



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA17/03105

Date and time of decision: 20 April 2018 10:11:00

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 male from Parwan Province, Afghanistan. On 23 June 2017, the applicant lodged an application for a Safe Haven Enterprise Visa (SHEV). A delegate for the Minister of Immigration and Border Protection (the delegate) refused to grant this visa on 6 July 2017.
2. The delegate found the applicant would not face a real chance of serious harm or a real risk of significant harm if he returned to Afghanistan.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 1 August 2017 the IAA received a submission from the applicant. Contained in this submission was discussion about why the applicant does not agree with the delegate's decision. I consider this to be argument and discussion rather than new information and therefore have had regard to it.
5. On 22 December 2017 the applicant submitted to the IAA a report written by [an] Officer at [Organisation 1], dated [December] 2017. The report indicates that the applicant was diagnosed with anxiety, depression and past trauma. The period of treatment received by the applicant commenced in July 2017 and ceased in December 2017. This report was not before the delegate and I consider it to be new information. The delegate's decision was made prior to the applicant commencing this treatment and I am satisfied that this information could not have been provided to the delegate prior to the decision and that there are exceptional circumstances to justify its consideration. I am satisfied s.473DD is met and I have therefore had regard to this information.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - The applicant is from [Parwan] Province, Afghanistan. He moved to Kabul to attend university in 2011 and resided there until his departure for Australia in 2012.
 - While at university in Kabul he studied [Course 1] and worked as [Profession 1].
 - In 2012 he was travelling from Kabul to his home village with [Relative 1]. They were stopped by the Taliban who searched their vehicle and their personal possessions. The Taliban found the applicant's personal documents, his taskera and university card. The Taliban also found [Relative 1]'s [Profession 2] identification card and are aware that he works with foreigners in Afghanistan. The Taliban accused them of being government sympathisers and helping foreigners. The applicant was accused of being a student and a driver for [a Profession 2].
 - The applicant and [Relative 1] were able to escape from the Taliban as the Afghan Army commenced gunfire with the Taliban members who had captured them. This distracted the Taliban and the applicant and [Relative 1] ran away. They returned to Kabul,

however the applicant feared that the Taliban were targeting people who had escaped their captivity. The Taliban also kept the applicant's taskera and student card so were aware of his personal information.

- The applicant fears being caught by the Taliban upon return to Afghanistan as they have his identification documents and know all about him.
- He also fears harm as he is a Shia Muslim, of Hazara ethnicity, has been living in Australia, a western country, and will be returning as a failed asylum seeker. He fears he will be considered to be an infidel as the Taliban will think he has converted to Christianity.

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 consistently provided information that he is a Shia Hazara from Parwan Province, Afghanistan and his immediate family continue to reside there. He has also been consistent in providing information that he resided in Kabul immediately prior to departing Afghanistan for Australia. The applicant provided a copy of his Afghan taskera in order to support his claims. I accept the applicant is a Shia, Hazara from Parwan Province, who resided for a short period in Kabul, and that Afghanistan is the receiving country for the purpose of this assessment.
10. The applicant has provided a report issued by [Organisation 1] which states that the applicant suffered from anxiety, depression and past trauma. The report indicates that the treatment received by the applicant commenced in July 2017 (subsequent to the delegate's decision) and ceased in December 2017. I accept the applicant has previously experienced mental health

issues however based on the evidence before me, the applicant is no longer undergoing any treatment or provided any evidence that he will require treatment in the reasonably foreseeable future. There is also no evidence before me to indicate that the applicant was undergoing any treatment during the process of him presenting his claims for protection or that he suffered from these mental health issues during that process and I am not satisfied his ability to present his claims for protection was impacted. Further, I am not satisfied that the applicant's previous mental health conditions will have any impact upon his return to Afghanistan. Further the applicant has not raised to fear harm on the basis of previously having such mental health conditions. I am not satisfied there is a real chance the applicant will face any harm on the basis of previously having and being treated for mental health issues.

11. In his arrival interview, the applicant claimed that he left Afghanistan as his home area is surrounded by the Taliban and that in 2012 he was held by the Taliban, along with [Relative 1]. He claimed that he was able to escape but feared being captured again as the Taliban had copies of his personal identification documents. During this interview he claimed to have commenced making arrangements to depart Afghanistan in March 2012 and left Afghanistan in September 2012.
12. In his SHEV application the applicant elaborated on his claims and stated that until 2010 the applicant was living in Parwan Province and worked on his family farm. In 2011 he moved to Kabul to attend university and studied [Course 1]. He stated that in order to cover his university expenses he commenced working as [Profession 1] and that he would work within Kabul city except during holidays when he worked between Kabul and [his hometown]. He claimed that in 2012 he was stopped by the Taliban while driving from Kabul to his home area with [Relative 1] as they were visiting their family. The Taliban found the applicant's taskera and student card and [Relative 1]'s [Profession 2] card so accused them of being government sympathisers. The applicant also claims that he returned to Kabul after this incident and recommenced his studies at university but was warned by other people that the Taliban will continue to target him so he made arrangements to depart Afghanistan.
13. During the SHEV interview, the applicant was asked about the incident with the Taliban. He stated that he was stopped while travelling from Kabul to Parwan with [Relative 1] and that the Taliban took his taskera and student identification card. The applicant claimed he and [Relative 1] were both searched, as was their vehicle. They were called infidels by the Taliban and accused of working with foreigners as the Taliban had found [Relative 1]'s [Profession 2] card. After 30 minutes of searching them and their vehicle, the Taliban wanted to drag them into the jungle but at that same time the Afghan National Army came and commenced shooting so the Taliban members got distracted and that is when the applicant and [Relative 1] were able to escape. The applicant stated that they went to the shops nearby and then returned to Kabul. [Relative 1] returned to his workplace and the applicant went to the [authorities] and told them about the incident and that his car was still located at the place where the Taliban stopped them. He stated that during the time they were with the Taliban, their hands were not tied and there were four or five Taliban members who were all armed.
14. The applicant also stated that upon return to Kabul he spoke to some friends about what happened. He was told by friends that he should leave the country as the Taliban will try and find him. The applicant was asked why the Taliban would continue to be after him. He stated that because they have his identification they will be able to find him anywhere. He also stated he will be harmed because he is a student. He claimed that he could not relocate elsewhere in Afghanistan as Taliban are all over and will seek him out.

15. During the SHEV interview the applicant stated that he departed Afghanistan two weeks after the incident occurred with the Taliban. During his arrival interview he stated that he commenced making arrangements to depart Afghanistan in March 2012 and left in September 2012.
16. In a post interview submission to the delegate, the applicant stated that travelling through Parwan Province, particularly Ghorband valley is very dangerous. In support, the applicant submitted country information reporting that this area is a Taliban stronghold and its security situation has deteriorated. These pieces of country information were published in 2011 and 2012. Country information before me, specifically the European Asylum Support Organisation (EASO) report published more recently in 2016 states that Parwan Province is located north of Kabul with 70 per cent of its inhabitants Tajik, 18 per cent Pashtun, 11 per cent Hazara and 1 per cent Turkmen. The same report has indicated that in recent years the security situation in Parwan deteriorated due to insurgent activity and clashes between anti-government elements and the foreign forces and illegal armed groups linked with local powerbrokers and criminality. The insurgent groups active in the province include the Taliban, Hezb-Islami, IMU and Al Qaeda and that the main targets include the international military base and its personnel. There were 140 recorded security incidents between 1 September 2015 and 31 May 2016, the vast majority targeting those working for the military, foreign forces and its personnel.
17. DFAT in 2015 reported that insurgents regularly conduct high profile attacks in many parts of Afghanistan, including Kabul. Common targets for insurgent attacks are government institution, political figures, the ANDSF, Mission Resolute Support (the NATO led mission that succeeded the ISAF mission on 1 January 2015), other security forces, foreign missions and international organisations, although mosques, schools, hospitals and other civilian targets are also vulnerable. All Afghans are vulnerable to violent attacks associated with insurgent and/or terrorist groups. DFAT in 2016 reported that insurgent and terrorist groups, including the Taliban, openly target government officials and people associated with the international community. These individuals are often subject to intimidation threats, abduction and killing and these attacks occur throughout Afghanistan.
18. I accept that incidences such as the one the applicant has described occur throughout Afghanistan. And on the basis of the evidence before me, I am willing to accept the applicant and [Relative 1], while travelling through Parwan Province were stopped by the Taliban and that their vehicle and personal possessions were searched. However I do not accept the applicant had to escape this situation as I am not satisfied they would have been of any interest to the Taliban. The country information cited above indicates that the main targets are government officials and people associated with the international community. I am not satisfied the applicant fits into any of these profiles. While the applicant claims [Relative 1] was [a Profession 2] and the Taliban accused them of being government sympathisers, the applicant has provided no supporting evidence of this and I do not accept this claim. The applicant also failed to mention [Relative 1]'s occupation during the arrival interview. I accept the Taliban had, and possibly continue to have, access to the applicant's taskera and student card. However I am not satisfied that on the basis of being stopped by the Taliban and them having access to his personal documents that he will face any harm upon return to Afghanistan, specifically Parwan Province.
19. Based on the country information cited above, I am not satisfied the applicant would be of continuing interest to the Taliban. He claims that as a student and because the Taliban have his student card, he will be harmed. However there is no independent evidence before me to indicate that the Taliban have an interest in students, particularly those studying [Course 1] such as the applicant. I am not satisfied this course would be of any interest to the Taliban. I

note [Relative 1] who he was travelling with was [a Profession 2] and worked with foreigners, however the applicant has provided no evidence to support his claim that [Relative 1] was [a Profession 2], nor has the applicant provided any evidence to indicate what happened to [Relative 1] and his current whereabouts to corroborate his claims.

20. I am not satisfied there is a real chance the applicant will face any harm on the basis of him previously being stopped by the Taliban and his personal identification documents being held by them. I am satisfied the applicant is able to return to Parwan Province and reside with his immediate family who continue to reside there. I note the applicant previously worked as [Profession 1] within Kabul and claimed that during his holidays he worked as [Profession 1] between Kabul and Parwan Province, specifically, [his] home area. Apart from being stopped by the Taliban on this one occasion, the applicant has not made any claims that he faced any harm during his travels while working as [Profession 1], nor has the applicant made any claims to fear returning to Parwan Province via road. I am therefore satisfied the applicant will be able to return to his home area, as he has done many times before from Kabul, and I am satisfied there is no real chance he will face any harm during this journey.
21. The applicant further claims that as a Hazara and Shia Muslim he will be targeted upon return to Afghanistan. The applicant has not said he previously faced any harm on the basis of his race or religion however he claims that he will face harm on this basis upon return. He also claims to fear returning to Afghanistan as he will be identified as someone who has resided in Australia, a western country. He will be perceived to be western, to have converted to Christianity and be returning as an asylum seeker.
22. During the SHEV interview, the applicant was asked why he could not return to Afghanistan based on his race and/or religion. He stated that the Taliban hate Shias and Hazaras because they have and are perceived to have cooperated with foreigners. The Taliban accuse them of being traitors. He also claimed there have been attacks in Shia mosques and a number of people have been killed.
23. The United States Commission on International Religious Freedom (USCRIF) in 2017, stated that 10 to 15 per cent of the Afghan population is Shia Muslim and nine per cent of the population of Hazara ethnicity. United Nations Assistance Mission in Afghanistan (UNAMA) in 2017 reported that there were five separate attacks against Shia Muslim mosques and gatherings in the second half of 2016. All of these took place in Kabul, Balkh and Herat. UNAMA documented a decline in the number of Hazara civilians abducted in 2016, recording 16 incidents involving the abduction of 85 Hazara civilians, in comparison to 26 incidents in 2015 in which anti-government elements abducted 224 Hazara civilians. In 2016, UNAMA documented the abduction of Hazara civilians in Baghlan, Uruzgan, Sari Pul, Daikundi, Maidan Wardak and Ghor Provinces. None of these attacks took place in the applicant's home area of Parwan.
24. USCRIF also reported on the incidents targeting Shia Muslims stating that in 2016, Shia Muslims fell victim to multiple violent and deadly attacks attributed to the Taliban and ISIS. More than 500 members of the Shia community were injured or killed between July and November 2016. Like UNAMA, the USCRIF reported the location of these incidents and I note that none of these occurred in Parwan Province. DFAT has no evidence to suggest that Hazaras are systematically targeted in these attacks on the basis of their ethnicity alone.
25. The applicant has never previously faced any harm on the basis of his race or religion. I note that he was stopped by the Taliban on one occasion but I have found that he is not of any ongoing interest to the Taliban or anyone else in Afghanistan on this basis. The applicant's

immediate family also continue to reside in Parwan Province and the applicant has not raised any claims to suggest that they have been harmed on the basis of being Hazara Shia. I am not satisfied there is a real chance the applicant will face any harm upon return on the basis of his race and/or religion.

26. I note the applicant will be returning to Afghanistan as someone who has been residing in Australia, a western country and may be considered to have become westernised. He will also be returning to Afghanistan as an asylum seeker. In 2016, the UNHCR have reported that anti-government elements (AGE's) reportedly targeted individuals who are perceived to have adopted values and/or appearances associated with Western countries due to their imputed support for the government and the international community. There are reports of individuals who returned from western countries having been killed or tortured by AGEs on the grounds that they had become foreigners or that they were spies for a western country, however based on the information before me none of these incidences have taken place in Parwan Province.
27. DFAT in 2015 and 2016 reported that returnees from western countries are almost exclusively returned to Kabul. While some families are returned, most tend to be single men. While men of working age are more likely to be able to return and reintegrate successfully than unaccompanied women and children, the lack of family networks for single men can also impact their ability to reintegrate into Afghan community.
28. 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 however DFAT assess 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. I am not satisfied the applicant has such a profile and even if his local community became aware of his residence in Australia, the evidence before me does not indicate that this would amount to any harm. The applicant also claims that he will be perceived to have converted to Christianity, however there is no evidence before me to indicate that this will be the case or that there is any basis that this will actually occur.
29. I note that in 2014, an Afghan Hazara from Jaghori was abducted and tortured by the Taliban following his deportation from Australia. He reportedly escaped from his captors and returned to Kabul. These reports have not been corroborated. Based on the country information before me, no such incidents have occurred since 2014.
30. DFAT in 2016 also reported that Hazaras are widely perceived to be affiliated with both the government and the international community, and I accept the applicant is a Hazara who would be returning from a western country. Many Afghans travel abroad and there are large communities of Hazaras living overseas, including in Australia. This is not to suggest that all Hazaras face the same level of risk as those working for the government or the international community. Rather, the perception of Hazaras having disproportionately benefitted from the ousting of the Taliban regime, or the perception of links with the international community, may in some circumstances be a contributing factor in the choice of target for an attack that would have happened anyway. DFAT assesses that low profile Hazaras who have spent time in western countries face a low risk of violence as a result of those international links. People who are openly affiliated with the government or the international community face a high risk of being targeted by anti-government elements across Afghanistan. The applicant has not presented any evidence to suggest he will be someone viewed as being affiliated with the

government or international community. I am not satisfied the applicant has such a profile and I am not satisfied there is a real chance the applicant will face any harm on the basis of being a returning Hazara Shia from Australia, a western country as an asylum seeker.

31. Given the applicant will be able to safely return to his home area, I am not satisfied the applicant will face a real chance of any harm upon return on the basis of his race or religion or on the basis of an imputed political opinion being a returnee from the west, a failed asylum seeker, nor will he be considered to be a Christian, either individually or cumulatively. I am also not satisfied that he will face a real chance of harm as someone who has previously been searched by the Taliban in 2012, or as someone who has previously had and received treatment for any mental health conditions.

Refugee: conclusion

32. 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

33. 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

34. 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.
35. I have accepted the applicant was [Profession 1] for a short period of time and that he and [Relative 1] were searched by the Taliban and that his personal documents were taken from him. I have also accepted the applicant is a Shia Hazara who will be returning to Parwan as someone who has resided in the west and an asylum seeker who has previously had and received treatment for mental health conditions. I have found there is no real chance the applicant will face harm on these bases. 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

36. 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.