



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN
IAA reference: IAA19/06210

Date and time of decision: 25 March 2019 12:04:00
C Wilson, 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 an Afghan Sunni Pashtun from Pakistan, born in Afghanistan and holding only Afghan citizenship. He arrived in Australia [in] June 2013 as an unauthorised maritime arrival, and on 15 May 2017 he applied for a Safe Haven Enterprise Visa (SHEV).
2. On 7 January 2019 a delegate of the Minister for Home Affairs (the delegate) refused the application. The delegate did not accept the applicant was an Afghan refugee from Pakistan, and found he was a Pakistani citizen. The delegate found the applicant had not made any claims against Pakistan, and nor did he face a real chance or real risk of harm if he returned there.

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 1 February 2019 the representative provided submissions responding to the delegate's decision, in particular addressing the finding that the applicant was not an Afghan citizen as claimed, and a Statutory Declaration from the applicant. The applicant also provide the following new information:
 - The applicant's home village in Zabul province is actually called [Village 1]. As the locals informally refer to it as [Village 2], this is why the applicant thought it was called [Village 2]. A map showing the location of [Village 1] is provided.
 - The applicant's Afghan identity card, a taskera, has been verified by the Ministry of Foreign Affairs in Afghanistan, and a copy of the verification is provided.
 - A redacted copy of [name deleted] Afghan passport.
 - Country information that supports the applicant's claim that he used a fraudulent passport to depart Pakistan.
 - The claim that the applicant has been rendered 'stateless' by the delegate's decision. Pakistan will not accept him because he has never been a citizen of that country. Afghanistan will now not accept him because there is a decision finding he is also not a citizen of Afghanistan.
5. In response to the delegate's finding that the applicant's village in Zabul province could not be located, the applicant has provided a new name for the village he claims to have come from in Afghanistan, and a copy of a map showing where the village is located. Despite the applicant's assertion that he was not aware at the interview that the delegate had concerns about the location of his village, it is clear from the interview that she did put to him that she could not locate it on any map she had consulted. The delegate also told him at the interview that it would be good idea for him to talk to his family to get more detail of where he was from in Afghanistan. However no further detail on his family's home village was provided in post-interview submissions. I do not accept this information could not have been provided before the decision was made. I am also concerned that the applicant is now saying [Village 2] is not

the official name of the village, when the taskera he has provided lists [Village 2] as his village and place of birth, and there is no mention of [Village 1] on that document. In the circumstances I do not consider this new information to be credible, and therefore I consider it is not credible personal information that may have affected the consideration of his claims. For these reasons I am not satisfied either s.473DD(b)(i) or (ii) are met. I am also not satisfied there are exceptional circumstances to justify considering this new information given how late he is providing such information and its inconsistency with documents (such as the taskera) provided by the applicant. Accordingly I must not consider this new information.

6. The applicant has provided a document that purports to verify his taskera. I accept the information is personal information. Although I have concerns about the credibility of the document I accept it is 'credible' to the extent it is capable of being believed. I accept a 'verified taskera' may have affected the consideration of his claims. I am satisfied there are exceptional circumstances to justify considering this new information because his nationality is critical to the question of his receiving country.
7. The redacted copy of an Afghan passport for a person named [name deleted] was provided as evidence it was possible for an Afghan living in Pakistan to access a mobile phone without being a citizen of Pakistan. I am concerned by the number of redactions on the passport and lack of other evidence about its provenance and the person named in the passport, making it difficult to assess whose passport this actually is and whether this is a friend of the applicant and whether this passport is held by an Afghan living in Pakistan. For these reasons I consider this piece of information is of little relevance and not reliable, and I am therefore not satisfied there are exceptional circumstances to justify considering this new information.
8. The representative provided new information that country information supported the applicant's claim to have departed Pakistan on a fraudulent passport. He has not however provided copies of the information, merely provided a very short extract and footnoted it. In any event I am not satisfied the information could not have been provided before the decision was made, and nor am I satisfied it is credible personal information which was not previously known that may have affected the consideration of the claims. It does not meet s.4733DD(b) and for this reason I must not consider this new information.
9. I have considered whether to accept the new information that the applicant claims to have been rendered 'stateless'. For the reasons set out in this decision, I have accepted the applicant is a citizen of Afghanistan as claimed, and I reject the assertion that the delegate's decision has rendered the applicant stateless. In the circumstances I am not satisfied there are exceptional circumstances to consider this new information.
10. The representative submits the Authority should put the applicant on notice if it is to make a decision affirming the delegate's decision on different grounds. I do not accept the Authority has any obligation to do so. The applicant has put forward his claims for protection and I have undertaken a *de novo* consideration of the merits of his application and claims.

Applicant's claims for protection

11. The applicant's claims can be summarised as follows:
 - He was born in [a district in] Zabul Province, Afghanistan. He is married with one child, and his family remain in Quetta, Pakistan.

- When he was 3 or 4 years old his family left Afghanistan and moved to Pakistan. His father decided to move the family after being threatened by the Taliban because of his work as a teacher.
- The applicant lived in Quetta until departing for Australia. He never returned to Afghanistan and doesn't have any close family in Zabul province.
- He left Pakistan because Afghan Pashtuns are targeted for deportation or are seen as potential terrorists.
- He cannot return to Pakistan as he has no residency rights there.
- He fears returning to Afghanistan because he'll be targeted by the Taliban because his father was a teacher. He would be recognised anywhere he might go in Afghanistan.

Factual findings

12. The delegate did not accept the applicant was a citizen of Afghanistan, and found he was in fact a citizen of Pakistan.
13. In support of his claim to be a citizen of Afghanistan the applicant provided copies of his taskera and his father's taskera. The applicant's taskera is dated [2012]. There is no explanation as to why the applicant obtained a taskera at that time, and I consider it may have been obtained with the view to coming to Australia.
14. According to country information, a taskera must be applied for in person and in Afghanistan.¹ The applicant however did not personally apply in Afghanistan. He says the taskera was obtained through an agent engaged by his father. The delegate raised a number of concerns with the applicant at the SHEV interview, indicating she may find the document was not a genuine taskera. In post SHEV interview submissions the applicant conceded he was unaware of the authenticity of the taskera, but maintained the information contained therein was correct. I consider this was a concession that the taskera was not authentic. In submissions to the Authority however the applicant withdraws his suggestion that it may not be an authentic taskera, and claims it has now been verified. He has provided a document that purports to show this. However, I have concerns about how the applicant obtained his first taskera, and the fact his father obtained it through the use of an 'agent' without the applicant making a personal application, suggests the taskera is not genuine. I am not satisfied the 'verification' is genuine either. Document fraud is prevalent in Afghanistan, and taskeras, which have no security features, are particularly vulnerable to fraud.² I am not satisfied the applicant's taskera or its purported verification are genuine, and I give them little weight.
15. The copy of the father's taskera is of poor quality and I cannot be satisfied of its authenticity. I give it little weight.
16. Although I have found the taskeras and the purported verification are not genuine, it does not necessarily follow that I find the applicant is not Afghan. I accept a genuine citizen of Afghanistan may obtain a non-genuine identity document in an attempt to show their citizenship, and may do so either knowingly or in the mistaken belief that an 'agent' is obtaining a genuine document for them.

¹ Immigration and Refugee Board of Canada 2011 *Afghanistan: The issuance of tazkira certificates; whether individuals can obtain tazkiras while abroad*, 16 December 2011, AFG103918.E.

² DFAT *Country Information Report Afghanistan*, 18 September 2017, p.33, CISED50AD5515 (DFAT report).

17. The delegate relied on a number of factors to conclude the applicant was in fact a citizen of Pakistan. These included: his lack of registration or identity card (a 'Proof of Registration' card or PoR) as an Afghan refugee in Pakistan; his ability to run a [business] in Quetta and undertake study without a PoR; the ability for his family to have mobile phones without any PoR; his lack of knowledge of his claimed birthplace; and his social media account which contained material mostly relevant to Pakistan including an indication that he attended [a university]. I agree these factors raise doubts about the applicant's claim to be an Afghan. I also acknowledge the applicant has provided plausible explanations for these anomalies. He submits that not all Afghans living long term in Pakistan have never taken out PoR cards yet have managed to lead lives that can include running a small business. Country information supports the assertion that not all Afghans in Pakistan have PoRs. I accept the applicant was very young when he left Afghanistan and has never returned, and it may be his father never talked about their home area or if he did the applicant retains little knowledge of that. From all of the information he has provided and his presentation at the Entry and SHEV interviews I consider the applicant does not present as a university graduate. I accept he did not attend the [university name] and that this misinformation was something he put on his [social media] account to embellish his profile. Thus whilst all these factors relied on by the delegate raise doubts, I am not satisfied they are conclusive about his citizenship. Even considered cumulatively I consider I do not have sufficient evidence before me to make a positive finding that he is in fact a citizen of Pakistan.
18. I note in the SHEV interview the delegate put to the applicant that the Department had third party information that linked him with people in Australia who are claiming to be from Afghanistan but are in fact nationals of Pakistan. The contents or source of this information is not further disclosed or described. It is not in the referred material. It is not discussed in the delegate's decision. There is in fact no such information before me, beyond what was put to the applicant at the interview. As I do not have information before me to show the applicant is linked to Pakistanis falsely claiming to be Afghan, I give this unknown third party information no weight.
19. On consideration of all the material before me, I find the applicant has given a consistent and plausible account of how he says he was born in Afghanistan but raised in Pakistan after his family fled there. Whilst there are aspects of his history and presentation that suggest he could be a citizen of Pakistan, I consider there is not enough evidence before me to enable me to make a positive finding he is a citizen of Pakistan. In the absence of evidence to demonstrate otherwise, I find the applicant is a citizen of Afghanistan as claimed.

Refugee assessment

20. 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

21. 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.
22. I accept the applicant is a citizen of Afghanistan, for the reasons given above, and that Afghanistan is his receiving country.
23. The applicant has no connection to or recollection of his birthplace in Zabul province and no close family residing there. I note he said he believed he had paternal uncles in Zabul province, but he did not know how many or have any information about them. He has never returned to Zabul after leaving as a young child, has no knowledge of the area, and has never expressed any intention to return there. I find the applicant will not return to Zabul province in these circumstances.
24. I rely on country information to find Afghan returnees from Western countries are almost exclusively returned to Kabul, and many remain there for economic reasons rather than return to previous home areas.³ I find the applicant will be returned to Kabul from Australia. Given his lack of connection to Zabul province and his lack of any expressed intention to return there, I find he would not travel on to Zabul province after being returned to Kabul. I find Kabul is the area he is likely to remain in Afghanistan. I have therefore assessed his claims against Kabul as his 'home area'.
25. The applicant claims to fear persecution in Afghanistan because he is the son of a teacher. He claims his father fled with his family from their village in Afghanistan in around 1996 because of threats from the Taliban over his occupation as a teacher. His father was targeted, or feared he would be as other teachers in nearby villages had, because he taught girls and boys. I acknowledge there has been a history of threats, intimidation and harassment from anti-government elements, including the Taliban, of persons associated with the education of girls in Afghanistan.⁴ I accept as plausible the claim that his father feared harm as a teacher of girls and fled Afghanistan with his family for this reason.
26. I do not accept however that the applicant as the son of a girls' teacher would now, or in the reasonably foreseeable future, be targeted for work his father did as a teacher over 20 years ago. I do not accept the Taliban would have any adverse interest in the applicant or connect him with his father's work. Even if the Taliban had personally targeted his father over 20 years ago, rather than the father just fearing he might be targeted next as a teacher, I do not accept the Taliban would have an ongoing interest in members of the father's family. The applicant confirmed that no relative of his father, including his father's brothers, has ever been targeted for being related to a teacher. I do not accept his father's work was so high profile that a

³ DFAT *Country Information Report Afghanistan*, 18 September 2017, p.31, CISED50AD5515 (DFAT report).

⁴ DFAT report p.8.

member of his family would still be targeted for it. I find the chance of harm to the applicant as the son of a person who taught girls in Afghanistan over 20 years ago is too remote to amount to a real chance.

27. I consider even if his father had also taught girls more recently in Pakistan, there is no claim he was threatened by the Pakistani Taliban for this work. The idea that the Taliban operating in Afghanistan may have been aware of work he was doing in Quetta is farfetched. I find the applicant does not face a real chance of harm for work done as a teacher by his father more recently in Pakistan.
28. The applicant is a Sunni Pashtun. He was asked by the delegate if he feared harm in Afghanistan for this reason. The applicant responded no. There is no claim on this basis, and I find one does not arise on the material before me. Being a Sunni Pashtun puts the applicant in the majority group in Afghanistan, with around 85% of Afghans being Sunni Muslim⁵ and Pashtuns being the largest ethnic group in the country.⁶ There is nothing before me to indicate Sunnis or Pashtuns face a real chance of harm in Kabul for reason of their ethnicity or religion. I find the applicant does not have a real chance of harm for reason of his ethnicity or religion, either singularly or cumulatively.
29. The applicant claimed a fear of harm in returning to Afghanistan from a Western country, as he claimed he would be viewed as working for a foreign country. His representative also submitted it would be difficult for the applicant to return to Afghanistan after living in Pakistan for over 20 years.
30. In recent decades Afghanistan has seen large-scale population movements caused by the conflict related stability. The majority migrated to Pakistan, as the applicant claimed his family did. Between 2002 and 2007 about 5.7 million Afghans returned. In the first half of 2017 around 133,000 Afghans returned. Many returnees, like the applicant, had lived outside of Afghanistan for decades.⁷ There is nothing before me to indicate an Afghan spending periods of time in Pakistan, even decades, is targeted for this reason in Afghanistan. I consider that with the large numbers of people moving between the two countries a Pakistani raised Afghan returning to Kabul would not be unusual and would not of itself give rise to a real chance of harm.
31. DFAT reports there is no information to suggest returnees from Western countries attract adverse attention from the state authorities for having been in the West or seeking asylum.⁸ There are occasional reports alleging returnees from Western countries have been kidnapped or otherwise targeted, and DFAT speculates this may be because they are associated with the international community.⁹ I acknowledge the Taliban and other extremist groups target Afghans working for, supporting, or associated with the government and/or international community.¹⁰ The applicant does not fit any of these profiles, as he has never worked for or supported the Afghan government or international forces in Afghanistan. However I have taken into account
32. DFAT's speculation that a Western returnee may be associated with the international community. Returnees can take measures to conceal their association with the country from

⁵ DFAT report p.13.

⁶ Around 40% of Afghans are Pashtuns, DFAT report p.6.

⁷ DFAT report p.31.

⁸ DFAT report p.31.

⁹ DFAT report p.31.

¹⁰ DFAT report p.17.

which they have returned, such as by not carrying identifying documents that would link them to that country. I find the applicant could take these steps to modify any conduct, such as protecting any documentation linking him to Australia and not openly discussing his time in Australia. I consider these steps are reasonable and not the type of behaviour modification that is impermissible under s.5J(3). Given the movement of people into and out of a large city like Kabul, I consider the chance of the applicant being known for and targeted for his time in the West, including being kidnapped, is too low to amount to a real chance. In the event there is a chance of harm for his time spent in the West, I find he could take reasonable steps that would enable him to avoid a real chance of persecution for time spent in a Western country.

33. I consider the chance of him being targeted by the Taliban or other extremist groups, in the reasonably foreseeable future, for time spent out of Afghanistan and/or in the West is too remote to amount to a real chance.

Refugee: conclusion

34. 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

35. 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

36. 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.

37. I have not accepted the applicant faces a real chance of harm because his father was a teacher or for reason of being a Sunni Pashtun or returning to Afghanistan from a Western country, or returning to Afghanistan after living in Pakistan for nearly 20 years. 'Real chance' and 'real risk' has been found to equate to the same threshold. For the reasons given above I find the applicant does not face a real risk of significant harm for reason of his father's work as a teacher or for being targeted by the Taliban more than 20 years ago for this work, for being a Sunni Pashtun, or returning to Afghanistan from the West or after a long time in Pakistan.

38. I acknowledge that the security situation in Kabul is complex and highly fluid. I acknowledge there have been an increasing number of high profile attacks in Kabul. But these attacks are generally targeted, and the common targets include government institutions, political figures,

Afghan and international security forces, demonstrations, foreign diplomatic missions and international organisations.¹¹ There is nothing to indicate the applicant falls into any of these groups, except that he may have occasion to visit a government institution. However I am not satisfied an occasional or possible visit to a government institution would give rise to a real risk of significant harm. I find there are not substantial grounds for believing that there is a real risk of significant harm in Kabul.

39. In the event the applicant may be caught up in generalised violence in Afghanistan, I find this is a risk faced by the population of Afghanistan generally. I rely on s36(2B) which provides there is taken not to be a real risk that a person will suffer significant harm in a country if the real risk is one faced by the population generally and is not faced by the applicant personally.

Complementary protection: conclusion

40. 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.

¹¹ DFAT report p.10.

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.