



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

PAKISTAN
IAA reference: IAA19/06578

Date and time of decision: 21 May 2019 14:49:00
S Ryan, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a national of Pakistan and arrived in Australia [in] October 2012. On 2 May 2016 he lodged an application for a Safe Haven Enterprise visa (SHEV). A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 24 April 2019 and referred the matter to the IAA on 29 April 2019.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the Migration Act 1958 (the Act). No further information has been obtained or received.

Applicant's claims for protection

3. The applicant's claims can be summarised as follows:
 - He was born in a small village near [City 1] in the Kurram District of Khyber Pakhtunkhwa province and lived there for all his life until he departed Pakistan in 2013.
 - He is of Pashtun ethnicity and is a Shia Muslim from the Turi tribe.
 - He fears being harmed by the Taliban (Tehreek-e-Taliban Pakistan or TTP) and other militias operating in Kurram on account of being a Shia Turi.
 - His brother, [Mr A], was injured in a bomb blast that targeted a large crowd in [City 1] in [2007] and his family received a threatening letter from the TTP shortly after.
 - His brother, [Mr B], was kidnapped by the TTP in 2008. They have never located his body but believe that he was killed. He and his family are at greater risk of being targeted by the TTP as a result
 - Between 2008 and 2012 he worked as a [in Occupation 1] for an employer who held a [contract] nearby his home. He fears he will be individually targeted by the TTP on account of his profile as a former [organisation] worker.
 - He and his family received many letters from the TTP threatening them and he has escaped several kidnap attempts.
 - In 2012 he was in a vehicle that was part of a convoy of cars travelling from [City 1] to Kohat that was attacked by the TTP. He avoided harm by turning around and returning to [City 1].
 - He cannot return to Pakistan as the security situation is now worse than when he left.
 - He would be unable to relocate to another part of Pakistan as terrorism is everywhere and the government does not protect Shia.

Refugee assessment

4. 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

5. 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.
6. The applicant has provided copies of identity documents, namely his Pakistani passport, Pakistani Identity Card, Pakistani birth certificate and Pakistani 'Character Certificate'. The applicant has presented consistent evidence in relation to his identity throughout the entry interview and protection application process, and has provided a range of credible biographical information. I accept that the applicant is a practicing Shia Muslim who is of Pashtun ethnicity, and is from [a] sub-tribe of the Turi tribe. I accept he was born in the [City 1] area in the Kurram District of the Khyber Pakhtunkhwa Province of Pakistan and lived there for most of his life until travelling to Australia. In August 2012 the applicant left Pakistan legally on a Pakistani passport issued in his own name. I accept that the applicant is a national of Pakistan and accordingly I have assessed him against Pakistan as the receiving country.
7. The applicant has never been married, but states he is engaged to marry a person in [City 1]. His parents and one of his siblings are deceased and [number] remaining siblings reside in the [City 1] area. He completed schooling up to Year 7, and then in 2008 took up a job [in Occupation 1] and [Occupation 2] in areas close to his home, a position he held up until his departure from Pakistan. He also worked part time [in another occupation]. I accept that if returned to [City 1], the applicant would be identifiable as a Turi Shia to sectarian militant groups on the basis of such things as his name, social milieu and his manner of practicing religion. I also accept that he will very likely regularly attend public areas and events frequented by Shias, such as markets, mosques and Shia ceremonies.
8. The applicant claimed during the SHEV interview that he suffered from 'severe depression' which affected his ability to remember things. He later provided a letter prepared by a psychologist on 5 March 2019 which confirmed that the applicant had reported symptoms of [various medical conditions]. I accept the observations made the psychologist in this letter, although I note that the counsellor's letter is an informal summary rather than a formal diagnosis, and does not indicate when the applicant had commenced mental health counselling. I do not consider this letter amounts to an independent assessment describing the extent to which the applicant's ability to recall events or give evidence in support of the SHEV application on 26 February 2019 might have been affected by his condition. Nor does

the letter provide detailed information about the applicant's current mental health condition, or a prognosis for his recovery. The applicant has presented the letter solely in the context of requesting consideration of the impact his condition may have had on his capacity to recall events and dates and for the reasons given above I give it little weight. The applicant has not asserted that, if he returned to Pakistan, he will be unable to obtain treatment for his medical condition or that he faces a real chance of persecution or significant harm on this basis, and I am satisfied that is so.

9. The applicant fears harm from the TTP and other Sunni sectarian militias on account of his religion (Shia Muslim) and his tribal identity (Turi). He also claims to have been personally targeted by Sunni militants and, as supporting evidence, he provided a letter from the [an official of an organisation] prepared in 2015 which describes the general security situation for Shias in Kurram, and also the personal risk of harm faced by the applicant and his family. The applicant described [the organisation] as a community organisation representing Shia residents of Kurram. The [organisation's] letter states the applicant had taken action against terrorists by assisting the transport of injured people to hospital during 'crises in the area', that the applicant's brother [Mr A] was injured in a 2007 bomb blast, and that the TTP had attempted to kill the applicant and his family and that the applicant had escaped several kidnap attempts by the TTP. I put limited value on this letter as corroborative evidence of the events it describes as the [organisation] does not indicate it has any independent basis for confirming the personal events concerning the applicant, and it appears their description is based solely on the applicant's own account or an account put forward to them by his family or an associate in 2015.
10. I accept that the applicant may have assisted casualties in the aftermath of a terrorist attack against the Shia community in [City 1], as attested in the [organisation] letter, although the applicant himself has not mentioned any instance in which he did. More importantly, there is no evidence before me that the applicant, either in the course of his employment or in any other capacity, actively fought against the TTP or any other militant group, or took action to thwart or resist their operations in Kurram. In relation to the claimed kidnapping attempts, I find it telling that this is not mentioned in the applicant's written claims and, when invited to describe these events during the SHEV interview, the applicant provided scant evidence, unable to recount even the most basic circumstances of any of the attempted kidnappings. Even taking into account the evidence concerning the applicant's mental health, I do not consider it plausible that, if this claim were true, the applicant would be unable to provide a basic description of such significant events, either during the SHEV interview or in a written statement prepared with the assistance of his legal representative. In the three page statutory declaration provided with the SHEV application the applicant described being part of a convoy of cars that came under attack by the TTP in 2012 and that his vehicle turned around and he returned to [City 1] without harm. He did not make any claim to have escaped multiple kidnap attempts by the TTP in his Entry Interview or in his statement of claims provided with the SHEV application. On the evidence he has provided I do not accept the attempted kidnappings took place.
11. The applicant has consistently stated that his brother, [Mr B], was killed by TTP militants in 2008 or 2009, and I am willing to accept this occurred. From the applicant's account, his brother was a member of a convoy travelling in Kurram and the convoy was targeted by TTP militants on the basis having been identified as being Turi Shias. The applicant did not suggest, and there are no indications, that the applicant's brother had an elevated personal profile with the TTP, or was for any other reason the personal target of this militant attack. The applicant has claimed he and his family face an increased risk of being targeted by the TTP on account of his brother having been killed by the TTP. He claimed he and his family were personally

targeted and threatened and that he escaped several attempts by the TTP to kidnap him, but did not provide any reasons for this. When asked to provide specific examples where he or any of his family members were personally targeted after his brother's death, he referred to the general threats the TTP had made against the Turi people. There is no information before me that suggests that family members of Shia Turis killed in a TTP attack in the manner of the applicant's brother have an elevated risk of harm as a result and I do not accept this is the case.

12. The applicant has claimed that he would have an increased personal risk of harm from the TTP on account of his previous employment [in Occupation 1] and [Occupation 2] for an employer who held a [contract]. He claimed '*many people working with [services] were kidnapped and killed*'. The delegate asked the applicant to describe why his job had elevated the risk of attack from militants and asked whether he had any experiences of being harmed or threatened on account of his employment, and I consider it telling that he did not provide any instances where either he or his colleagues were specifically threatened, or where they had encountered militants in the course of their work. He was also asked to describe the letters he and his family received and referred each time to the broader threats being made by militants against the Turi community. The delegate put him on notice that she did not consider he was of personal interest to the TTP or that his employment had led to an escalated risk of harm the applicant, and invited him to provide comment. The applicant responded that he had heard through his colleagues that the militants had been threatening him and that he was at risk of abduction if he returned to Pakistan. He also described how he perceived the broader threats being made against the Turi community to be a personal threat made against him.
13. I have taken into consideration that analysis in the country information before me confirms that militant groups in Pakistan have been known to target certain persons working for or otherwise associated with the Pakistani government, in particular security force personnel, prominent political figures and tribal leaders. Nevertheless, there is no independent information before me suggesting that a person in the applicant's circumstances, a low level local employee working for a [an individual] with a [contract] to manage [a business], would be personally targeted by sectarian militias on the basis of their association with or support for the Pakistan government. As noted by the delegate, the economy of Kurram was and remains reliant on agriculture as the main source of employment, and I do not consider the nature of the applicant's employment differentiated him from the ordinary populace or drew adverse attention from the TTP or other militant groups.
14. The evidence before me does not support the applicant's claim that he was perceived by the TTP or any other sectarian militant groups as a person associated with the Pakistan government or that he was the target of personal threats of harm made by militants. I do not consider there is any credible evidence that the applicant's risk of harm was elevated by his association with his brother or his employment. The applicant has not claimed to have ever held a prominent role in his village or tribe, or be associated with any such person. He has not claimed to have participated in a political party, peace negotiations, or a tribal militia, or to have undertaken any other activities that might draw the adverse attention of the TTP or another sectarian militia. I accept that he is recognisable in [City 1] as a member of the Turi Shia community and as such he will be assumed by Sunni sectarian militias to be opposed them and their goals. However I am not satisfied on the evidence before me that the applicant has taken any specific actions to oppose the Sunni militants or support the Pakistan government, or that he would be perceived by militants to be such a person.
15. The applicant indicated that his brother, [name deleted], had been granted asylum in [Country 1] in 2017 and requested that this be considered as evidence in support of his own claims for

protection. He provided evidence of his brother's visa and I accept that, taken on its face, it would appear to confirm the applicant's brother has been granted asylum in [Country 1]. The applicant did not provide any further information as to his brother's claims for protection or explain how his brother's profile in Pakistan related to his own claims. Given the scant information provided by the applicant I am not satisfied that the asylum claims made by the applicant's brother in a different country are related to the applicant's own claims for protection or that they can be taken to have any corroborative value in the assessment of his own claims.

16. I accept that the applicant has had a number of highly affecting personal experiences of sectarian violence in his home area, some of which have resulted in the death of one brother in 2008, and resulted in another brother sustaining injuries in a bomb blast targeted a large crowd in [City 1] in 2007. I also accept that the applicant perceives threats made by the TTP and other sectarian groups against the Turi Shia community to be a personal threat against him and his family. While I accept that he, his family and his friends have been affected by prolonged period of unrest and sectarian violence in Kurram, I am not satisfied that the applicant or his family have ever been persons of heightened profile who were personally targeted for attack by sectarian militias. Nevertheless, the information before me confirms that the TTP and other sectarian militias have targetted ordinary Shia Turi civilians in Kurram and I accept that the applicant may be readily identifiable to these groups as a Turi Shia Pashtun from Upper Kurram. In the context of his personal experiences and the long-term unrest and violence in his home region, I accept that the applicant holds a subjective fear of harm if he were to return to Pakistan. However for the following reasons I am not satisfied that that fear is well founded.
17. The Australian Department of Foreign Affairs and Trade (DFAT) describes Kurram as one of seven districts that make up the former Federally Administered Tribal Areas (FATA). In 2018 the FATA was merged with Khyber Pakhtunkhwa province. It is located alongside Pakistan's north-western border with Afghanistan, with Parachinar in the Upper Kurram administrative division being its largest town. Shias are estimated to make up 80 per cent of the population of Upper Kurram, the majority being members of the Turi tribe, which is estimated to be around 500,000 people. Kurram has been the site of decades of sectarian tension between Sunnis and Shia tribespeople and that these tensions have periodically catalysed into intense fighting. The arrival of the pro-Taliban Pakistani militias in 2007 triggered a particularly violent period, featuring significant fighting between Sunni militias and Shia militia groups. The Middle East Institute notes that Parachinar has had strategic value to the Sunni militants as it was a vital passageway between Pakistan and Afghanistan. During the most intense period of the conflict Sunni militias controlled the Thall-Parachinar Road that connected Upper Kurram to Peshawar, resulting in severe shortages of goods such as food and medicines. DFAT observes that the concentration of Turis in small geographic areas renders these communities particularly vulnerable to attack.
18. Recent analysis undertaken by DFAT, Pak Institute for Peace Studies (PIPS), the European Asylum Support Office (EASO), and the FATA Research Centre (FRC) assess that the security situation in the Kurram, and across Pakistan's tribal areas has improved significantly as a result of the Pakistan government's counter terrorism military operations that commenced in 2014. These reports all describe how the TTP and other sectarian militant groups operating in Pakistan have been weakened by the successive and intensive military operations across the country.
19. While it is clear that incidents of criminal violence, terrorist activities, and anti-Shia sectarian violence across the former FATA have declined significantly over the past five years, I note a

deterioration in the security situation for Shia's in Kurram in the first half of 2017. A surge in civilian casualties was the result of four high profile and coordinated sectarian attacks on Shia civilians in the Parachinar area between January and July 2017 that killed more than 150 people and injured over 300 others. The FRC observed that, as a countermeasure against the increased tempo of terrorist attacks, the Pakistani military had stepped up its counter-terrorism activities across the former FATA. It reported hundreds of terrorists affiliated with the TTP and other sectarian militant groups including Islamic State were killed and terrorist bases in Khyber and North Waziristan districts that had been used to undertake the attacks in the first half of 2017 were destroyed. PIPS reports that the major Pakistani militant groups continued to suffer huge losses in 2018, both in terms of damage to their operational capacities as well as elimination of their leaders.

20. PIPS reports that in July 2017 the Pakistan established the 'Safe City' project in the Parachinar area to combat the growing threat of sectarian groups on Shias living in the area. The project includes the installation of closed-circuit television cameras throughout Parachinar, which are linked to a command and control centre and which police officers monitor live. DFAT also reported the Pakistani armed forces took control of all of Parachinar's entry and exit checkpoints. DFAT, FRC and PIPS report the Pakistan government has allocated significant resources to improve the management of the border between Pakistan and Afghanistan, including the construction of military fencing which started in April 2017 and is expected to be completed in December 2019. While small scale militant attacks on security posts in Pakistan's border in the tribal areas continued to occur in 2018, these measures appear to have decreased border permeability, and led to significant reductions in cross-border attacks from Pakistani militant groups sheltering in Afghanistan. EASO's 2018 report describes the Pakistani security forces' current operations in the former FATA being out of the 'main combat phase', and that they are now able to focus on clearing isolated pockets of the insurgency. PIPS 2018 report published in January 2019 goes further and assesses that Pakistan's armed forces can now claim that the entire tribal conflict zone is under their control.
21. While their capabilities have been substantially diminished, the TTP and other Sunni sectarian groups continue to publicly declare their ongoing intention to target Shias across the tribal areas. I note Mohanty's caution in the Eurasia Review in November 2018 "*..the spectre of sectarian violence is unlikely to leave Pakistan in the foreseeable future*". PIPS report the vast majority of sectarian terrorist attacks in 2018 were undertaken by religiously inspired sectarian groups; predominately the TTP and its splinter groups, Lashkar-e-Jhangvi, as well as sectarian militant groups affiliated with Islamic State. Overall there were 125 terrorist attacks across Khyber Pakhtunkhwa in 2018 killing 196 and injuring 376 people. This represents a decline of 43% from 2017, which continued the long term downwards trend. Only one terrorist attack was reported to have taken place in Kurram, killing seven people. There were seven sectarian related attacks in 2018 across Pakistan that were reported to have been targeted towards members of the Shia community, and these killed 43 people, and injuring another 43 people. The great majority of these casualties occurring in a single suicide attack claimed by Islamic State in neighbouring Orakzai, killing 35 people. Apart from the major attack in Orakzai, the other six sectarian-related attacks across all provinces in Pakistan in 2018 were low intensity incidents.
22. The single terrorist attack in Kurram in 2018 reported by PIPS involved seven Shia Turi civilians killed when their vehicle hit a landmine on a road near the Afghan border. PIPS records this as a terrorism related incident but does not categorise this as a targeted sectarian attack. DFAT note Turi community reports of two sectarian attacks in the first quarter of 2018 including one involving an improvised explosive device, but could not verify the community claims. Regardless, even if I were to accept the landmine incident was a targeted sectarian incident, I

do not regard this incident amounts to a reversal of the longer term security trend showing a steady decline in sectarian and other forms of violence in the FATA. The evidence before me shows a significant and sustained diminishment of the capacity of the Taliban and other sectarian militant groups to undertake attacks of any sort in Kurram.

23. DFAT's 2019 report confirms the security situation in Parachinar and Kurram Agency has continued to improve, noting a significant decrease in the frequency and severity of attacks in 2018, and assesses this trend is likely to continue in 2019. The road connecting Parachinar to Peshawar is open and in regular use, and has remained under control of the Pakistan authorities for a number of years without a major security incident. I take into consideration that the DFAT, FRC, PIPS and EASO reports all express some caution about the prospects for durable security arrangements in the former FATA, and I accept that the geographic concentration of Turis in Upper Kurram and their proximity to the Afghan border places them in a position of some vulnerability. Nevertheless, the information before me does not indicate that, since June 2017, Turi Shias in Kurram have been unable to conduct religious or cultural ceremonies, attend festivities and shrines or observe specific holidays, such as Muharram, or that militants have used these or any such high profile public event to conduct attacks on Shias.
24. I have considered the chance of harm faced by the applicant as a result of being a bystander injured or killed during a militant attack on Pakistan government security personnel or infrastructure in Kurram, or as a result of military operations conducted by Pakistani or international forces. In this case, having regard to information about the current effectiveness of the significant security and armed presence and government control in and around [City 1], the low number of violent incidents in Kurram since 2015, and the applicant's lack of any personal profile with militant groups, I find that the chance of the applicant being killed or seriously injured for this reason is remote.
25. I accept sectarian attacks and other acts of violence harming Turi Shias in Kurram may still occur in the foreseeable future and that the applicant faces some chance of harm as a result. However, in light of the country information showing significant and sustained improvements in the security situation in Kurram, I am not satisfied that the chance of harm faced by the applicant rises to real one. I consider the chance of the applicant being killed or otherwise harmed for the reason of being a Pashtun Shia Muslim from the Turi tribe is remote. I am not satisfied the applicant faces a real chance of harm on this basis.
26. The applicant has claimed that, if he returned to [City 1], the fact that he would be returning after having spent time in Australia would be widely known, and would increase his risk of harm. The applicant did not claim that his risk of harm would be affected by the fact that he had sought asylum in Australia, however the delegate nevertheless considered it under the particular social group 'failed asylum seeker returning from a Western country'. DFAT observes that Western influences are pervasive in Pakistan and that many Pakistanis live abroad and return, or have relatives who do so. As noted by the delegate, DFAT assesses that people who have spent time living in Western countries are not subject to discrimination or violence on this basis. For the reasons given earlier I have found that the applicant does not face a real chance of harm by a sectarian militant group for the reason of being a Pashtun Shia Muslim from the Turi tribe. I am not satisfied that he faces a real chance of any harm should it become known to these groups that he is person who had lived in Australia or sought asylum there, or that his brother has sought asylum in a Western country.
27. The applicant departed Pakistan legally in 2012 on a genuine passport issued in his true identity however that passport has since expired. It is likely that, regardless of whether the

applicant would be returned involuntarily or travelled voluntarily, he would do so on a temporary travel document issued by the Pakistan government. DFAT understands that those returned to Pakistan in these circumstances are typically questioned upon arrival to ascertain whether they left the country illegally, are wanted for crimes in Pakistan, or have committed any offences while abroad. There is no information before me indicating the applicant is wanted for crimes in Pakistan, or committed any offences while abroad, or that he would be suspected of having departed Pakistan illegally or been involved in human trafficking or people smuggling operations. I also note DFAT's assessment does not indicate that a person who has lived and sought asylum in a Western country faces a real chance of harm if returning to Pakistan, or that they would be targeted by Pakistani government intelligence or security forces for this reason. DFAT also advise however that some returnees to the tribal areas of Pakistan have come to the attention of Pakistani security forces after being identified as "suspects or collaborators" either of sectarian militant or Pashtun nationalist groups. The applicant does not claim to have ever trained or fought with, or otherwise been associated with sectarian militant groups or Pashtun nationalist groups, or claim that he has ever been suspected of such activity. There is no information before me that would indicate that, if returned to his home region he would be at a real risk of coming to the attention to Pakistani security forces on this basis. I am not satisfied the applicant faces a real chance of any harm from the Pakistan authorities on the basis that he would be returned from a Western country where he has sought asylum, or that his brother has sought asylum in a Western country.

Refugee: conclusion

28. I am not satisfied the applicant has a well-founded fear of persecution. 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

29. 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

30. 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.

31. I have concluded above that the applicant does not face a real chance of any harm on any of the bases claimed. As 'real risk' and 'real chance' involve the application of the same standard,

I am also not satisfied that the applicant would face a real risk of significant harm for the purposes of s.36(2)(aa) on these grounds.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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