



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN
IAA reference: IAA16/01630

Date and time of decision: 27 June 2017 11:11:00
Karen Dix, Reviewer

Decision

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

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Sunni Pashtun from Afghanistan. [In] April 2016 he lodged an application for a safe haven enterprise visa (SHEV) claiming to fear harm from the Taliban due to his work as an [occupation 1] with the [ISAF] forces. [In] December 2016 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa.
2. The delegate was satisfied that the applicant faced a real chance of serious harm from the Taliban in his home area due to his former work as an [occupation 1]. However the delegate found he would not face a real chance of harm in Kabul city and it was reasonable for him to relocate there.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. [In] January 2017 the IAA received a submission from the applicant's representative. The submission refutes a number of the delegate's findings and discusses matters which were before the delegate, referring to some country information which was also before the delegate. I do not consider that these aspects of the submission amount to 'new information' within the meaning of s.473DC.
5. The submission refers to numerous documents which predate the delegate's decision, which were not before the delegate and which is new information. These documents include a Canadian Immigration and Refugee Board (IRB) report, an Irish Refugee documentation Centre report, 4 BBC News articles, Australian DFAT Smart Traveller advice, a SIGAR report, a UNAMA report, a New York Times article, and an OCHA report. The representative also refers to an expert opinion dated July 2016 from Professor William Maley regarding reasonableness of return to Afghanistan. The cited reports pertain to the targeting of [occupation 1]s, the deteriorating security situation in Kabul and the ability of the applicant to relocate. The representative submits that this information could not have been provided to the Minister before a decision was made as the applicant was self-represented and was not able to present his claims as fully and completely as if he had representation. Additionally the information is said to be relevant to the applicant's ability to relocate and given the fluidity of the security situation in Kabul updated information is required to assess the risk faced by the applicant. I accept that the applicant was self-represented before the Department; however the country information pertains to issues which were before the delegate and were discussed with the applicant during the interview. The applicant was aware that he could forward any further information to the delegate prior to a decision and it would be considered. I am not satisfied the documents could not have been provided prior to the delegate's decision. Nor am I satisfied that the information provided is credible personal information. I am not satisfied that s.473DD(b) is met.
6. The representative also states that the applicant previously advised the delegate that he had married an Australian citizen in October 2016. However his wife who is [from Country 1] is now expecting their child. Evidence of the pregnancy is provided with the submission. The representative claims that having a [wife from Country 1] and child increases the likelihood of

the applicant coming to the attention of the Taliban and his background as an [occupation 1] being exposed. The need to support his wife and child will also increase the likelihood that the applicant being forced to return to his work as a [occupation 1]. Additionally the applicant's return to Afghanistan without his family would contravene the Convention of the Rights of the Child (CROC). I accept that the applicant's marriage to a [Country 1 national] is not new information and was before the delegate. However the information regarding his wife's pregnancy and the subsequent claims are new information. I note that the document provided as evidence of the pregnancy is dated [date], however a decision was not made by the delegate [until] December 2016. Nevertheless given that the decision was made shortly after the applicant was notified of the pregnancy, I am satisfied the information is credible personal information which could not have been provided prior to the delegate's decision. However I do not accept this information impacts on consideration of the applicant's claims as the unborn child is not an applicant and I am not satisfied that there are exceptional circumstances for considering it. The applicant has also made a new claim arising from his marriage to a [Country 1] citizen and the pregnancy. When the applicant advised the delegate of his married status in late November 2016, he also advised that there were no other changes to his situation and did not raise any new claims arising from his marriage although the delegate had advised him at interview that he could email the delegate with any further information. I am not satisfied that this claim could not have been made prior to the delegate's decision. Nor do I accept that there are exceptional circumstances for considering it.

7. I have obtained country information on the security situation in Afghanistan, the presence of Pashtuns in large urban areas of Afghanistan and the presence of [ISAF] bases in Kabul.¹ This information was not before the delegate and is new information. The situation in Afghanistan has evolved over recent times, and the information addresses the broader security situation and how it may impact on the real chance or risk of harm to the applicant in Afghanistan in the reasonably foreseeable future. There was also no country information before the delegate in relation to the [ISAF] base which the applicant claims he was working at, which formed part of the applicant's claims. Nor was there any country information before the delegate in relation to the consideration of the applicant's ability to live in other areas of Afghanistan. I am satisfied that there are exceptional circumstances for considering this information.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:
 - The applicant is an Afghani national of Pashtun ethnicity who was born in [Neighbourhood 1], Kabul city and practises Sunni Islam. He moved to [Country 2] with his family when he was young and returned to [Neighbourhood 2] an outlying area of Kabul when he was approximately nine/ten years of age.
 - The applicant's parents and siblings continue to reside in [Neighbourhood 2] which is approximately a [number] minute drive from Kabul city.
 - The applicant completed his education to year 12 level which included studies in English. He subsequently completed [further study] at a [college] in Kabul and also attended [university] in Kabul for 1.5 years where he partially completed a [degree]. While studying at university he worked part time as a [occupation 2] in [Neighbourhood 2] where he had a small shop. However he did not complete his studies as he did not have the financial resources. The applicant is literate in Dari, Pashto and English.

¹ [information deleted]

- In approximately October 2011 he secured employment as an [occupation 1] with [an agency]. The applicant was located at [Town 1] where he was an [occupation 1] for the [ISAF]. Whilst working at [Town 1] he also received [training] in preparation for his deployment to [Province 1] as an [occupation 1].
- After the applicant had been working as an [occupation 1] for over 2 months, he found a threatening letter from the Taliban on the door of his house in [Neighbourhood 2] early one morning as he was leaving for work. The letter warned him to stop working as an [occupation 1] and spy with the [ISAF] and join the Taliban otherwise he would be punished.
- The applicant continued working as an [occupation 1] following the receipt of the letter but when the body of another person who had been working as an [occupation 1] was returned to [Neighbourhood 2] for burial, approximately a month later, he became frightened and fled to [Country 2] where he made arrangements to travel to Australia.
- The applicant fears being targeted by the Taliban due to his former work as an [occupation 1] for the [ISAF] in Kabul. He also fears harm from the Taliban as he disobeyed their order to join them. He is unable to relocate as the Taliban has a very strong network and there are Taliban sympathisers and informants in the Pashtun community who would find out about the applicant's past work and tell the Taliban.

Refugee assessment

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
 - 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.

Identity and Receiving Country

11. The applicant maintains that he was born in [Neighbourhood 1] in Kabul and moved to [Country 2] when he was young. He resided with his family in [Neighbourhood 2], Kabul upon his return from [Country 2] and lived there until his departure from Afghanistan in early 2012. He provided a number of documents as evidence of his identity including a taskera, educational certificates and 2 UNHCR registration letters. His account of his bio data and personal information has been consistent and at interview he demonstrated a familiarity with his home area, [Neighbourhood 2] and Kabul city where he lived until his departure from Afghanistan in 2012. I accept that his identity is as claimed, and that he is an Afghani national whose receiving country is Afghanistan.

Employment as an [occupation 1]

12. The applicant fears that he will be killed by the Taliban on return to Afghanistan due to his employment by [an agency] as an [occupation 1] for the [ISAF].
13. The applicant during the SHEV interview gave a detailed explanation of the process he underwent before he was offered employment as an [occupation 1] by [an agency] which country information confirms was the [specified] government's leading provider of [occupation 1]s in Afghanistan.² The applicant provided a letter from [the agency] instructing the Kabul bank to open a bank account for the applicant for the deposit of his wages as evidence of his employment. He was also questioned about his work with the [military] and claimed that he was based at [Town 1] (which country information indicates was a [training facility] east of Kabul city³), where as well as undertaking [occupation 1] work he was also being prepared for deployment with the military to [Province 1]. He stated that he had a security pass which remained at [Town 1] and was issued to him on a daily basis after he had undertaken fingerprint and eye scans. Although the applicant stated that he was not required to undertake any security checks and did not have any other evidence of his employment, I am satisfied from the applicant's responses at interview that he was employed as an [occupation 1] as claimed. I am also satisfied that given the danger of holding documentation which identified the applicant's employment with the [ISAF] in particular, that it is plausible the applicant did not hold or retain such documentation.
14. The applicant claims that he received a letter from the Taliban which was stuck on the door of his house in [Neighbourhood 2] where he resided with his family. He provided a copy of the letter to the delegate. Information before me indicates that the Taliban use letters to intimidate people and to ensure they do not engage in any way with the Afghan government or international community. According to information provided by the UNHCR to the Danish Immigration Service in 2012 the use of night letters to intimidate people working for the Afghan government and westerners is very widespread, although the pattern of intimidation in Kabul is different and would more likely be in the form of phone calls. However intimidation is mostly repeated until the victim obeys orders and in cases of continued refusal can lead to physical elimination. Intimidation can often include family members. A political analyst based in Kabul stated that [occupation 1]s, contractors and suppliers of the military and high-ranking government officials are primary targets.⁴
15. After consideration of the applicant's account and country information I am satisfied that the applicant received a letter from the Taliban warning him to cease his employment. The

² [information deleted]

³ [information deleted]

⁴ [information deleted]

applicant was travelling to [Town 1] on a regular basis and as noted by the Danish Immigration Service would have been seen entering and leaving the base on a regular basis. Given his visibility in entering and leaving the base on a daily basis and the risk to [occupation 1]s and others who supported the bases and worked for the [ISAF], I accept that his activities may have come to the attention of the Taliban in Kabul and that despite being discreet about his employment Pashtuns in his area who were sympathetic to the Taliban may also have become aware of his employment and advised the Taliban. The applicant claims that he continued to work for nearly a month following receipt of the letter until the body of a local person who had been an [occupation 1] was returned for burial. I accept as plausible that the applicant did not fully realise the risks of his employment until this time at which time he then ceased his employment and left the area.

16. The European Asylum Support Office (EASO) in 2012 stated that in general those with low profiles do not face much risk of being targeted by insurgents in Kabul, Mazar-e-Sharif and Herat because of their position, activity or job; however a person may be at increased risk depending on their individual and specific circumstances. Other sources in the same report indicate that it is possible to escape targeting by ceasing an activity but that a person with a profile such as an [occupation 1] would have to join, or at least contact, the Taliban and would then still face a chance of being targeted in areas which are within 'easy reach' of the insurgents.⁵ All sources cited by the Danish Immigration Service indicated that people working for the foreign forces as [occupation 1]s are at high risk of being targeted and can be kidnapped, blackmailed or killed because of this association.⁶ UNHCR in 2016 stated that anti-government elements (AGEs) are widely reported to target civilians who are suspected of collaborating with or "spying for" pro-government forces and have reportedly threatened and attacked Afghan civilians who work for the international military forces as [occupation 1]s or in other civilian capacities. There are also reports of AGEs targeting former employees of the international forces and the government. UNHCR has relied on reports indicating that former [occupation 1]s have been killed by the Taliban while awaiting visa outcomes from the US government and information indicating that visible collaboration with international troops turns [occupation 1]s into [targets].⁷
17. I am satisfied that the applicant was previously threatened by the Taliban due to his work as an [occupation 1] and that if he were to return to [Neighbourhood 2] or Kabul he would face a real chance of serious harm from the Taliban due to his former employment. I am satisfied after consideration of the country information cited above that there is a real chance of the applicant being threatened, attacked, kidnapped or killed, all of which I am satisfied are instances of serious harm. I am also satisfied that the essential and significant reason for the Taliban inflicting serious harm on the applicant would be for reasons of his imputed pro-American political opinion arising from his former work as an [occupation 1], and that such harm would be inflicted against the applicant in a systematic and discriminatory way. [Occupation 1]s were primary targets of the Taliban when the applicant left Afghanistan and the country information indicates that even if an [occupation 1] ceases an activity particularly if he was working for the [ISAF], this may not be sufficient to ameliorate his perceived support and he will continue to be targeted due to his former activities. Although the applicant was unaware of any attempts by the Taliban to contact his family or locate him following his departure, I consider that the applicant's departure would have been known by the Taliban through their networks and that his return to Kabul or [Neighbourhood 2] would also come to their attention through Taliban sympathisers in the Pashtun community and that he would be

⁵ [information deleted]

⁶ [information deleted]

⁷ [information deleted]

targeted due to his pro-American political opinion arising from his former employment. I am satisfied that the applicant faces a real chance of serious harm in Kabul and [Neighbourhood 2] for the essential and significant reason of his imputed pro-American political opinion arising from his former employment as an [occupation 1].

Risk of Harm in all areas of Afghanistan

18. While I am satisfied the applicant faces a real chance of persecution in Kabul, s.5J(1)(c) of the Act provides that the real chance of persecution must relate to all areas of the receiving country.
19. EASO indicates that in general urban centres are seen as more secure than rural areas, however Kandahar which is overwhelmingly Pashtun, is one of the areas which suffers from more insecurity and traditionally accounts for a large share of security incidents. Kandahar province is one of the most volatile provinces in southern Afghanistan, as anti-government armed militant groups are operating and frequently carry out insurgency activities and military operations and clashes between anti-government elements (AGEs) and the Afghan National Security Forces (ANSF) are also common. Kandahar city was the birthplace of the Taliban's insurgency and is the focus of the Taliban's efforts as regaining control over Kandahar city has been one of their most important goals since 2001. The presence of AQIS, the newest regional branch of al Qaeda's international organisation, was also noted in the province.⁸ Although Pashtuns are a majority ethnic group in Balkh and Herat provinces, within Mazar-e-Sharif and Herat city which are considered to be safer than Kandahar, Tajiks form the majority of the population and Pashtun communities are a minority in both cities and tend to be located in surrounding rural areas and districts where the Taliban are active. The Taliban, as well as other AGE groups, maintain their power bases in rural areas where government power is more decentralised than major cities and Afghans living in rural areas are significantly more likely to support AGES.⁹ DFAT indicates that insurgent and terrorist groups, including the Taliban, openly target government officials and people associated with the international community throughout Afghanistan.¹⁰
20. The applicant at interview stated that if he were to relocate to another part of Afghanistan, where he was not known by the local community, the local Pashtuns which have Taliban informants and sympathisers would investigate him and find out about his background and disclose it to the Taliban who will then target him because of his previous work for the [ISAF]. Given the significant Taliban presence in areas where there are Pashtun majorities including Kandahar and surrounding rural areas of cities which are in government control, as well as the small Pashtun numbers in cities such as Herat and Mazar-e-Sharif, where although they are under government control, targeted attacks still occur, I am satisfied that there is a real likelihood the applicant's former employment will become known and will come to the attention of the Taliban who will be impute him with a pro-American/western political opinion. In the circumstances I am satisfied that if the applicant were to return to Afghanistan he would face more than a remote chance of serious harm from the Taliban due to an imputed pro-American political opinion. I am satisfied that there is a real chance he will be targeted in other areas of Afghanistan.

⁸ EASO, "Country of Origin Information Report: Afghanistan Security Situation", January 2016, CIS38A8012395, pp. 30, 69-73; EASO, "Country of Origin Information Report: Afghanistan Security Situation ", 1 November 2016, CIS38A80122597, pp. 72-75

⁹ Ibid, p. 34-35; United States Institute of Peace (USIP), "Political and Economic Dynamics of Herat", 2 April 2015, CISEC96CF1495, p. 8; UNHCR, "UNHCR Response to RRT Questions - Mazar-i-Sharif", 15 March 2004, CX91040

¹⁰ Department of Foreign Affairs and Trade (DFAT), "Country Information Report: Afghanistan", 18 September 2015, CISEC96CF13366, 3.34

21. Accordingly, I am satisfied that the applicant faces a real chance of persecution in relation to all areas of Afghanistan.

Effective Protection measures / modification of behaviour

22. A person is taken not to have a well-founded fear of persecution if, pursuant to s.5J(2) of the Act there are effective protection measures available to the person in their receiving country.
23. DFAT and UNHCR indicate that the ongoing insurgency across Afghanistan has resulted in the government struggling to exercise effective control over many parts of the country, particularly areas outside major urban centres. As a result, the government lacks the ability to adequately address human rights issues, protect vulnerable groups and prosecute human rights violators in those areas. Although there are major concerns over the capacity of law enforcement and judicial systems, security in urban centres is typically better than in rural areas, although violent attacks still occur. In contested areas where the government's control is weaker insurgents maintain parallel political and judicial structures. The Afghan National Police (ANP) although responsible for internal law and order in practice largely operates as a counter-insurgency force. The capacity of the ANP to maintain law and order is constrained by a number of factors, including a lack of resources and equipment, poor training and low education levels of individual members. Afghan governance and the adherence to the rule of law are perceived as particularly weak, with corruption within the police and the judicial system reported to be endemic, as is the abuse of power and extortion. The capability of the Afghan government to protect human rights is undermined in many districts by insecurity and the high number of attacks by AGEs. Rural and unstable areas reportedly suffer from a generally weak formal justice system that is unable to effectively and reliably adjudicate civil and criminal disputes.¹¹
24. On the evidence before me, I am not satisfied that there are effective protection measures in rural areas available to the applicant. There is limited access to protection in other areas of Afghanistan, and a high incidence of corruption and human rights abuses in the police force. In these circumstances, I am not satisfied that the Afghani State, or any other party or organisation is either willing or able to offer protection against the persecution. Section 5J(2) does not apply.
25. Under s.5J(3) of the Act, a person does not to have a well-founded fear of harm if he or she could take reasonable steps to modify his behaviour so as to avoid a real chance of persecution. I have found the applicant has a well-founded fear of persecution due to his past conduct. As the applicant cannot modify his past behaviour to avoid a real chance of persecution s.5J(3) does not apply.
26. I am satisfied that the applicant has a well-founded fear of persecution in Afghanistan for reasons of his imputed political opinion, in the reasonably foreseeable future.
27. Given my findings above, it is not necessary for me to consider the remainder of the applicant's claims.

Refugee: conclusion

28. The applicant meets the requirements of the definition of refugee in s.5H(1).

¹¹ DFAT, "Country Information Report: Afghanistan", 18 September 2015, CISEC96CF13366, 5.1-5.11; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, pp. 24-26

Decision

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

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.