



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

PAKISTAN
IAA reference: IAA19/06418

Date and time of decision: 11 April 2019 15:11:00
C Wilson, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

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 Turi Shia from Pakistan. He arrived in Australia as an unauthorised maritime arrival [in] September 2012. On 22 February 2016 he applied for a Safe Have Enterprise Visa (SHEV).
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused the application on 4 May 2017. That decision was affirmed by the Authority on 30 June 2017¹, and the applicant sought judicial review.
3. [In] February 2019 [the] Federal Circuit Court remitted the application on the basis the Authority has misapplied the term 'exceptional circumstances' in s.473DD in relation to new information provided by the applicant regarding his mental health.

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 15 June 2017 the applicant's representative provided written submissions, articles and three medical reports. The submissions addressed the delegate's decision but also provided the following new information:
 - The applicant claims to have been diagnosed with post-traumatic stress disorder (PTSD). He has only sought medical treatment since the delegate's decision. In support of this new claim letters were provided from: general practitioner [dated] [May] 2017; psychologist [dated] [May] 2017; and psychologist [name deleted] dated [May] 2017. Two articles on PTSD were also referred to.
 - Two articles on attacks in Parachinar dated 1 April 2017 and 25 April 2017 were provided as evidence the applicant's home area has seen a surge in sectarian violence.
 - Two articles on attacks in Lahore and Sindh province dated 14 February 2017 and 17 February 2017 were provide to support a submission that the applicant could not safely relocate as extremists are targeting religious minorities throughout Pakistan.
 - Claims that the applicant could not reasonably relocate because he will be identified as a returnee from a Western country, and he would be unable to find employment because of his age and skill set.
 - Five articles dated 21 and 25 February 2017 and 15 June 2017 were provided on the racial profiling of Pashtuns in Punjab province, and a new claim made that he faces a real chance of being racially profiled as a Pashtun.
6. I have considered whether there are exceptional circumstances to consider the new information relating to the applicant's mental health. The information is provided to explain inconsistencies in the applicant's claims and address the delegate's concerns about the

¹ IAA17/02597. Different Reviewer.

applicant's credibility. The representative submits the material could not have been provided earlier as the applicant was resistant to seeking medical treatment for cultural reasons. However since the delegate's decision he is more receptive to doing so. I accept this information is credible personal information that was not previously known but had it been known may have affected the consideration of the claims, in particular, in relation to the inconsistencies, poor recall of dates and ability to relocate. The delegate did put to the applicant that she was concerned with the considerable inconsistencies in his claims. The applicant was represented at that time, but even in the post-interview submissions nothing was raised about the applicant's mental health. However I note the applicant was represented by an interstate agent who assisted him at the SHEV interview by telephone, and may not have appreciated at the time that the applicant was suffering poor mental health. Taking into account the credible medical evidence, the explanation as to why the applicant only sought a diagnosis and help after the delegate's decision, the fact he had been represented in his SHEV application by an agent interstate and not one in person, and the potential impact of his mental state on his ability to present his claims at the interview, I am satisfied that cumulatively there are exceptional circumstances to justify considering the new information concerning his mental health, including the claim and the medical letters.

7. I am not satisfied however that there are exceptional circumstances to justify considering the referred to articles on trauma and PTSD. I note only one of the two articles were even provided to the Authority. I consider there is sufficient information in the report from [the second psychologist] on the symptoms suffered by the applicant, including his memory problems, and have taken this into account. I am not satisfied there are exceptional circumstances to justify consider the new information contained in an academic paper unrelated to the applicant.
8. In relation to the articles from April 2017 on sectarian violence in the applicant's home area, I consider these could have been provided prior to the delegate's decision being made as they pre-date the decision. In any event the information concerning these events in Parachinar in 2017 is contained within country information before me.² In all the circumstances I am not satisfied there are exceptional circumstances to justify considering the new information in the form of these two articles.
9. In relation to the articles on attacks in Lahore and Sindh province from February 2017, I am not satisfied this information could not have been provided prior to the delegate's decision being made as they pre-date the delegate's decision by some months. I also consider the articles of little relevance to this decision and note there is more recent country information before me on the security situation in Pakistan. In all the circumstances I am not satisfied there are exceptional circumstances to justify considering the new information in the form of these articles.
10. I have considered the new claims made in June 2017 as to why relocation was not reasonable. The issue of relocation was raised at the SHEV interview, and the applicant was represented at that time. I consider those claims could have been put at the interview or in post-interview submissions. I am not satisfied there are exceptional circumstances to justify considering this new information in relation to relocation.
11. In relation to the articles on racial profiling in the Punjab, I do not accept this information could not have been provided to the Minister prior to the decision being made. No claims were made in the written claims or in the post-interview submissions that the applicant

² DFAT *Country Information Report Pakistan*, 20 February 2019, 20190220093409 (DFAT report)

feared being racially profiled as a Pashtun. The representative submits the claims were not made because at that time there was not the country information to support the claims. However these articles date mostly from February 2017, three months before the decision was made. The articles also relate to Punjab province, which is not the applicant's home area, and on this basis they have little relevance to the treatment of Pashtuns in his home area. I have more recent country information before me on the treatment of Pashtuns in Pakistan in any event. In all the circumstances I am not satisfied there are exceptional circumstances to justify considering the new information of claims he may be racially profiled and the articles provided on this issue.

12. After this matter was remitted by the Court the applicant appointed two migration agents to represent him. Both have provided submissions to the Authority. He has since confirmed that only one continues to be his representative, but asked the Authority to take into account all material provided by both agents. I have done so.
13. On 7 March 2019 his representative provided a statutory declaration from the applicant dated 6 March 2019 and a copy and translation of the applicant's national identity card. The national identity card, with translation, was provided to the Department and is not new information. His statutory declaration contained two pieces of new information: that [in] Mary 2017 he sustained multiple injuries to his [foot] and leg at work, has been unable to work since, and this has worsened his mental health; and his national identity card has expired and returning to his home areas to renew the card will put him at risk. I accept this new information is credible personal information that was not previously known but had it been known may have affected the consideration of the claims. I accept these pieces of information could not have been provided earlier, and that they are relevant to his ability to reasonably relocate in Pakistan. In all the circumstances I am satisfied there are exceptional circumstances to justify considering the new information.
14. On 21 March 2019 he provided a report from psychologist [Mr A] dated [March] 2019. [Mr A] provides a diagnosis of Major Depression. I accept this information could not have been provided to the Minister before the decision was made, as [Mr A] was not his treating psychologist at that time. For the reasons given above in relation to the other letters regarding his mental health, I am satisfied there are exceptional circumstances to justify considering the new information from [March] 2019 concerning the applicant's mental health.
15. On 15 March 2019 the second agent (but not his current representative) provided a written submission. The submissions do not contain new information but address the reasons for the court remittal and provide legal argument. The submissions do refer to the new information regarding the applicant's foot injury, but I have dealt with that new information above.
16. I have obtained more recent country information on sectarian violence targeting Shias in Pakistan from the Australian Department of Foreign Affairs and Trade (DFAT) *Country Information Report Pakistan*³ and the South Asia Terrorism Portal's (SATP) report from June 2018 on *Shias killed in Pakistan since 2001*⁴. The DFAT report was published after the delegate's decision and replaces the earlier version of the report relied upon by the delegate. It contains more up to date information on the security situation in the applicant's home area, the treatment of Shia Turis, and the treatment of returnees. The SATP report gives a more recent picture of the incidents targeting Shias than the SATP reports relied on by the

³ DFAT report.

⁴ 'Shias Killed in Pakistan Since 2001', South Asia Terrorism Portal, 17 June 2018, CIS7B839419943 (SATP report)

delegate. I am satisfied there are exceptional circumstances to justify considering this new information, noting the delegate's decision was made nearly two years ago.

Applicant's claims for protection

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

- He is a Shia Muslim of the Turi-Ghundi Khal Tribe from Parachinar, Upper Kurram Agency, in the former Federally Administered Tribal Areas (FATA)⁵. He is married with [children].
- He inherited a [business] from his father. He imported [goods] from Afghanistan to sell locally. The business was successful and he employed four people.
- In 2007 he started receiving threatening phone calls from the Taliban, demanding money and [goods] but generally threatening him because he was Shia. They also threatened his [employees] who went to Afghanistan to collect the [goods]. The Taliban told the employees to bring the applicant with them. When the Taliban stopped them, and the applicant was not present, they killed the employees and then called the applicant to tell him they had done this.
- His paternal uncle was killed in 2007. The uncle was amongst a group on a bus travelling from Peshawar to Parachinar when the Taliban stopped the bus. They checked the passengers' identity cards and when they saw they were Shia they killed all but a small child.
- After these two incidents the applicant closed his [business] out of fear.
- His wife worked as [an occupation]. After he closed his business she started getting threatening calls from the Taliban. She was threatened because of her work but also for being married to the applicant, a rich Shia. She was forced to resign in 2008 and has not worked since.
- His nephew (the son of the uncle who was killed) was kidnapped by the Taliban in 2008. He was taken when travelling on a bus from Parachinar to Islamabad for study. The Taliban called the applicant seeking a ransom for his nephew's release. The applicant was getting the money together when he heard the Taliban had killed him anyway.
- In 2010 a bomb or grenade was thrown at his house around 1am. The explosion broke the windows but no-one was injured. The Taliban called and said they would continue to attack them. The applicant decided to sell his house and moved in with an uncle.
- The Taliban continued targeting him because they knew he was a wealthy Shia. If he returns to Pakistan they will kill him because they have targeted him personally. He fears he will be killed before he even reaches Parachinar, because the Taliban control the roads. The police cannot protect him and he cannot relocate to avoid the harm.

Refugee assessment

18. 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

⁵ Now a part of Khyber Pakhtunkhwa province: DFAT report p.9.

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

19. 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.
20. I accept the applicant is a citizen of Pakistan, based on the identity documents he provided to the Department. His family continue to live in Parachinar and I find that is the area he would return to. I find Pakistan is his receiving country and Parachinar is his home area.
21. I accept the applicant is a Shia Muslim of the Turi Tribe from Parachinar. DFAT advises that Shia Muslims make up around 20% of the overwhelmingly Muslim population of Pakistan.⁶ They are spread throughout the country with the applicant's home area in Upper Kurram Agency being one of the places in Pakistan with a significant Shia population (about 80% of the population). Much of the Shia population in Upper Kurram Agency, like the applicant, are members of the Turi tribe.⁷
22. Anti-Shia extremist groups, such as the Tehreek-e-Taliban, have carried out attacks directed at Turi Shias in Kurram Agency because of their Shia faith, over a significant period of time. Between 2008 and 2014 Turis faced significant violence.⁸ Operations by the authorities to combat the rising violence (discussed below) significantly decreased the attacks on Turis. However in early 2017 three significant attacks killed more than 120 people in Parachinar: on 21 January 2017 militants detonated a remote-controlled improvised explosive device in a market; on 31 March 2017 a suicide bomber attacked an imambargah (Shia place of worship); and on 24 June 2017 two devices detonated in a market.
23. In response to the rising sectarian violence and terrorism, the Pakistan government commenced the counter-terrorism military operation *Zarb-e-Azb* in June 2014. Following the attack in December 2014 at the Peshawar Army public school, in which more than 140 children were killed, the government also introduced the National Action Plan (NAP). Together these operations formed a civil-military effort to combat terrorist, separatist and

⁶ Muslims make up 95% of the population of Pakistan. DFAT *Thematic Report Shias in Pakistan*, 15 January 2016, CIS38A801265, p.4.

⁷ Ibid p.12.

⁸ DFAT report p.25.

criminal groups across Pakistan. Operation *Zarb-e-Azb* and the NAP are credited with a significant reduction in the number of violent attacks in Pakistan. Observers in the applicant's home province of Khyber Pakhtunkhwa reported a trend of increased security, a reduction in reported killings and reduced fear in the community in 2018.⁹

24. The country information before me does not contain reports of Turi Shias being targeted in Kurram Agency since the deadly attacks in early 2017. No country information has been provided by the applicant since June 2017, and there is no submission in the material provided in 2019 claiming any deterioration in security in his home area. Taking into account the significant downward trend in violence since 2013 and the relative calm over an extended period of time in his home area, since the attacks 2 years ago in 2017, I find his chance of harm as an ordinary Turi Shia in Parachinar in the reasonably foreseeable future is too remote to amount to a real chance.
25. The applicant claims however his chance of harm is greater than an ordinary Turi Shia in Parachinar, because he was previously targeted and threatened by the Taliban, and was seen as successful Shia businessman who warranted such adverse attention.
26. The applicant has consistently claimed he ran a [business] in Parachinar, and gave a convincing account of it in his SHEV interview. The delegate accepted the applicant owned and operated such a business. I accept the applicant ran a business selling [goods] from approximately 1992 to 2008 and that the business was financially profitable for him. I accept he would have had a profile in his home area as a successful businessman. I accept such a business could have caught the attention of the Taliban operating in his home area, particularly as it involved purchasing [goods] from across the border in Afghanistan and transporting them to Parachinar.
27. The delegate considered the applicant was not a credible witness, due to some inconsistencies in his claims, and for this reason did not believe he had been threatened because of his [business] or for any other reason. In particular, the delegate relied on inconsistencies between the Entry Interview and the SHEV application.
28. I have considered the claims made by the applicant at his Entry Interview, which was his first real opportunity to raise why he left Pakistan. I note on the Entry Interview form there are additional claims raised: 'Taliban killed my uncle and beheaded my cousin – they were after me for taking my cousin in after uncle killed. Left for my protection and protection of family'. Having listened to the recording for that interview I am satisfied he did not say these words at the Entry Interview. It appears he gave that explanation at the Arrival Interview shortly after arriving in Australia, and the interviewer for the Entry Interview has for some reason copied that information across to the Entry Interview form. There is no recording of the Arrival Interview before me, so I am unable to verify whether the applicant articulated a claim in those words. I note the delegate states in their decision that they listened to the recording of the Arrival Interview dated 26 November 2012, but the interview held on that date was in fact the Entry Interview. The Arrival Interview form is dated 11 October 2012. I have given no weight to what was said in the Arrival Interview.
29. I acknowledge there are some differences in what the applicant said in the Entry Interview and what he raised as his claims in his SHEV application. However, I consider the similarities in the claims are more significant than the differences, and I accept his level of education, speaking through an interpreter, and lack of representation at the Entry Interview may have

⁹ DFAT report p.19.

contributed to the differences. I accept that at the earliest opportunity he said an uncle and cousin had been killed by the Taliban. I give no weight to the inconsistencies in the information he gave of how they were killed. I note the applicant was not present at either event, and the differences in the account may be explained by his hearing about them second-hand and the passage of time since these events occurred.

30. The delegate was concerned by the different dates given as to when the applicant closed his business. In the Entry Interview form it is written that he worked in the business until March 2012, but in his SHEV application he claims to have closed the business after receiving threats in 2007. I have listened to the Entry Interview recording in relation to his employment. The applicant did not give any start or finish dates for this work. He merely said he worked for his father in his [business] after doing 4 years of schooling, and then he ran the business for 15 or 20 years. The dates were inserted by the interviewer. They may have assumed the applicant ran the business until they left Pakistan. The applicant was not directly asked when he had closed the business.
31. I give weight to the fact the applicant claimed at the Entry Interview that an employee had been killed whilst transporting [goods]. I acknowledge the claim in the SHEV application became that *three* employees had been killed. I consider it possible the claim later that it was 3 employees is an exaggeration, but it is also possible he said *employees* plural at the Entry Interview and it was interpreted as only *employee* singular. Given the consistency of the essence of the claim, and the consistency with country information that Shias travelling on roads throughout FATA in those times could be vulnerable to attacks from the Taliban, I accept at least one employee was killed whilst working for him. I accept it is plausible it was either because he was an employee of the applicant's business, or that the applicant and his business became of adverse interest to the Taliban after they had opportunistically come across the employee travelling between Pakistan and Afghanistan.
32. The applicant claims he was personally threatened by the Taliban. He claims he received threatening phone calls and demands that he hand over money and [goods]. I accept that as a successful Shia businessman in Parachinar such claims are plausible. He claims that in 2010 a grenade was thrown in his property. Whilst he claimed the Taliban threatened him in the Entry Interview, it was not until the SHEV application that he mentioned the grenade incident. I accept his failure to mention it at the Entry Interview is not determinative, as he was giving only an overview of why he left Pakistan, however I agree with the delegate that his description of the event in his application and at the SHEV interview lacked credibility. I am not persuaded this event occurred, even taking into account he was suffering poor mental health at the time of the SHEV interview.
33. I have considered the applicant's claims about why he says he was personally targeted by the Taliban. I have taken into account his mental health at the time of the SHEV interview. I note there are some inconsistencies in his claims, but I consider his level of education, mental health issues and the passage of time accounts for some of these inconsistencies. On his core claims he has been roughly consistent. I am satisfied on the information before me that he was a successful businessman in Parachinar, and I am satisfied such a profile would and did attract adverse interest from the Taliban. I note he has been out of his home area for over 6 years now, but given the longevity of his [business] and his father's business beforehand, I consider there remains a real chance he may still be a person of adverse interest to the Taliban. I find the applicant faces a real chance of harm from the Taliban in his home area in the reasonably foreseeable future, because of his profile and because he was targeted in the past.

34. I have considered whether the applicant's chance of harm from the Taliban, or other like anti-Shia extremist groups, for reason of his profile or because he is Shia, or for any other reason, extends to all areas of Pakistan.
35. DFAT assesses the risk for Shias depends on the geographic location, and concludes the risk of sectarian violence is low for Shias living in Islamabad and Lahore.¹⁰ In 2016 DFAT reported that Islamabad remained relatively safe for migrant Shia communities. According to the Turi community there had been only one attack on Turi migrants in Islamabad from 2012-2016, with an attempted suicide attack on a Shia imambargah.¹¹ I note from the SATP report there were no reported deaths of Shias from terrorist or sectarian related incidents in Islamabad in 2015 to 2018.¹² There is no information before me to suggest any incidents have occurred in 2019.
36. Although I accept the applicant has a profile in his home area that would be of interest to the local Taliban, I do not accept this profile is such that it extends to all areas of Pakistan. I consider it farfetched to claim the Taliban operating in or near Islamabad would notice the return of the applicant, now an older man without a business and without much of his previous wealth, and identify him as a successful Shia businessman. I consider in a larger city such as Islamabad he would be another ordinary Shia, and would not have the profile he has in his home area.
37. The applicant claimed he would face harm because he is returning from a Western country. I note he would also be returning as a failed asylum seeker. DFAT assessed returnees to Pakistan do not face a significant risk of societal violence or discrimination as a result of their attempt to migrate or for having lived in a Western country.¹³ The applicant spent more than 50 years living in Pakistan and there is nothing before me to indicate he has been so 'westernised' that he would be unable to integrate back into Pakistan. I do not accept a person who had spent time in a Western country would stand out in a large urban city such as Islamabad. I find the applicant does not face a real chance of harm because of his time in a Western country or for being a failed asylum seeker.
38. I find the country information before me indicates sectarian violence targeting Shias in Islamabad is rare. I have taken into account his personal circumstances, but I find the chance of him facing any harm in Islamabad for reason of his religion, ethnicity, past business in Parachinar, loss of family members to sectarian violence, political opinion, time in the West, or any other reason, is too remote to amount to a real chance. I am satisfied the chance of serious harm does not extend to all areas of Pakistan.

Refugee: conclusion

39. 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

40. 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

¹⁰ DFAT report p.37.

¹¹ DFAT *Thematic Report Shias in Pakistan*, 15 January 2016, CIS38A801265, p.11.

¹² SATP report pp.34-40.

¹³ DFAT report p.68.

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

41. 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.

42. I rely on the country information and findings above to find the applicant would face a real risk of significant harm if returned to his home area.

43. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm.

44. I have considered whether it would be reasonable for the applicant to relocate to Islamabad, or any other area of Pakistan, where there would not be a real risk that he would suffer significant harm.

45. The applicant claims it is not reasonable for him to relocate because of his health. I note the applicant is age around [age] and has health concerns in relation to a leg and foot injury and poor mental health. He claims not to have returned to work since an injury to his left foot and leg at work in late May 2017. He has not provided medical evidence in relation to the foot and leg injury and it is unclear from the information before me how significant that injury is and whether it would affect his mobility and employability. I am however concerned by the medical evidence in relation to his mental health. I note the latest report from [March] 2019 states the applicant has Major Depression with moderate to severe symptoms. The psychologist states the cognitive behavioural therapy has had minimal result and the applicant's suicidal ideation has become more prominent. Taking into account the medical evidence from June 2017, the applicant appears to have been suffering poor mental health for an extended period and the condition appears to be chronic. I consider he would not be returning to Pakistan in a fit state to re-settle in an unfamiliar area in Pakistan without family or other personal support.

46. The applicant claims all of his family live in Parachinar. The delegate noted money had been sent by the applicant to Pakistan in 2016 and collected in Rawalpindi by a person the applicant identified as a cousin. The applicant claims the cousin had to travel to Rawalpindi because the money transfer agency did not dispense money in Parachinar. I have concerns about why money was sent to Rawalpindi, however I consider three money transfers in 2016 is not sufficient evidence to make a finding the applicant has relatives living there in 2019. He has consistently claimed his family remain in Parachinar and there is nothing else before me

to indicate otherwise. I accept his claim that he does not have family in Islamabad or elsewhere in Pakistan, outside of Parachinar.

47. I find it is not reasonable for the applicant, given his health issues and lack of family or connections outside of Parachinar, to relocate to a city such as Islamabad or any other area in Pakistan where there would not be a real risk of significant harm. For this reason s.36(2B) does not operate such that there is taken not to be a real risk of significant harm.

Complementary protection: conclusion

48. There are 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.

Decision

The IAA remits the decision for reconsideration with the direction that:

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

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.