



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA18/04406

Date and time of decision: 17 August 2018 14:06:00

M Currie, 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 of Pashtun ethnicity. He arrived in Australia in May 2013. In September 2016, he lodged an application for a Safe Haven Enterprise Visa. In February 2018 a delegate of the Minister for Immigration and Border Protection refused to grant the Visa on the grounds that Australia did not owe protection obligations to the applicant after concluding that the applicant's principal claim for protection was false. On 21 February 2018, the matter was referred to the Immigration Assessment Authority (IAA).

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 29 March 2018 a migration agent, acting on behalf of the applicant sent an email containing a five page legal submission to the IAA. The legal submission argued against the findings of the delegate.
4. The legal submission argues that the applicant's age and identity are as claimed. The point of this argument is not entirely clear as the delegate, after outlining some issues of concern relating to the identification of the applicant, ultimately accepted the applicant's claimed identity.
5. The submission also argued that the applicant's principal claim for protection was truthful and that differences between the applicant's written claims in his SHEV application and his verbal claims at his Protection Visa Interview can be readily explained by the fact that the applicant does not speak English and was forced to use a translator and thus the '*meanings of many words could thus be lost in translation in both directions*'. The migration agent, himself a speaker of Pashtu (applicant's preferred language) prepared the applicants written SHEV application, and suggests that the translator at interview was burdened by having to '*interpret in both directions*'. The submission suggests that that the migration agent's own translation of the applicant's claims (in the earlier SHEV application) is unblemished by this burden. It is not entirely clear whether these assertions are offered as mere argument, or as a new claim (i.e. new information). For the sake of caution, I will treat the assertions about mistranslation by the translator as new information (but note that my considerations would also apply to argument).
6. I find this explanation to be unconvincing. I note that no claims of any mistranslation were voiced during the interview by the applicant, or his representative despite the applicant's representative being present at the Protection Visa Interview. I note that no actual examples of any mistranslations have been provided in the legal submission. I observe that both the applicant and the translator spoke Pashtu and that the applicant acknowledged he could understand the translator at the commencement of the interview. Though I do not speak Pashtu, I have listened to a recording of the interview and I am unable to discern any particular communication difficulties between the applicant and the translator beyond the normal clarification of points at interview. I note the translator used at the Protection Visa Interview was certified by the National Accreditation Authority for Translators and Interpreters (NAATI) accreditation scheme. It is not clear to me why the accredited

translators should be disregarded as the submission does not indicate how or where the translator's interpretation of the applicant's claims was in error, or was otherwise problematic. It is clear that a requirement existed for the applicant's words to be translated into English at his Protection Visa Interview and during the preparation of his earlier SHEV application. Presumably, the applicant's representative would have faced similar difficulties to the translator in preparing the written application. In these circumstances, I am not satisfied that there are any exceptional circumstances for consideration of this claim.

7. I note the submission also states that the applicant's memory has been '*badly impacted*' by the recent death of his father and the '*significant trauma*', the applicant has undergone in his life. It is suggested that these factors explain why the applicant has provided conflicting accounts. This claim was not before the delegate and is new information.
8. I accept that a person's memory of events can change over time, and that stress and other factors can inhibit a person's ability to recount events consistently. Furthermore, I accept that the death of a close family member may be stressful and upsetting for the applicant. However, I note that the applicant has not provided any medical evidence about his badly impacted memory or any significant trauma. The applicant's representative has not put forward any information to suggest he has medical training or expertise or is otherwise qualified to make any assessment of the applicant's medical condition. The assertion is unsupported. In these circumstances, I am not persuaded that there are exceptional circumstances to justify considering the new information.
9. The legal submission reiterates the applicant's denial that he is a close relative of his Australian housemate. This issue was raised by the delegate during the applicant's Protection Visa Interview based on a range of information from the applicant's case file, including that the applicant and his housemate lived in the same village in Afghanistan, that they have similar family names listed in their identity documentation, they presented very similar protection claims and financial information which was before the delegate. Ultimately the delegate concluded the applicant and his housemate were 'close relatives' but that they had failed to declare their true relationship. In my opinion whether the applicant and his housemate are related has little relevance to the consideration of his claims for protection, and it is unnecessary for me to consider it further.

Applicant's claims for protection

10. The applicant's claims can be summarised as follows:
 - The applicant is an afghan citizen of Pashtun ethnicity. He was born in Khost Province in the East of Afghanistan and lived in [Village 1] in [District 1]. He lived in the village for his entire life and worked on his family farm in cooperation with his extended family.
 - One evening early in 2013, the applicant was walking from his home to the nearby village of [Village 2] in order to visit his brother's father-in-Law who was a family friend. [Village 2] was approximately 2km away from the applicant's home.
 - On the way, the applicant saw two masked men acting suspiciously on the roadside. He formed the view that they were planting an improvised explosive device (IED) by the roadside. He pretended that he had seen nothing, and continued walking.
 - When he passed through a Government checkpoint, he reported what he had seen to the afghan authorities. He then continued onto his friend's house.

- Whilst at his friend's house he heard gunfire. He formed the view that the gunfire was Afghan security forces engaging the two masked men. Because of this event, the applicant stayed overnight at his friends home.
- The next morning, the applicant's brother rang him and informed him that the family farm had been raided the night before by the anti-Government elements and that the applicant's [child], and his father had been beaten by the Taliban who were looking for the applicant. His brother advised him that the Taliban had formed the view that the applicant had informed the Afghan authorities about the IED. The applicant was advised not to return home.
- The applicant went into hiding. He travelled to Kabul, and after ten days departed Afghanistan and commenced his travel to Australia.
- The applicant fears that if returned to Afghanistan he would face harm from the Taliban. He says that the Taliban would seek to punish him for informing the Afghan authorities about the IED. He further fears harm having spent time in a Western country.

Factual findings

11. In order to establish his identity the applicant has provided documents to Australian authorities. The Applicant has submitted the following documentation:
 - Taskira (serial number [first number]). No translation has been provided for this document.
 - A second Taskira (serial number [second number]). A translation has been provided for this document.
 - An Afghan Passport issued Canberra [in] 2016 (Passport Number [number]).
12. These documents do not contain consistent information about the applicant's identity raising the possibility that the applicant is not who he claims to be, or that he has passed bogus documents to Australian authorities. Some explanation is required.
13. The first Taskira is untranslated. As a consequence, no useful information about the applicant's identity can be obtained from this Taskira by me, though I note that at the applicant's Protection Visa Interview, the interpreter indicated this document recorded the applicant's date of birth as [given year]. The second Taskira does not list the applicant's date of birth, but does record that he was [age] years old in 2005. This would indicate that the applicant was born around [ten years earlier], and that he was now around [an older age]. The Passport the applicant has provided lists his date of birth as [given year].
14. When he first arrived in Australia, the applicant's birthday was recorded by the department as [given year]. In his 2016 SHEV application when he answered question 14 (Date of Birth) he said he was born in [given year]. During his Protection Visa Interview, the applicant stated that he was not aware of his own birth date, but understood that he was in his [age range]. He said the date recorded in 2013 ([given year]) was recorded incorrectly by the departmental officer interviewing him at that time, yet I note he provided the same date in his SHEV application of 2016 which was prepared with the assistance of his NAATI accredited (Pashto) language migration agent. In an effort to establish the applicant's age, the delegate asked him whether he could remember the invasion of Afghanistan by the Soviet Union

which occurred in 1979 in order to determine [roughly how old he was] at the time but the applicant was unable to give a or useful answer, only saying he was young.

15. The applicant explained that during his life he had held three separate Taskiras. The first was lost before he came to Australia (and does not feature further in this application). The applicant obtained another Taskira as a replacement (i.e. Taskira [first number]). In Australia, the applicant subsequently lost the replacement Taskira, necessitating the requirement to obtain a third Taskira (i.e. Taskira [second number]) which a family member arranged for him and sent to Australia. Later he found the first replacement Taskira (i.e. Taskira [first number]) and thereafter had two Taskiras in his possession in Australia which contained inconsistent information. I note there is substantial country information which indicates that in Afghanistan, births are not always registered and records are frequently unreliable¹.
16. In 2016, the applicant and a group of Afghan friends travelled to Canberra in order to obtain Afghan Passports. Because he is illiterate, a friend filled in his passport application. The applicant gave his friend his copy of Taskira [first number]. Ultimately, this resulted in the applicant being issued a Passport listing his date of birth as [given year].
17. Given the conflicting documentary evidence provided, it is difficult to determine the exact date of the applicant's birth. However, I note that he has consistently provided Australian authorities with details of his name, where he was born and his home district in Afghanistan. These are recorded consistently on all his documentation. I am willing accept the applicant's explanation for his various documents.
18. The applicant's explanation and his documentation establish his identity to my satisfaction. I accept that he is an Afghan citizen, who was born and lived in [Village 1], [District 1] in the Khost Province of Afghanistan. I conclude that Afghanistan is his receiving country.

Taliban IED

19. The applicant claims that early in 2013 he was walking in the evening to the home of a family friend (Father-in-Law of his brother) who lived in the nearby village of [Village 2]. The applicant says that on the way he saw two masked men alight from a motorcycle and he believes that they were attempting to conceal a roadside IED. He formed the view that the men were members of the Taliban. The applicant pretended not to notice the men and continued on his way.
20. On the way to his friend's home, the applicant had to pass through a checkpoint manned by members of the Afghan security forces. When he passed through the checkpoint the applicant claims to have reported the two masked men and his suspicions about their activity, to the checkpoint guards. He then continued on his way to [Village 2]. On the way the applicant says he heard gunfire. He assumed this gunfire was the result of the Afghan security forces engaging the two men who were planting the IED based on his information. Because of the gunfire, the applicant decided to stay the night at his friend's home for safety.
21. The next morning, the applicant's brother called him at the friend home. His brother advised that during the night the Taliban had visited the family's farm looking for the applicant. He said the Taliban had formed the view that the applicant had informed the Afghan authorities about the attempt to plant the IED (which on the applicant's own evidence he had). The

¹ Department of Foreign Affairs and Trade (DFAT),"Country Information Report: Afghanistan 18 September 2017", CISED50AD5680, 5.25

Taliban had beaten the applicant's [child] and his father in order to intimidate them into divulging the applicant's whereabouts to them (they did not). The applicant was advised not to return home. He went into hiding and upon the advice of another friend travelled to Kabul. His friend made arrangements with a people smuggler for him to travel overseas. 10 days after arriving in Kabul, he departed Afghanistan on the first leg of his journey to Australia. He was able to pay for the travel, as his family sold a parcel of the family farm. He has not seen his home, or his family since this time.

22. Country information indicates that Khost province suffers from weak central Government administration and a long porous border with Pakistan². These factors have contributed to an above average level of insurgent violence in the province relative to the Provinces population³. The province is reported to be under the sway of the Haqqani Network of insurgents which is affiliated with the Taliban⁴. DFAT reports that the security situation in Afghanistan is complex, highly fluid, and varies considerably by location, including between rural and urban areas. A number of anti-government elements, most notably the Taliban, remain engaged in a violent armed insurgency against the government and its international partners. Allegiances between groups can change quickly. Arrangements of convenience exist, even between groups generally considered adversarial. Insurgent forces contest many areas of the country, and no part of Afghanistan can be considered free from conflict-related violence⁵.
23. 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. Mosques, schools, hospitals and other civilian targets are also vulnerable. Attacks can include small arms fire, indirect (rocket) fire, suicide bombings, car bombs, improvised explosive devices (IEDs) and complex attacks involving a combination of these methods⁶. Attacks are generally directed at specific targets, but the methods of attack can be indiscriminate and often result in civilian casualties⁷.
24. This event is the applicant's principal claim for protection. It is the reason he departed Afghanistan, and the chief reason he claims to fear retribution upon return. It was the focus of questioning at his 2017 Protection Visa Interview. However, the applicant's claims about this event have not been consistent. I found his answers to questions about the event to be vague and to lack credible detail. I found him to be evasive when asked detailed questions about this event.
25. Initially he claimed that he saw the two masked men on a main road in his village, but later described it as a minor side road. He initially said the event happened during the day, then claims that the event occurred around evening time on a cloudy day. When asked why the Taliban emplace an IED he said the road was not used very often. When asked why the Taliban would place a bomb on a road not used very often, he said the Americans frequently used the road. When questioned about what he actually saw initially stated that he saw the men emplacing an IED and later he said that it was too dark to determine what the men were doing and that he only thought on of the men might have had a weapon on the shoulder. He

²European Asylum Support Office (EASO), "EASO COI Afghanistan Security Situation 2016", EASO, 20 January 2016, CIS38A8012395, 2.4.3

³ EASO, "EASO COI Afghanistan Security Situation 2016", EASO, 20 January 2016, CIS38A8012395, 1.6

⁴ EASO, "EASO COI Afghanistan Security Situation 2016", EASO, 20 January 2016, CIS38A8012395, 2.4.3

⁵ DFAT, "DFAT Country Information Report Afghanistan 18 September 2017 ", CISED50AD5680, 2.31

⁶ DFAT, "DFAT Country Information Report Afghanistan 18 September 2017 ", CISED50AD5680, 2.32

⁷ DFAT, "DFAT Country Information Report Afghanistan 18 September 2017 ", CISED50AD5680, 2.32

said he did not see an IED. He said he did not recognise the men, but that they must have recognised him since they went to his house.

26. Overall, I did not find the applicant's claims about this event convincing. To my mind, he was evasive and vague. Most of these differences are admittedly minor, but there is a substantial difference between two men with something which might have been a weapon on their shoulder as he claimed in his SHEV application, and seeing to men planting an IED as he said at his Protection Visa Interview. The differences in his various accounts lead me to conclude that the applicant is not telling the truth about this issue. I do not accept that he applicant ever witnessed the emplacement of an IED or reported it to the authorities in his province. It follows that I do not accept that his father or his [child] ever faced retribution for his actions. I conclude that the applicant has fabricated this event in order to justify his departure from Afghanistan, and to enhance his claims of protection in Australia. I therefore conclude that the applicant was not of interest to the Taliban at the time of his departure from Afghanistan.

Refugee assessment

27. 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

28. 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.
29. If returned to Afghanistan, I conclude that the applicant would live in his home village of [Village 1], in [District 1], as he did for his entire life prior to his departure for Australia. Like the delegate, I have found that the applicant's principal claim is not factual and that he did not have a profile of interest to the Taliban in his home province at the time of his departure.
30. The applicant claims to fear that he would be harmed if returning to Afghanistan due to the time he has spent in Australia, a western country. I note the delegate also considered

whether the applicant would face harm as a Sunni Pashtun living in Khost Province although the applicant did not specifically claim harm on this basis.

31. Almost 99% of Afghanistan is Muslim, with approximately 85% being of the same Sunni faith as the applicant. Religious leaders have sometimes been targeted by insurgents; however, this is usually the result of speaking out in favour of the Government⁸. Pashtuns are the country's largest ethnic group accounting for approximately 40% of the population⁹.
32. The European Asylum Support Office has addressed the issue of 'westernised' Afghans returning to their home country and found that documented instances of individual targeting of returning Afghans were scarce¹⁰. Most reports of this nature appear to originate with refugee advocacy groups. There is no information to suggest that such persons are targeted by the state¹¹. Typically, reports indicate that the fear of return relates to the situation in Afghanistan generally rather than a specific fear of being targeted personally¹².
33. Persons targeted by insurgents in Afghanistan are typically those who are prominent political figures, or associated with the Government, or with the international community organisations. This includes, but is not limited to, government employees, judges and prosecutors, judicial workers, police, and Afghan and international security force personnel¹³. This targeting framework is consistent with the stated aim of the Taliban to delegitimise and overthrow the Afghan State¹⁴. The use of IEDs and suicide explosives attacks is widespread¹⁵.
34. DFAT assesses that people working for, supporting or associated with the government and/or the international community (or perceived to be doing so) face a high risk of violence perpetrated by anti-government elements, particularly the Taliban. While ethnicity and religion are unlikely to be primary motivations for attacks on government workers, in some cases these issues may be contributing factors. Given the methods of attack used are highly indiscriminate in nature, this risk applies whether or not the person is the specific target of the attack or is a lower level employee of the organisation in question¹⁶.
35. The applicant is an orthodox Sunni of Pashtun ethnicity, the dominant ethnic and religious groups in his country. He has not outlined any specific issues arising from his ethnicity or his religion. He has never been employed by, and has never claimed to be a sympathiser or supporter of the Afghan Government and has no other Government affiliations. He has never worked for the Afghan security forces. He is not active politically and has not indicated that ever has, or is interested in speaking out about religious or political issues in his country. The applicant describes himself as merely a farmer, who works his family plot in conjunction with his extended family. Having considered all of the evidence before me, I am not satisfied the applicant would be of interest to insurgents over six years after his departure. The evidence indicates he would not be of interest to the State and the applicant has not made any claims to fear harm, persecution or discrimination from Government forces. I am not satisfied the applicant would face a real chance of harm arising from his religion, his ethnicity or his time

⁸ DFAT, "DFAT Country Information Report Afghanistan 18 September 2017 ", CISED50AD5680, 3.6 – 3.9

⁹ DFAT, "DFAT Country Information Report Afghanistan 18 September 2017 ", CISED50AD5680, 2.6

¹⁰ EASO European Asylum Support Office, "EASO Country of Origin Information Report. Afghanistan. Individuals targeted under societal and legal norms", EASO European Asylum Support Office, 12 December 2017, CISED50AD8181

¹¹ Ibid, 8.1

¹² Ibid, 8.2

¹³ DFAT, "DFAT Country Information Report Afghanistan 18 September 2017 ", CISED50AD5680, 3.19

¹⁴ European Asylum Support Office (EASO), "Afghanistan: Individuals targeted by armed actors in the conflict", EASO, 12 December 2017, CISED50AD7868

¹⁵ DFAT, "DFAT Country Information Report Afghanistan 18 September 2017 ", CISED50AD5680, 3.21

¹⁶ DFAT, "DFAT Country Information Report Afghanistan 18 September 2017 ", CISED50AD5680, 3.23

in a western country (Australia), or any combination of these factors, if returned to Afghanistan.

36. Country information indicates that random attacks by anti-Government elements in Afghanistan continue to be a significant problem throughout the country including in Khost. It is possible the applicant may become caught up in such an event. However, in such a case even if the risk is a real one, the risks faced by the applicant would be, by definition, random and unrelated to his profile, or his wider claims for protection. The essential and significant reasons for such generalised violence, while personally difficult for the applicant, would not be for one or more of the five reasons referred to in s.5J(1) of the Act.
37. I am not satisfied the applicant has a well-founded fear of persecution.

Refugee: conclusion

38. 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

39. 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

40. 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.
41. I have found that the applicant was not of any direct interest to anti-Government insurgents at the time of his departure from Afghanistan, and would not be of any interest to them now if he was returned. The applicant has not made any claims to fear harm, persecution or discrimination from Government forces. Given his profile I am not satisfied that in relation to these matters there's a real risk that the applicant would face the death penalty, be arbitrarily deprived of his life or torture if returned to Afghanistan. I am also not satisfied that there is a real risk he would be subjected to cruel or inhuman or degrading treatment or punishment.
42. Country information cited above indicates that Khost is a violent Province within Afghanistan. Anti-Government insurgent groups continue to fight against the Government and random attacks are frequent. DFAT reports indicate that anti-government elements regularly

perpetrate violent attacks which injure civilians¹⁷ . These factors suggest to me that there is some possibility that the applicant might be arbitrarily deprived of his life if returned to Afghanistan but even if these can be said to rise to a real risk, they affect the population of Afghanistan generally, not the applicant personally. As such, the applicant is taken not to face a real risk of significant harm on this basis.

43. I have otherwise found that the applicant would not face a real chance of harm arising from his ethnicity, his religion, or his time in a western country if returned to Afghanistan. As 'real chance' and 'real risk' have been found to meet the same standard, it follows that he would not face a real risk of significant harm arising from these factors.

Complementary protection: conclusion

44. 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.

¹⁷ DFAT "Country Information Report Afghanistan 18 September 2017 ", CISED50AD5680 , 4.1 – 4.6

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.