment**

4. 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**

5. 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.
6. The applicant has been consistent in stating his identity since his arrival in Australia. In support of his claimed identity the applicant presented copies of his Pakistani passport and national identity card (NIC), as well as various other documents issued to him in Pakistan. The applicant's evidence at SHEV interview regarding his place of origin and his religious practice was also detailed and spontaneous. I accept that the applicant is from near Parachinar, Kurram Agency, KPP, and that he is a practising Sunni Muslim of Pashtun ethnicity. On the basis of the information before me I am satisfied the applicant's identity is as claimed and that Pakistan is the receiving country for the purposes of this assessment.
7. Country information before me supports the applicant's claims regarding the poor security situation in KPP prior to 2014, due to the sectarian conflict between Sunni and Shia tribes. I accept the applicant's evidence that the Taliban and other Sunni militant groups, who were trying to access Afghanistan, were very active in Parachinar and surrounding villages. I accept the applicant was only able to attend school until the end of Year [number] due to the security situation. I accept that upon his return from [Country] the applicant began working as a taxi driver.
8. During the SHEV interview the applicant described his village as small, comprising of [number] of Sunni residents and around [distance] drive from Parachinar city. I accept the

applicant's evidence that a lot of his customers were his fellow villagers who needed to get to Parachinar for medical treatment at the hospital there.

9. I have serious concerns however with the applicant's evidence regarding what he claims occurred in 2011, and consider it farfetched and lacking in credibility. The applicant claims that in 2011 he received a phone call from the Taliban, who introduced themselves as such, and ordered him to pick up their wounded fighters as needed and transport them in his taxi to Parachinar for treatment. The applicant claims that he refused their demands and ended the call. The delegate asked the applicant why the Taliban had made this demand of him, out of all the Sunni taxi drivers, and he responded that maybe it was because he was close by. The delegate put to the applicant that the Taliban would have their own cars and would not need to rely on taxis to take them where they wanted to go. The applicant agreed that this was the case. Following a break in the SHEV interview the applicant's representative reiterated the applicant's written claim, that the Taliban would have preferred to use civilian taxis as these would not raise suspicion at security checkpoints. I have considered this response however I am of the view that the authorities' suspicions would have been raised regardless, both at the checkpoints and at presentation at the hospital, of persons suffering wounds and injuries and do not consider it credible that the Taliban would be seeking to use civilian taxis for this reason.
10. The applicant claims that one month later he and his wife were taking their son from the village to Parachinar for medical treatment when around twenty minutes into the journey his taxi was shot at. The applicant claims that the attack appeared to originate from some disused buildings approximately fifty metres away but he was unable to see the attackers. The applicant's wife was hit by four bullets and died at the scene. The applicant received a minor wound to his leg and his son was unharmed. Approximately thirty minutes later other villagers came to his assistance, and he received several stitches in his leg. The applicant took his wife back to their village, where she was buried. The applicant did not obtain a death certificate for his wife because there was no need to take her to the hospital as she had already passed away.
11. The delegate asked the applicant if he had informed the police about the incident, and his wife's death, and he responded in the negative. The delegate put to the applicant that it would seem usual practice to inform the authorities of such matters and he responded that everyone was aware of the incident and that the authorities did not care, because if they did, they would have come to his house. The delegate commented that without notifying the authorities of his wife's death, he would not have been able to get remarried in the future if he wished to do so. The applicant did not respond to this directly, instead reiterating that he could not have notified anyone about the death because he could not leave the house and that the authorities did not care. When the delegate put to the applicant that it was concerning that he did not have any evidence to corroborate his wife's death he did not respond. I am satisfied that the applicant was squarely on notice that his lack of documentation regarding his wife was detrimental to his credibility and that his responses to the delegate's questions were farfetched and implausible. I also note the applicant has provided a range of other documents with his SHEV application such as his character certificate, his marriage certificate, his birth certificate, and his school records, and like the delegate, I find it concerning that he has not provided any such evidence for his wife.
12. I also have difficulties accepting the applicant's claims regarding his whereabouts following his wife's death and his departure from Pakistan almost two years later. The applicant claims that a week after his wife's death he received another phone call from the Taliban in which they admitted that they had intended to target him but had killed his wife instead. The

applicant claims that he then went into hiding, staying sometimes at his own home and sometimes with his maternal uncle, or with his cousins. When asked, the applicant confirmed that these relatives lived in the same village as himself. When the delegate put to the applicant that it would have been relatively easy for the Taliban to find him, he initially responded that he used to go to these relatives' houses at night and stay at his own house during the day, but then appeared change his evidence and declared the opposite arrangement. I also note that in the applicant's written SHEV application he has claimed that during these two years he also spent time hiding in hotels in Peshawar, and yet he did not mention this during the SHEV interview.

13. The delegate then asked the applicant how he managed to renew his NIC in December 2011, and apply for a passport in December 2012, if he was in hiding. The applicant responded that he had travelled from his village to Parachinar at night, stayed there during the day to lodge the applications, and then returned to his village the following night. I consider it entirely lacking in credibility that by travelling at night, the applicant could have avoided the Taliban if they were seeking to harm him. I also note that in the applicant's arrival interview, which was held in August 2013 (one month after his arrival in Australia), he also noted that the Taliban usually attack at night. When the delegate asked the applicant why the Taliban hadn't targeted his family since he has been in Australia, he responded that as he was the one who had refused to help them, they were not after his family. I do not consider it credible that if the Taliban had wanted to take revenge against the applicant for his lack of support, and had gone to effort to track his movements and attack his car on the morning of the claimed incident, that they would not take further action against his parents, siblings, children, or extended family, who all live in the same village.
14. I also have serious concerns with the applicant's other responses at his arrival interview regarding his reasons for leaving Pakistan. The applicant claimed that in 2011 the Taliban killed his wife and threatened him, and that he had left Pakistan to save himself. The applicant also told the interviewer that the last threat he had received from the Taliban had been between 4 and 6 months earlier (early 2013). When asked why the Taliban had killed his wife and threatened him, the applicant responded that he has no information as to why they did so, and that he did not understand why it had happened. When detailing his employment history in his arrival interview the applicant declared he had worked as a taxi driver until 2011, and that from 2011 until 2013 he had not worked but stayed at home taking care of his children as his family were financially secure landowners. When the delegate put these discrepancies to the applicant for comment, he responded that he had been confused and unfamiliar with the interview process and unfamiliar with the culture here. These explanations were reiterated by the applicant's representative following a break in the SHEV interview.
15. The delegate then pointed out to the applicant that he had been able to provide specific and detailed information during his arrival interview regarding a range of other matters (such as his family composition, address and employment history, and travel to Australia), but when asked why his wife had been killed he had responded "I don't know" and he had not mentioned the phone call from the Taliban he had purportedly received after her death. While I have taken the applicant's explanations about his discomfiture in the arrival interview into account, these do not overcome my concerns that he left Pakistan and travelled to Australia to seek protection purportedly because he had refused to assist the Taliban, yet when asked directly, he claimed not to know the reasons why he was being targeted.
16. Given all the evidence before me, I do not accept that in 2011 the Taliban contacted the applicant and ordered him to transport their wounded personnel to hospital. I do not accept

that one month later the Taliban shot at his taxi and accidentally killed his wife. I do not accept that one week later the applicant received another phone call from the Taliban in which they took responsibility for his wife's death and threatened to target him again. I do not accept that the applicant spent the next two years in hiding before his departure for Australia in 2013. On the evidence overall I am satisfied that the applicant does not have any sort of profile with the Taliban in his home area and there is no credible reason before me that the Taliban, or anyone else, would impute the applicant to hold an anti-extremist political opinion. Nor do I accept, on the evidence before me, that the applicant holds such views.

17. Despite the problematic nature of the applicant's evidence regarding the events of 2011, his evidence during the SHEV interview regarding the emotional difficulty his wife's death caused him and his young children was detailed and plausible. The applicant spoke consistently of the need to become the primary caregiver of his two young children, and that his youngest child, who had previously been breastfed by his wife, had refused to drink water after she passed away. The applicant has also consistently claimed that it wasn't until 2013 he felt that he was in a position to leave his children in the care of his family and travel to Australia. While I am concerned about the applicant's failure to provide any evidence of his wife's death, on the strength of his testimony regarding the effect of her death on himself and their children, I am still prepared to accept that she died in 2011 as claimed. However, on the evidence overall, I do not accept that she was killed by Taliban gunfire, but have concluded that she instead died of a different, unspecified, cause. I also note that in October 2013 the applicant requested removal from Australia, but this did not eventuate. Given his family circumstances which I accept as credible, I have not drawn an adverse inference from this request.

*Situation for Sunni Pashtuns in Khyber Pakhtunkhwa Province (KPP)*

18. In June 2014, a year after the applicant's departure from Pakistan, *Operation Zarb-e-Azb* commenced in a number of Pakistani cities, targeting terrorist and criminal networks. The National Action Plan (NAP), established later that same year in response to an attack on a Peshawar public school in which more than 130 children died, ended Pakistan's unofficial moratorium on the death penalty, established military courts to try suspected militants, targeted sources of finance for militant organisations, took measures to restrict hate speech, and committed to policy reforms, particularly in the former Federally Administered Tribal Areas (FATA), now KPP. In 2015 and 2016 the military operations and NAP continued, with the Pakistani army targeting a wide array of militant groups in the tribal areas. In response to some major attacks in early 2017, the Pakistani government introduced *Operation Raad-ul-Fasaad* as the successor to *Operation Zarb-e-Azb*.<sup>1</sup>
19. In 2018, the Pakistani government announced its second National Security Policy, and the Ministry of Interior is reportedly preparing NAP-2. Observers credit *Operation Zarb-e-Azb*, its successor *Operation Raad-ul-Fasaad*, and the NAP with a significant reduction in the number of violent and terrorism related attacks in Pakistan.<sup>2</sup>
20. The security situation varies across the country, however, and militant attacks can occur anywhere. While KPP, including the former FATA, reported the highest number of terrorist attacks in 2018 (125 attacks, killing 196), Balochistan reported the second highest number of

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Pakistan", 20 February 2019, 20190220093409

<sup>2</sup> Ibid.

attacks (115), but claimed the highest death toll (354). Security and law enforcement personnel were the target of the largest number of attacks during 2018 (136 attacks, or 52 per cent, killing 217), however the most lethal attacks were against political leaders and workers (24 attacks, killing 218). In 2013, 3,000 civilians and 676 security force personnel were killed in terrorism related attacks, but in 2018 the total number killed was 595 people, including both civilians and security personnel.<sup>3</sup> In 2018 local observers, including officials, in KPP also reported a trend of increased security, a reduction in reported killings, and reduced fear within the community.<sup>4</sup> On the basis of the country information before me I am satisfied that the security situation in the KPP has improved markedly since the start of *Operation Zarb-e-Azb*.

21. Amidst the trend of declining sectarian violence, Parachinar experienced three significant attacks in the first half of 2017: on 21 January 2017 militants detonated a remote controlled improvised explosive device in a market; on 31 March 2017 a suicide bomber attacked a Shia mosque; and on 24 June 2017 two devices were detonated in a market. The three attacks killed over 120 people.<sup>5</sup> Since these attacks in the first half of 2017 there have been no more significant attacks in Parachinar.
22. The Department of Foreign Affairs and Trade (DFAT) reports that recent military operations to erect fencing and other border control measures have improved the security situation in Kurram Agency, with a 20 to 30 square kilometre 'red zone' around Parachinar now secured by the military. Significantly fewer road attacks have been reported, as militants have been forced into the mountains.<sup>6</sup>
23. Given the country information, I have considered whether the applicant faces a real chance of harm as a Sunni Pashtun from near Parachinar, Kurram Agency. Pashtuns, who are predominantly Sunni, comprise an estimated 15.4 per cent of the population of Pakistan, making them the second-largest ethnic group in the country after Punjabis, and are represented at all levels of society in Pakistan.<sup>7</sup> Pashtuns traditionally live among their own tribes and sub-tribes in KPP, although many have migrated to urban areas. The largest Pashtun communities live in Karachi, followed by Peshawar. DFAT notes Pashtuns migrating to places such as Lahore and Karachi have reported ethnic profiling and harassment by local security officials. DFAT also assesses that Pashtuns may face a risk of such profiling in areas where they are in the minority, but that there is low risk of official discrimination against Pashtuns in areas where they form the majority, such as the applicant's home area. Pashtun-majority areas, such as the applicant's home area, have historically experienced high levels of tribal, intra-communal and politically motivated violence, and a high concentration of military operations. However, as discussed above, the overall security situation for all Pakistanis, including Pashtuns, has improved, including in the KPP and I consider the applicant's Pashtun ethnicity does not change or elevate his profile in Kurram Agency.<sup>8</sup>
24. I have also considered the applicant's profile as a taxi driver in Kurram Agency. The main Thall-Parachinar road has reopened in recent years and the security operations have restored the community's confidence for group travel on this route, and for individual travel during daylight.<sup>9</sup> When asked to comment on the country information, which indicates the security

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

situation has improved across Pakistan, including in the KPP, the applicant responded that it is not safe for him to return because the Taliban will still kill him for refusing to help them. For the reasons already given, I do not accept the applicant has any sort of profile with the Taliban, or anyone else. Given the country information I consider the chance of the applicant, a Sunni Pashtun taxi driver, facing harm on the roads in Kurram Agency in the reasonably foreseeable future, to be remote.

25. The applicant has claimed that the Pakistani authorities are unable to protect him from the Taliban and other Sunni militant groups in Pakistan as they are also the targets of these groups. Yet as of February 2018 the Pakistani authorities had completed 40 per cent of military fencing in Kurram Agency which, coupled with tighter border controls, decreased the permeability of the Pakistan-Afghanistan border. Furthermore, the military has implemented a 20-30 kilometre red zone in Parachinar, which contains a smaller, second red zone in which markets and schools are located, and access to these zones requires the presentation of identity documents.<sup>10</sup> Despite the three attacks in Parachinar city in 2017, the country information before me indicates that the Pakistani authorities have further enhanced security in and around the city. On the evidence overall I am not satisfied the authorities are unable or unwilling to provide protection as the applicant claims. I accept the security situation in much of Pakistan remains fragile; however, looking at all the information before me as discussed above, overall I am satisfied the situation in Parachinar, Kurram Agency, and KPP more widely, has improved markedly since the applicant was last there.
26. Based on the applicant's personal circumstances and recent country information, I am not satisfied he faces a real chance of harm in Kurram Agency because of his profile as a Sunni Pashtun taxi driver; because of any anti-Taliban, or anti-extremist, political opinion; the general security situation in the KPP; or at all.

*Returning Asylum Seeker from a Western Country (Australia)*

27. I accept that the applicant may be returned to Pakistan involuntarily, or on a temporary travel document, which DFAT indicates will attract attention from the Pakistani authorities upon arrival. DFAT also indicates that in such cases returnees are questioned and those who have departed Pakistan legally are issued with temporary documents upon arrival.<sup>11</sup> Those wanted for a crime in Pakistan or who have committed a serious offence while abroad may be arrested and held on remand, or required to report regularly to police as a form of parole.<sup>12</sup> The applicant departed Pakistan legally and is not wanted for a crime in Pakistan and is not otherwise of adverse interest to the Pakistani authorities.
28. In his decision the delegate accepted the applicant's personal information, including his name, date of birth, citizenship, mode of arrival (boat), and detention status had been briefly accessible online during the 2014 data breach and I also accept that this is the case. However, no protection claims were published in the data breach and I am not satisfied the Pakistani authorities, or anyone else, even if they had accessed the applicant's information, would be aware of the contents of his SHEV application.
29. The applicant claims that due to the amount of time he has spent seeking asylum in Australia, a Western country, the Taliban and other extremists in Pakistan will believe he wanted to change his lifestyle and live in an infidel country, and that this will lead such groups and individuals to target and kill him for this reason. Country information before me indicates

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.



Western influence is pervasive in many parts of Pakistan. Both Urdu and English are official languages, and English is taught in many schools and is widely spoken among Pakistan's elite. According to the 'Minister for Overseas Pakistanis and Human Resources Development', approximately 2.5 million Pakistanis travelled overseas for employment between 2015 and 2018. Nearly 0.8 million people travelled abroad in 2014, 0.9 million in 2015, and 0.8 million in 2016. DFAT further indicates that returnees to Pakistan do not face a significant risk of societal violence or discrimination as a result of their attempt to migrate, and are typically able to reintegrate into their respective community without issues.<sup>13</sup> Nor does the country information support the applicant's assertion that extremist groups, such as the Taliban, are targeting returnees from Western countries like Australia for seeking asylum in the West, on the basis of any imputed anti-extremist political opinion, or for being perceived as infidels. Overall, I am not satisfied that the applicant would face a real chance of harm upon return to Pakistan as a returning asylum seeker from a Western country.

30. The applicant does not have a well-founded fear of persecution within the meaning of s.5J of the Act.

#### **Refugee: conclusion**

31. 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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32. 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**

33. 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.
34. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
35. I have concluded that the applicant does not face a real chance of harm for any reason. Based on the same information, I am not satisfied that the applicant has a real risk of suffering significant harm.

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<sup>13</sup> Ibid.

36. After having regard to the applicant's circumstances, I find that he does not face a real risk of suffering significant harm.

**Complementary protection: conclusion**

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

**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.