



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

INDIA

IAA reference: IAA19/07437

Date and time of decision: 5 December 2019 09:28:00

M Currie, 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 an Indian citizen and an adherent of the Sikh faith. He arrived in Australia in July 2013 and lodged an application for a Safe Haven Enterprise Visa (SHEV) in November 2016. In October 2019, a delegate of the Minister for Immigration found that Australia did not owe protection obligations to the Applicant. On 1 November 2019, the applicant's matter was referred to the Immigration Assessment Authority (IAA).
2. My task is to consider the applicant's claims for protection afresh. As this is a de novo decision, I am not bound by any earlier findings by the delegate.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 18 November 2019, the applicant sent an email to the IAA. It contained two attachments. The first was a five-page submission to the IAA which argued against the delegate's findings. The second document was titled '*Appendixs*' [sic] and is a 42-page document in the Portable Document Format (PDF) which was said to contain seven separate Appendices in the form of news articles and reports of relevance. In fact, the document contained nine articles and reports (with two articles incorrectly identified as Appendix 3, and two articles incorrectly identified as Appendix 4)¹. The applicant's submission pointed to information in the articles which he thought was of relevance to my consideration of his claims. None of the articles or reports provided in the 42 page PDF or referred to in the applicant's submission to the IAA was before the delegate. It is all new information.
5. No specific reasons have been offered by the applicant to justify the consideration of the new information. I observe that all of the new information in the various articles and reports is general country information about conditions in India. The material in the articles and reports relates to issues that were squarely before the delegate, principally the caste system in India; honour killings; the treatment of Sikhs; extra-marital relationships and difficulties associated with inter-caste and interreligious marriage in India. All of the articles were publically available. Except for the BBC News article, all of the articles and reports and were published well before the date of the delegate's decision. The applicant has not provided any reason as

¹ BBC News, 'The Couples on the Run for Love in India', 14 April 2019 (labelled Appendix 1 by the applicant) ; The Telegraph, 'Indian woman, 20, killed by her family for eloping with man from 'wrong caste'', 19 September 2013 (labelled Appendix 2 by the applicant); Immigration and Refugee Board of Canada, 'India: Treatment of Dalits by society and government authorities, including the state response to mistreatment (2010-March 2012)', 7 May 2012 (labelled Appendix 3 by the applicant); The Economic Times, 'Adult couple can live together without marriage, says Supreme Court', 7 May 2018 (also labelled Appendix 3 by the applicant); South China Morning Post, 'Courts helpless as corrupt police collude in India's 'honour killings'', 2 March 2009 (labelled Appendix 4 by the applicant); Immigration and Refugee Board of Canada, 'India: Honour crimes, including their prevalence in both rural and urban areas; government protection and services offered to victims of honour crimes (2009-April 2013)', 9 May 2013 (also labelled Appendix 4 by the applicant); The Times of India, 'Centre against FIR for kidnapping if girl weds voluntarily', 2 March 2013 (labelled Appendix 5 by the applicant); Immigration and Refugee Board of Canada, 'India: Situation of Sikhs outside the state of Punjab, including treatment by authorities; ability of Sikhs to relocate within India, including challenges they may encounter (2009-April 2013)', 13 May 2013 (labelled Appendix 6 by the applicant); Immigration and Refugee Board of Canada, 'India: Treatment by authorities of Indian citizens who are deported back to India, who return without a valid passport and/or who are suspected of having requested refugee status while abroad (2013 May 2016)', 9 May 2016 (labelled Appendix 7 by the applicant)

to why they were not provided earlier. I note that in case, the applicant is unrepresented before the IAA; I also note that he was unrepresented before the Department and that though he had assistance in completing his SHEV application this assistance was not provided by a migration agent or a person with legal qualifications. Finally, I observe that the applicant only has a primary school education. In the circumstances I am satisfied that there are exceptional circumstances to justify consideration of the new information provided by the applicant in the 'Appendix' and in his Submission to the IAA. I am satisfied that the new information contains credible personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claims. I have considered the new information and the arguments in the Submission to the IAA.

Applicant's claims for protection

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

- He was born in [year] and lived in [City 1] with his family. He worked as a [Occupation 1]. He is a Sikh and a member of the Mazhabi Caste (lowest caste). In 2008, he commenced an illicit relationship with a Hindu woman ([Ms A]) of the Brahmin Caste (highest caste). They kept the relationship secret. They wanted to marry.
- Sometime in late 2009 or early 2010, [Ms A]'s family became aware of the relationship. They opposed the relationship and sought to end it. [Ms A]'s father was a powerful local politician. Thereafter, on two occasions, [Ms A]'s family and friends twice attacked the applicant. On one occasion, members of [Ms A]'s family threw rocks at the applicant's home.
- On the first occasion, the applicant was beaten. He reported the incident to the police. The Police indicated they would make inquiries.
- On the second occasion, he was knocked unconscious and was almost killed. During the second attack, [Ms A]'s brothers indicated they were aware that he had lodged a complaint against them with the Police. Fortunately, the applicant's family intervened and he was taken to the hospital where he spent the night. After he spent the night in hospital, he was advised that the hospital staff would be required to lodge a report with the Police. The applicant was afraid and ran away from the hospital.
- Fearing that [Ms A]'s family were able to influence the local Police, the applicant travelled to Amritsar and reported the incidents to Police there. However, the Amritsar Police rang the Police in [City 1] and advised them of his intention; they said the applicant had to return to [City 1] and deal with the local police.
- Fearing for his safety, the applicant travelled to Delhi and stayed with a cousin. During this period, [Ms A]'s family approached the applicant's brother and beat him in an attempt to locate the applicant.
- Somehow, [Ms A]'s family found out where he was. They visited his cousin's house while he was out, and threatened his cousin's family. When he returned to his cousin's home, his uncle and aunt said he had to leave, and his bags were placed on the street. Fearing for his life, the applicant approached an agent, who assisted him to travel to [Country 1] on a Passport and a tourist visa.
- In [Country 1], he obtained a working visa and was able to stay in phone contact with [Ms A] for a time. He lived in [Country 1] for almost three years. However, after a while [Ms A]'s family became aware of his location. Around 2012, two Indian men in [Country 1] attacked him at the behest of [Ms A]'s family; they said he had brought shame on her

and her family. He feared he would be killed. Soon after the attack, he made arrangements to travel to Australia.

- The applicant left India because he and his family were being threatened by his former girlfriend's family. He fears he will be seriously injured or killed because of his past relationship with [Ms A], as they belonged to different castes and religions.
- He believes that [Ms A]'s family have a lot of influence, power and money and they used this against the applicant. He went to the police station in [City 1] and in Amritsar, but Police were unwilling to assist him. He believes this is due to the power of [Ms A]'s family.
- He believes that if he returned to India, the family of [Ms A] and the police would be able to find him throughout India.

Factual findings

7. As part of his SHEV application, the applicant has provided a copy of an Indian Drivers licence. This is the only original identity document provided by the applicant. It provides identity information that is consistent with the applicant's verbal identity claims. The applicant has established his identity to my satisfaction. I accept that he is an Indian citizen who was born in [month year]. I accept that he lives in [City 1] in Punjab State. For the purposes of this decision, I find that India is his receiving country.

Inter-Caste/interreligious relationship

8. The central claim advanced by this applicant is that in 2008 he, a Sikh member of a low caste, commenced an illicit relationship with [Ms A], a Hindu woman of the highest caste. Sometime in late 2009 or early 2010, [Ms A]'s family became aware of the relationship. Due to the disparities in the applicant's and [Ms A]'s caste and religion, [Ms A]'s family opposed the relationship and sought to end it. Furthermore, [Ms A]'s father was a powerful local politician who could and did use his influence in order to end the relationship. Thereafter, on two occasions, [Ms A]'s family and friends twice attacked the applicant. On one occasion, members of [Ms A]'s family threw rocks at the applicant's home. The applicant's brother was beaten and his family was threatened.
9. The applicant has provided a large volume of country information before relating to issues of marriage, caste, and religion. This information indicates that in India the caste systems is hereditary and it is uncommon for a man of a low caste like the applicant to marry a high caste woman and fewer than 5% of marriages are inter-caste. There are a range of historic societal and cultural constraints against such marriages. Charges can be lodged against male partners when the female was under the age of 16. It is clear that in India there are difficulties associated with Inter-Caste and interreligious relationships. 'Love matches' between Inter-Caste and interreligious couples have led to violence and so called honour killings; a crime motivated by the view that the victim has brought dishonour on the family. These killings are usually committed by the relative of the female partner and can result in extreme violence against both partners of a relationship. In northern and rural areas, there is widespread acceptance of this type of violence. Furthermore, police are often alleged to be unwilling to assist in honour crimes, or in the investigation of crimes against persons of low caste.

10. Nevertheless, other information before me indicates that India has a secular constitution and that interreligious and inter-caste marriages are legal and are protected by law². Marriage system in India is based primarily on the social system and stratification³. Some states require marriages to be registered by law. Couples may seek to marry under one of India's personal religious laws, which have been codified according to the requirements of different religions. The Special Marriage Act (1954) is an alternative to each of the various religious personal laws. The Act is available to all citizens who choose to marry outside their faith, and the religion of the parties to an intended marriage is immaterial under the Act⁴. Furthermore, the law permits marriage without religious conversion, though Hindus and Sikhs who do so may lose some inheritance rights⁵. Arranged marriages continue to account for the overwhelming majority of marriages across India. Parents or other family members often assume sole responsibility for deciding whom their children marry, particularly in northern India. Many parents consider arranging a marriage for their children a right and a duty, and may not accept their son or daughter choosing their own spouse. According to DFAT, this is usually a consequence of family dynamics. Women face social pressure to marry by their mid-20s and men by their mid-30s⁶. Marriages between Muslim men and Hindu women have become politicised in recent years⁷. Despite these many issues, the Government of India recognises the value of inter-caste marriages and in recent years has sought to encourage inter-caste marriage and has offered an incentive payment of \$1000 to couples⁸. While mixed marriages are still not common in India, such marriages are becoming much more frequent and according one study, the number of inter-caste and inter-religious marriages in India have nearly doubled during the period 1981-2005⁹. Such marriages are much more common in urban areas. Punjab is said to have one of the highest rates of such marriages, with more than 12% of women marrying outside of their caste¹⁰.
11. Notwithstanding the country information I cited above, which summarises some difficulties associated with inter-caste and interreligious marriage; I have some concerns about the applicant's claims for protection. To my mind, there is something of a dichotomy with the applicant's central claims. He says that he cannot return to India, because [Ms A]'s family has so much power and influence that they could and would find and kill him without suffering consequences. He says that he would not be safe anywhere in the country. However, on his own evidence, [Ms A]'s family did have at least two opportunities to kill him in India and they did not do so. Furthermore, there was another attack on him in [Country 1]. Rather, his own evidence is that on the occasions they did catch him, they beat him twice, threw rocks at his house and beat his brother. He has also indicated that [Ms A]'s family could and did call on the support of local police who they were able to influence. But on his own account, he had many interactions with the Police during this period and they did not arrest or detain him at all. When the delegate pointed out to the applicant that it would appear that if [Ms A]'s family wanted to kill him, they could have done so, the applicant expanded his claim to assert

² Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report – India', 17 October 2018, CIS7B839419830

³ Goli, S, Singh, D, Sekher, T. V, 'Exploring the Myth of Mixed Marriages in India: Evidence from a Nation-wide Survey', 27 August 2013, CIS36DE0BB2110

⁴ DFAT, 'DFAT Country Information Report – India', 17 October 2018, CIS7B839419830

⁵ US Department of State, 'International Religious Freedom Report for 2018 - India', 21 June 2019, 20190625175131

⁶ DFAT, 'DFAT Country Information Report – India', 17 October 2018, CIS7B839419830

⁷ DFAT, 'DFAT Country Information Report – India', 17 October 2018, CIS7B839419830

⁸ Goli, S, Singh, D, Sekher, T. V, 'Exploring the Myth of Mixed Marriages in India: Evidence from a Nation-wide Survey', 27 August 2013, CIS36DE0BB2110

⁹ Goli, S, Singh, D, Sekher, T. V, 'Exploring the Myth of Mixed Marriages in India: Evidence from a Nation-wide Survey', 27 August 2013, CIS36DE0BB2110

¹⁰ Goli, S, Singh, D, Sekher, T. V, 'Exploring the Myth of Mixed Marriages in India: Evidence from a Nation-wide Survey', 27 August 2013, CIS36DE0BB2110

that, in fact, [Ms A]'s family had thought him dead after the second attack, and so they had tried to kill him. This is not what he had said earlier in the interview, or in his SHEV application. When the delegate questioned him as to how he had avoided the Police, he said he was not home. I do not accept that if Police were seeking him, he could have avoided them by this means.

12. There are other problems with the applicant's account. I note that very early in his Protection Visa Interview the applicant said he obtained a genuine Indian Passport in 2008, and that he commenced saving for a working visa in [Country 1] at that time, which was expensive. In the same interview, he later said that due to his fears of [Ms A]'s family, he had to travel to [Country 1] on a tourist visa which was arranged by an agent. He said he had to pay 60K- 70K Indian Rupees for the visa. As noted by the delegate, this means that the applicant was preparing to travel to [Country 1] for employment purposes for a lengthy period prior to his eventual departure. The delegate questioned the applicant closely about how he managed to live and work in [Country 1] for so long if he travelled on a tourist visa. He said that he paid his agent for the work visa, but was only able to obtain the tourist visa on short notice. He concedes he paid too much for a tourist visa, but said that in [Country 1], he was able to convert the tourist visa to a working visa. I found the applicant's answer unconvincing. He appeared, to me, to be inventing elements of his claims in order to answer the delegate's concerns about when and how he obtained his visa. He was unconvincing. Like the delegate, I find that the applicant's concession that his long term plan was to obtain a working visa and travel to [Country 1], which is what actually happened, tends to cast some doubt upon his claim that he had to flee India in fear of his life.
13. Throughout the applicant's Protection Visa application and interview, there were other instances of him changing key elements of his story when questioned by the delegate or omitting key events. For example;
 - He originally indicated that [Ms A]'s father was the powerful local politician, but later in the interview said it was her uncle. He then reverted to claiming it was her father.
 - He said that when he went to Delhi he went and stayed at his cousin's home. He spoke about his aunt and uncle asking him to leave the house. However, at other times during the same interview, he said he was staying at the house of a friend. He said his friend's mother and father asked him to leave.
 - He said that his uncle in Delhi called the police who advised him they were looking for the applicant. He also said that the police called his uncle. He also said that police visited the house in Delhi. At various times he seemed to conflate these three events.
 - Initially he indicated that he had reported the first beating he received to the police. He said that they took his complaint and commenced making inquiries. When the delegate indicated that this suggested that his claims were taken seriously by the authorities, and that it would appear that, there were attempts to assist him, his account shifted. He said that they did not accept his complaint, and refused to help him.
 - He said in his SHEV application that his family had disowned him. He said in his Protection Visa Interview that this was a formal procedure whereby his parents had declared to an official in India that the authorities could do what they liked to the applicant. He said that as a consequence, he had had no contact with his family since 2015. However, in his SHEV application of November 2016, he indicated he spoke to his mother a few times a month. When asked by the delegate to explain this discrepancy, he indicated that these calls were in secret and no longer occurred. His explanation for the discrepancy was unconvincing.

- In his SHEV application, the applicant has claimed that he tried *“to relocate to different parts of India (North, East, West) but they know you don’t belong there & it is hard to fit in”* but neither the remainder of his application, nor his Protection Visa Interview, nor his submission to the IAA indicate that this ever occurred. Rather he has otherwise claimed to have tried to move around the homes of several relatives in Punjab, and spent two weeks in Delhi.
 - At the start of his interview, the applicant indicated that his brother had been beaten by [Ms A]’s family and friends. This beating is central to the applicant’s claims that [Ms A]’s family was after him and that he had to flee. Later in the same interview, in passing, the applicant said that this beating resulted in his brother becoming disabled. This was an entirely new assertion which had not been made before. It does not accord with any of the applicant’s other statements about his brother.
 - Finally, I note that at the end of his October 2019 Protection Visa Interview the applicant was asked if he had any further comments. At that time, the applicant referred to the period when he first he arrived in this country. He indicated that, at that time, he did not cite persecution, discrimination or the risk of harm as the reason for his travel to Australia and he did not lodge any protection claims. He indicated to the delegate that the reason that he did not mention any of his claims related to [Ms A], or her family when he was first interviewed by the Department, soon after he arrived in this country, was that he was scared.
14. While individually, each of these issues is relatively minor. When considered cumulatively they present, to my mind, a very different picture. Key elements of the applicants account have shifted; some more than once. I have considered whether there may be other explanations for these factors, such as a failure of memory. But the applicant has not claimed this and there is no other evidence before me to suggest it, or any other factor may be involved.
15. On the whole, I did not find this applicant to be a reliable witness. I found his account to be shifting and unconvincing. When considering his claims, have carefully considered the country information cited above which does indicate difficulties for inter-caste and interreligious relationships. Nevertheless, I do not accept that he has told the truth about any of these claims. In this case, I found the applicant to be disingenuous and unpersuasive. On the evidence before me, the applicant had planned to travel to [Country 1] for work purposes for around 2 years prior to his departure. He had obtained a Passport for this purpose, and was saving for a working visa. I do not accept that he was ever in a relationship with [Ms A], or any Hindu or Brahmin. As a consequence, I do not accept that he was ever pursued, or attacked by [Ms A]’s family or friends. I do not accept that [Ms A]’s family influence the Indian Police to find and harass him. I do not accept that his family has disowned him. I note that without these claims, the applicant would not have any protection claims at all. I conclude that the applicant has entirely fabricated these aspects of his account in order to enhance his chances of obtaining a protection visa. I conclude that the applicant travelled to [Country 1] for the purposes of employment, after saving for that reason for around two years as he had always intended.

Refugee assessment

16. 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

17. 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.

18. This applicant lived the vast majority of his life in the city of [City 1] in the Indian State of Punjab, except for the three years he lived in [Country 1] and the time he has spent in Australia. His family remain living in various places in Punjab, including in [City 1]. I have not accepted his claim that his family renounced him. I conclude that if returned to India, the applicant would return to [City 1] and reside there with his family.

19. I have concluded that the applicant fabricated all of his claims for protection relating to [Ms A], her family and his difficulties with the Police. Having dismissed these claims, the applicant, effectively has no protection claims. I note that in the s.65 decision the delegate considered whether it would be safe for the applicant to relocate to other parts of India, but I have found the applicant would return to [City 1], so this is unnecessary. I also observe that the delegate considered whether the applicant would be able to access effective State protection if returned India. However, such considerations only arise if the applicant's claims are accepted. I have not accepted the applicant's claims about harassment by the Police at the behest of [Ms A]'s family upon which these claims are founded. As a consequence, the issue of State protection does not arise in this decision either.

20. In the circumstances, I am only left to deal with the applicant's residual claims. That he is affected by a 2014 departmental data breach and issues that arise on the material before me; that he is Sikh from the Punjab who sought asylum.

2014 Data Breach

21. I observe that in the s.65 decision, the delegate considered whether the applicant would face harm arising from a 2014 data breach by the Department.

22. In 2014, the Department inadvertently published a document on its website which included details regarding some persons who were in immigration detention at that time. The Department has advised all affected parties, that the information released during the 2014 data breach was not easily accessible, was only available for a short time and included the

applicant's name, date of birth, gender, nationality and some details about their period of immigration detention in Australia. Affected applicants have also been advised that no information about any specific claims made by them was available during the breach. The data released during the breach is information that would be immediately apparent to Indian authorities should the applicant be returned to India (that is, information about his identity and that that he had sought asylum in Australia) and does not contain any information from which anti-Government activity by the applicant could be inferred. There is no evidence before me that anybody in or associated with India has accessed these documents, including members of the Indian Government. In these circumstances I am not satisfied that the applicant would face a real chance of any harm arising from the 2014 data breach or if returned to India. In the circumstances, I am also not persuaded that the Departments Data Breach would contribute to his profile in India.

Sikh who sought asylum in Australia

23. On the applicant's own evidence, he departed India legally on a genuine Indian Passport. The country information before me does not indicate that returnees to India would face any problems associated with lodging a claim to asylum in another country, except in those instances where they had previously come to the attention of the authorities. This applicant has not indicated that he was of any interest to the authorities in India, except for the claims which I have not accepted. I am not satisfied that he was of any interest.
24. According to information provided by the applicant, there are approximately 19 million Sikhs in India and they make up around 1.9% of the population. However, over 14 million Sikhs live in Punjab, and account for approximately 60 percent of the Punjab population. Religious freedom is protected by the constitution of India and there is no discrimination against Sikhs and they are not the targets of particular violence. Other information before me supports that Sikhs do not face persecution or discrimination. I note that the applicant has not founded any protection claims on his religion, other than those he said arose from his relationship with [Ms A]. I have not accepted these claims.
25. I am not satisfied that the applicant would face a real chance of harm arising from his attempt to claim asylum in Australia, or his Sikh religion.

Refugee: conclusion

26. 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

27. 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

28. 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.

29. I have found that the applicant would not face a real chance of harm arising from any of his claims for protection. As 'real chance' and 'real risk' have been found to meet the same standard, it follows that he would not face a real risk of significant harm arising from any combination of his claims.

Complementary protection: conclusion

30. 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.