



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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AFGHANISTAN

IAA reference: IAA17/01762

Date and time of decision: 10 October 2017 17:43:00

Matthew Tubridy, Reviewer

**Decision**

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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

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### Visa application

1. The referred applicant (the applicant) claims to be a national of Afghanistan. [In] September 2016 he lodged an application for a Safe Have Enterprise visa (SHEV). A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] January 2017, and the Department of Immigration and Border Protection (the Department) referred the matter to the IAA [later in] January 2017.

### 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 7 February 2017 the applicant's representative provided a submission to the IAA. To the extent that this engages in argument with the delegate's decision based on information which was before the delegate I have had regard to it. Additionally, some information was supplied which was not before the delegate and which amounts to new information. All of the new information in question concerns the situation in Afghanistan with regard to the issue of child labour and many of these were published after the date of the delegate's decision and which therefore could not have been provided before the date of the delegate's decision. Beyond this, it is submitted that all of this information (including those reports published before the date of the delegate's decision) could not have been provided except in response to the delegate's decision. I accept that the applicant could not have foreseen that the matter of the employment of his children [would] become a relevant consideration for the delegate. Given all of this, I am satisfied that s.473DD(b)(i) is met with regard to this new information and that there are exceptional circumstances to justify considering this information.
4. On 5 June 2017 the IAA invited the applicant to comment on new information obtained by the IAA relevant to considering whether the applicant would face a real chance of persecution in all areas of his receiving country, and also whether it would be reasonable for the applicant to relocate to an area of the country where he would not face a real risk of suffering significant harm. Given that I have reached different conclusions to the applicant about the risk he would face from a Hazara commander who lives in both S-District and Kabul, and given the resulting need for a more expansive approach to these matters, I am satisfied that there are exceptional reasons to justify considering the information which the IAA has obtained and invited the applicant to comment upon. On 20 June 2017 the applicant's representative provided the IAA with a response. This refers to a number of reports which were not before the delegate and which amount to new information. Given that this new information has been provided in response to a specific invitation made by the IAA I am satisfied that s.473DD(b)(i) is met and that there are exceptional circumstances to justify considering this information.

### Applicant's claims for protection

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5. The applicant's claims can be summarised as follows:
  - He is a national of Afghanistan, an ethnic Hazara and a Shia Muslim who originates from a village in S-District. His father was a village elder and also worked their family land to provide for the family.

- In around 1997 during the Afghan civil war the applicant's father was pressured to join the M-Group (which was the main opposition group in S-District). The district was predominantly under the control of Commander-D (the D-Group) and [his] brothers, Commander-A and Commander-T. Tension between the M and D-Groups gave rise to a series of local conflicts.
- Sometime in about 2000 or 2001 Commander-D and his brothers had established full control of S-District after successfully ousting members of several smaller opposition groups. A group of elders wanted to stop the political violence and organised a peace building meeting for both groups to attend. However, at the meeting Commander-A was killed by the commander of the M-Group. Following this, Commander-D ordered his men to execute each and every member of the M-Group, including their families. The applicant's family feared for the applicant's safety and sent him to [hide]. His father remained behind to stay with and protect the M-Group. About a week later the applicant returned and found his family were not at home. He then found his mother at his maternal grandmother's home. His mother said that his father had been killed by one of Commander-D's men. The applicant soon began making arrangements to flee to [Country 1] with his family. In 2001 he departed for [Country 1]. They lived in [a district in Country 1] for some time and in 2010 they moved to [City 1 in Country 1]. The security situation in [City 1] became so bad for Shia Hazaras that in 2013 he decided he needed to flee [Country 1] for his own safety. As he feared returning to Afghanistan he decided to seek protection abroad.
- He fears that if he returns to Afghanistan he will be subjected to serious and significant harm including but not limited to: intimidation and harassment; physical violence; cruel degrading and inhuman treatment or punishment; and/or death. He fears being arrested and killed by Commander-D and his group and/or anti-Hazara and anti-Shia groups such as the Taliban, Islamic State and supporters of these people and other armed groups. He fears that Commander-D and his group will seek to harm / mistreat him because of his affiliation with his father (who was killed because he was imputed to be involved in the murder of Commander-A). He fears he will be harmed mistreated by the Taliban and/or Islamic State because he is a Hazara, because he is a Shia Muslim, and because he would be imputed to be anti-Taliban and/or anti-Islamic State, or pro-western, and/or because he is a failed asylum seeker.

## Refugee assessment

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6. 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

7. 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.
8. The applicant claims to be a national of Afghanistan, an ethnic Hazara and a Shia Muslim who originates from a village in S-District and these claims are not in dispute. I accept that the applicant is a national of Afghanistan and I find that Afghanistan is the applicant's receiving country for the purpose of this review.
  9. The applicant's [September] 2016 SHEV application includes written claims in which it is stated that the applicant's father was a village elder who was forced to join a Hazara opposition group, the M-Group, in around 1997. At this time Commander-D (commander is a common term in Afghanistan for a person who effectively acts as the head of a local militia and sometimes in the manner of a local war lord) had predominant control of S-District and had been ousting members of opposition groups. A group of elders wanted to stop this political violence and organised a peace building meeting for both groups to attend. However, at the meeting Commander-D's brother, Commander-A, was killed by the commander of the M-Group. Commander-D ordered that his men should execute each and every member of the M-Group, including their families, in retaliation. The applicant's family feared for the applicant's safety and sent him to [hide], and he could only visit his family's home at night. His father remained behind to stay with and protect the M-Group. About a week later the applicant returned and found his family were not at home. He found his mother at his maternal grandmother's home. His mother said that his father had been killed by one of Commander-D's men in the G-area of S-District. The villagers had helped transfer his father's body back to the village. While he was hiding [he] missed his father's burial. He soon began making arrangements for himself and his family to flee Afghanistan, and sometime in about 2001 they made their way to [Country 1].
  10. At the [December] 2016 SHEV interview the applicant was asked how it was that he knew that his father had been killed by Commander-D. The applicant said that there had been fighting between the D and M-Groups for control of S-District, and that his father was an elder and that after Commander-A was killed his father had sought to intervene to stop the fighting and that the D-Group had abducted his father and killed him. The delegate asked the applicant how he knew it was the D-Group who had done this. The applicant said that the people who had brought his father's body, and not just the body of his father but the bodies of a few other people as well, had said that these people were abducted by the D-Group. Asked why he could not return now that 15 years had passed the applicant said that Commander-D had signed a truce with the Taliban at the start and that Commander-D may have given his name to the Taliban, and also one of Commander-D's wives was a [senior government official].
  11. The applicant was asked whether his wife still had any family living in his home village. He said that his wife's [siblings] were still living there. The applicant also said that, following his arrival in Australia, his [relative] had gone to S-District office and obtained a re-issued copy of the applicant's Afghan Taskera national identity document on his behalf. Asked if he had any family in Australia he said he did not. It was put to the applicant that at his departmental entry

interview he had said that he had a friend in Australia called Mr A. The applicant said that this was so and that when he first arrived in Australia he had initially stayed with Mr A but he had lost contact with this man. The applicant was asked if he had any siblings. He said he did not. Asked to confirm that he had no siblings at all, he said that some were born but they died. Asked if he was absolutely sure he had no siblings he said he was. It was then put to the applicant that the Department was in possession of an application lodged by a man with Mr A's name, whose parents had the exact same names as the applicant's parents, with exactly the same claims in terms of what had happened to the applicant's father and the group responsible, and on which the applicant was listed as Mr A's brother. The applicant maintained that he had no siblings. Later in the interview, after conferring with his representative, the applicant said that Mr A was his brother but he did not say so out of fear because all the people around him, including Mr A, had advised him not to mention this because it might damage Mr A's case. Asked if he was in contact with Mr A he said he was. The applicant was then asked about the location of [other] siblings about which the Department was aware, Ms Z and Mr N. Asked for the location of Ms Z the applicant thought for some time before replying that she was in [Country 2]. Asked for the location of Mr N, he said he did not know where Mr N was. Asked why Ms Z was in [Country 2] the applicant said that they got separated when they fled in 2001 and she ended up in [Country 2]. Asked when he lost contact with Mr N he said it was [a number of] years ago. Asked where Mr N was living he said that he thinks Mr N and Mr Z went to [Country 2]. Asked if he was in contact with Ms Z he said he was not. Asked if she is married he said she has been for married for several years now.

12. [In] December 2016 a submission was provided to the delegate which included a revised table of the applicant's family members, and this presented Mr A as the applicant's [brother] and the holder of a permanent visa in Australia, while [his] sister, Ms N, was said to be in [Country 2], and his [other] brother, Mr N, was said to have gone missing in 2014 *en route* to [another continent]. A written submission was also provided in support of the applicant's claims but this provided no further information about these persons.
13. Even if it was the case that the applicant's brother, Mr A, directed the applicant not to mention their relationship for fear that the applicant might, somehow, damage Mr A's case, this would not explain why the applicant also concealed the fact that he had [other] siblings. The applicant's claim to have become separated from his [siblings] was vague and never convincingly explained. The applicant has never provided a satisfactory account of how this occurred and this raises questions about whether the applicant's siblings actually did depart the applicant's village in 2001. Although the applicant's written claims explain that the applicant's father chose to remain in the village to protect other members of the group, it is not explained why only the applicant was sent to [hide], and why no harm came to his wife and mother notwithstanding the fact that they remained in the village, nor has an amended statement of claims been provided, following the applicant's admission to having siblings, that accounts for where the applicant's siblings were throughout the material events such as the period in which the applicant claims to have been in [hiding].
14. In his written claims the applicant said that his father was a village elder who was forced to join the M-Group and who, following the killing of Commander-A by the M-Commander, stayed behind to protect the M-Group and that he (the applicant) was subsequently told by his mother that his father was killed by one of Commander-D's men. However, [in] February 2013, the applicant participated in a Departmental arrival interview during which he is transcribed as having said that his father was an M-Commander and that Commander-D had accused the applicant's father of Commander-A's death, and that one day Commander-D was looking for the applicant's father and killed him. The applicant was at home and someone informed him (the applicant) that they (Commander-D and his men) were looking for him also, and so he had

no option but to leave. He said that Commander-D had then come and looted the applicant's home. The sequence of the entry interview referred to the IAA as an audio recording includes the applicant's being asked what he thinks would happen to him if he returned to Afghanistan, to which he responds that his life would be in danger because Commander-D considers the applicant to be the killer of his brother, Commander-A, and that Commander-D had spies who told Commander-D that the applicant had been fighting against them while he was [hiding]. The applicant's subsequent evidence has made no reference to his being told that he was of specific interest to the D-Group as an individual, nor has he subsequently referred to his father as an M-Commander and the man accused of being directly responsible for the death of Commander-A.

15. Even so, at the SHEV interview the delegate specified that the applicant's SHEV application account of the events which affected his father was 'exactly' the same as the account provided by his brother, Mr A (none of the Mr A material referred to by the delegate was given to the IAA by the Secretary), and the delegate went on to implicitly accept, as per the applicant's SHEV application written and interview claims, that the applicant's father had been a member of the M-Group and had been killed by the D-Group. Given this, I am also willing to accept that the applicant's father was a village elder who was pressured to join the M-Group in 1997 and who, in about 2000 or 2001, was killed by the D-Group after Commander-D's brother was killed by the commander of the M-Group; and that the inconsistencies in the applicant's evidence in other regards may be explained as attempts by the applicant to sometimes give greater prominence to himself (as his father's only child and son) and to his father (as a M-Group commander) in the events which occurred (wherein the applicant's father was a village elder and a member of the M-Group but not a commander, not directly accused of responsibility for the killing of Commander-A, and where the applicant was not the [only] son and was one of [a few] children to his father). Although I am not persuaded that the applicant lost contact with his [siblings] as he now claims, I am also willing to accept, in the absence of firm evidence to the contrary, that shortly after the death of the applicant's father, every remaining member of the applicant's family, including the applicant and his [siblings], departed their village. I am also willing to accept that the applicant's family had learned, following the death of the Commander-A, that Commander-D had ordered his men to execute each and every member of the M-Group, including their families. I am also willing to accept, as the delegate did, that the D-Group occupied the applicant's family's [land] and home in S-District.
16. The applicant has provided no supporting evidence, in the form of independent reporting, to substantiate the claim that a conflict between the D and M-Groups took place in S-District in around 2000 or 2001 in the manner claimed, or to substantiate his claims regarding Commander-D's influence more broadly. However, the delegate had regard to country information which referred to Commander-D, a strong man and warlord in D-Province, and that human rights organisations claim Commander-D is responsible for murder in [numerous] cases, [and involved in other illegal activities]. This information was sourced from a website providing biographical information on prominent Afghans with the page in question providing information on one of Commander-D's wives, Ms S, who in 2005 and again in 2010 had been elected to [a public office], and who was said to be a member of [a political party] and to be 'controlled' by her husband.<sup>1</sup> The delegate concluded that the applicant would not face a real chance of harm from Commander-D as it was only the applicant's father who was involved with the M-Group and as the applicant had been absent from the area for some 16 years and would not plausibly be able to threaten the D-Group's possession of the applicant's family's former property.

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<sup>1</sup> "Ms S", Who is who in Afghanistan, (undated), CIS38A80122925

17. The evidence before me regarding Commander-D indicates that, like many pro-government militia commanders in Afghanistan,<sup>2</sup> he is able to act with impunity in S-District and that human rights organisations claim is responsible for murder in [numerous] cases [and involved in other illegal activities]. Although Hazaras are not known to pursue vendettas to the same extent as is the case in Pashtun culture<sup>3</sup> – wherein an actor may wait for many years for the opportunity to attack the target of a blood feud – I am unable to positively dismiss the possibility that Commander-D might act in this way, notwithstanding the passage of almost two decades, given that he is a local warlord known for acting violently and without regard for the rule of law. Given this, I accept that the applicant would for the foreseeable future, for reason of being the son of his father (a member of the M-Group) face a real chance of being killed by the Commander-D in a revenge attack if he were to return to S-District. This would amount to a real chance of serious harm for reason of the applicant's being a member of a particular social group that consists of his family and, although personal revenge was no doubt among the reasons why the applicant's father was targeted by the D-Group, it was the applicant's father's political association with the M-Group and that group's political struggle with the with the D-Group that was the essential and significant reason for the harm suffered. The applicant's father's political opinion was thus the essential and significant reason for why he was killed by the D-Group and thus also for why the applicant would now, were he to return to S-District, face a real chance of serious harm for reason of his membership of the particular social group of his father's family.
18. However, pursuant to s.5J of the Act the real chance of persecution must relate to all areas of the receiving country. On the evidence before me there are a number of government controlled urban centres in Afghanistan with Hazara communities (including Kabul, Mazar-e-Sharif, Herat and Bamyan)<sup>4</sup> which the applicant could safely and legally access if he were to return to Afghanistan. The applicant has submitted that the risk of harm he would face from Commander-D extends throughout all of Afghanistan as Commander-D and his group are very powerful with connections to the Afghan government and that this is demonstrated by the fact that Commander-D's wife, Ms S, is an Afghan [public office holder]. It is also submitted that Commander-D has a second residence in Kabul where he lives with Ms S. He has also submitted that because Commander-D had a treaty with the Taliban that Commander-D may have given the applicant's name to the Taliban who would be looking for him.
19. Although some Hazara Hezb-e Wahdat commanders did submit to collaboration with the Taliban during the years of Taliban rule which ended with the overthrow of the Taliban rule in 2001,<sup>5</sup> and although some Hazara leaders and communities have in more recent years made reciprocal arrangements with the Taliban to allow safe passage for Taliban fighters through Hazara territory,<sup>6</sup> the evidence indicates that it is nonetheless highly unlikely that the Taliban would be willing to make its resources available to a Hazara commander like Commander-D by

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<sup>2</sup> UNAMA, "Afghanistan Annual Report 2015: Protection Of Civilians In Armed Conflict", 14 February 2016, CIS38A8012245; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660; Danish Immigration Service (DIS), "Country of Origin Information for Use in the Asylum Determination Process: Report from the DIS's Fact Finding Mission to Kabul, Afghanistan", 1 May 2012, CIS23406.

<sup>3</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660; DIS, "Country of Origin Information for Use in the Asylum Determination Process: Report from the DIS's Fact Finding Mission to Kabul, Afghanistan", 1 May 2012, CIS23406.

<sup>4</sup> DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186; DFAT, "DFAT Country Information Report: Afghanistan", 18 September 2015, CISEC96CF13366; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660; Country of Origin Information Section (COIS), "Issues Paper: Afghanistan: Returnees and Relocation", 31 January 2014.

<sup>5</sup> Landinfo, "Hazaras and Afghan insurgent groups", 3 October 2016, CIS38A80122778.

<sup>6</sup> DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186;

having its checkpoints monitor and search for the applicant on Commander-D's behalf. I am not, in any event, persuaded that that Commander-D is currently actively searching for the applicant.

20. I am, however, and as has been discussed above, satisfied that there is a real chance Commander-D would seek to have a family member of the M-Group killed if the opportunity presented itself, and that for this reason the applicant would face a real chance of being killed by the D-Group if he returned to S-District. The question is whether there is a real chance of the applicant's return to Afghanistan becoming known to Commander-D if the applicant did not return to S-District. On the evidence before me, Commander-D is a powerful figure in S-District and also a figure of some influence beyond S-District and in Kabul where he also resides, with connections, partly expressed through his wife's position in [the government], to the Afghan government and more directly to the Hezb-e Wahdat political movement which has been a pervasive force in Hazara politics in Afghanistan.<sup>7</sup> It is also true that the manner in which Hazaras engage in internal migration<sup>8</sup> is such that there are almost certainly Hazaras from S-District living in every Afghan provincial centre which the applicant could safely and legally access, and some of these persons may be either connected with, or willing to provide information to or act on behalf of, the D-Group. It is far from certain that the applicant would, on this basis be identified and then targeted by the D-Group or by persons acting their behalf, if the applicant were to return to such a location. [City 1 in Country 1] is, after all, home to a sizable Afghan Hazara population<sup>9</sup> which no doubt includes many persons who, like the applicant's family, originate from S-District and some of whom may have connections to the D-Group, yet the applicant did not suffer any harm or even any threats from the D-Group over the years in which the applicant resided in that city. Even so, given that the applicant would be returning to Afghanistan itself where the D-Group may feel that it is able to act with greater freedom against family members of the M-Group, given the extent to which information may travel through migrant networks in Afghan communities, and (most significantly) given the manner in which Commander-D is known to perpetrate acts of violence, including some [extensive number of] murders, without regard for the rule of law, I am willing to accept that outside of his home area the applicant would face a small but nonetheless real chance of being killed by the D-Group for reason of being the son of his father, a member of the M-Group. I am therefore satisfied that the real chance of persecution faced by the applicant relates to all areas of the receiving country for the purpose of s.5J.

21. Pursuant to s.5J(2) of the Act, a person is taken not have a well-founded fear of persecution if there are effective protection measures available to the person in his receiving country. Section 5LA provides that 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. The available evidence indicates that Afghan police personnel, and the Afghan security forces more generally, are attempting to combat AGEs and crime, and to provide protection to Afghanistan's civilian population. Nevertheless, DFAT has observed that the capacity of the Afghan national police 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. Political manipulation and poor pay levels contribute to high levels of corruption. It continues to be the case, notwithstanding the efforts of many dedicated persons with the Afghan security services and its judicial establishment, that powerful figures, and notably warlords like Commander-D, are sometimes able to act with

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<sup>7</sup> [Source deleted].

<sup>8</sup> DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186; Landinfo, "Hazaras and Afghan insurgent groups", 3 October 2016, CIS38A80122778

<sup>9</sup> [Source deleted].

impunity.<sup>10</sup> Given this, on the evidence before me I am not satisfied that effective protection measures are available to the applicant in Afghanistan.

22. 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. However, as I have found the applicant has a well-founded fear of persecution due to his membership of his family unit, his father's past political association with the M-Group, and associated events which have taken place in the past over which he has no control and is unable to modify, s.5J(3) does not apply.

### **Refugee: conclusion**

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

### **Decision**

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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*.

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<sup>10</sup> DFAT, "DFAT Country Information Report: Afghanistan", 18 September 2015, CISEC96CF13366; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660.

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

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***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.