



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA17/04092

Date and time of decision: 30 August 2018 16:26:00

D Hughes, 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 citizen of Afghanistan. He applied for a protection visa on 8 December 2016. A delegate of the Minister for Immigration refused to grant the visa on 14 December 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). No further information has been obtained or received.

Refugee assessment

3. 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

4. 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.

Background and identity

5. The applicant claims he was born in Logar Province in Afghanistan circa [year]. The applicant provided a copy of a taskera. While I agree with the delegate that the applicant was vague and inconsistent about the process by which he obtained his taskera, I also give weight to the fact that he spoke freely about his life in Afghanistan, and his tribal background, which gave the impression of a true account. While country information before me indicates a high prevalence of fraud in relation to Afghan identity documents, without information before me

that clearly contradicts his identity documentation,¹ I give weight to this document as positive support for his identity.

6. The delegate referred to his concerns about the applicant's Afghan licence and his presence on social media during the visa interview. That information has not been referred to the IAA, but I have weighed the applicant's oral evidence about these matters at the visa interview and, in the absence of information that raises further concerns, I accept his evidence and give these matters no adverse weight.
7. Having regard to what is before me, I am satisfied of the applicant's identity. I accept his claims that he is a Sunni Pashtun male born in Logar Province in Afghanistan in or around [year].
8. The applicant claimed that he lived in [Country 1] between [year] and [year], meaning that he lived in the country between the ages of 3 and 13. In his written application, he claimed he was tortured by the [Country 1] Police around twice a month when he was travelling to and from work. He claimed they tortured him because he was a refugee in [Country 1]. This was the reason they decided to return to Afghanistan. At the visa interview, the applicant's evidence shifted. He clarified that they were harassed by the police, and that he was not personally beaten and imprisoned, but his father was mistreated. He then further clarified that he was harmed on two occasions.
9. I find it difficult to accept that the applicant would be tortured or seriously harmed by the police on his way to work given his age at the time, but if his status was irregular in [Country 1], it is plausible he and his family faced harassment from the authorities. Whatever the case, based on the information before me, specifically the applicant's taskera and otherwise consistent evidence, I accept he is a citizen of Afghanistan and I have no reason to find that he has a right to enter and reside in [Country 1].

Claims related to Taliban attacks in Logar

10. The applicant lived in a village in Logar Province from 2002 until he left Afghanistan in late 2012.
11. The applicant gave a plausible account of his life in Logar during this period. He gave evidence about his family's store, the goods they sold and explained how they were sourced. He described the bazaar in Logar where his store was located. He claimed there were [multiple]shops. The shops were close to each other on both sides of the street. Local people and travellers on the road would come to buy items. Sometimes it was not busy, but most of the time cars were travelling on the road. I was persuaded by his freely given evidence and accept his family had a store in a bazaar in Logar Province.
12. The applicant's claims turn principally on incident(s) that occurred near his family's store. Specifically, he claims that he witnessed one or more attacks against Afghan forces by the Taliban. He claims that as a result of one of these incidents he obtained a profile with the Taliban that put him at risk of being killed by the Taliban if he remained in the country.
13. In contrast to his other evidence, I have a number of concerns about these claims and found his evidence about these attacks to have been inconsistent, implausible and lacking in credibility.

¹ DFAT, "Country Information Report: Afghanistan", 18 September 2017, CISED50AD5680.

14. My first concern relates to the inconsistency of his various accounts. In the arrival interview, the applicant referred to only one incident involving a Taliban [attack]. He explained that the attack occurred near his shop in the bazaar. He described the incident in some detail. When asked by the interviewing officer why he would be harmed or killed if he did not do anything during this incident, the applicant said that he had told the Afghan National Army (ANA) what had happened and that he had identified a wounded Taliban leader. The ANA accepted he did not do anything and he closed his shop. He claimed that night he spoke to his friend (H) who said he might be in trouble with the Taliban. His friend came to Logar at midnight and took him to Kabul.
15. In the written application, the applicant claimed the incident (which was now the second of two incidents) involved an ANA convoy. He said the ANA were passing his bazaar when they were attacked by the Taliban, who fired on the ANA soldiers. The applicant said he knew a police officer and called him. The man brought many police to the scene. He said many people had seen him call the police. After the attack, he claimed the Taliban went to his home at around 10pm. He claimed they were looking for him because they knew he had called the police. His father told them he was not around, and they beat his father and brother with the back of a gun. He said he had already left his home by 9pm to go to Kabul. He claimed his friend H took him to Kabul, before he then travelled to [Country 1].
16. In the visa interview, the applicant claimed the convoy was a mix of ANA and the Afghan Police. He again talked about the firefight. He claimed he called the Police, but conceded they may have used their own radios to call for assistance. He said after the Taliban retreated, the police came and questioned some of the other shopkeepers, but he did not speak to them. He closed his shop and went home. Later on in [Country 1], he found out that the Taliban had gone to his home, beaten his brother and father and questioned them about his whereabouts.
17. In his arrival interview, the applicant did not claim to have called the ANA or Police to report the attack. He did not claim the Taliban came to his home and beat his brother and father at 10pm, but rather he left Afghanistan because of the advice he received from his friend H. He claimed he spoke to H at 9pm, and he left home at midnight with H.
18. In the written statement and visa interview, the applicant did not refer to having spoken to the ANA after the attack; in fact, he expressly claimed he did not. In the written statement, he did not refer to the injured Taliban leader and his role in the attack, or that the applicant was seen talking with the ANA and/or identifying the Taliban leader. He also did not raise these matters in the visa interview until the delegate put to him that he had failed to mention the Taliban commander. Even after the prompts, the applicant could not give consistent evidence about whether the Taliban leader was dead or injured.
19. In the written statement, he claimed he left home at 9pm to travel to Kabul, and that the Taliban came to his home at 10pm. At the visa interview, he said he spoke to H about the incident after H had seen a report of the attack on television. H was concerned that the Taliban may find out the applicant called the police and that they would harm or kill him. At around 9pm, H came to his home and took him to Kabul. In his oral evidence, he said H called him at 9pm, and it was around 12am when he arrived in Kabul. The delegate asked why it took so long to get back to Kabul. The applicant said the road condition was not good.
20. There have been a number of inconsistencies in his accounts of this incident, which seriously undermine the credibility of these claims. I have regard to the context of the arrival interview, the time that has passed, the applicant's education level, his claims related to his

poor memory, and the potential impact of past trauma in weighing the consistency and plausibility of his account. I note the applicant claimed to have memory issues, but he also confirmed he had no health or medical concerns. I accept there might be variance in the timing of the incident(s), the date of the incident(s), the specifics of who was involved, and what occurred, and that these variances may be explained by such factors. However, in addition to these smaller inconsistencies is a significant material shift in his claims and reasons for why he left Afghanistan that I do not consider is explained by these considerations. The applicant failed to refer to any telephone calls to the Afghan Police in his earlier evidence, and he failed to refer to speaking to the ANA directly and identifying a Taliban commander in his later evidence. Given that these matters were the catalyst for him leaving Afghanistan, I do not accept that his account would differ so significantly on this issue, even allowing for the above considerations.

21. Ultimately, I consider the major and smaller inconsistencies and discrepancies strongly undermine his claims that he had any active role in the incident(s) or that he had any adverse profile with the Taliban as a consequence of his claimed involvement.
22. Another concern is the plausibility of his account and the timing of what occurred after the attack. The applicant claims the incident happened towards the end of the day, around four or five o'clock. The applicant said that it took the Police around 15 minutes to attend after the initial firefight (and his phone call). After the incident, the police came and spoke with some of the shop owners. When pressed by the delegate, he later claimed that there was a discussion about the injured/dead Taliban commander. The applicant said it was not quite dark. He claims that the same night his friend (H) saw on the news that there had been an attack at the bazaar, and called him from Kabul. They discussed the situation, and his friend drove to Logar from Kabul out of concern for the applicant's safety. His friend arrived in Logar around 9pm. The applicant then discussed the matter with his friend, his brother and his father, before leaving Logar for Kabul. He said he did not pack anything to take and his brother and father agreed he should go.
23. It is difficult to accept that the applicant would witness a major incident in the late afternoon, that he would call the Afghan Police, that the Police would then attend and repel the Taliban, that the community would gather to discuss what happened while the Police questioned those in attendance, that a media report would be made about the attack and televised, that his friend in Kabul would see the report, that his friend would then call the applicant and they would discuss the incident, that they would decide he was at threat because he had telephoned the Afghan Police, that his friend would drive to Logar from Kabul (which the applicant described as a slow journey because of the poor roads), that they would discuss the issue with his family, and that he would decide to leave his home area and the family business, all in a matter of hours. The next day, he would leave the country altogether.
24. At this point, the threat to the applicant was entirely speculative. There had been no direct threat made to the applicant or his family from the Taliban. Other than his friend's advice, there was also no actual indication anyone had told the Taliban the applicant had called the Afghan Police. Indeed, if the first incident did occur, the applicant had previously called the Police over a Taliban attack in the same area without facing any consequences. In that context, it is difficult to accept the applicant would have decided to so quickly leave the area, let alone accept that this series of events could have all occurred in a matter of hours.
25. It is also concerning that the applicant would so quickly decide to leave Afghanistan. In the visa interview, the applicant said that he stayed in Kabul for one night, before travelling to [Country 1]. He claimed he only spoke to his family when his brother later came to [Country

1], at which point his brother told him the Taliban had come to question them about the applicant's whereabouts, and that they were beaten. If this is accepted, the applicant was still not aware that there was any actual threat or risk from the Taliban until his brother arrived in [Country 1]. In that context, it is difficult to accept the applicant would leave the country without first spending some time in Kabul to determine, firstly, if he was at risk in Logar, and secondly, if he was also at risk in Kabul.

26. When viewed in totality, I find the applicant has not been credible, consistent or plausible in terms of his participation in these attacks, in his actions that followed, or in relation to his profile with the Taliban. I find that the applicant's claims that he either phoned the Afghan Police or other authorities, or provided information about the Taliban directly to the ANA or the Afghan Police after the attacks, are contrivances intended to demonstrate the applicant has an adverse profile with the Taliban. I do not accept he ever called or spoke to the Afghan Police or the ANA in relation to any incident near the bazaar. It follows that I do not accept he ever had a profile with the Taliban or was at threat from the group (or any other armed person or group). This also means that I do not accept his brother or father were ever beaten, questioned, threatened, dispossessed of the land, or otherwise harmed by the Taliban or any other person or group in connection with these matters.
27. I am prepared to accept that the applicant may have witnessed, or have been in close proximity, to one or more Taliban attacks against Afghan armed forces, particularly if he owned a store in a roadside bazaar. The applicant is from an area where ground engagements between the Taliban and the Afghan armed forces occur,² but I am satisfied that the applicant was never personally at threat or at any real chance of harm. In this respect, I note when asked why he did not run out of the shop into the safety of his home during the attack, the applicant said the Taliban always attack, but they knew they would not attack them (i.e. those working and shopping at the bazaar). Considering the totality of evidence before me, I find there is no chance of the applicant facing harm from the Taliban or any other armed person or group, in connection with the Taliban attacks in Logar, or on the basis of any other related profile.

Generalised and insurgent violence, and other profile factors

28. In relation to generalised and insurgent violence and insecurity in Afghanistan, I accept the security situation in Afghanistan has deteriorated in recent years. According to DFAT a number of anti-government elements, most notably the Taliban (but also recently Islamic State), remain engaged in a violent armed insurgency against the government and its international partners. The most common targets for insurgent attacks are government institutions, political figures, the ANDSF and other Afghan and international security forces, demonstrations, foreign diplomatic missions and international organisations. Attacks are generally directed at specific (high profile) targets, but the methods of attack can be indiscriminate and often result in civilian casualties.³ In terms of Islamic State, that group has also targeted Afghanistan's minority Shia Hazara population in Afghanistan, albeit there are no reported attacks in Logar.⁴
29. The information before me indicates that Logar Province has been described as one of the most volatile and kinetic provinces in the region and constitutes an "insurgents' highway" from [Country 1] to Kabul, through an unguarded border of eight kilometres in Azra district.

² UK Home Office, "Country of origin information report Afghanistan", 8 May 2013, OGCOD145410; EASO, "Country of Origin Information Report – Afghanistan Security Situation", 1 November 2016, CIS38A80122597.

³ DFAT, "Country Information Report: Afghanistan", 18 September 2017, CISED50AD5680.

⁴ DFAT, "Country Information Report: Afghanistan", 18 September 2017, CISED50AD5680.

According to EASO, the province is around 70 percent Pashtun and 30 percent Tajik. Both the Taliban and Islamic State are active in Logar.⁵

30. EASO analysis is consistent with much of the applicant's evidence about insurgent activities and its clashes with Afghan's defence forces. Some Taliban-controlled districts appear to be unsafe even for civilians. However the applicant's home area, near the provincial capital of Pul-e-Alam, has a strong Afghan Local Police and Afghan National Police presence, and while there are a higher number of security incidents in this area (around 55 in the District between 1 September 2015 to 31 May 2016), the information before me does not indicate that his home area is under or a threat of Taliban control, and in fact indicates that locals have staged uprisings against the Taliban. EASO describes the provincial centre in Pul-e-Alam and neighbouring Mohammad Agha as relatively safe areas. Nevertheless, there were high casualty incidents where civilians have been killed and injured in these areas, albeit the targets were government and armed forces. Equally, US and Afghan forces remain active in Logar, launching a number of operations against the Taliban and other armed groups.⁶
31. While EASO describes Logar as volatile, the number of incidents in the province (around 180 security incidents over the above period), is considerably lower than neighbouring provinces in Kabul (312), Wardak (359), Ghazni (1,292), Paktya (394) and Nangarhar (1,901). Incidents targeting individuals in Logar Province totalled 15.⁷
32. He has not claimed to fear harm based on his religious and ethnic, or any other higher profile other than that advanced above. The applicant is from the Sunni Pashtun ethnic and religious majority, which forms the majority of the population in Logar. I am satisfied he would not face any chance of harm on the basis of his religious or ethnic profile from Islamic State, which has targeted the minority Shia Hazara population. The groups at risk from the Taliban, Islamic State and other armed groups, remain those associated with the government, the military, and the international community. I am satisfied the applicant has no such profile, nor would he have any proximity to persons with such a profile on return to the country. I consider he would return to Logar Province and work as a low profile storeowner from the Sunni Pashtun majority, and he would face no real chance of harm from any person or group for reasons of that profile.
33. I accept there are dangers to low profile civilians living in Logar Province, however I do not consider that the country information before me indicates that insurgent or generalised violence is at such a level, scope or frequency, that the applicant would face a real chance of harm as a civilian if he returned to live in his home area. No area in Afghanistan is immune from generalised and insurgent violence, and this includes Logar and the surrounding districts and provinces, however, when having regard to the number of security incidents in his home district and the province in general, the security presence and operations in the city, the applicant's lack of any profile or proximity to those with a risk profile, and given the lack of advice to suggest that a person with the applicant's low profile would be at a real chance of harm, I find the chance of the applicant being harmed in generalised or insurgent violence is present, but remote.

Claims related to time in west (Australia) and asylum claims

34. The delegate considered whether the applicant would face a real chance of harm on the basis of his time in a western country (Australia), his status as an asylum seeker, or on the basis

⁵ EASO, "Country of Origin Information Report – Afghanistan Security Situation", 1 November 2016, CIS38A80122597.

⁶ EASO, "Country of Origin Information Report – Afghanistan Security Situation", 1 November 2016, CIS38A80122597.

⁷ EASO, "Country of Origin Information Report – Afghanistan Security Situation", 1 November 2016, CIS38A80122597.

that he would be imputed with a pro-Western political opinion on return by the Taliban or other insurgent groups.

35. The applicant did not advance this claim, at least not overtly, in his written or oral evidence. This type of claim is not uncommon in the context of Afghan protection claims, but I am concerned as to why it has been advanced in this instance. Weighing everything, I am not satisfied the applicant has a subjective fear of harm for these reasons, which is the basis on which such claims are predicated in s.5J(1)
36. I am mindful that the applicant has not engaged with the IAA review, and it is unclear whether this is a claim he relies on, or would continue to rely on. For completeness, I will consider this claim.
37. DFAT states that it has no information to suggest that returnees from western countries attract negative attention from state authorities for having sought and failed to gain asylum. DFAT does state that it is aware of occasional reports alleging that returnees from western countries have been kidnapped or otherwise targeted based on their having spent time in a western country. However, DFAT also states that it understands that most returnees take measures to conceal their association with the country from which they have returned, and keep a low profile on return. DFAT further states that people in this situation do not face a significantly higher risk of violence or discrimination than other Afghans with a similar ethnic and religious profile.⁸
38. DFAT does not provide any useful guidance about what measures people take to conceal their association with the country from which they have returned, however in a 2015 report they did elaborate, suggesting that people do travel with documents or symbols that may link them to the Afghan government, the international community based in Afghanistan or western countries. In that report, DFAT also assessed that returnees from western countries are not specifically targeted on the basis of their being failed asylum-seekers. DFAT cites one example of a person abducted and tortured by the Taliban following his deportation from Australia.⁹
39. Outside of these incident(s) from 2014, there is little in the way of recent and specific information, examples of attacks, or other clear advice before me that indicates that persons with the profile of a returnee from the west (Australia), and/or who sought asylum/protection in the west, have been targeted for serious harm for those reasons on return to the country, or because of an imputed political opinion or other profile, including within the latest DFAT report.¹⁰
40. Because of ongoing insecurity in Afghanistan, at least 10 million Afghans have fled the country. Many continue to look for asylum in neighbouring countries. Pakistan and Iran continue to host the vast majority of the Afghan refugee population, totalling an estimated 2.5 million people. Among all those who applied for asylum in 44 countries in Europe, North America, Oceania and Asia in 2014, asylum seekers from Afghanistan were the third-largest group with an estimated 59,500 claims. In 2015, more than 190,000 Afghans applied for asylum in EU+ states, nearly five times as many as 2014. Equally, many Afghans decided to return to Afghanistan after 2001 or were deported. From March 2002 to June 2016, UNHCR

⁸ DFAT, "Country Information Report: Afghanistan", 18 September 2017, CISED50AD5680.

⁹ DFAT, "Country Information Report - Afghanistan", 18 September 2015, CISEC96CF13366.

¹⁰ DFAT, "Country Information Report: Afghanistan", 18 September 2017, CISED50AD5680; Department of Foreign Affairs and Trade, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186; EASO, "Country of Origin Information Report – Afghanistan Security Situation", 1 November 2016, CIS38A80122597.

reported nearly 6 million people returning home of which 4.8 million were assisted by UNHCR and the Ministry of Refugees and Repatriation. UNHCR estimated that returnees constitute about 20 percent of the population.¹¹ In that context, I consider his status as a returnee from the west, or an asylum seeker, would be unremarkable. Moreover, he would be returning to Logar where he is already known, and likely well known because of his store.

41. I accept there will be challenges for the applicant on return to his home country. However, having regard to the available information, I am not satisfied that he would be vulnerable or targeted for harm for these reasons. I am also not satisfied that he would be imputed with an adverse profile or political opinion related to these factors. I have found the applicant faces no real chance of violence or discrimination on the basis of his ethnic, religious or any other profile. I further find there is not a real chance of the applicant facing harm as a returnee from the (west) Australia, as an asylum seeker, or because of any imputed pro-Western or anti-Taliban political opinion.
42. Alternatively, I am satisfied the applicant could take reasonable steps to modify his behaviour to avoid any chance of harm he may face arising from his profile of having returned from the west (Australia) or having sought asylum. Specifically, I am satisfied the applicant could do this by not travelling with documents or symbols that may link him to the west (Australia), not openly speaking English or about his time in Australia, and wearing traditional Afghan clothing. I have no reason to consider these were not the steps the applicant would have taken on return to the country, and there is no information before me that taking these steps would clash or conflict with the applicant's beliefs or identity. On the basis of the information before me, I do not consider that taking these steps would conflict with any characteristics that are fundamental to his identity or conscience, or require him to conceal an innate or immutable characteristic, or require him to act in any way or do any of the things contemplated by s.5J(3)(c)(i-vi) of the Act. I consider instead that these would be reasonable (and prudent) steps given the insecurity in the country. It follows that I do not accept he would face a real chance of harm for any of these reasons, and I find his claims on this basis are not well founded.

Refugee: conclusion

43. In view of all the circumstances, I find there is no real chance of the applicant facing harm for any reason related to the incident(s) he witnessed in Logar involving the Taliban, in generalised or insurgent violence, on the basis of his religious, ethnic or any related profile, as a returnee from the west or an asylum seeker, or on the basis of any other related profile.
44. 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

45. 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.

¹¹ EASO, "Country of Origin Information Report – Afghanistan Security Situation", 1 November 2016, CIS38A80122597.

Real risk of significant harm

46. 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.
47. I have found above there is not a real chance of the applicant facing harm for any reason related to the incident(s) he witnessed in Logar involving the Taliban, in generalised or insurgent violence, on the basis of his religious, ethnic or any related profile, as a returnee from the west or an asylum seeker, or on the basis of any other related profile. For the same reasons, and on the basis of the same information, I am satisfied there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's removal to his home area in Afghanistan, the applicant will face a real risk of significant harm.

Complementary protection: conclusion

48. 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

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.