



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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PAKISTAN  
IAA reference: IAA19/07554

Date and time of decision: 22 January 2020 09:21:00  
N Becke, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be from Karachi, Sindh Province, Pakistan and a citizen of that country. On 16 December 2016 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 21 November 2019 a delegate of the Minister for Immigration (the delegate) refused to grant this visa.

### 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).
3. On 30 December 2019 the IAA received a submission on behalf of the applicant ('the IAA submission'). The IAA submission reiterates claims made to the delegate that are contained in the review material. It also contains arguments in relation to issues before the delegate, which I have noted and considered.
4. The IAA submission also raises new claims on behalf of the applicant, namely:
  - The Pakistani authorities are aware that the applicant departed Pakistan for [country] and later arrived in Australia by boat. Under Pakistan's *Passport Act 1974* he will face charges for acting in a manner prejudicial to Pakistan's interests or relations with a foreign power, or for destroying his passport. Upon return to Pakistan he will face a jail sentence of up to three years and/or a fine, which would amount to significant harm.
  - The applicant also fears harm from the Pakistani authorities and his community in Pakistan because he has been in Australia for more than seven years seeking asylum.
  - The Pakistani government keeps a record of all Shias who return home after a long period of time outside of the country and makes them disappear.
5. The IAA submission also contains extracts from Pakistan's *Passport Act 1974* which appear to predate the delegate's decision and to have been provided to corroborate the applicant's new claim that the Pakistani authorities will subject him to significant harm for his purported breaches of that Act.
6. The author of the IAA submission is the applicant's representative, who also assisted him prepare his SHEV application and attended his SHEV interview, and the submission does not explain why these new claims, or the new country information, were not raised earlier if they were relevant to the applicant's SHEV application, or how they constitute credible, personal information in the relevant sense. At the outset of the SHEV interview the applicant confirmed the form "Important information about your Protection visa interview" had been explained to him and that he understood it was his responsibility to raise all his claims for protection in the first instance. During the SHEV interview the applicant's representative clarified various matters on the applicant's behalf and, in addition to the applicant's 2016 statutory declaration, she also provided pre and post SHEV interview submissions for the delegate's consideration, and yet these new claims were not mentioned. It is also difficult to see how these claims have arisen as the result of the delegate's findings, nor am I satisfied that they otherwise arise on the material before me. Given the circumstances overall, I am not satisfied there are exceptional circumstances to justify considering any of the above new claims or the extracts from the *Passport Act 1974*, or that the matters in 473DD(b) are met.

7. The IAA submission references four other sources of country information which, for various reasons, do not comply with the IAA's Practice Direction. The first source is a three line extract from a July 2019 *DW* article and the second consists of a brief, paraphrased section of a July 2019 *Eurasian Times* article. I do not consider that a three line extract provides sufficient context to corroborate the applicant's new claim regarding the disappearance of Shias upon return to Pakistan, and a copy of the *Eurasian Times* piece has not been provided or extracted at all. The third source is a four line extract which, contrary to the Practice Direction, has not been identified. The extract appears to have originated from a blog, but I am unable to identify the author or determine its reliability. The fourth source is a footnoted reference to a 2017 article from *Outsidermag*. Again, contrary to the Practice Direction, a copy has not been provided or extracted at all. The applicant has been provided a copy of the IAA's Practice Direction, and an information sheet in his own language, which specify the requirements of giving information to the IAA and I note the author of the IAA submission is a registered migration agent providing assistance to Fast Track applicants. Given these circumstances I have decided not to accept any of the four sources.

### **Applicant's claims for protection**

8. The applicant's claims can be summarised as follows:
- In [year] he was born in a Shia village in the Gilgit-Baltistan region of Pakistan ('Gilgit'). He is a Shia Muslim.
  - From 1988 the Taliban targeted Shias in Gilgit and his grandfather was wounded by them and later passed away.
  - From 1992 conditions improved somewhat but the Pakistani government did not provide schools, hospitals, or other facilities in Gilgit.
  - In 1996 he and his family relocated to Karachi, where they took up residence in a Shia majority area. He regularly heard about instances where other Shia Muslims in Karachi were targeted on account of their religion.
  - In 2007 his cousin was travelling between Karachi and Gilgit, when insurgents identified him as Shia and killed him.
  - His older brother is a Shia cleric who educated him about the Shia religion. From 2007 the applicant began to join protests against the killing of Shias in Karachi. He was elected President of the *Anjuman Raza-e-Abbas* ('the Anjuman') at his local mosque.<sup>1</sup> He arranged religious gatherings, engaged in fundraising for the local Shia community, and spoke to people about the deeds of the Imam Hussain.
  - In 2009 he narrowly escaped injury in a bomb blast which was targeted at Shia students participating in a religious ceremony at his university. He helped his injured friends and organised for people to give blood.
  - In 2010 he narrowly escaped injury or death again in a large explosion near the university, which targeted a Shia rally to which he arrived late. He witnessed graphic scenes in the immediate aftermath. One of his friends died and another is now permanently disabled.

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<sup>1</sup> Shia cultural and community organisation.

- In 2011 he became [Office Bearer 1] of his local *Majilis Wahdat ul Muslimeen* (MWM) Pakistan.<sup>2</sup> He used to organise meetings to raise awareness of the Shia religion and the current political situation in which Shias faced persecution in Pakistan. Their protests were shut down by the Pakistani authorities.
- In 2012 the Secretary General of his local MWM chapter, and other members, informed him his life was in danger and he must leave the country.
- In March 2013 he departed Pakistan legally, using his own passport. [Later in] 2013 the Secretary General and the others who had warned him to leave, were themselves shot and killed in Karachi.
- In November 2016 another cousin was shot and killed on his way to university.
- The applicant is identifiable as a Shia from his national identity card (NIC), due to his name and address.
- He fears that Sunni extremist groups, such as Lashkar-e-Jhangvi (LeJ), Sepah-e-Sahaba, Tehrek-e-Taliban, and others, will seriously harm and kill him because he is known as a young, educated Shia activist, and because of his anti-Pakistani government political opinion.
- The Pakistani authorities are corrupt and unable or unwilling to protect him. The authorities have links to the Sunni extremist groups
- He cannot relocate to another part of Pakistan because he needs to support his mother in Karachi and because all other areas of Pakistan are also unsafe for Shias.

### **Refugee assessment**

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9. 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**

10. 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

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<sup>2</sup> Shia political organisation.

- 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.
11. The applicant has been consistent in stating his identity since his arrival in Australia. In support, the applicant has provided a copy of his Pakistani NIC, with an English translation, and copies of his Pakistani Government [Service Book] and Pakistani drivers licence. On the basis of the information before me I am satisfied the applicant's identity is as claimed and that Pakistan is the receiving country for the purposes of this assessment.
  12. I accept that the applicant was born in a village in the Gilgit region of Pakistan. I accept the applicant's evidence that during the late 1980s the Taliban had a presence in the area and the Pakistani authorities provided few services or protection for the local communities. I accept that the applicant and his family moved to Karachi, Sindh Province when he was ten years old and they settled in a Shia neighbourhood.
  13. The applicant studied in Karachi, where he completed high school and some university subjects, as well as some [specified] qualifications. Between 2009 and his departure from Pakistan in 2013 he worked in Karachi as a sales executive for a [company] and as a [Occupation 1]. The applicant's mother, [number] living siblings, and their families all still live in Karachi. On the evidence before me I am satisfied Karachi is the area to which he would return.
  14. The applicant's responses to the delegate's questions regarding his religion were detailed and credible, and I am satisfied he is a practising Shia Muslim.<sup>3</sup> The Department of Foreign Affairs and Trade (DFAT) notes that most Pakistani Shias are not physically or linguistically distinguishable from Pakistani Sunnis.<sup>4</sup> I accept the applicant's older brother is a Shia cleric, who educated the applicant about the Shia religion. While I accept the applicant's involvement in Shia religious and political activities, or his name and address on his NIC, could also lead someone to infer he was Shia, I am not satisfied he could be readily identified as a Shia from his appearance alone.
  15. I accept most of the applicant's claims regarding his experiences in Pakistan. I accept that in 2007 the applicant's cousin, who was travelling between Karachi and Gilgit, was shot and that the family was later informed that those responsible for the killing had first identified him as a Shia. The applicant was evidently emotional when this matter was discussed during the SHEV interview and I accept such an incident occurred. The applicant has also claimed that in 2016 another of his cousins was shot on his way to university with friends; however there are no further details before me about this incident. The country information cited below indicates that violent sectarian and criminal incidents can still occur in Karachi, despite the marked improvement in the security situation since the applicant's departure in 2013. While I am prepared to accept in 2016 the applicant's cousin was shot on the way to university as claimed, on the evidence before I am not satisfied this was because of his identity as a Shia.
  16. I accept that following the death of his cousin in 2007 the applicant began to participate in protests against anti-Shia violence in Karachi. In his written SHEV statement the applicant claims he was elected President of the Anjuman at his local mosque, where he organised religious gatherings, engaged in fundraising for the local Shia community, and spoke to people about the deeds of the Imam Hussain. During the SHEV interview the applicant's evidence was somewhat more vague, telling the delegate that he used to gather "other boys" to hold

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<sup>3</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Pakistan", 20 February 2019, 20190220093409

<sup>4</sup> Ibid.

religious events to raise awareness of what was happening to Shia people, and organise charity events to help poor Shias. The applicant also claims he was elected [Office Bearer 1] of his local MWM chapter, where he undertook similar activities.

17. I have had regard to a translation of a 'character certificate' from the 'General Secretary' MWM Trust which indicates the applicant served as President of the Anjuman from November 2009 until October 2012. The certificate indicates the applicant worked as a 'scout' during Moharram and because of the terrorism threat he assisted the organisers to 'maintain coordination'. I do not consider the letter supports the applicant's claim that he was responsible for organising the activities he has claimed to have organised and his own evidence regarding this was somewhat superficial. I also note that the certificate does not mention that the applicant was appointed [Office Bearer 1] of the MWM in 2011 as he has claimed. Overall I am prepared to accept that as President of his Anjuman the applicant worked with others to organise pro-Shia rallies or processions, but not that he played a leading role. I also do not accept that the applicant was the [Office Bearer 1] of the MWM, although I accept he had some involvement with the senior figures of his local MWM chapter, such as the Secretary General.
18. I accept that in 2009 the applicant was on his way to a Shia religious ceremony at his university when he narrowly escaped injury in a bomb blast which targeted the gathering. I also accept that in 2010 the applicant was running late to another Shia rally, just outside the campus, when a large explosion took place. Based on the applicant's emotional evidence to the delegate I accept he witnessed the aftermath, in which some of his friends died and another is now permanently disabled.
19. Attached to the SHEV application and post SHEV interview submission are several pages of uncaptioned photos, the first of which the submission identifies as the applicant with friends during his time in Karachi but the rest are mostly uncaptioned. Some of the photos are duplicates. One photo shows the applicant sitting with a group of five other men in casual clothes, another shows a person who may be the applicant at what appears to be a conference table and another shows a person who may be the applicant standing with two men in white robes. The remainder of the photos show various unidentified flags and banners, rallies and crowds (in which it is not possible to distinguish the applicant), various photos of unidentified injured, or possibly deceased, men in wheelchairs and hospital beds, various photos of unidentified clerics surrounded by crowds, and a document in a language other than English for which no translation has been provided. One of the photos attached to the SHEV application has a handwritten caption which points to the applicant's position in the photo, in which he appears to be a pallbearer.
20. I also have serious concerns with the events the applicant claims prompted his departure from Pakistan in mid-2013. During the SHEV interview the applicant reiterated his written claim that in 2012 the Secretary General of the MWM and others informed him his life was in danger and he must leave the country. During the SHEV interview the delegate pointed out to the applicant that he was told that his life was in danger in 2012 but he did not leave Pakistan until May 2013. The applicant confirmed to the delegate that he did not receive any threats during this time, but he lived with his mother and was afraid to go out, and that he went to the police station and told them he was being targeted. I consider this at odds with the applicant's claim to the delegate that he fears the Pakistani government would imprison him if he were to seek protection from them. When asked, the applicant also confirmed that no one in his large immediate family in Karachi, including his older brother who is a Shia cleric, has ever been targeted or threatened because of the applicant's involvement with the Anjuman or the MWM, because of their identities as Shias, or for any other reason.

21. Following a break in the SHEV interview the applicant's representative claimed that the applicant had advised her that the weather had been very hot at the time his MWM contacts told him about the threats, and as the representative herself has been to Karachi during August and September, when it was very hot, this was probably when he was told. In that case, the representative argued, only six months had elapsed between the threats and his departure in May; however I consider her argument to be wholly unconvincing. I have also had regard to the 'Employment History' section of the SHEV application which indicates the applicant continued to work as a self-employed [Occupation 1] until 2013 which is at odds with his claim that he was afraid to leave his mother's house during this time. I also note that the MWM 'Character Certificate' the applicant has provided, while praising his activities on behalf of the organisation and the Anjuman, does not indicate that he ever received threats to his life. Given the applicant has claimed that he was warned about these threats by senior members of the local MWM, it is concerning the threats are not mentioned in the certificate itself.
22. During the SHEV interview the delegate put to the applicant that there were significant discrepancies between his evidence at his arrival interview, which was held around three weeks after his arrival in Australia, and his SHEV application. The transcript from the applicant's arrival interview indicates that when asked if he (or his family) had ever been threatened by the Taliban or other terrorist groups, the applicant confirmed twice that he had not, although he noted there had been bomb blasts in his home area. When asked if he had ever been involved in any activities or protests against the government the applicant responded that he had attended over ten peaceful protests, but he did not mention his involvement with the Anjuman or MWM. When the delegate asked the applicant about these omissions at the SHEV interview he responded that the arrival interview was a fragile time for him and his mind was not in the right place because he was still focused on the boat journey during which the vessel had almost capsized. The IAA submission also argues that the delegate placed more weight on the applicant's failure to mention his association with the Anjuman and MWM than on the photographs of him during his activities as Shia activist. However, as noted above, only one or two of the photos are captioned, very little or no information about their context has been provided, and the applicant is not easily identifiable in most of those photos.
23. I have had regard to the applicant's explanation regarding the omissions in his arrival interview and it is plausible that three weeks after his arrival in Australia he may still have been under stress in the new environment of a detention centre, and recovering from the arduous journey by boat. In this context I am prepared to accept he may have not mentioned his role at the Anjuman and involvement with the MWM, but I find it difficult to accept that he advised the interviewer twice that he had never faced personal threats in Pakistan.
24. Overall, I accept the applicant is educated and was known to people in his community as the President of the local Anjuman, and through his involvement with the local MQM chapter. I also accept that during the SHEV interview the applicant expressed a genuine anti-Pakistani government political opinion and that he has attended public rallies in Karachi. However, I consider the applicant's claim to be a known Shia activist unconvincing and not supported by the letter he has provided from the MWM Trust. On the evidence before me I do not accept that the applicant is a Shia activist. I do not accept there was ever a specific threat to the applicant's life in Karachi, that he was in hiding prior to his departure from Pakistan, or that he is known to any anti-Shia person or group, or to the Pakistani authorities, for any reason.
25. The applicant also claims that in [2013], some months after his arrival in Australia, the Secretary General, and two other MWM members, were shot in Karachi, which I am prepared to accept. There is no further information about this before me regarding the circumstances of their deaths, and given all the circumstances I am not satisfied that this is related to the applicant's

own situation. At the time the applicant resided in Karachi, sectarian violence was at or near its peak, with almost 300 reported incidents of Sunni-Shia sectarian violence between 2007 and 2013, putting it on par with Balochistan as the most unstable area of Pakistan during this period.<sup>5</sup> DFAT notes that Karachi has historically experienced high levels of violence due to rival ethnic, sectarian, political, business and criminal interests; however the frequency of attacks has declined annually since then as the result of the Pakistani government's efforts to combat terrorist, separatist and criminal groups operating in the country.<sup>6</sup>

26. In June 2014 *Operation Zarb-e-Azb* commenced in a number of cities including Karachi, targeting terrorist and criminal networks. The National Action Plan (NAP), established later that same year, in response to an attack on a Peshawar public school in which more than 130 children died, ended Pakistan's unofficial moratorium on the death penalty, established military courts to try suspected militants, targeted sources of finance for militant organisations, took measures to restrict hate speech, and committed to policy reforms, particularly in the former Federally Administered Tribal Areas (FATA).<sup>7</sup>
27. In 2015 and 2016 the military operations and NAP continued, with the Pakistani army targeting a wide array of militant groups in the tribal areas. In 2017 the government introduced a further nationwide military operation, named *Operation Raad-ul-Fasaad*, in response to some major attacks in early 2017 in Lahore, Quetta and Sehwan.<sup>8</sup> In 2018, the Government announced its second National Security Policy, and the Ministry of Interior is reportedly preparing NAP-2. Observers credit *Operation Zarb-e-Azb*, its successor *Operation Raad-ul-Fasaad*, and the NAP with a significant reduction in the number of violent and terrorism related attacks in Pakistan.<sup>9</sup>
28. Security operations in Karachi, and the highly visible presence of the federal paramilitary Rangers, have led to a significant decrease in violence. While DFAT assesses that a low level of sectarian-motivated violence in Karachi exists within the context of a moderate level of overall violence, and that the sustainability of recent security force efforts to reduce violence in Karachi is not yet clear, the same report also points to a nine year downward trend in violent incidents across the country.<sup>10</sup> The South Asia Terrorism Portal points to clear improvements in Karachi across a number of security and law enforcement indicators in the years leading up to its 2017 report: Between 2015 and 2016 there was a 60 percent reduction in police officer deaths, a 72 percent reduction in targeted killings, a 27 percent reduction in reported extortion cases, and since 2014 a 66 percent reduction in "violence" related casualties.<sup>11</sup>
29. I have also given weight to data from the 2019 Pakistan Institute for Peace Studies (PIPS) which indicates (consistent with their 2017 reporting) that the Rangers-led operation in Karachi, and the anti-militant actions of the Counter Terrorism Department (as part of the NAP and *Raad-ul-Fasaad*) has helped to sustain the declining trend of terrorist attacks in the city since 2014.<sup>12</sup> DFAT notes that in 2018 twelve terrorist attacks took place in Karachi, resulting in 19 deaths, a 62 per cent reduction on 2017 figures, as well as a 57 per cent reduction on a provincial level, figures which are also consistent with the 2018 PIPS report.<sup>13</sup> DFAT also notes that 52 per cent

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<sup>5</sup> Arif Rafiq, 'Sunni Deobandi Shii Sectarian Violence in Pakistan: Explaining the Resurgence Since 2007', Middle East Institute, 1 December 2014, CIS2F827D91993

<sup>6</sup> DFAT, "DFAT Country Information Report – Pakistan", 20 February 2019, CIS20190220093409

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> South Asia Terrorism Portal (SATP), "Pakistan Timeline – 2017 (to 4 December), 12 December 2017, CISED50AD7845

<sup>12</sup> Pakistan Institute for Peace Studies (PIPS), "Pakistan Security Report 2018", 6 January 2019, 20190121110758

<sup>13</sup> DFAT, "DFAT Country Information Report – Pakistan", 20 February 2019, 20190220093409; PIPS, "Pakistan Security Report 2018", 6 January 2019, 20190121110758

of all terrorist attacks across Pakistan in 2018 were directed at security and law enforcement personnel.<sup>14</sup> I also note that while the applicant is a Shia, he is not a Hazara, a group which country information indicates has previously been the target of anti-Shia sectarian attacks in other areas of Pakistan, nor is he involved with security or law enforcement.

30. In terms of the applicant's Shia religion DFAT notes that although Shia enclaves (usually comprised of Shia Hazaras or Turis) exist in a number of Pakistani cities, in general Sunni and Shia communities across Pakistan are well integrated. Overall, DFAT assesses that Shia who are not Hazara or Turi generally do not face discrimination based on their religious affiliation when seeking employment, including in the public sector. DFAT also assesses that there are no barriers preventing Shia from actively participating in democratic processes in Pakistan due to their sectarian affiliation.<sup>15</sup> Low-level anti-Shia discrimination does occur at the community level, and can manifest in violence or damage to property.<sup>16</sup>
31. The applicant claims the Pakistani authorities are corrupt and on the same side as the Sunni extremists and they are unable, or unwilling, to provide protection to him as a Shia. Country information before the delegate does indicate that corruption remains a serious issue within Pakistan's various security and law enforcement branches, particularly the police. However, DFAT notes that in recent years the Rangers and police have arrested large numbers of people allegedly involved in kidnap, robbery and extortion in Karachi and that while verifiable data remains unavailable, serious crime across Pakistan, especially in Karachi, has reduced significantly since the period in which the applicant was residing there.<sup>17</sup> Given the country information, I do not accept the Pakistani authorities are unable or unwilling to offer the Shia population protection from terrorist and criminal elements.
32. While I accept the applicant experienced the traumatic loss of two of his cousins, as well as some close friends and colleagues, the country information cited above clearly indicates that the security situation has improved significantly since the applicant was last in Karachi. I accept that the applicant will likely attend Shia mosques and publicly participate in Shia religious ceremonies upon return to Pakistan and Karachi is a city of almost 20 million, of which the Shia community comprises more than 7 million.<sup>18</sup> In light of the country information above, I am satisfied the chance of the applicant being targeted because he is an educated Shia, because of his previous involvement in local Shia organisations, his anti-Pakistani government political opinion, or as an inadvertent bystander in a terrorist or criminal act in Karachi, to be remote.
33. The applicant does not have a well-founded fear of persecution within the meaning of s.5J of the Act.

#### **Refugee: conclusion**

34. 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).

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<sup>14</sup> DFAT, "DFAT Country Information Report – Pakistan", 20 February 2019, 20190220093409

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

## **Complementary protection assessment**

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35. 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**

36. 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.
37. I have concluded that the applicant does not face a real chance of harm for any reason. Based on the same information, I am not satisfied that the applicant has a real risk of suffering significant harm.
38. After having regard to the applicant's circumstances, I find that he does not face a real risk of suffering significant harm.

### **Complementary protection: conclusion**

39. 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**

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

## Applicable law

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### **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.