



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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AFGHANISTAN

IAA reference: IAA18/05824

Date and time of decision: 10 January 2019 17:47:00

J McLeod, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) arrived in Australia [in] June 2013 and lodged an application for a Safe Haven Enterprise visa (SHEV) on 4 May 2017. A delegate of the Minister for Immigration and Border Protection (the delegate) interviewed the applicant on 12 June 2018 and she refused the grant of this visa on 9 October 2018.

### 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 3 November 2018 the IAA received a submission from the applicant. For the most part the submission reiterates the applicant's claims and addresses the delegate's reasoning and findings and I am satisfied that these parts of the submission amount to arguments and not new information.
4. However the submission also contains new information about Abdul Raziq Achakzai, whom the former police chief and warlord in Afghanistan who was killed by the Taliban on 18 October 2018. The applicant submits that he, a commoner cannot be expected to be safe after returning to Afghanistan as a failed returnee when this police chief, a person who had security around him at all times, was himself not even safe from the Taliban. While the applicant raised similar arguments with the delegate the information pertaining to Abdul Raziq in particular, and about his death in 2018 is new information. Given that Abdul Raziq's death postdates the delegate's decision I am satisfied that this information could not have been provided prior to the decision being made. However the applicant has not provided any information to indicate that the applicant has any connection to him, or others in similar positions, or the location in which the fatal incident occurred, nor any supporting evidence or reports to indicate that security in his area has been affected by Abdul Raziq's death. The country information already before me from the sources considered by the delegate contains numerous examples of targeting of police, army, security and government personnel including those in high levels, and it also contains information on the security situation in Kandahar. As such I am not satisfied that there is anything about this new information which points to there being exceptional circumstances. Having regard to all relevant factors I am not satisfied there are exceptional circumstances to justify considering this new information.
5. The applicant states in the submission that there are compassionate and compelling grounds in his case which the delegate overlooked however there is no further explanation. I have considered whether to invite the applicant to provide information about this but I take into account that the delegate conducted a thorough SHEV interview with the applicant, and that he was advised during the interview of the importance of providing all of his claims in the SHEV process. The delegate told the applicant he may not have another chance to present claims and she put adverse information to him for comment. He was also advised that any further information he provided before a decision was made would be considered. The decision was not made until more than three months after the interview and nothing in the referred material indicates that he provided, or indicated that he intended to provide any further information during this time. He has not requested an opportunity to provide further information about his circumstances to the IAA. I am satisfied there is sufficient information

before me to make a decision and that an invitation to provide information is not warranted in the circumstances.

6. I have obtained new information from the United Kingdom Home Office (UKHO) about the situation in Afghanistan for returnees and persons perceived of being westernised.<sup>1</sup> The information is recent and relevant to the applicant's claims and the UKHO is an authoritative source which I note the delegate drew other country information from. I am satisfied that there are exceptional circumstances to justify considering this new information.

### **Applicant's claims for protection**

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7. The applicant's claims can be summarised as follows:
  - He is a Pashtun Sunni Muslim and Afghan national from Kandahar, Afghanistan.
  - In around May 2013 a government military vehicle (a troop carrier) arrived at his [business] in [Town 1] with its sirens on. When the applicant [completed a purchase], he saw two people tied up in the back, who he assumed were captured Taliban members. There were also about five government soldiers in the vehicle. They stayed at the shop with the vehicle for about four to five hours. Three days later, he was threatened by a six Taliban members on motorbikes. They asked him about what had happened three days earlier and demanded he tell them where the two arrestees were taken. They told him to go away and think about it and threatened to take him if he did not tell them later. He knew he couldn't meet their demands. As he could not escape the Taliban in Afghanistan his sister's husband advised him to leave the country. He left two to three weeks after he was threatened.
  - According to his mother, the Taliban patrolled their local streets numerous times in 2014. He fears they were looking for him.
  - He fears being harmed and/or killed by the Taliban and the government. He fears the Taliban will harm him because of what happened in his shop and their suspicion that he was aligning with/working with the government. He fears the government would harm him because they would suspect he was working with the Taliban, and because he left Afghanistan illegally. He also fears being harmed because he is Sunni and Pashtun.

### **Refugee assessment**

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8. 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**

9. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:

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<sup>1</sup> United Kingdom Home Office, "Country Policy and Information Note Afghanistan: Afghans perceived as "Westernised", 1 January 2018, OG9EF76792

- 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.

*Identity / Background / Family*

10. While there were some anomalies with respect to the details in the applicant's Taskera and driver's licence and the claimed whereabouts of his and his father's original identity documents, I accept the applicant is a Sunni Pashtun from the Kakar tribe who lived in the [two specified] areas of Kandahar in Southern Afghanistan.
11. I accept that after his father's death the applicant's uncle assumed responsibility for the applicant, his mother and siblings and that they and the uncle's family moved together to [Village 1]. I accept his [family members] now live in Quetta, Pakistan with his [other specified family members]. I accept his uncle and family also moved to Quetta due to recent fighting in [Village 1] but that they have plans to return to Afghanistan.

*Imputed pro-government opinion arising from [business] incident*

12. The applicant's central claim is that he will be harmed by the Taliban who suspect he is aligned with the government. He claims they developed this suspicion after a government military (Afghan National Army or 'ANA') vehicle holding two arrested Taliban members and several military officers was stopped at his [business] for several hours in May 2013. He claims that three days after this he was stopped on the road by six Taliban members wanting to know where the arrestees had been taken. He claims they told him to think about it and if he did not give them the information they would take him and kill him. The applicant claims that he took the threat seriously and quickly left area. He claims that following his departure, on three or four occasions the Taliban paid children in the area to look for the applicant at his house, and that the Taliban shot his [Relative A] in 2018 because he would not give them the applicant's whereabouts.
13. I have reviewed the various statements the applicant has given about these events, across his Entry interview, his written Statement of Claims prepared for his SHEV application and his SHEV interview, and while there are a number of inconsistencies in the applicant's accounts I nonetheless accept that the applicant worked in a [business] and that he became fearful of Taliban retaliation after two arrested Taliban members were held for several hours by the military in the applicant's presence, at his shop.
14. I do not however accept that the Taliban showed any interest in the applicant following this event. I consider it implausible that the Taliban believing the applicant had some involvement or knowledge of their comrade's capture and whereabouts would have waited three days before approaching him for information, and, that on doing so, they would have released the applicant to think about it, even under threat. On the applicant's own evidence the Taliban

knew where he lived and worked and while he claims he did not return to his shop after this, there is no indication before me that the Taliban or anyone came looking for the applicant in the week that he remained in Afghanistan. I also find the applicant's claims about the Taliban getting children to look in his house for him to be vague and implausible and I do not accept the suggestion in his written statement that the Taliban patrolling the streets in 2014 were looking for him. Further, while I accept the applicant's [Relative A] was shot and injured in 2018, I find it was an unrelated incident and did not result from Taliban looking for the applicant. I find the timeframe of several years after the applicant left the country to be implausible. I note too that the applicant does not claim the Taliban ever personally targeted, threatened or even approached any other members of his family in [Village 1] or even [another area] where the applicant's mother's relatives have always lived and I find this to be incongruous with the applicant's claims that the Taliban have been looking for him. While the applicant's mother and siblings now reside in Pakistan, they left when his [sibling] got married to a [relative] residing there and there is no suggestion they left due to any problems connected with the applicant or the Taliban. Similarly, while the applicant's uncle's family also went to Pakistan, with the exception of [Relative A] who went to India for treatment, the family did not leave Afghanistan immediately after the shooting but rather, remained in the area for another few months and the applicant explained at the SHEV interview that they had left for Pakistan fighting in the area; he does not claim they faced problems or left Afghanistan on account of the applicant's claimed issue with the Taliban or even due to any association with the attack on [Relative A]. I am satisfied these relatives all left Afghanistan for reasons unconnected with the applicant.

15. Overall, I find the applicant's claims that he was, and continues to be wanted by, or in fact or any interest to, the Taliban are not credible. I do not accept the Taliban have imputed the applicant as someone aligned with, or working with, the government, nor of having any other adverse profile. Nor do I accept the applicant is personally known to the Taliban. I do not accept the applicant faces a real chance of harm arising from the [business premises] incident, or from any associated matter or imputed pro-government or anti-Taliban profile.

#### *Religion / Race*

16. In his written claims submitted with his SHEV application, the applicant indicated he feared harm on account of being Sunni and Pashtun. However when questioned about this at the SHEV interview, the applicant confirmed his fear from the Taliban did not emanate from any religious issues. The delegate directly asked the applicant if he feared that someone would hurt him in Afghanistan because he is Pashtun Sunni and he responded "*No, it's not a threat for me because I am Pashtun and Sunni*". The delegate noted in her decision that the applicant clarified in the SHEV interview that he does not fear persecution relating to his ethnicity or religion and the applicant has not disputed this in his submission to the IAA. On balance, I am satisfied the applicant does not fear harm on account of his Sunni Pashtun profile, or for any reasons relating to his religion and/or ethnicity/race. Given this, and noting that information considered by the delegate indicates that Sunnis make-up the majority religious group in Afghanistan and that Pashtuns are the dominant ethnic group in Kandahar province, and that there is no information to suggest they are targeted for harm on religious or ethnic grounds, I am satisfied the applicant does not face a real chance of harm on account of racial or religious reasons.

*Western returnee / failed asylum seeker/ illegal departee*

17. I have given consideration to the applicant's return after seeking asylum in the west and I note his comments in the SHEV interview that people may perceive that he has changed his culture and religion and 'everything'.
18. EASO's Afghanistan Country Guidance report of June 2018 considered by the delegate notes that Afghans identifying with western values may be targeted by insurgent groups, since they can be perceived as un-Islamic, or pro-government, or can be considered spies but that very few incidents related to westernisation are reported. EASO reports that in general, the risk of persecution for men perceived as westernised is minimal and dependent on the specific individual circumstances.
19. The applicant has only spent the last five years of his [age] year life in Australia/a western country. I am satisfied he would be returning to Afghanistan with knowledge and personal experience of Afghan culture. I do not consider he would have lost his knowledge and practise of his Afghan culture in these years in Australia to any large extent and there is no indication before me that the applicant has changed his religion. The evidence before me does not indicate the applicant has foreign or western mannerisms that would reveal his residence in a western country or would otherwise place him at risk upon return. I have not accepted he would be returning as someone perceived as aligned with the government stemming from the [business] incident and I do not accept his return from the west would imputed him with such profile, nor as a spy or as someone who is un-Islamic.
20. DFAT's 2017 report considered by the delegate notes there are occasional reports of returnees from western countries (including two Hazaras from Australia in 2014) allegedly being targeted for having spent time in a western country. However these incidents occurred in Ghazni province which is removed from the applicant's home area, and unlike the applicant who is Pashtun, these incidents involved persons of Hazara ethnicity, a factor which the United Kingdom Home Office (UKHO) considers relevant. Consistent with other reporting before the delegate from EASO and earlier reports from the UKHO, in January 2018, in its Country Policy and Information Note on "*Afghanistan: Afghans perceived as Westernised*", the UKHO described the reports of harmed returnees as isolated reports about a small number of returnees. It also noted the motivations for such attacks have often been unclear and factors such as the person's ethnicity appear to have been significant. There have been no reports of individual returnees from Australia being targeted since the two incidents in 2014, and no such incidents recorded as occurring in Kandahar province.
21. EASO's 'Individuals targeted under societal and legal norms' report of December 2017 also contains information from reliable and authoritative sources relevant to this matter. In August 2017, the International Organisation for Migration's (IOM's) national programme manager on return, reintegration and resettlement told EASO that based on his work with other 20 000 Afghan returnees from Europe and Australia, IOM has not documented state or non-state targeting of Afghan returnees due to 'Westernisation' or time spent abroad. He also stated there have been no ethnically-based killings or returnees coming back from Western countries, unless someone becomes caught in a cross-fire between government forces and insurgents. IOM has indicated that contrary to recent reporting about the killing of a deportee from Germany in April-May 2017, the incident 'has not been confirmed by any reliable sources'. Similarly, in December 2017 EASO noted it was unable to locate any corroborating information regarding a claimed targeted killing of a returnee from Norway and nor was there any corroborating information in any other sources before me. EASO also referred to some other incidents reported by the UNHCR, the Refugee Support Network and

the Guardian however I am satisfied those incidents involved mostly younger returnees with and in particular circumstances which I do not accept are reflective of the applicant's.

22. Overall, the country information does not indicate there is systematic targeting of returnees in Afghanistan, including those who return from Australia, those with western clothing or mannerisms or who are failed asylum seekers. It does not indicate they are targeted due a perception that they are infidels or spies. I am not satisfied that the applicant faces a real chance of harm on account of being a returnee asylum seeker from the west- nor for any related opinion or profile. Nor am I satisfied, as country information does not support it, that the applicant would face harm on return on account of his illegal departure.
23. On a separate basis, while I found above that the risk of the applicant being harmed on account of any imputed political opinion arising from his links with the west would not amount to a real chance, I have considered that as suggested in EASO's December 2017 report, he may adjust his behaviour. DFAT also advises that most returnees take measures to conceal their association with the country from which they have returned, and keep a low profile on return. I have no reason to conclude the applicant would not also act in this manner upon return. I am satisfied he would adjust his approach and behaviour in line with the context and environment to which he returns. I am satisfied that the applicant's adjustment of approach and behaviour would involve taking reasonable steps to modify his conduct to avoid any future chance or risk of harm, for example through not openly discussing his time in Australia, by taking steps to protect any documentation or history that may link him to Australia or the west, or in dressing and acting in a way that is more consistent with other Afghans. As noted above, I am satisfied the applicant would have sufficiently retained his cultural identity and I am satisfied he will be able to navigate any cultural and linguistic issues and general reintegration upon return. I consider that for the applicant, taking such steps would be reasonable and would not in themselves expose him to a real chance of harm of any kind. I am not satisfied that they would compromise an innate or immutable characteristic or a characteristic fundamental to his identity or conscience, or that this would amount to a modification that falls within any other s.5J(3) limitation.

#### *Generalised violence and criminality*

24. I accept the applicant's uncle's family (in particular his [Relative A]) has been personally affected by the security situation in [Town 1] and left the area due to the security situation in 2018. I accept insurgent attacks have and will continue to be carried out in the Kandahar and [Town 1] region to some extent. However the information considered by the delegate indicates that the primary targets of Taliban and insurgent attacks in Kandahar province are the military, police, government officials and people associated with the international community, and civilian groups such as human rights defenders, journalists, lawyers and judges, aid workers and civil servants, with whom the applicant has no links. Given this and that attacks in [Town 1] have been only sporadic, I find the chance the applicant would be harmed as a bystander, inadvertently getting caught up in attacks, or otherwise through generalised violence is remote. I am not satisfied that the applicant faces a real chance of harm in the foreseeable future from the Taliban or other insurgent groups due to the general security situation in [Village 1], or the [Town 1] area.
25. As for criminality, while all of Afghanistan is affected, country information does not indicate that persons with the applicant's profile including returnees from the west are systematically targeted for money or any perception of wealth (although EASO in December 2017 noted the presence of some isolated incidents) and I am not in any case satisfied the applicant would be perceived as wealthy or that he has any other profile factors that would lead him to be

targeted by criminal elements in [Town 1] or in Kabul. Furthermore, I am satisfied that the applicant's familiarisation with Afghan culture and the local area will be conducive to his integration and his ability to take reasonable precautions consistent with those taken by other ordinary civilians in Afghanistan which would not amount to precluded modifications of behaviour. Considering all of this, I am not, on the evidence, satisfied that the applicant would face a real chance of harm in Afghanistan as a consequence of criminality.

#### *Access*

26. The DFAT report before me indicates that most returnees are returned to Kabul airport. The applicant may need to wait briefly around Kabul for his onward transport to the [Village 1]/[Town 1] area. Having regard to the country information about Kabul and the airport and linking road which was before the delegate and provided by the representative, I am satisfied that there is a strong military presence in Kabul and there is likely to be so in the reasonably foreseeable future. I am satisfied that the applicant is not of personal interest to the Taliban and the information before the delegate does not indicate that Pashtuns, members of the Kakar tribe, Sunnis or returnees from the West are targeted in Kabul or elsewhere in Afghanistan. I am not satisfied the applicant would be imputed to have an opinion or profile connected to the insurgent's main targets or that he would be considered an infidel or spy. I am satisfied that the government and security forces maintain effective control over Kabul and its airport and I am satisfied that this will not change in the reasonably foreseeable future.
27. In terms of making the onward journey to [Town 1], I have considered the information in the DFAT report and other sources before the delegate which indicates that the Taliban, other anti-government groups and criminal elements target the national highway and secondary roads, and unofficial checkpoints manned by armed insurgents are common with the main targets being people who appear wealthy or who are associated with the government or the international community in attacks that can include kidnapping for ransom. There are risks on the roads from insurgents and criminal violence for all travellers, however given the applicant would be making a single journey to [Town 1] (some of which may be taken by air between Kabul and Kandahar) and he does not hold the profile of those mainly targeted, I consider the chance of the applicant being seriously harmed while returning to his home area to be remote, whichever way he travels.

#### *Other considerations*

28. I have taken into account that at the time of the SHEV interview (in June 2018), the applicant's mother and [specified members] were all in Pakistan but that [some among them] were planning to return to Afghanistan after Eid. There is no further update before me on whether they actually returned so I have considered that the applicant may be returning to [Town 1] without family. While I accept this would be challenging, there is nothing before me to indicate the applicant, who would be in the religious and ethnic minority and has extensive amount of familiarity with the area and has run a [business] business there in the past will face a real chance of harm in the event that his family are still in Pakistan.

#### **Refugee: conclusion**

29. I have considered the applicant's claims in their totality but I am not satisfied the applicant is or would be personally identifiable or of any adverse interest to the Taliban or to anyone and considering all the information before me, I find there is not a real chance of the applicant - an adult Sunni Pashtun male returnee asylum seeker from the west on or during his return to



his home area of [Town 1]. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

### **Complementary protection assessment**

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30. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

### **Real risk of significant harm**

31. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
  - the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.
32. I have found there is not a real chance of the applicant being harmed on the basis of any reason relating to his profile as a Sunni Pashtun adult male returnee failed asylum seeker from Australia/the west who departed illegally, even taking into account that he was previously threatened by Taliban members and that his family ([specified] family) may or may not be present when he returns. I also found that he can safely return to [Town 1]. Applying the same reasoning, and because 'real chance' equates to 'real risk', I am also not satisfied that the applicant faces a real risk of suffering significant harm in or in accessing his home area upon return.
33. I have also found the applicant will not face a real chance of being harmed through generalised violence or criminality in Afghanistan. For the reasons discussed above and because 'real chance' equates to 'real risk', I am satisfied that the applicant does not face a real risk of suffering significant harm in that manner upon return. Further I am also satisfied these risks are faced by the population of the country generally and are not faced by the applicant personally, and as such under s.36(2B)(c) there would be taken not to be a real risk that the applicant will suffer significant harm in Afghanistan.

### **Complementary protection: conclusion**

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

### **Decision**

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

## Applicable law

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

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

In this Act, unless the contrary intention appears:

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

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

...

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

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

...

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

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

...

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

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

...

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

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

...

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

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

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

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

...

### 5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

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

### 5K Membership of a particular social group consisting of family

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

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

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

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

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

#### **5L Membership of a particular social group other than family**

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

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

#### **5LA Effective protection measures**

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

...

#### **36 Protection visas – criteria provided for by this Act**

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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