



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN
IAA reference: IAA20/08391

Date and time of decision: 26 June 2020 13:13:00
N Becke, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Sunni Muslim and ethnic Pashtun from Jalalabad, Nangarhar Province, Afghanistan. On 1 August 2016 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 13 May 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).
3. On 8 June 2020 the IAA received a legal submission on behalf of the applicant. The submission reiterates claims made to the delegate that are contained in the review material. It also contains arguments in relation to issues before the delegate, which I have noted and considered.
4. Attached to the submission were two new sources of country information from 2017 which the applicant has provided regarding an Islamic State (IS) attack on [Agency 1] in Nangarhar. The two sources predate the delegate's decision and it appears the applicant has provided them because the delegate was not satisfied that the applicant's father had in fact died in that attack. However, for the reasons given below, I accept the applicant's claims regarding his father's death in their entirety. Given the circumstances, I am not satisfied exceptional circumstances exist to justify consideration of the two new sources.
5. The IAA also received two requests for an additional two weeks to obtain unspecified documents from the applicant's family in Afghanistan, as well as evidence of his employment in the Afghan National Army (ANA). In its response IAA noted that under the *Practice Direction for Applicants, Representatives and Authorised Recipients* any new information must be given to the IAA within 21 days of the date on which the case was referred by the Department. In this case the IAA was not satisfied that the circumstances warranted an extension of time, but noted that any new information received prior to making a decision would be considered, subject to the *Practice Direction* and s.473DD of the Act. The requested two week period has now passed and no further information has been received. It is not clear what the applicant sought to obtain from his family, and for the reasons given below I have accepted his claim to have been a soldier in the ANA. Given the circumstances, I have proceeded to make a decision on the basis of the information which is before me.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - In [year] he was born in a village, [distance] from Jalalabad, Nangarhar Province.
 - In [year] he and his family relocated to [Town 1], Pakistan to avoid the armed conflict in Nangarhar and returned four years later.
 - In approximately 2003 he and his family relocated to Peshawar, Pakistan to avoid the armed conflict in Nangarhar and returned to Jalalabad two years later.

- In [year] he enlisted in the ANA and served in the [specified units]. After [number] years he left due to Taliban threats against ANA personnel.
- [Between specified years] he worked in a [business] in [Country 1].
- Upon his return to Jalalabad he [started a job in] which he [travelled] around Jalalabad, and between Jalalabad and Kabul.
- One year later the Taliban stopped his [vehicle]. They demanded he serve them for [same number] years, being equal to the time they knew he had served in the ANA, or they would seriously harm him.
- He pretended to agree and said he was going home to prepare. The Taliban warned him that they knew where his family lived and the routes he drove.
- Instead of returning to the Taliban he [left his job] and approximately one week later departed Afghanistan.
- In [2017] his father, who was [an occupation] at [Agency 1] in Jalalabad, and [several] other [colleagues], were killed when IS gunmen attacked the building.
- He fears the Taliban or other Anti-Government Element (AGE) will forcibly recruit him, or seriously harm or kill him because of: his previous service with the ANA, his escape from the Taliban, his opposition to their ideology, and as an asylum seeker returning from the West (Australia).
- He also fears IS, who have a presence in Nangarhar, will seriously harm or kill him because of his and his father's association with the government.
- He is not safe anywhere in Afghanistan due to the extensive networks of the Taliban, IS and their supporters.

Refugee assessment

7. 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

8. 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.
9. Since the applicant's arrival in Australia he has been consistent regarding his name, date of birth, and identity as a Sunni Pashtun from Jalalabad, Nangarhar Province, Afghanistan. The applicant has also provided three different taskeras (Afghan national ID cards) which purport to corroborate these personal details. The applicant claims that the first taskera was personally issued to him prior to his departure from Afghanistan, but he did not bring it with him to Australia. His family emailed him a copy of this taskera shortly after his arrival in 2013, but were later unable to locate to the original and so applied for a "duplicate original". Prior to his 2019 SHEV interview the applicant's family applied for a third taskera for him, which was later posted to the Department.
 10. During the SHEV interview the delegate raised a number of concerns he had with the provision of these taskeras, specifically that the second taskera provided, which the applicant claims is an original duplicate of the first, bears a different serial number. The delegate also noted country information indicates that, generally speaking, an Afghan national must personally present to the authorities in their home area of Afghanistan in order to be issued a taskera.
 11. Following the SHEV interview the applicant's then representative provided a written submission to address the delegate's concerns regarding the applicant's identity. Attached to the submission were copies of his parents and [siblings'] taskeras with English translations, which I consider corroborate the applicant's claims regarding his family name, composition and origin. The applicant has also provided copies of his school reports from Jalalabad and a United Nations High Commission for Refugees (UNHCR) document which he claims was issued to him upon his second repatriation from Pakistan to Afghanistan around [year].
 12. Like the delegate, I consider the applicant's responses at the SHEV interview regarding his identity documents was difficult to follow and appeared evasive. The Department of Foreign Affairs and Trade (DFAT) also indicates taskeras are printed on plain paper without any embedded security features, which make it difficult to determine whether they are genuine or not, and that document fraud is widespread in Afghanistan.¹ However, as also noted above, the applicant has been consistent about his personal details and identity since his arrival in Australia, which has been further corroborated by the provision of taskeras with English translations for his immediate family. On the basis of the information before me I am satisfied the applicant's identity is as claimed and that Afghanistan is the receiving country for the purposes of this assessment.
 13. I consider the applicant's claims about his early life were detailed, plausible and consistent with the country information before me. I accept that the applicant was born in a village on the outskirts of Jalalabad city and attended school in the city itself, where his father worked and where his family have a home and currently reside. In approximately [year] the applicant, his mother and his siblings relocated to [Town 1 in] Pakistan to avoid fighting in their area and returned in approximately [year]. I accept that in 2004 the applicant, his mother, and siblings again relocated to Peshawar, Pakistan to avoid fighting between the US forces and the Taliban. The applicant claims that in approximately [year] he returned to Afghanistan and enlisted in the ANA.

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Afghanistan", 27 June 2019, 20190627113333

14. During the SHEV interview the delegate raised a number of concerns he had regarding the applicant's claim to have been an ANA soldier. Like the delegate I find it concerning that the applicant has not been able to produce any evidence to corroborate his claim in this regard, apart from one photo which shows him wearing army fatigues. The photo appears to have been cropped on one side and no other contextual information is apparent. When asked if he had an ANA ID card the applicant responded that he used to have a card to access the base in Kabul, where he was stationed. The applicant also claimed that he had destroyed other photos of his time in the ANA in case they fell into the hands of the Taliban.
15. The delegate then asked the applicant about the particulars of his time in the ANA and I consider his evidence was detailed when he described the steps he took to enlist in Jalalabad and then travel to [a base] in Kabul, where he undertook his military training and was later stationed. When asked, the applicant responded that he was not required to provide identity documents at the time he enlisted. The applicant also told the delegate that he used a fake name as he was concerned that if the Taliban in his home area found out, they would target him. When asked, the applicant was also able to quickly and confidently recall the fake name he had used. When the delegate expressed concern about the applicant's claims in this regard, he responded that at that time the priority of the Afghan government was to get as many people enlisted as possible and all they asked was for an individual's name, father's name, their home address, and mobile number. The delegate questioned whether the applicant had been asked about his educational history or his support for the Afghan President, to which the applicant again responded that the ANA were recruiting labourers from street corners in order to fill the ranks, and once he arrived in Kabul he was not asked further questions. When the delegate expressed his concern that the applicant could have been a Taliban fighter in disguise, he responded that he had served without blemish on his record.
16. I consider the applicant also adequately described the routine of being stationed at [a base in] Kabul and his regular periods of leave, during which he returned to Jalalabad. The applicant spoke of being deployed to Wardak and Laghman provinces, and his encounters with the Taliban during skirmishes en route, with sufficient detail to satisfy me he was recalling evidence from his own personal experience. On the evidence before me overall I accept the applicant served in the ANA from approximately [specified year] until [year].
17. During the SHEV interview the delegate also asked the applicant about his decision to leave the ANA a few months short of [number] years' service. The applicant explained that in [year] the Taliban's power was increasing and they started leaving threat letters in villages, ordering people to cease their support of the ANA. The delegate asked the applicant if his household had received one of these letters, to which he responded in the negative. The applicant added that a letter was given to his other relatives in the village because the Taliban knew he was from there. When asked if the letter was addressed to him personally, the applicant again responded in the negative but clarified that it was addressed to "anyone who was in the army and I was in the army". The delegate put to the applicant that it seemed strange that his extended family, but not his own parents, had received a letter which the applicant claims was about him but yet did not specifically name him and also noted that in any event, he had used a fake name to enlist. The applicant responded that even if the Taliban had found out he had used a different name he would have still been in danger and that he felt it was not safe to remain in the ANA, or Afghanistan, so he went to [Country 1] for [several] years.
18. When asked, the applicant confirmed that he first applied for his taskera, and then a passport, from Jalalabad. When the delegate noted that the applicant had not been harmed during the period between the letter being received and leaving the country, he responded that he had stayed with various friends in Jalalabad city, did not visit his village where the letter had been

received, and generally kept a low profile. The applicant then confirmed that during the [years] he was in [Country 1] he had returned to Afghanistan on at least four occasions. When asked why he had decided to return, the applicant responded that he felt “mentally relaxed”, as he had complied with the Taliban’s demands by leaving the army. The applicant clarified that he believed it was safe to stay in Jalalabad city during these return visits, but that he did not go to his home village.

19. Overall I consider the applicant’s claimed reasons for leaving the ANA appeared internally inconsistent and lacked credibility. While it is plausible, and I accept, that around [year] the Taliban left general threat letters in villages warning people against ANA involvement, and that such letters were received in the applicant’s home village, I do not accept he was in any way personally known to the Taliban. I also consider the applicant’s decision to leave his posting in Kabul to return to Jalalabad indicates that he did not perceive there was any real risk that the Taliban would find out he had been in the ANA. I also find it difficult to reconcile that the applicant felt he had no option but to leave Afghanistan entirely, but that he then felt comfortable enough to travel back to his home area at least once a year. I do not consider the applicant’s actions are consistent with someone who had received a specific threat to their life. Given the evidence overall I am not satisfied the applicant left the ANA, and took up an employment opportunity in [Country 1], for the reasons claimed.
20. The applicant claims that in late 2011 his [Country 1] visa expired and he returned to Afghanistan with the intention to stay there permanently. The applicant claims up on return he [started a job in] which he [travelled] between Jalalabad city, his home village, and Kabul for a year without incident. The applicant then claims that one day he was driving back from his [village] when four armed Taliban members pulled him over. The applicant claims the Taliban asked him how long he had spent in the ANA and then ordered him to join them for the same period of time.
21. When the delegate asked the applicant for further details about the incident he described the Taliban’s attitude as “upset” and “not friendly”. When the delegate asked the applicant why he did not deny that he had been in the ANA he did not answer directly, but instead claimed that he had no option but to accept the Taliban’s demand. When the delegate asked the applicant what happened next, he responded that he [left his job], went to [Country 1], and then came to Australia. When the delegate noted that the applicant’s account lacked details, and requested that he be more specific, he claimed that the same day as the Taliban incident the spoke to a [colleague], who [took his equipment], and that he delivered it to him a few days later. When asked again for more detail, the applicant estimated that it took him between a week and nine days to organise his departure from Afghanistan. The applicant also claimed that three or four days after he had left, the Taliban asked his uncles where he was and they said he had left Afghanistan.
22. Overall I consider the applicant’s evidence regarding his encounter with the Taliban was farfetched and lacking in credibility. I find it difficult to accept that the Taliban would discover, a year after the applicant’s return to Afghanistan, and almost [number] years after he had left the ANA, that he had been a soldier, particularly given he enlisted under a fake name. I also find it difficult to accept that the Taliban would order the applicant to join them in the circumstances described, and threaten him and his family, then let him go as he needed time to prepare, and not make an effort to find him until four days after his departure. I have considered the applicant’s explanation that the Taliban operate in the villages outside of Jalalabad city and that they do not usually come into the city itself. However, I still find it lacking in credibility that the Taliban would go to the effort of targeting the applicant’s [vehicle], issuing him with an ultimatum, but then not follow up for more than two weeks. Given the

evidence overall, I do not accept the incident with the Taliban occurred or that the applicant left Afghanistan in early 2013 for the reasons claimed.

23. The applicant claims that his father was a long term employee of [Agency 1] in Jalalabad, who was killed in 2017 during an IS attack on his workplace. The applicant has provided various copies of his father's employment ID cards, professional membership cards, and bank cards, which list his occupation as [different roles]. The applicant has also provided media reports and videos, which I am satisfied indicate that a man bearing the same name as his father was killed along with [several] other employees of the [agency]. I accept the applicant's claims in this regard.
24. During the SHEV interview the delegate asked the applicant to explain how the circumstances of his father's death were relevant to his own situation should he return to Afghanistan. The applicant responded that his father was a civilian and that if IS would take a civilian's life then they would come after him because he had been a soldier. The applicant also claimed that both he and his father had an association with the Afghan government, and that he is against the Taliban's strict ideology of killing innocent people. The applicant added that he faces being forcibly recruited by such armed groups upon return because of his weapons training, and that when he refuses, he will be killed.
25. It is plausible, and I accept, that IS launched the 2017 attack on [Agency 1] in Jalalabad because it is [an agency connected to] the Afghan government. I also accept that government employees, such as the applicant's father, were the intended collateral damage of the attack. DFAT indicates that insurgent and terrorist groups, particularly the Taliban, have openly targeted Afghans of all ethnicities working for, supporting or associated with the government and/or the international community. This includes, but is not limited to, government employees, judges and prosecutors, judicial workers, police, and Afghan and international security force personnel. Such people are often subject to intimidation, threats, abduction and targeted killings. Attacks occur throughout Afghanistan, but are particularly prevalent in Kabul. While I have had regard to DFAT's assessment that people working for or supporting the government or international forces, or imputed to be doing so, face a high risk of violence, I have given greater weight to the applicant's personal circumstances.
26. The applicant claims that he left the ANA in [year] and for the reasons given above I am not satisfied that he did so because of any personal threat against him from the Taliban as he claims. For the reasons given above I am also not satisfied that the 2013 incident with the Taliban occurred. The applicant has consistently advised that he has no further proof, apart from one photograph, of his time with the ANA and that he used a fake name to enlist. More than ten years have now passed and the applicant has not expressed any interest in working in such a role should he return to Afghanistan. Nor is there any credible evidence before me to support the applicant's claims that AGEs are forcibly recruiting former soldiers with weapons skills, like the applicant. While I accept the applicant does not support the ideology of IS or the Taliban, he has not claimed that he wants or intends to express this opinion to anyone, or otherwise take a stance against them upon return. There is also no evidence before me that prior to the 2017 attack the applicant's father was personally known to IS or that he was specifically targeted on that occasion. The applicant has also confirmed that the remainder of his family, being his mother and other siblings, continue to live in Jalalabad city and have not faced harm from IS or any other source. Given the circumstances, I consider the chance that the applicant would come to the adverse attention of any AGEs on account of his father's work, his own previous service with the ANA, or any pro-Afghan government profile or political opinion, to be remote.

Returnee from the West

27. The applicant claims if he returns to Afghanistan he will be imputed to be a spy, or an infidel, due to the amount of time he has spent seeking asylum in Australia, a Western country, and that the Taliban, or other AGEs, will seriously harm or kill him for this reason. The UNHCR notes instances where AGEs have targeted and killed individuals who are perceived to have adopted values and/or appearances associated with Western countries.² DFAT notes that Amnesty International has also reported that there have been cases in which returnees from Europe have been killed after returning to Afghanistan. However, DFAT assesses that these cases are more likely to have been connected to the dangerous general security situation, which affects all Afghans.³ DFAT also understands that most returnees take measures to conceal their association with the country from which they have returned, and keep a low profile on return, although it does not make this point in relation to Jalalabad specifically. DFAT assesses that people in this situation do not face a significantly higher risk of violence or discrimination than Afghans with an otherwise similar profile.⁴
28. I accept that while some returnees may face discrimination in their home communities, the applicant would be returning to Jalalabad, which DFAT indicates is one of Afghanistan's major urban centres (along with Kabul and Herat). Due to its proximity with to the border, Jalalabad has attracted particularly high numbers returnees from Pakistan, many of whom have been outside of Afghanistan for decades. While DFAT indicates that this has put considerable strain on local resources and services,⁵ the applicant's family have lived in Jalalabad for many years and I am satisfied he would not be in the same situation as other returnees who do not have family links. Given the country information regarding the situation for returnees in Jalalabad, and the applicant's own circumstances, I am not satisfied he would need to keep a low profile there or that he would otherwise face harm as a returnee from the West.

Travel to Jalalabad

29. I have also considered whether the applicant would be able to safely access his home area of Jalalabad upon return to Afghanistan. DFAT indicates that returnees from Western countries are almost exclusively returned to Kabul and I am satisfied the applicant would transit there on his way to Jalalabad, a journey which would likely be made by road from Kabul airport.⁶
30. The applicant previously worked [in a job] and advised the delegate that he used to travel regularly between Jalalabad and Kabul by car, a journey of several hours and that there were Improvised Explosive Devices (IEDs) on the roads around Jalalabad. I accept the applicant's evidence in this regard. DFAT notes that when abductions of travellers do take place it is difficult to establish motivation as criminals and insurgents on roads tend to target people of all ethnicities, who appear wealthy, in attacks that can include kidnapping for ransom. DFAT concurs with the assessment of the United Nations Assistance Mission in Afghanistan (UNAMA) and other international sources that the primary motivations for kidnapping/abductions include taking hostages for ransom or prisoner exchange, or to target those with connections to the government or international community.⁷ Given the evidence before me I accept that journeys by road in Afghanistan present risks for all travellers. However, the applicant has not

² United Nations High Commission for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016

³ DFAT, "DFAT Country Information Report Afghanistan", 27 June 2019, 20190627113333

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

claimed that he intends to work [in the same job] again upon return. Nor, for the reasons already given, do I accept that the 2013 incident on the road with the Taliban ever occurred and there is no other evidence before me to indicate that the applicant has ever experienced harm on these roads. There are also no reports before me to indicate that persons with a profile like the applicant, including those who have been resident in a Western country, are being targeted on the roads between Kabul and Jalalabad (or anywhere else). Accordingly, I am satisfied the applicant does not face a real chance of harm accessing, or moving around, his home area.

31. I have also considered whether the applicant would face harm as a result of the general security situation in Jalalabad upon return. The country information before me indicates that Nangarhar Province is one of the more volatile in Afghanistan, with a marked IS and Taliban presence. In recent years there have been a number of high profile IS attacks on targets of interest in Jalalabad, including the [2017] attack on [Agency 1], which resulted in the death of the applicant's father, and in mid-2018 [attacks] on [another state agency] which resulted in a number of civilian deaths and casualties. IS were also responsible for a number of IEDs placed around the perimeters of schools in a campaign to deter education amongst the general population, but particularly the education of girls. In January 2018 IS stormed the Save the Children office in Jalalabad, killing at least six and injuring 27.⁸
32. In 2018 Nangarhar and Kabul were the most impacted provinces in terms of civilian casualties (681 deaths in Nangarhar, and 1,134 injuries) which in Nangarhar represented a more than 100 per cent increase on 2017. Most civilian casualties were the result of suicide/complex attacks. However UNAMA documented 581 deaths and 1,192 injuries across Afghanistan in the first quarter of 2019. This represented a 23 per cent decrease in overall civilian casualties as compared to the same period in 2018, and is the lowest for a first quarter since 2013. UNAMA attributed this to a decrease in casualties from suicide IED attacks, and particularly harsh winter conditions (that may have contributed to a reduction in fighting). Civilians living in Kabul, Helmand, Nangarhar, Faryab, and Kunduz provinces were most affected. DFAT describes the targeted operations against IS by the Afghan Government and international military forces as "rigorous".⁹ Overall, I am satisfied that although IS and the Taliban have a presence in Nangarhar, this has been met with sustained resistance from the Afghan and international forces.
33. While I accept that the security situation in Nangarhar Province is volatile, based on the most recent country information before me, I find the chance that the applicant would be harmed as a bystander, or inadvertently caught up in an attack, or otherwise harmed through generalised violence, is remote. For the reasons already given I am satisfied the applicant is not known to any AGE, and his mother and siblings continue to reside in Jalalabad unharmed, despite the extremely unfortunate death of his father in [2017]. I am also satisfied that any harm the applicant may possibly face in relation to generalised violence would also not be for the essential and significant reason or reasons of his race, religion, nationality, membership of a particular social group or political opinion, but rather a consequence of any ongoing insurgency or insecurity present in the country overall. Accordingly, s.5J(1)(a) and 5J(4)(a) of the Act would also not be satisfied.
34. Based on the applicant's personal circumstances and recent country information, I am not satisfied that the applicant faces a real chance of harm in or around Jalalabad due to his profile as a former ANA soldier and returning asylum seeker from the West, his father's death in 2017,

⁸ Ibid.

⁹ Ibid.

any real or imputed anti-Taliban, anti-IS, or anti-AGE political opinion, the general security situation, or at all.

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

Refugee: conclusion

36. 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

37. 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

38. 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.
39. 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.
40. I have found that the applicant does not face a real chance of any harm in Afghanistan for the reasons claimed. Based on the same information, and for the reasons set out above, I find he does not have a real risk of suffering significant harm in Afghanistan.
41. 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

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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