



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SYRIA
IAA reference: IAA20/08520

SYRIA
IAA reference: IAA20/08522

SYRIA
IAA reference: IAA20/08521

SYRIA
IAA reference: IAA20/08524

SYRIA
IAA reference: IAA20/08523

Date and time of decision: 22 July 2020 15:47:00
C Wilson, Reviewer

Decision

In respect of the referred applicant (IAA20/08520) the IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

In respect of the other referred applicants (IAA20/08521; IAA20/08522, IAA20/08523; IAA20/08524), the IAA remits the decision for reconsideration with the direction that:

- the other referred applicants are members of the same family unit as the above-named applicant and satisfy the criteria in s.36(2)(b)(i) of the *Migration Act 1958*.

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 applicants (the applicants) claim to be Shias from Aleppo, Syria. They are a family group of a father (applicant 1¹), mother (applicant 5²) and their three children (applicants 2, 3 and 4³). They arrived in Australia as unauthorised maritime arrivals [in] May 2013. They applied for Safe Haven Enterprise Visas on 18 September 2017.
2. A delegate of the Minister for Home Affairs (the delegate) refused the visas on 19 June 2020. The delegate accepted the applicants were Shias from Syria but had concerns about the credibility of some of their claims because she considered some of the information provided to the Department was inconsistent and contradictory. The delegate did not accept a relative was killed by the Free Syrian Army. The delegate found the applicants would be returning to a government controlled area in Syria and as persons who would be seen as loyal to the government they would not face a real chance or real risk of harm.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 17 July 2020 the IAA received three emails containing numerous documents from the applicants' representative. The documents include legal submissions, statutory declarations from applicants 1 and 5, medical records and reports, and country information. The representative submits that the statutory declarations are not new information. I agree the information in the statutory declarations is not new information, as it is comment on the delegate's decision and clarification of material already before me. I have taken these statutory declarations into account.
5. The medical and country information is new information. The representative provides a number of reasons why they say there are exceptional circumstances to justify considering this new information. These include arguments that: the information responds to the delegate's concerns and may make a material difference to the outcome of the IAA's decision; there was a long delay between the SHEV interview in September 2019 and the decision in June 2020; that in this limited form of review there is a risk of a decision being made that is not fair or just; and that a failure to consider the relevant information would result in the IAA failing to discharge its statutory task. I have considered these arguments but find them unpersuasive for the following reasons. Whilst there was a delay between the SHEV interview and decision, the delegate invited the applicants on two occasions during that period to respond to adverse information and concerns of the delegate. The applicants were clearly on notice of the delegate's concerns. The applicants responded on both occasions and were able to provide any information they wanted considered with their applications up until the decisions were made. In relation to the fairness arguments raised by the representative, I do not accept the failure to consider the new information results in an unfair decision when I am able to make a positive decision on the information already before me. For these reasons, I am not satisfied there are exceptional circumstances to justify considering the new information.

¹ IAA20/08520

² IAA20/08524

³ IAA20/08521, IAA20/08522, IAA20/08523

Applicants' claims for protection

6. Applicants 1 and 5 provided written statements of claims and both were interviewed by the delegate. They also advanced claims on behalf of their children.

7. Applicant 1's claims can be summarised as follows:

- He is a Shia Muslim of Arab ethnicity. He is married to applicant 5 and they have three children.
- He completed his compulsory military service from [year] to [year] and then worked in [a job sector] and as [an Occupation 1].
- He had no problems in Syria until the war broke out in 2011. Violent Sunni Muslims began to target people who did not adhere to their faith, including Shia Muslims like him. The Syrian government tried to protect various religious groups, and consequently even Shias with no affiliation to the government were seen by the Sunni extremists as government allies.
- His brother worked in [the military]. Some of his brother's friends were recruited by insurgent groups opposed to the Syrian government, and they told these groups about the brother. His brother received threats from the insurgents, including that they would harm his family.
- He had a [cousin] who was mayor in the town of [Town 1], [Province 1]. In May 2012 this cousin was kidnapped for being Shia and only released when a ransom of [amount] Syrian pounds was paid.
- In mid-2012 [Suburb 1], where the applicants lived, was attacked by the Free Syrian Army (FSA). When applicant 1 was at work the FSA entered his house and beat his wife and children. They targeted his house because they were Shia but also because of applicant 1's brother's work in [the military]. His wife's brother was at their home during this attack and the FSA took him with them and later killed him. Applicant 1 tried to get to his house but was shot at when driving there. He fled to his mother's house in another part of Aleppo, and found his wife and children had also fled there.
- He realised Syria was not safe and looked for a way to leave. He arranged passports for the family and arranged for his wife and children to take a bus to town called Tartus, near the border with Lebanon. He joined them later in Tartus, and they flew out of Syria from a town called Latakia to [Country 1]. From there they flew to [Country 2] and then made their way to Australia, where he had a sister living as a permanent resident.
- He and his family cannot return to Syria because the country is at war, and they will be targeted, attacked and possibly killed. He will be targeted for his Shia religion and as a returning failed asylum seeker. He risks harm from either the government or the insurgents, because both sides will impute him with a political opinion that is against them. He will be considered a traitor by groups loyal to the Syrian government because he left the country and did not fight. He may be forced back into the army or harmed if he refuses. Insurgent groups may also force him to join them. As [an Occupation 1] he would be at risk when travelling through checkpoints.

8. Applicant 5's claims can be summarised as follows:

- She is a Shia Muslim of Arab ethnicity. She is married to applicant 1 and they have three children.

- In July or August 2012 she was at home with her children and her brother when around 6 men from an insurgent group called the FSA entered her home. They beat her and the children with their rifles, and took her brother because he was a Shia. She and the children fled to her mother in law's house in another part of Aleppo. Her husband, applicant 1, met them there later.
- The FSA killed her brother and announced this on their Facebook site. Someone from the FSA also rang her parents to tell them about his death.
- She and her family feared for their lives in Syria and decided to leave. Her husband made all the arrangements. She left Aleppo with the children in March 2013 and travelled to the seaside town of Tartus. Her husband joined them later and they left Syria on their own passports [in] April 2013.
- She fears returning to Syria because the country is at war, and they will be targeted, attacked and possibly killed. She will be targeted for her Shia religion and as a returning failed asylum seeker. She risks harm from either the government or the insurgents, because both sides will impute them with a political opinion that is against them. She and her daughter are at risk of sexual violence as women in Syria.

9. Applicant 2's claims can be summarised as follows:

- He is a child of Arab ethnicity, raised as a Shia Muslim.
- He has a number of complex medical conditions, including [specified condition], for which he needs high level medical care. He would not be able to obtain this level of care in Syria and his health and life would be severely compromised.
- Because of the conflict in Syria he would be at risk of kidnapping, forced recruitment, violence, child labour, human trafficking and a denial of education.

10. Applicant 3's claims can be summarised as follows:

- She is a child of Arab ethnicity, raised as a Shia Muslim.
- She remembers some traumatic experiences in the war before the family left Syria and is traumatised by the memories and unwilling to return to Syria.
- As a female she will be at risk of sexual violence, which has been prevalent in the conflict. She will also be at risk of kidnapping, forced recruitment, forced or underage marriage, violence, child labour, human trafficking and a denial of education.

11. Applicant 4's claims can be summarised as follows:

- He is a child of Arab ethnicity, raised as a Shia Muslim.
- He remembers some traumatic experiences in the war before the family left Syria and is traumatised by the memories. He refuses even to speak Arabic and will not talk about Syria or consider returning there.
- Because of the conflict in Syria he would be at risk of kidnapping, forced recruitment, violence, child labour, human trafficking and a denial or education.

Refugee assessment

12. Under s.36(2)(a) of the Act a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection

obligations because the person is a refugee. 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

13. 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.

14. The applicants have consistently claimed to be Syrian nationals. To verify this their identity documents including National Identity Cards (NICs) for applicants 1 and 5, the family book, and driver’s licence for applicant 1, were referred to the Department’s document examiners. The document examiner concluded these documents were legitimately manufactured, with no signs of fraudulent alteration, and were genuine Syrian documents. Based on the consistency of the claim and the verified identity documents, I find the applicants are nationals of Syria and that Syria is their receiving country. The applicants claimed to have lived in Aleppo prior to departing Syria, in districts called [Suburb 1] and [Suburb 2]. They also have connection to the town [Town 1] in [Province 1] where the family is originally from. However as they lived primarily in Aleppo prior to leaving Syria, I consider this is the area they are likely to return to.

15. I note that questions were raised within the Department as to whether any of the applicants may be [Country 1] nationals or have a right to enter and reside in [Country 1]. Applicants 1 and 5 were interviewed a few months after their arrival in Australia to determine their identity and nationality. Applicant 1 had a Syrian NIC and other identification, which prima facie appeared to be genuine. He also had credible and detailed knowledge of Aleppo and the conflict occurring there. The interviewer concluded applicant 1 was in all probability a Syrian national. Applicant 5 did not have her NIC when she arrived in Australia. The Departmental officer interviewing her for the identity interview suspected that the lack of documentation, and other concerns about her nervousness in the interview, might indicate she was in fact a national of [Country 1]. The officer hypothesised that while applicant 1 was a Syrian national, applicant 5 could be [a national of Country 1] and that they were living in [Country 1] before coming to Australia. This hypothesis seems to have raised suspicion about applicant 5’s credibility and the credibility of the family generally, which ultimately appears to have been unwarranted. The officer who interviewed applicant 1 discussed the hypothesis that the family may have come from [Country 1], but noted *‘should the [Syrian] family registration document surface, and should it be found to be genuine,*

then this may allay any suspicion in this regard'. The applicants did in fact produce an original family book and it was examined and found to be a genuine document. Enquiries were also made by the Department with [Country 1], with the applicants' consent, to ascertain whether there was any record of the applicants as nationals or temporary residents in [Country 1]. The response from the [Country 1] authorities was that there was no record of the applicants in [Country 1]. There is therefore no evidence before me to suggest the applicants have any connection to [Country 1], and no evidence they have any right to enter or reside in [Country 1].

16. The applicants claim to have left Syria in April 2013 due to the ongoing conflict. They claim they fled their home in [Suburb 1] district, Aleppo, in around July 2012 after [Suburb 1] was taken over by the FSA. They claim to have fled to applicant 1's mother's house in [Suburb 2] where they lived until they could arrange to leave Syria in April 2013. The applicants claim that during the attack on [Suburb 1] in July 2012 their house was invaded and the brother of applicant 5 was taken, and later killed. Applicant 1 claims that during this attack he was shot at whilst trying to drive home. They claim their house was specifically targeted because they were Shias but also because applicant 1's brother worked in [the military]. The delegate found the applicants' account of these events was not credible because she was concerned by inconsistencies in the accounts between the biodata interview, entry interview, identity interview, written applications, and SHEV interview. The representative argues the identified inconsistencies are minor and reasonably explainable or due to misinterpretations, mental health issues and the significant delay since the events and the since the applicants arrived in Australia. The representative argues more weight should be given to the fact the claims have been broadly consistent since their earliest interview than to minor inconsistencies.
17. Country information does support the applicants' claim that [Suburb 1] district in Aleppo was attacked in July 2012 by the FSA.⁴ The FSA were reported to have entered [the area in] July 2012 and took over the area after clashing with government forces. [The rebels] attacked security facilities and other targets in hit and run clashes, whilst the government forces responded by shelling [the area]. Thousands of [civilians] were reported to have fled the city for safer neighbourhoods and suburbs.
18. I have considered the inconsistencies raised by the delegate and the applicants' responses. Taking into account the country information and the broad consistency of their claim, I consider it is plausible the applicants were caught up in the attack on [Suburb 1]. I consider it unnecessary to make firm findings on the detailed claims of what they say happened to them in July 2012, because I consider the details of the event from 8 years ago has little relevance to their risk of harm in the reasonably foreseeable future. Having regard to their claims made on arrival and throughout the SHEV application, I accept the applicants left Syria for reason of the conflict in Aleppo, and Syria more broadly, and that they had been personally impacted and traumatised by that conflict.
19. The conflict in Syria began in 2011, during a period of protests within the region known as the 'Arab Spring'. DFAT reports that a lack of political freedom and economic woes in Syria fuelled resentment towards the government, as well as the reported detention and torture of young protestors who had written pro-Arab Spring graffiti. In March 2011 peaceful protests against the torture of the young protestors were met with increasing aggression from the Syrian government. By July 2011 military defectors formed the group FSA with the aim of overthrowing the government, and the country headed into civil war. Other opposition groups quickly emerged, with the Islamic State in Iraq and the Levant (ISIL) adding complexity to the instability in Syria. Other states became involved or supported groups in the conflict. DFAT reported in

⁴ [Source deleted]

2017 that a range of initiatives to broker a resolution in Syria had been tried but failed to end the violence or the indiscriminate attacks on civilians. By 2016 more than 400,000 people had died in the conflict, and around 13.5 million people (out of a population of around 17 million) were in need of humanitarian assistance.⁵

20. The current situation in Syria is that the Syrian regime had regained control over 60% of the country, including Aleppo. ISIL has been considerably weakened and has lost territory it once controlled. However the security situation remains volatile, with the regime's military weakened after years of conflict. The regime is reported to be struggling to control areas outside of Damascus, with a lack of forces to secure the areas it retakes. Within the areas it controls it reportedly pursues punitive policies against its own population. There are reports civilians have been forcibly conscripted, arbitrarily arrested, tortured and even executed.⁶
21. Applicant 1 claims he will be harmed as a returnee to Syria for having left in 2013. He says he will be viewed as a traitor by the government and imputed with a political opinion that he is opposed to them. He fears he is caught in the middle as the government will believe he is pro-insurgents, and the insurgents will believe he supports the government.
22. In December 2012 the UK Upper Tribunal, in a country guidance case, considered the situation for Syrians returning after fleeing the conflict. They concluded it was likely a returnee would face a real risk of arrest, detention and serious mistreatment during that detention, as a result of an imputed political opinion for being a failed asylum seeker who was forcibly returned. In its 2016 report on Syria the UK Home Office referred to this Upper Tribunal decision and reported that since that guidance decision the scale and spread of human rights abuses had only widened.⁷
23. In October 2017 DFAT reported the Syrian authorities may view individual who left Syria with suspicion, and that all civilians were vulnerable to physical harm caused by deliberate targeting, politically motivated or sectarian-related detention. The government and pro-government forces had killed, tortured and detained civilians on a large scale, and impunity for government actors was pervasive and deeply embedded.⁸ The US Department of State reported the Syrian regime is suspicious of returnees because they impute returning Syrian refugees as supporters of the opposition. They have also refused to allow Syrians to return, with reports of around 10% being denied the right to even re-enter Syria.⁹ The UNHCR reported in 2017 that conditions were not safe to return civilians to Syria and that persons perceived to be opposing the government were likely in need of international protection.¹⁰
24. The Assad regime had stated it will ensure the security of returnees and that none will be subject to abuse. The country information does not support this assertion. The Office of the High Commissioner for Human Rights stated in February 2019 that despite changes in Syria those returning faced a lack of rule of law, widespread human rights violations, and that safe and sustainable returns were not possible.¹¹ A civil rights group called the Syrian Association for Citizens' Dignity (SACD) reported in October 2019 that their research concluded it is not safe for displaced Syrians to return to Assad-held areas because widespread and systematic human

⁵ DFAT, Thematic Report on Conditions in Syria, 23 October 2017.

⁶ US Institute of Peace, Syria Study Group Final Report, 24 September 2019.

⁷ UK Home Office, Country Information and Guidance Syria: the Syrian Civil War, August 2016.

⁸ DFAT, Thematic Report on Conditions in Syria, 23 October 2017.

⁹ US Department of State, Syria 2018 Human Rights Report, 12 March 2019.

¹⁰ UNHCR, International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update V, 3 November 2017.

¹¹ EASO, Country of Origin Report on Syria: Targeting of Individuals, 10 March 2020.

rights violations continued to be committed by the regime against Syrians living in these areas. They reported that returnees and others living in these areas lived in fear and felt extremely vulnerable and unsafe. Their main sources of fear were said to be arbitrary arrest, forced conscription, and the chaotic security situation caused by the presence of regime forces and militias. There were reports of the regime's security forces harassing returnees and accusing returnees of committing treason.¹²

25. The European Asylum Support Office (EASO) reported in 2020¹³ that in a recent survey around 75% of Syrians returning to government-held areas had been harassed at checkpoints, in government offices, or in the street, or been arrested. Returnees were being detained at the border, from an hour to several days or longer, and forced to give extensive information about their contacts and time abroad. They reported forced conscription into the military despite promises before their return that they would be exempted. EASO also reported information from an organisation called the European Institute of Peace (EIP) who found there had many cases of arrests and torture by government security forces of returnees, and even deaths in custody. The EIP identified those most susceptible to arrest on return included persons who worked in sectors associated with the opposition (eg journalists, aid workers), those returning without seeking security permission prior to returning, men of military age, and those with family members forcibly displaced to Idlib or Aleppo. EIP states however that it should not be assumed that only those within those identified groups were at risk of detention or arrest now or in the future.¹⁴ I note applicant 1 has completed military service and is older than the 42 years of age that has traditionally been the cut off for service, but there are reports of the age limit being raised to 50 and that even those who completed service have been re-conscripted.¹⁵
26. I note the delegate considered applicant 1 would be seen as loyal to the government because he had previously undertaken military service, his brother worked in [the military], and had family still in Syria who appeared not to have been harmed. I note his military service was completed more than 25 years ago and I do not consider this long past compulsory military service would be viewed as evidence of loyalty. I note also the brother no longer works in [the military], and was in fact permanently injured in a mortar attack, although it is not known who caused the attack or whether he was targeted. As discussed below, I accept opposition groups may impute him with a pro-government political opinion because he is a Shia from Aleppo. However I consider the country information referred to above from sources such as DFAT, US Department of State and EASO about the suspicion and anti-regime political opinion imputed to returnees supports a conclusion that as a Shia from Aleppo who left in early 2013 he may not be viewed by the authorities as loyal to the government.
27. As found above, I consider applicant 1 would likely return to Aleppo, an area that is controlled by the Syrian regime. I rely on the information before me that the regime has a tenuous hold on its territory, is suspicious of returnees, and has a record of inflicting retaliatory policies against civilians. In such circumstances I consider his chance as a returnee of being harassed, arrested or detained by the government or government forces is more than remote and that it amounts to a real chance. Having regard to the country information referred to above regarding human rights abuses committed by the Syrian regime and its forces, including arbitrary detention, significant physical mistreatment or even threat to life, I am satisfied this harm amounts to serious harm. I accept the essential and significant reason for the persecution would be an

¹² SACD, Vengeance repression and fear: Reality behind Assad's promises to displaced Syrians, 17 October 2019.

¹³ EASO, Country of Origin Report on Syria: Targeting of Individuals, 10 March 2020.

¹⁴ EASO, Country of Origin Report on Syria: Targeting of Individuals, 10 March 2020.

¹⁵ DFAT, Thematic Report on Conditions in Syria, 23 October 2017.

imputed political opinion as a returnee or his membership of a particular social group 'returnees', and that it would include systematic and discriminatory conduct.

28. I find the Syrian authorities cannot offer applicant 1 protection in circumstances where they are the agent of the persecution. There is no information before me to support a conclusion that a non-state party or organisation could offer him effective protection in Syria.
29. I also accept applicant 1's fear extends to all areas of Syria. Although the Syrian authorities do not control all of Syria, they likely control any border he may return through (as he would most likely be returned by international flight) and in reliance on the country information referred to above, I consider he faces a real chance of harm at the border on return. However if he was able to return, bypass the Syrian authorities and move to an area outside their control, I also accept applicant 1's claim that he fears harm from groups opposing the Syrian government. In addition to being viewed with suspicion by the government as a returnee, he could equally be viewed with suspicion by the opposition groups and imputed with a political opinion that is pro-government based on his Shia religion and place of origin in Aleppo. I rely on the assessment by UNHCR that persons perceived to be supporting the government are at risk in areas under de facto control of armed groups.¹⁶ I consider the country information before me supports a finding a returnee with an imputed political opinion of being pro-government faces a real chance of harm from opposition armed groups in control of areas outside the regime's territory. I am satisfied the persecution would amount to serious harm, would include systematic and discriminatory conduct, and that he could not access effective protection.
30. For these reasons I find applicant 1's fear of persecution is well-founded.
31. Given my positive findings in relation to applicant 1's claims as a returnee to Syria, I have not needed to consider his other claims for protection. I also find it unnecessary to separately consider the claims of the other applicants, as for reasons given below I find they meet the criteria for protection visas under s.36(2)(b).

Refugee: conclusion

32. The applicant IAA20/08520 meets the requirements of the definition of refugee in s.5H(1). The applicant IAA20/08520 meets s.36(2)(a).

Member of same family unit

33. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include spouse and dependent children.
34. I rely on the family book and the consistent and plausible claims to be a family unit to find applicant 5 is the spouse of applicant 1, and that applicants 2, 3 and 4 are the children of applicant 1. I am satisfied the children are his dependent children as defined in r.1.03 as they

¹⁶ UNHCR, International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update V, 3 November 2017.

are all under the age of 18. I find applicants 2, 3, 4 and 5 are members of the same family unit as applicant 1.

35. As applicant IAA20/08520 is a person mentioned in s.36(2)(a), applicants IAA20/08521, IAA20/08522, IAA20/08523 and IAA20/08524 meet s.36(2)(b)(i).

Decision

In respect of the referred applicant (IAA20/08520) the IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

In respect of the other referred applicants (IAA20/08521; IAA20/08522, IAA20/08523; IAA20/08524), the IAA remits the decision for reconsideration with the direction that:

- the other referred applicants are members of the same family unit as the above-named applicant and satisfy the criteria in s.36(2)(b)(i) of the *Migration Act 1958*.

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.