



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

PAKISTAN
IAA reference: IAA19/06267

Date and time of decision: 18 April 2019 15:34:00
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 an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Sunni Pashtun from Helmand Province, Afghanistan. He arrived in Australia on [March] 2013 as an unauthorised maritime arrival. On 24 November 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. On 10 January 2019 a delegate of the Minister for Home Affairs (the delegate) refused the application. The delegate found the applicant was not an Afghan national, but was in fact a national of Pakistan. The delegate found the applicant did not face a real chance or real risk of harm in Pakistan.

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. The applicant provided new information that he had applied for an Afghan passport at the Embassy of the Islamic Republic of Afghanistan and expected to receive his passport in 6 weeks. I considered this was credible personal information which was not previously known and had it been known it may have affected the consideration of his claims. I am also satisfied there are exceptional circumstances to justify considering the new information, given his nationality is critical to the assessment of his claims.
5. I delayed the decision for 6 weeks and then invited the applicant to provide a certified copy of the passport or any further correspondence with the Embassy. The applicant responded that the delay was due to the Embassy verifying his taskera (Afghan identity document) in Afghanistan. Again, I am satisfied this is credible personal information which was not previously known and had it been known it may have affected the consideration of his claims. I am also satisfied there are exceptional circumstances to justify considering the new information, given his nationality is critical to the assessment of his claims.
6. No further information has been obtained or received. The applicant has not provided any further information about his passport application since the last correspondence on 26 March 2019, and has not provided a passport. The application has been before the Authority for 12 weeks now and I consider the applicant has had sufficient time to provide evidence of a passport, if one were issued.

Applicant's claims for protection

7. The applicant's claims can be summarised as follows:
 - He is a Sunni Pashtun from a village in [District 1], Helmand Province. He had [a few] years of education at the village school.
 - The applicant and his brother worked in a [business] in [a location in Town 1]. Through their work [at this location] they met and talked to soldiers from the Coalition troops, particularly those from Canada and the United Kingdom. The applicant spoke to the troops to practice English. The applicant had learnt English from his brother's friend, who worked as an Occupation 1].

- The Taliban threatened the applicant and his brother because they thought they were giving secret information to the troops. The Taliban killed his brother for this reason.
- After his brother was killed the applicant made plans to flee Afghanistan with the help of a family friend. He travelled to Pakistan and departed Karachi on a fake passport.
- The applicant's parents remained in Afghanistan, but later travelled to Pakistan for medical treatment for the father. His father died of natural cause [in] Pakistan in 2018. His mother travelled between Afghanistan and Pakistan but is currently in Pakistan
- The applicant fears returning to Afghanistan because the Taliban will target him for the same reason as before and because he has lived in a western country and will be considered an infidel. He cannot live safely in other parts of Afghanistan because his accent will identify him as being from Helmand Province.

Factual findings

8. The applicant claims to be a national of Afghanistan. For the following reasons I have found he is actually a citizen of Pakistan.
9. The applicant claimed to be from a village in Helmand province called[Village 1]. The delegate was unable to locate the village on any map. At the SHEV interview the applicant was unable to name the road he travelled on from his village to his workplace in [Town 1]. He was unable to provide the names of surrounding villages. He could not say when the Taliban moved into his province. He was unable to name the governor of Helmand Province. He could not say when foreign troops first arrived in his district. He could not name any notable security incidents in his district. He could not describe the colour of the currency in Afghanistan, saying he'd forgotten as it had been 6 years. His lack of ability to describe such matters seems inconsistent with his claimed background of being someone who lived there for [some] years, had some education and ran a business with his brother in a larger town.
10. In his SHEV application the applicant claimed his parents lived in Afghanistan. He claimed in his statutory declaration in November 2016 that he'd had no direct contact with his parents since arriving in Australia, but that this brother had a friend now living in Quetta and this friend was able to get messages to his family if he visited Helmand province. At the SHEV interview in August 2018 the applicant said his father had passed away in [2018] [in] Quetta, Pakistan. His mother was sometimes in Quetta and sometimes in Afghanistan, but since his father passed away she stayed in Quetta. He claimed to have no relatives in Afghanistan.
11. The delegate raised with the applicant at the SHEV interview that he'd made multiple money transfers to Pakistan for family support. Transaction reports accessed by the Department showed the applicant had sent a total of around [number] between 2013 and 2018 to a number of people in Quetta, Pakistan. There were occasional transfers to other parts of Pakistan, and a few to Indonesia and Malaysia. There were however no money transfers to Afghanistan. The applicant does not deny sending this money, and stated in a post-interview statement that he sent money through several people to help his mother or pay for his father's medical expenses. He did not explain why no money to support his parents was ever sent to Afghanistan. That the money was consistently sent to Pakistan over the period 2013 to 2018 indicates that is where his parents resided throughout this period.
12. Although the applicant has not raised this, I have considered whether money was sent only during the periods his parents were in Pakistan. I am not satisfied that it was. The regularity of the transfers, [frequently] from February 2015 onwards, makes it unlikely that money was

only sent when his parents were in Pakistan. I consider also the regularity of the money sent to support them is inconsistent with his claim in his SHEV application that he'd had no direct contact with his parents and could only get a message to them through a friend visiting Helmand province. If his parents were in Quetta all that time I find it unlikely he never contacted them directly, but in the event he did not do so and only got messages to them through friends, he did not need to do so by way of Helmand province.

13. I consider the applicant's English language skills suggest he is more likely to have grown up in Pakistan than Afghanistan. The applicant described his English capability as 'poor' in his Entry Interview, conducted a month after arriving in Australia. He did however mention that he sometimes talked to the NATO and British forces. An 'Individual Management Plan' (IMP) was also completed at the immigration detention centre, around the same time as his Entry Interview. In the IMP the following was recorded:

[The applicant] states he has a primary school education he can read and write English, his own language and he speak [sic] English...

[The applicant] is quiet [sic] good at English and was in intermediate class on CI¹.

14. In his SHEV application, lodged in 2016, the applicant indicated he would need an interpreter in the Pashto language 'as spoken in Pakistan'. He claimed to speak, read and write both Pashto and English, and to speak Dari. In his statutory declaration dated 25 November 2016 he declared he learnt English 'from friends of my brother who came to our family business'. In his SHEV interview he said he liked to talk to the soldiers from English speaking countries to practice his English. When the delegate put to him the information from the IMP form, that he was good at English, the applicant responded 'that's right, even the people who wouldn't be able to speak English in the detention centre, I would interpret for them.' When the delegate put to him that he had requested a Pashto interpreter from Pakistan the applicant denied ever making such a request and said it must be a mistake. In a post-interview statement he said he asked for a Pakistani interpreter because the Pashto in Helmand is similar to the Pashto spoken in Quetta, Pakistan. No independent country information was provided to support this claim.²
15. English and Urdu are the two official languages in Pakistan. Both English and Urdu are the languages of instruction in Pakistani schools.³ In Afghanistan English is not an official language⁴, and I consider it unlikely it would have been taught in the village school he claims to have attended in Afghanistan. In any event, the applicant does not claim to have learnt English at school, but claims he learnt it from his brother's friends, particularly one who worked [in Occupation 1]. Whilst this may be plausible for learning some spoken English, I consider it unlikely a young man from an Afghan village would learn to read and write English from such an informal arrangement. There was no suggestion the brother's friends formally tutored him to teach him to read and write in English. The applicant does not claim to have learnt English from English speaking troops, but claims he practiced his English through talking to them. I consider it more likely his ability to read, write and speak English was learnt in the education system in Pakistan, than from a friend of his brother in Afghanistan. I find his English skills are a strong indication he grew up in Pakistan.

¹ I have taken 'CI' to be a reference to [detention].

² The alleged similarity between the Pashto spoken in Helmand province and Quetta was also not addressed in the expert report provided by Dr Mike Martin, and discussed at [21]-[22].

³ DFAT *Country Information Report Pakistan*, 1 September 2017, CISED50AD5515, p.5. (DFAT report)

⁴ The official languages in Afghanistan are Dari and Pashto: DFAT *Country Information Report Afghanistan*, 18 September 2017, CISED50AD5680, p.6.

16. I acknowledge it is possible for an Afghan national to grow up in Pakistan and not be a citizen of Pakistan. However if it were the case his family had moved to Pakistan when he was young for example, I would expect he would have claimed so. I consider his English language skills indicate he is from Pakistan, not Afghanistan.
17. The delegate put to the applicant at the SHEV interview that the Department had third party information that the applicant was a national of Pakistan and that he resided with other Pakistani nationals. The particulars of this information were not given to the applicant, except for particulars in relation to the money transfers referred to above. The delegate did not disclose any further information in relation to this 'third party information' in their decision record. I have given no weight to the comment by the delegate at the interview that they had such third party information. In relation to the comment that the applicant resided with Pakistani nationals, I give this no weight in my decision on the applicant's nationality. An Afghan national may live with Pakistani nationals, but the nationality of housemates is not evidence of a person's own nationality.
18. The delegate took some screen shots of the applicant's [social media account]. The pages show him with a banner over his profile picture which states 'I support PTI', that is the Pakistan Tehreek-e-Insaf party of which Imran Khan is the leader. Another page has writing that the delegate identified as Urdu. I do not have the expertise to recognise what language the writing is in, and the applicant denied in post-interview submissions that there was any Urdu on his [social media account] that was written by him. I note Urdu is an official language of Pakistan but is not a language the applicant admits to speaking. I do not have examples before me of the applicant writing in Urdu on his [social media account], and I give the possible existence of Urdu on his social media little weight. I accept a Pashtun from Afghanistan may admire the Pakistani Pashtun politician Imran Khan because he was a famous cricketer, however I consider it a little unusual for an Afghan who spent only a few weeks in Pakistan to take the step to publicly align with a Pakistani political party. There is no evidence before me that he has declared support for Afghan political parties on his [social media account]. It may be the applicant has socialised more with Pakistanis than Afghans in Australia and online and this may account for the Pakistani leaning material on his [social media account]. I give the information on his social media account little weight.
19. In support of his claim to be an Afghan national the applicant provided the following evidence: a taskera and verification of the taskera; an export report from [Dr A]; a statutory declaration from a friend Q; a letter from the Afghan Community Support Association; documents from a Pakistani [medical facility]; and information that he had applied for an Afghan passport.
20. The applicant provided a copy of his taskera, Afghan identity card, with his SHEV application. At the SHEV interview the delegate raised some concerns with the applicant about the document. The applicant said he had obtained the taskera with the help of family friend, and had done so in the weeks before he fled Afghanistan. Following the SHEV interview the applicant claims he asked the Afghan Embassy in Canberra to get an identity document and they told him he needed to have his taskera verified in Afghanistan. So he asked a friend to do this. The friend N travelled to Helmand province to obtain the verification. In a statement N claims he is a Pakistani from Quetta who used to have a shop in [Town 1] and knew the applicant and his brother there. N states he travelled back to Helmand province to find witnesses from the village to get verification of the taskera. A verification letter purportedly from the Ministry of Justice confirmed the validity of the taskera. I note however that now the applicant has applied for a passport, the Embassy in Canberra has sent his taskera to Afghanistan to be verified. It would appear they did not accept the purported verification

from August 2018 as reliable. I have concerns about the genuineness of the taskera, and about the timing of its acquisition. As an adult living in Afghanistan and running a business with his brother, I would expect he would already have such a document and not wait until he was about to leave the country to apply for it. I am not satisfied either the taskera or the verification are genuine and I give them little weight.

21. The applicant provided a report from [Dr A] of [a college] dated 15 August 2018. [Dr A] states he served in the British [Defence Force] in Helmand Province for [number] years as a [an] Adviser. He is fluent in Pashto. He was asked by the applicant's representative to comment on: whether there is a distinct Helmandi accent and whether this may identify a person as Talib; whether there's a village near [Town 1] called [Village 1]; and comment on the presence of insurgent/terrorist groups in Helmand. [Dr A] says the dialect from Helmand is distinct and it is highly likely other Pashtun Afghans, and possibly also non-Pashtun Afghans, could recognise the dialect. It does not however identify someone as Talib. [Dr A] was unable to locate the applicant's village on any map of Helmand but as a small village he stated this was entirely normal as maps of Helmand are poor and undetailed. [Dr A] also stated the conflict in Helmand was more akin to a civil war than simple anti-government insurgency. Individuals and small groups swap allegiances constantly, such that they can be members of Taliban one week and Daesh/IS the next, as they temporarily adopt such labels to mask other activities like revenge feuds or trafficking opium.
22. I accept [Dr A]'s credentials and accept his opinion that there is a distinct Helmandi dialect. I note he was not provided with any examples of the applicant's speech and could therefore give no opinion on whether the applicant speaks the Helmandi dialect. I find there is nothing in the report from [Dr A] that is personal to the applicant. That is, there is nothing that confirms the applicant is recognised as a person from Helmand Province, or anywhere else in Afghanistan, by this expert. I give this report little weight.
23. I have considered the statutory declaration from the applicant's friend Q. This friend declares he was born in Afghanistan in [date], came to Australia in 2000, and became an Australian citizen in 2008. He declares he has known the applicant since meeting him in Australia in 2013 or 2014. He considers the applicant has a distinct Helmand accent. He declares he knows this accent because he worked as an [in Occupation 1] for the US [Defence Forces] in Helmand province in 2012 for [a few] weeks and became familiar with Helmand Pashto. He also declares the applicant's liking of Imran Khan is common across both Pakistani and Afghan Pashtuns because he is a famous Pashtun sportsman. I do not have any independent verification of Q's expertise in the Helmand accent or evidence of his travel to Afghanistan in 2012. He provided the first page of his passport as identification, but did not provide evidence of the claimed travel to Afghanistan. Q did not know the applicant in Afghanistan. As a friend of the applicant I consider Q may have other motives for supporting the applicant's claim to be Afghan. I give this statutory declaration little weight as evidence of the applicant being from Helmand province Afghanistan.
24. I have considered the letter from the[a senior official]. The [senior official] states the applicant's father and grandfather are greatly respected members of the Afghan Community in Australia. However, the applicant's father and grandfather are both deceased and there is nothing before me to indicate they were ever in Australia. The applicant's name and the names of his father and grandfather have been included in the letter, but the error in stating they are members of the community in Australia, when they are not, indicates the letter is probably a standard reference that has not been written for the applicant personally. I note the letter says the applicant has been an active member and frequent volunteer since moving to [City 1] in June 2014, however according to his SHEV application he was still living in

[another state] as at that date. Given the errors in the letter I do not consider it reliable information and I give it no weight.

25. I have considered the evidence showing the applicant's father was treated at a hospital in Pakistan in 2017 as a private patient. I note that private healthcare is available in Pakistan for people able to afford it.⁵ I do not accept the evidence that his father was treated as a private patient indicates he had to be because he was an Afghan and not a Pakistani citizen. Noting the amounts of money sent by the applicant as family support to Pakistan, I consider his parents would have had the funds to pay for private treatment. I consider this evidence is neutral and does not support either that he is Pakistani or Afghan.
26. I have considered the applicant's actions in applying for an Afghan passport and whether that supports his claim to be Afghan. I note that at the time of decision no passport has been provided to the Authority. The decision was delayed 10 weeks from the date the applicant applied for the passport, even though he initially said it would only take 6 weeks. I acknowledge the information that the Embassy was awaiting verification of the taskera, but this in itself is troubling. The applicant purports to have already verified the taskera, but the Embassy has clearly not accepted that verification. The Embassy has received and acknowledged the passport application. They have attempted to verify the taskera the applicant provided them. But after 10 weeks they have not issued a passport. I consider a passport has not been issued because the Embassy is not satisfied on the information provided by the applicant that he is an Afghan citizen who is entitled to one. I give no weight to the act of applying for the passport as evidence the applicant is an Afghan citizen.
27. I have weighed up the evidence provided by the applicant to support his claim to be Afghan. I find the copies of the taskera and its alleged verification are not reliable evidence. I give the supporting letters limited weight. I give his actions in applying for a passport no weight, as the passport was not issued. I acknowledge the applicant has consistently claimed since arriving in Australia that he is from Afghanistan. However I find the evidence provided in support of his claim to be an Afghan citizen is outweighed by the evidence that suggests he is a citizen of Pakistan. That evidence includes that his mother lives there, his father passed away there, he has been sending money to Pakistan to support his parents since 2013 and never sent any money to Afghanistan, he arrived in Australia with a fluency in English that was suggestive of an education in Pakistan, his request for a Pakistani Pashto speaking interpreter, and that his knowledge of his claimed home area in Afghanistan was limited and unconvincing.
28. Taking all of this evidence into account I find the applicant is from Pakistan, is a citizen of Pakistan, and is not from Afghanistan. I also find he is most likely from the city of Quetta where he appears to have family, as that is where he has overwhelmingly sent money as family support.

Refugee assessment

29. 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.

⁵ DFAT report p.6.

Well-founded fear of persecution

30. 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.
31. For the reasons given above, I find the applicant is a citizen of Pakistan I find Pakistan is his receiving country and Quetta is the area he is likely to return to.
32. The applicant has not made any claims to have a well-founded fear of persecution in Pakistan. I find that if the applicant had experienced any harm in Pakistan, and if he had a well-founded fear of persecution in Pakistan, he would have raised this in his application. I consider he fabricated his claim to be from Afghanistan because he had no claims in relation to Pakistan. Even in the face of the delegate's findings that the applicant is from Pakistan, the applicant has not sought to raise any claims in relation to Pakistan with the Authority.

Refugee: conclusion

33. 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

34. 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

35. 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.
36. I have found the applicant is a citizen of Pakistan, not Afghanistan. I have found Pakistan is his receiving country.
37. There are no claims before me in relation to Pakistan, and nothing to indicate there are substantial grounds to believe he has a real risk of significant harm in Pakistan.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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