



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

PAKISTAN
IAA reference: IAA19/06359

Date and time of decision: 2 April 2019 09:39:00
M Brereton, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Shi'a and a Hazara from Parachinar in the Kurram Agency in Pakistan. He departed Pakistan legally in July 2013 and arrived on Christmas Island [in] July 2013. On 26 May 2017, he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 8 February 2019, a delegate of the Minister for Immigration (the delegate) refused to grant the visa.
2. The applicant claimed to fear harm from the Taliban and other Sunni extremist groups because he is a Shi'a and a Hazara. He also claimed to fear harm because: he has been in a Western country and will be suspected of having converted to Christianity; as a failed asylum-seeker; and because he has no networks or education and will be unable to relocate anywhere in Pakistan.
3. The delegate accepted the applicant's claims as to identity, ethnicity, religion and origin. The delegate found that the applicant would face a real chance of serious harm as a Shi'a and a Hazara in the Kurram Agency but that he could relocate to Islamabad or Lahore and that it would be reasonable to do so. The delegate found that the applicant did not face a real chance of serious harm or a real risk of significant harm in Islamabad or Lahore for any reason and that the applicant was not a person in respect of whom Australia owes protection obligations.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. On 3 March 2019, the applicant, through his current migration agent (not the agent who assisted with the application or at the interview with the delegate), provided a submission to the IAA. Parts of this submission refer to and make argument in respect of the delegate's decision and information that was before the delegate and to that extent are not new information.
6. The submission refers to a new country information report published by the Australian Department of Foreign Affairs and Trade (DFAT) on 20 February 2019.¹ This report was not before the delegate and is new information. This report was published after the date of the delegate's decision and I am satisfied that it could not have been provided to the Minister before the delegate made the decision. The applicant submits that his former agent made no reference to any independent country information and that the delegate relied on an earlier version of the DFAT report. The 2019 report was prepared for the purpose of assisting decision makers considering protection claims in Australia. It contains recent information on the security and general situation for Shi'as from the Kurram Agency, the security situation in other areas of Pakistan including Islamabad and Lahore, and the situation for returned asylum-seekers. This information and the assessments made by DFAT are more current than the information that was before the delegate. Having regard to all of the above, I am satisfied that there are exceptional circumstances to justify considering this new information.

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Pakistan", 20 February 2019, 20190220093409.

7. The submission claims that the applicant will be restricted from accessing state protection and health care and refers to parts of the new 2019 DFAT assessment in support of these claims. These claims were not raised before the delegate and I am satisfied that they are new information. The applicant has not explained why they could not have been raised before the delegate made the decision. Although the supporting information is drawn from a DFAT report that post-dates the delegate's decision, that information is in substance the same as the information in the 2017 version of the report that was before the delegate.² I am not satisfied that these claims could not have been raised before the delegate made the decision. Although the claims refer to the applicant's ability to access protection or services and to that extent appear to be personal information, there is no evidence before me that he, or any member of his family, has ever been denied protection or services, including healthcare, or restricted from accessing protection or services for any reason. The country information relied on by the applicant does not suggest that accessibility or provision of protection or services has deteriorated since the 2017 country report. I consider that these claims are no more than speculative and having regard to all of the circumstances, I am not satisfied that there are exceptional circumstances to justify considering them.
8. The applicant's submission notes that the delegate found that the applicant faced a real chance of harm in Parachinar and states that if the IAA considers it is safe for the applicant to return to Parachinar, it should notify the applicant and follow "natural justice procedures" or risk breaching procedural fairness. The applicant has not identified what these "natural justice procedures" are or how they are said to arise in the context of the IAA review.
9. I am conducting a fast-track review under Part 7AA of the Act. Section 473DB of the Act provides that subject to the other provisions of Part 7AA, the review is to be conducted on the review material provided by the Department without interviewing the applicant and without accepting or requesting new information. There is no right to a hearing. Nor is there any obligation on the IAA to advise an applicant if findings different to those of the delegate are to be made, or any duty or general obligation to otherwise seek comment from an applicant if the view taken by the IAA differs from that of the delegate.³ Further, if I was to invite further comment or information from the applicant, any new information that he proposes to give would need to satisfy s.473DD of the Act before the IAA could consider it. The applicant has not identified any particular information or evidence that he proposes to give that he has not already provided to the delegate, nor how such information would satisfy the requirements of s.473DD. I have considered whether to exercise my discretion to obtain new information or comment from the applicant but having regard to all of the above, and as the issue of harm in Parachinar was squarely raised and addressed before the delegate, I have decided not to exercise my discretion to invite or obtain such information or comment from the applicant.
10. The applicant's submission to the IAA makes arguments as to whether it is reasonable for him to relocate to other areas of Pakistan. The submission also refers to the situation facing Hazaras living outside the Hazara enclaves in Quetta, including the risk of societal discrimination. The applicant submits that the situation will be the same for him if he is outside Parachinar. I have come to a different view to that of the delegate and I have not found it necessary to consider relocation.

² DFAT, "Pakistan Country Information Report 1 September 2017", 1 September 2017, CISED50AD5515.

³ *DGZ16 v Minister for Immigration & Border Protection* [2018] FCAFC 12; *FGC17 v Minister for Immigration & Anor* [2018] FCCA 2217.

Applicant's claims for protection

11. The applicant's claims can be summarised as follows:

- He is a Shi'a and a Hazara who was born and lived in Parachinar, in the Upper Kurram Agency in Pakistan. His parents and siblings remain in the family home in Parachinar.
- The Taliban is active in Parachinar and there are regular attacks on Shi'as there. Shi'as and Hazaras are constantly under threat by the Taliban, Sipah-e-Sahaba and Lashkar-e-Jhangvi.
- In early 2013 (about 4-5 months before he left Pakistan), the applicant took his uncle to hospital in Peshawar. The applicant was approached by two men he believes were Sunni militants. They talked about killing Shi'a people and he felt threatened and walked away.
- The next night the two individuals came to a hall in the hospital where the applicant was sleeping. The men waited in the hall and the applicant believes they came to harm him but could not do so because there were other people present.
- He will be easily identified and targeted as a Shi'a Hazara from the Kurram Agency because of his language, accent, appearance and the details on his National Identity Card (NIC).
- Nowhere is safe for Shi'as and he will be targeted if he worships openly anywhere.
- He cannot relocate because he does not know anyone anywhere else. He is not educated and will not be able to find work. He has no social networks that could support, assist or protect him.
- If he returns he will be suspected of having converted to Christianity because he has been in a Western country.
- If he returns he will be taunted for being a failed asylum-seeker.

Refugee assessment

12. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

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

- the person fears persecution and there is a real chance that the person would be persecuted
- the real chance of persecution relates to all areas of the receiving country
- the persecution involves serious harm and systematic and discriminatory conduct

- the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
14. The applicant claims to be a Shi'a Hazara from Parachinar in the Kurram Agency, in the north-west of Pakistan. He has provided documentary evidence including his NIC, Pakistani passport and birth certificate. Some of his Australian documents show a different date of birth but he explained, and I accept, that this was an error made when he first arrived in Australia and that the date shown on his Pakistani documents is correct. The applicant was asked about the security situation in his claimed area and was able to provide detailed responses. He was asked about his claimed Shi'a religion and was able to answer in some detail. The applicant confirmed that he had previously travelled to [Country 1] for work on two occasions between 2009 and 2012. This travel was legal and he obtained visas in order to do so. He has not claimed, and the information before me does not indicate, that he has any lawful right to enter or reside in [Country 1], or any other country.
15. Having regard to all of the above, I am satisfied that the applicant is a Shi'a Hazara from this part of Pakistan and that Pakistan is the receiving country for the purposes of this review.
16. The applicant claims to have experienced two incidents in Pakistan. In his statement with his SHEV application he referred to these as an attempt on his life. He stated that he took his uncle to hospital in Peshawar and went out to get food. A Sunni individual from his local area saw him and shortly after two men came and sat with him. They started talking with him and told him they had killed two Shi'as from his area. The applicant was shocked by this. He felt threatened and went back to the hospital. The next night he was sleeping in a hallway in the hospital when the same two men came in. They were waiting for other people to leave so that they could kill or harm the applicant but fortunately the other people did not go.
17. At the start of the interview with the delegate on 29 January 2019 (the interview), the applicant explained that the Sunni person who recognised him was a former classmate who was working as [an occupation] in [a business]. He repeated his evidence about the incidents and said that he believed he was not harmed only because other people were around. The delegate confirmed with the applicant that he had remained in Pakistan for four or five months after the incidents before leaving Pakistan and asked if anything had happened to him in that time. The applicant said that he could not go outside of Parachinar but agreed that nothing else had happened to him.
18. I am prepared to accept that the claimed incidents occurred. The applicant has not claimed that he was being targeted for any reason other than being a Shi'a from Parachinar. He has not claimed that he had had any previous adverse interactions with the Sunni man who recognised him, that he was known to the other two men, or that he has had any interaction with any of these persons since the incidents. He has not claimed that the former classmate has returned to Parachinar or has instigated any threats or harassment of the applicant by other persons in Parachinar. The evidence before me indicates that this was an opportunistic incident and the applicant was not followed, threatened or targeted in any way after this – in fact, no person showed any further interest in him once he left the hospital. He has not

claimed that he or his family have experienced any previous incidents of threats, harm or harassment in Parachinar.

19. Having regard to all of the above, I am not satisfied that the applicant is of adverse interest to, or faces a real chance of harm from, the former classmate or the other two persons should he return to Parachinar. Further, I am not satisfied that these incidents indicate that the applicant has any specific or individual adverse profile with any extremist or militia group or other persons. I am not satisfied that the applicant faces a real chance of harm from any extremist or militia group, or any other persons, for any reason connected with these incidents.
20. The applicant claims to fear harm in Parachinar and the Kurram Agency as a Shi'a and a Hazara. He claims that as a Shi'a he has been constantly under threat from the Taliban and other extremist groups. I have accepted his claims as to identity and religion and I also accept that he is readily identifiable as a Hazara by his appearance, language and accent.
21. According to DFAT, Parachinar is the largest town in the Kurram Agency, within what was formerly the Federally Administered Tribal Areas (FATA) but which is now part of Khyber Pakhtunkhwa. Shi'as make up around 80 per cent of the Kurram Agency's population. Shi'as living in the Kurram Agency are predominantly Pashtun Turi or Bangash tribespeople. The Kurram Agency (which is located alongside Pakistan's north-western border with Afghanistan) has been the site of decades of sectarian tension between Sunnis and Shi'as and these tensions have periodically erupted into intense fighting. The arrival of the pro-Taliban Pakistani militias in 2007 triggered a particularly violent period, featuring significant fighting between Sunni and Shi'a militia groups. This violence began to decline in 2016 and DFAT assessed in 2017 that the security situation in the FATA had improved significantly as a result of the Pakistan Armed Forces' continuous counter-terrorism operations that commenced in 2014. Nevertheless, violence across the region is still prevalent and according to sources quoted by DFAT, the FATA had the third highest number of deaths from terrorism related incidents across all regions of Pakistan in 2016.⁴ During 2017, militants carried out mass-casualty attacks in Parachinar, including three bombings in Shi'a areas. Sunni extremist groups claimed responsibility and said that they had deliberately targeted Shi'as. The European Asylum Support Agency (EASO) also reported that 2017 saw a 'significant' increase in violent incidents in the Kurram Agency compared to 2016 and a very high increase was observed in the number of casualties. The majority of these casualties were civilians (138 deaths and 437 injured). Militants carried out 11 terrorism-related attacks, causing the most casualties in the FATA. EASO also noted that on 30 January 2018, an improvised explosive device (IED) explosion killed six people and injured one.⁵
22. Other information before me reports that Sunni militants have expressly targeted residents of Parachinar because of their Shi'a faith as well as because Shi'as were supporting the Assad regime in Syria. Turi and Bangash tribesmen from the former FATA were specifically accused of fighting for the regime in Syria.⁶ In 2016 and 2017 there were reports of cross-border attacks by extremists in Afghanistan, targeted bomb attacks on vehicles carrying Shi'as, and attempted attacks that were thwarted by the authorities.⁷ I also note information before me listing a

⁴ DFAT, "Pakistan Country Information Report 1 September 2017", 1 September 2017, CISED50AD5515; DFAT, "DFAT Country Information Report Pakistan", 20 February 2019, 20190220093409.

⁵ European Asylum Support Office (EASO), "EASO Country of Origin Information Report - Pakistan Security Situation", 16 October 2018, CIS7B8394110560.

⁶ "Big terror hit tatters peace", Nation, The (Pakistan), 22 January 2017, CXC904066521; "Daesh leaflets in Kurram Agency threaten a 'specific sect'", International News, The, 8 February 2017, CXC9040661620.

⁷ "15 killed in Kurram as bomb hits bus", The Nation (Pakistan), 26 April 2017, CXC9040666277; "Timely intervention: Security men intercept suicide attacker in Kurram Agency", Express Tribune (Pakistan), 15 October 2016, CX6A26A6E10964;

number of targeted attacks on individual Shi'as in 2018, including killings in Khyber Pakhtunkhwa. One killing occurred in the former FATA, where a Shi'a soldier was killed by the Taliban.⁸ On 23 November 2018 there was a suicide attack near a Shi'a place of worship in the neighbouring Orakzai district.⁹

23. Much of the assessment of risk from sectarian violence in Parachinar and the Kurram Agency before me dates from 2017 and is influenced by the large-scale and mass-casualty attacks in the first half of 2017. The evidence before me, including the most recent DFAT report, reports no ongoing or systematic attacks against Shi'as or Hazaras in Parachinar or the Kurram Agency since that period. On the other hand, DFAT assessed in 2017, and repeated this assessment in 2019, that the risk to civilians from sectarian violence is higher in the Kurram Agency, and particularly Parachinar, than other parts of the former FATA. The 2019 DFAT report also assesses that Hazaras moving out of the enclaves within and outside of Balochistan, face a high risk of societal discrimination and violence. While I take that assessment into account, the information before me indicates that there have been no further large-scale or significant attacks on Shi'as, Hazaras or civilians in or around Parachinar or in the Kurram Agency during 2018. Although that does not of itself mean that the area is now free of insurgency, it is nevertheless an area that has not reported systematic, frequent or ongoing attacks on Shi'as or Hazaras for over a year.
24. The applicant has not been targeted as a Shi'a or a Hazara in Parachinar in the past. His family remains in the family home and he has not claimed that they have been targeted for religious or ethnic reasons. The incidents that the applicant claims to have experienced occurred outside Parachinar (in Peshawar) and he told the delegate that nothing happened to him when he returned to Parachinar, because he did not go outside Parachinar. While I note the information before me as to ongoing conflict and the fluid situation in the Kurram Agency, I have already noted that there have been no reported attacks targeting Shi'as or Hazaras in Parachinar or the broader Kurram Agency by the Taliban or any other extremist groups since 2017, apart from the targeted killing of a Shi'a soldier.
25. The applicant has not claimed to have suffered any past incidents of criminal or generalised violence, nor has he claimed that his family in the Kurram Agency has been affected by such incidents. While I note the DFAT assessment that there is a moderate level of criminal violence across the former FATA¹⁰, I am not satisfied on the information before me that Shi'as or Shi'a Hazaras have been, or are now being, specifically targeted by criminal groups. I am not satisfied on the evidence before me that the applicant faces any more than a remote chance of being harmed in criminal or generalised violence should he return to Parachinar.
26. Ultimately, while I accept that the situation in Pakistan is fluid and have taken the November 2018 attack in the neighbouring district into account, I am not satisfied that the applicant faces a more than remote chance of being harmed by the Taliban, Sipah-e-Sahaba, Lashkar-e-Jhangvi, or any other extremists or militias in Parachinar because he as a Shi'a or a Hazara, or from criminal or generalised violence.
27. While the applicant has claimed to fear other harm, such as official or societal discrimination, as a Shi'a or a Hazara, these claims were made in the context of relocation outside Parachinar.

"Four Missiles Fired Into Upper Kurram Agency From Afghanistan", Tribal News Network (Pakistan), 2 April 2017, CXC9040665120.

⁸ Let's Build Pakistan, "Shia Genocide Database - A detailed account of Shia killings in Pakistan", 12 November 2018, CIS7B8394110090.

⁹ "Pakistan: Sectarian Savagery – Analysis", Eurasia Review, 29 November 2018, CXBB8A1DA40015.

¹⁰ DFAT, "DFAT Country Information Report Pakistan", 20 February 2019, 20190220093409.

He not claimed to have experienced, or to fear official or societal discrimination or any other general harm within Parachinar. I also note that apart from a fear he will be taunted as a failed asylum-seeker (considered below), the applicant has not claimed to have experienced, or to fear any harm from, or within, his community.

28. Having regard to all of the above, I am not satisfied on the evidence before me that the applicant has a well-founded fear of persecution as a Shi'a or a Hazara in the Kurram Agency.
29. The applicant claims to have departed Pakistan legally and there is no information before me which indicates that returned asylum-seekers who departed legally and are not of any other adverse interest to the authorities have been subject to harm by the authorities.
30. The applicant claimed to fear harm for having been in a Western country and that he will be accused of having converted to Christianity because he has been in the West. The delegate asked if the applicant had converted and the applicant said no. The delegate put to the applicant that many Pakistanis live all over the world and travel back to Pakistan regularly, and there is no evidence to support the argument that they are persecuted for having been overseas. The applicant did not respond to this or refer to it in the post-interview submission or IAA submission.
31. DFAT reports that returnees are typically able to reintegrate into Pakistani society without repercussions stemming from their migration attempt, although those who took on debt tend to face a higher risk of financial hardship. Western influence is pervasive in many parts of Pakistan, particularly in large urban centres. Western films and music are widely available (although in many cases subject to censorship), and western-branded retail chains operate throughout the country. English is one of the official languages and is taught in many schools and is widely spoken among Pakistan's elite. Many Pakistanis have relatives in western countries and many more aspire to migrate abroad. Those living abroad return to Pakistan frequently to visit relatives. DFAT assesses that individuals in Pakistan are not subject to any additional risk of discrimination or violence on the basis of having spent time in western countries or because of perceived western associations (such as clothing), despite a generally increasing conservatism and religiosity across the country.¹¹ The information before me does not indicate that this risk is different in the former FATA than in other parts of Pakistan.
32. The applicant has not claimed to be in debt or to fear facing financial hardship because of his migration attempt. Although he fears being taunted, he has not claimed to fear harm beyond being taunted. While I am prepared to accept that he may be subject to some taunts from members of his community, I am not satisfied that this taunting would include or amount to serious harm.
33. Further, his claim to fear harm for having been in the West or imputed as having converted to Christianity assumes that he will be identified or imputed as having sought asylum and been in a western country. Although he claims that his appearance, speech and practices identify him as a Shi'a Hazara from the Kurram Agency, he has not claimed or provided any evidence that he displays any characteristics, speech, appearance or anything else that would identify him as having been in the West, or impute him with having converted to Christianity. He has not claimed that he will need, or want to carry or display any documentation or other evidence that he has been in the West. He has not claimed to have any need or intention to disclose this fact to other persons. I consider the chance that he will be identified as a returned asylum-

¹¹ DFAT, "Pakistan Country Information Report 1 September 2017", 1 September 2017, CISED50AD5515; DFAT, "DFAT Country Information Report Pakistan", 20 February 2019, 20190220093409.

seeker from the West and/or be imputed with having converted to Christianity is remote, and therefore not a real chance. I am not satisfied that he faces a real chance of serious harm as a returned asylum-seeker, or a returned asylum-seeker from the West, now or in the reasonably foreseeable future.

34. I have considered the country information before me which reports incidents of violence, including improvised explosive devices (IED), on the roads into Parachinar. While I accept that some travellers have been harmed by incidents and explosions in this area in the past, the low number of such reported incidents and improved security situation indicates that this is not a frequent occurrence and although I cannot altogether discount this risk, I am not satisfied that it is more than remote. I am not satisfied on the evidence before me that the applicant faces a real chance of harm for any reason when accessing the Kurram Agency.
35. While I accept that Pakistan continues to suffer from sectarian violence, the information I have considered has led me to conclude that the applicant will face only a remote, and therefore not a real, chance of being harmed in violent incidents in the Kurram Agency. I am not satisfied that the applicant will face a real chance of harm from sectarian, criminal or generalised violence in, or in accessing, the Kurram Agency. I am not satisfied that he will face a real chance of serious harm for being a returned asylum-seeker from the West. I am not satisfied that he has a well-founded fear of persecution as a Shi'a or a Hazara in the Kurram Agency.
36. Having regard to all of the above, I am not satisfied that the applicant has a well-founded fear of persecution for any reason or combination of reasons now or in the reasonably foreseeable future, should he return to Pakistan.

Refugee: conclusion

37. 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

38. 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

39. 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.

40. I have found above that the applicant does not face a real chance of being harmed: from sectarian, criminal or generalised violence in the Kurram Agency; or accessing the Kurram Agency. As 'real chance' and 'real risk' equate to the same threshold¹² I am also not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's removal to Pakistan, the applicant will face a real risk of significant harm for these reasons in the Kurram Agency.
41. I have found that the applicant does not have a well-founded fear of persecution as a Shi'a or a Hazara in the Kurram Agency. He has not claimed to have experienced discrimination, obstruction or difficulties of any sort for those reasons in the past, nor has he claimed that his family has faced discrimination, obstruction or difficulties for those reasons. The applicant has referred to difficulties he may face obtaining employment if he was to relocate to another area of Pakistan, but I have not found it necessary to consider relocation and as noted above, the applicant has been able to obtain employment in Parachinar in the past and also operated his own business there. He has not claimed that he would be unable to obtain employment or support himself if he returned to Parachinar. I am not satisfied that the applicant will be unable to obtain employment or support himself in Parachinar.
42. While I accept that the applicant may face some taunts from other persons because he is a failed asylum-seeker, I am not satisfied that such taunts would amount to significant harm as defined. Accordingly, I am not satisfied that the applicant will face a real risk of significant harm arising from any taunts that he may face as a returned asylum-seeker.
43. Having regard to all of these factors, I am not satisfied that the applicant faces a real risk of significant harm for any reason as a Shi'a or a Hazara in Parachinar or the Kurram Agency.

Complementary protection: conclusion

44. 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.

¹² *MIAC v SZQRB* (2013) 210 FCR 505.

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.