



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

**Decision and Reasons**

**Referred application**

---

AFGHANISTAN  
IAA reference: IAA17/03037

Date and time of decision: 6 February 2018 10:24:00  
Urvi Bhatt, Reviewer

**Decision**

---

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

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

## Background to the review

---

### Visa application

1. The referred applicant (the applicant) claims to be a Shia Hazara from Ghazni, Afghanistan. The applicant lodged an application for a Safe Haven Enterprise Visa (SHEV) [in] September 2016.
2. The delegate for the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] June 2017. The delegate found the applicant could reasonably relocate to Kabul or Mazar-e Sharif.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. [In] July 2017, the IAA received a submission from the applicant. The submission reiterates claims which were before the delegate. This information is already before me. The applicant also outlines why he does not agree with the delegates decision, which is regarded as argument rather than 'information.'
5. I have also obtained new information about Shia's in Afghanistan, Hazaras in Afghanistan, returnees to Afghanistan and road travel within Afghanistan and more specifically Ghazni Province. This information was published after the delegate's decision and provides further detail in respect to the changing situation in Afghanistan. I am satisfied there are exceptional reasons to justify considering this information.<sup>1</sup>

### Applicant's claims for protection

---

6. The applicant's claims can be summarised as follows:
  - The applicant is from Ghazni Province. Since [age] (2001) he worked as a [Occupation 1, which supports the police/army]. He spent [a number of years] working in this same occupation in Kabul.
  - In 2011 and 2012, he was stopped by the Taliban on three occasions while travelling between [Village 1] (where he resided) and Ghazni city. The Taliban questioned him about whether he was working with the government or the army. He told them he was not working with them and he was released.
  - On the third occasion the Taliban interrogated him harshly and physically abused him. They questioned his frequent travel to Ghazni. They took him to a house and kept him there until dusk. They accused him of working with the army.
  - He was released on a condition that he would not be on the roads so often and they will kill him if they find he is working for the government or army.

---

<sup>1</sup> "Department of Foreign Affairs and Trade (DFAT), Country Information Report Afghanistan", DFAT, 18 September 2017, CISED50AD5680; DFAT Thematic Report - Hazaras in Afghanistan 18 September 2017", Department of Foreign Affairs and Trade, 18 September 2017, CISED50AD5681; "Afghanistan: Individuals targeted by armed actors in the conflict", European Asylum Support Office (EASO), 12 December 2017, CISED50AD7868; "Afghanistan: Security Situation December 2017", EASO, 1 December 2017, CISED50AD8102

- In mid-2012 he returned home from a friend's house and [a number of] unknown men had come to his house and given a letter to his wife. The letter read that 'we know [your occupation]. You better surrender yourself or we will blow your house and kill your entire house.'
- He feared for his life so took his family to Ghazni city and he escaped to [Country 1]. He then departed [Country 1] bound for Australia.
- He is unable to relocate within Afghanistan due to the poor security situation and the Taliban will find him. He also fears from ISIS/Daesh and other insurgent groups.
- He fears he will be harmed due to race and religion, and his real/imputed political opinion as he favors anti-Taliban political views. He also claims to be a member of the particular social group 'failed Hazara asylum seekers/infidels,' as someone who has returned from the West and appears 'western,' and as someone who used to work as [Occupation 1].
- He claims that his family land was forcibly rented out to the Kuchis and the Taliban is against education.

### **Refugee assessment**

---

7. 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**

8. 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.
9. The applicant has been consistent in presenting his identity since his arrival in Australia. In support of his claims, the applicant provided a copy of his taskera accompanied by an English translation. On this basis, I accept the applicant's claimed identity. The applicant has also consistently stated [District 1], Ghazni Province, Afghanistan as his home area since his arrival in Australia. The applicant appeared to be able to communicate in Hazaragi/Dari through his

arrival and protection visa interview. On this basis, I accept the applicant is an Afghan national from [District 1], Ghazni, Afghanistan and that Afghanistan is the receiving country for the purposes of this assessment.

10. Since his arrival in Australia the applicant has consistently stated that he departed Afghanistan on the basis of receiving a threatening letter from unknown men. He claims that his wife received a letter, addressed to him, which states that he will be set on fire, arrested and punished if he continued to work [as Occupation 1]. The applicant has presented a copy of this letter accompanied by an English translation. He claims that the original letter is lost.
11. The applicant claims that since he was [a particular age] he worked as [Occupation 1]. He always worked in Ghazni province apart from spending [number of years] in Kabul. In 2011 and 2012, while working in Ghazni Province, he was stopped three times by the Taliban while travelling on the road between [Village 1] in [District 1] and Ghazni city where he had to [undertake particular business activities]. He claims that he would drive between [Village 1] and Ghazni city [often]. It was a [duration] minute drive. On two of the three occasions he was allowed to proceed on his journey after answering a few questions. He claimed that this was because he never had any [products] on him so the Taliban were not aware of his occupation.
12. On the third and final encounter, he was held for a longer period, he claims that he was questioned and taken to a house and was kept there. He was beaten and verbally threatened. The Taliban searched his phone and he was subsequently released. On this occasion he also stated he did not have any [products] on him.
13. After this incident, a threatening letter was delivered to his house. His wife was home and she received the letter. This letter was addressed to the applicant and threatened to set him on fire, arrest and punish him if he continued to [work]. During the protection visa interview the applicant stated [a number of] 'unknown men,' delivered the letter.
14. I accept the applicant worked as [Occupation 1] in Afghanistan since he was [a particular age]. I accept that during this period he would [details of Occupation 1] and that he would have to travel to and from Ghazni city to [undertake business activities]. Given the applicant was travelling to and from Ghazni city for the purposes of [undertake business activities], I find it highly unlikely that the applicant would not have had any [products] on him on the three occasions he was stopped by the Taliban. Nonetheless, I am willing to accept he was stopped on these occasions and questioned and released immediately. I do not accept the applicant was targeted specifically on the basis that he was [undertaking Occupation 1] and I do not accept the Taliban were aware of his occupation. I find the Taliban purely questioned him on the purpose of his travel in a similar manner to them questioned many other people travelling on those roads. I do not accept the applicant faced any harm on these occasions and I do not accept the applicant was held, questioned and beaten on the third occasion of being stopped by the Taliban.
15. The applicant has been consistent about receiving a letter from the Taliban which was delivered by unknown men. During the interview with the delegate the applicant was unable to specify who these men were and what their purpose was. I find it doubtful that if the applicant were of interest to the Taliban on the basis of his occupation, that they would only send a letter, despite the applicant claiming that the Taliban knew where he lived, his travel to and from Ghazni city and where he worked. I find if he was of genuine interest to the Taliban and they genuinely wanted to harm him on the basis of his occupation they would have done so on the three occasions he was stopped while travelling on the road to or from Ghazni city. While I note the applicant has been consistent about receiving this letter and has provided a

copy of it, albeit an uncertified copy, I am not willing to accept the applicant received such a letter and this being the basis of his departure from Afghanistan.

16. I have accepted the applicant was questioned by the Taliban, but I do not accept the applicant was ever threatened by the Taliban prior to his departure from Afghanistan, I am also not satisfied the applicant will face any harm upon return. Recent country information indicates that the Taliban tend to target those who are wealthy or are associated with the government or the international community and common targets for insurgent attacks are government institutions, political figures, the ANDSF, Mission Resolute Support, other security forces, foreign missions and international organisations.<sup>2</sup> The Taliban have also been reported to have the following targets: foreign occupiers especially their permanent military bases, their intelligence and diplomatic centres, as well as government officials and Afghan security forces.<sup>3</sup>
17. The UNHCR report that Anti-Government Elements (AGEs) are reported to systematically target civilians who are associated with, or who are perceived to be supporting the Afghan Government, Afghan civil society and the international community in Afghanistan, including the international military forces and international humanitarian and development actors. Among the primary targets of such attacks are nationals and local political leaders, government officials, teachers and other civil services, off duty police officers, tribal elders, religious leaders, women in the public sphere, civilians accused of spying for pro-government forces, human rights activities, humanitarian and development workers and construction workers.<sup>4</sup>
18. The applicant spent [a number of] years working as a [Occupation 1] in and around Ghazni and Kabul. While I have accepted that he was questioned by the Taliban on three occasions, I have not accepted the purpose of this questioning was as a result of his occupation, nor have I accepted that he has faced any harm from the Taliban previously. And I note that on each occasion he was released almost immediately. I also note the applicant had been engaged in such employment between 2001 and 2012 and despite being stopped on these occasions was able to successfully continue his employment. He claimed that he ceased travelling to Ghazni city and would send his wife and [Relative A] in order to avoid being questioned again, however I note the applicant travelled to Ghazni city immediately prior to his departure from Afghanistan to his [relative's] house. I also note the applicant travelled [to] [Country 1] upon his departure without attracting any adverse attention. The applicant's [family] and [Relative A] continue to reside at the same residence and since the applicant's departure in 2012, there is no evidence before me to indicate that the Taliban or any other 'unknown men' have been in search of the applicant on the basis of his occupation or any other reason. In the applicant's post interview submission to the delegate he reiterates that he has a risk profile, however I am not satisfied the country information or personal profile supports his claim that he will be targeted by the Taliban, upon return to his home area.
19. I have also considered what would happen to the applicant if he were to return to his home area and re commence his [employment]. I have found he has not previously faced harm on this basis and, I am satisfied that even if he chose to do this, he would not be of interest to the Taliban.
20. I am not satisfied the applicant holds the profile of someone who would be of any interest to the Taliban on the basis of his previous [employment]. I note that when the applicant

---

<sup>2</sup> DFAT, Country Information Report Afghanistan", 18 September 2017, CISED50AD5680 2.32

<sup>3</sup> EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597

<sup>4</sup> United Nations High Commissioner for Refugees (UNHCR) Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660

previously worked in this occupation he was required to travel from [District 1] to Ghazni city by road, however country information before me indicates that road security on this [route] and in and around the applicant's home area has improved since the applicant's departure from Afghanistan. And therefore even if the applicant had to travel for work as he did previously, I am not satisfied he would face a real chance of any harm. I also note that since the applicant's arrival in Australia the applicant has worked as [occupation] and therefore acquired additional skills which he would be able to utilise upon return to Afghanistan if he chose to work in a different occupation.

21. I am not satisfied the applicant has a real or imputed political opinion on the basis of his previous occupation and/or if he continues to work in that occupation upon return to his home area which would result in the applicant facing a real chance of any harm in his home area. I am not satisfied there is a real chance the applicant will face harm on this basis.
22. The applicant also claims to fear harm on the basis of his race and religion as a Shia/Hazara. He fears harm from the Taliban, Daesh/ISIS and other insurgents.
23. The applicant's home area is [District 1], Ghazni Province. Ghazni is an ethnically diverse province location south of Kabul. The population is estimated to be between 1.1 million and 1.5 million of which around 50 per cent is Pashtun and 40 per cent Hazaras. Pashtun majority districts in Ghazni Province are not safe and the threat level in these districts is high due to the presence of the Taliban and other insurgent groups.<sup>5</sup> Hazaras comprise the vast majority of the population in most districts in these provinces, which reduces ethnic tensions. The mountainous terrain of the Hazarajat also offers a form of natural protection with few routes for outsiders to traverse these provinces.<sup>6</sup> EASO has reported that [District 1] is under government control and while a mixed Pashtun Hazara area, there is a majority Hazara population.<sup>7</sup>
24. EASO have reported that Ghazni is considered to be a volatile province where insurgents are operating in various districts and frequently carry out activities, resulting in high numbers of security incidents. Several security operations led by the Afghan National Army were conducted to clear areas from insurgents and weapons and explosive materials were seized during the operations.<sup>8</sup> It has been reported that Islamic State (IS) has infiltrated the Afghan insurgent scene. The insurgent groups operating under the flag of IS show most activity in Nangarhar where they are engaged in a struggle with the Taliban and the ANSF.<sup>9</sup> There have been no reports indicating that IS has a presence in Ghazni Province.
25. All groups in Afghanistan are vulnerable to violent attacks by insurgent and/or terrorist organisations, regardless of religious belief. This is as true for Hazaras as for other groups. DFAT is not aware of any credible evidence that everyday Hazaras are currently being systematically targeted on the basis of the Shia religion. Hazara religious and community leaders may be at risk of being specifically targeted for violent attacks, if they are known or perceived to support the government or preach anti-insurgent messages, but DFAT assesses that this targeting is due to political affiliation rather than their Shia religion.<sup>10</sup>

---

<sup>5</sup> DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", DFAT, 8 February 2016, CIS38A8012186 2.6, 2.23

<sup>6</sup> DFAT Thematic Report - Hazaras in Afghanistan 18 September 2017", DFAT, 18 September 2017, CISED50AD5681 2.18

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

<sup>8</sup> EASO COI Afghanistan Security Situation 2016", EASO, 20 January 2016, CIS38A8012395

<sup>9</sup> DFAT Thematic Report Conditions in Kabul - September 2015", DFAT, 18 September 2015, CISEC96CF13367 2.34

<sup>10</sup> DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", DFAT, 8 February 2016, CIS38A8012186 3.7

26. United Nations Assistance Missions in Afghanistan (UNAMA) reported a decline in the number of Hazara civilians abducted in 2016, recording 15 incidents involving the abduction of 82 Hazara civilians in comparison to 25 incidents in 2015 involving the abduction of 224 Hazara civilians. In 2016, UNAMA documented the abduction of Hazara civilians in Uruzgan, Sari Pul, Daykundi, Maidan Wardak and Ghor provinces. These provinces all border the Hazarajat. In comparison to 2015, when fifteen abducted Hazaras were killed, all of the 2016 Hazara abductees were released unharmed.<sup>11</sup> Although several abductions of Hazaras in Ghazni province occurred in 2015, UNAMA did not record any such incidents in 2016.<sup>12</sup>
27. DFAT assesses that abduction while travelling by road is a risk for Afghans of all ethnicities. Notwithstanding the decline in the number of incidents of abduction affecting Hazaras in 2016 compared to 2015, DFAT assesses that Hazaras remain likely to be selected for abduction or violence if a vehicle carrying a mix of ethnic groups is stopped. Noting that all of the abductions in 2016 occurred in provinces bordering the Hazarajat, as did the January 2017 incidents, DFAT assesses that Hazaras travelling to and from the Hazarajat are particularly at risk in this regard.<sup>13</sup>
28. Most returnees are returned to Kabul. The applicant would then be expected to travel, by road, to his home area. Given the applicant would be required to travel to the Hazarajat from Kabul, I find that road travel, as a Shia/Hazara may be precarious. However, in March 2016, Kam Air began direct commercial flights between Kabul and Bamiyan<sup>14</sup> and given the applicant has been working while in Australia and stated during the interview with the delegate that he has been financially supporting his family in Afghanistan, I am satisfied he is able to finance this one way flight. While I note the applicant will have to spend a short amount of time in Kabul transiting, country information indicates that the Afghan government retains control of Kabul, major population centres and most key transit routes.<sup>15</sup> I am satisfied that once in Bamiyan, the applicant will be able to travel by road safely to his home area of [District 1]. DFAT have advised that Hazara populations in the majority areas within the Hazara majority districts are able to move within these areas without facing undue risk. I also note the applicant will be travelling to where his wife and family continue to reside.
29. Given the applicant will be able to safely return to his home area, I am not satisfied he will face a real chance of any harm on the basis of being a Shia or Hazara. Country information does not support and I do not accept the applicant will face a real chance of harm from the Taliban, Islamic State/Daesh or any other insurgent activity in [Village 1] village, [District 1] district on the basis of his race or religion.
30. The applicant also claims that upon return to Afghanistan he will be identified as someone who has been living in the west, of western appearance and who is returning as a failed asylum seeker. He claims he will be identified as an infidel. I have considered the applicant will be returning to this region as someone who has spent a considerable period of time in Australia, a western country and has sought asylum. I also note he will be returning as a failed asylum seeker.

---

<sup>11</sup> DFAT Thematic Report - Hazaras in Afghanistan 18 September 2017", DFAT, 18 September 2017, CISED50AD5681 2.29

<sup>12</sup> Ibid. 2.30

<sup>13</sup> Ibid. 2.35

<sup>14</sup> EASO Country of Origin Information Report Afghanistan Security Situation November 2016", EASO, 1 November 2016, CIS38A80122597

<sup>15</sup> "Afghanistan: Security Situation December 2017", EASO, 1 December 2017, CISED50AD8102

31. Country information before me states that an increasing number of Afghans who had sought protection overseas are returning to Afghanistan, both voluntarily and involuntarily. DFAT is aware of occasional reports of returnees from western countries alleging they have been kidnapped or otherwise targeted on the basis of having spent time in a western country. In general DFAT assesses that returnees from western countries are not specifically targeted on the basis of their being failed asylum seekers. People who are identifiable as being associated with foreign (particularly western) countries may be targeted by insurgent groups such as the Taliban. Returnees from western countries, however face a similar level of risk to other people in Afghanistan who are associated with support for the government or the international community. People in this situation, which I am not satisfied the applicant is, often take measures to conceal their association such as not travelling with documents or symbols that may link them to the Afghan government, the international community based in Afghanistan or western countries. DFAT assesses that returnees from western countries who maintain a low profile such as taking steps to conceal their association with the country from which they have returned do not face a significantly higher risk of violence or discrimination than do other people in Afghanistan with similar ethnic and religious profile.<sup>16</sup>
32. The applicant resided in Afghanistan until the age of [age]. His formative years were spent living there and he will be returning to Afghanistan with the knowledge of the language, culture, and familiarity with his home area and to somewhere his immediate family continues to reside. I am not satisfied the applicant will be of any concern to the Taliban or any other insurgent group on the basis of residing in Australia, returning as a failed asylum seeker, or as someone who has sought asylum in a western country. I am also not satisfied the applicant will face harm on the basis of appearing to be western due to not having a beard or for wearing western clothes. I am not satisfied there is a real chance of any harm on this basis.
33. In his application for protection, the applicant stated that his father had to rent out their land to other farmers due to issues created by Pashtuns and Kuchis. I accept that this may have occurred, however the applicant has not claimed to have previously faced any harm on this basis, nor has he claimed that he will face any harm upon return to Afghanistan on this basis. I am not satisfied there is a real chance the applicant will face any harm on this basis.
34. The delegate, in its decision, has also stated that the applicant fears harm from the Taliban because he sends his children to school. I note the applicant has [a child]. I also note the applicant's [Relative A] and [another relative] reside with his wife in Afghanistan and they are both past school age [ages of relatives]. The applicant has not claimed that his [other family members] have ever faced any harm on the basis of attending or not attending school. The applicant himself has also not claimed to have faced any harm on this basis. I am not satisfied there is a real chance the applicant will face harm upon return to Afghanistan on this basis.
35. I have not accepted the applicant is of any adverse interest to the Taliban or any other insurgent group. I accept the applicant is a Shia/Hazara returning from a western country after failing to seek asylum, however I am not satisfied the applicant has a profile, individually or cumulatively, which would attract any adverse attention to prevent him from returning. I am not satisfied the applicant faces a real chance of harm on account of being a Shia/Hazara who previously worked [as Occupation 1] and/or as a someone returning to Afghanistan after living in a western country for a period of time and unsuccessfully seeking asylum. I have considered the applicant's claims individually and cumulatively and I am not satisfied there is a real chance of any harm.

---

<sup>16</sup> Ibid. 5.21

### **Refugee: conclusion**

36. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

### **Complementary protection assessment**

---

37. 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**

38. 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.

39. Above I have considered the applicant's claims individually and cumulatively and I am not satisfied the applicant would face a real chance of facing any harm if he were to return to Afghanistan on the basis of previously [undertaking Occupation 1, which supports] the army/police, for being a Shia/Hazara or as someone who is returning to Afghanistan after residing in the west for a period of time and unsuccessfully claiming asylum. As 'real chance' equals 'real risk' I am also not satisfied there is a real risk the applicant will face significant harm upon return.

### **Complementary protection: conclusion**

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

### **Decision**

---

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

## Applicable law

---

### **Migration Act 1958**

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

...

**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.