



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

**Decision and Reasons**

**Referred application**

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INDIA

IAA reference: IAA18/04567

Date and time of decision: 16 April 2018 15:10:00

Dione Dimitriadis, Reviewer

**Decision**

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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

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### Visa application

1. The referred [applicant] claims to be a citizen of India. On 21 March 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV).
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused the visa on 12 March 2018 and found that the applicant did not have a well-founded fear of persecution and there was not a real risk of significant harm upon his return to India.

### 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. The applicant made no submissions to the IAA. No further information has been obtained or received.

### Applicant's claims for protection

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5. The applicant's claims can be summarised as follows:
  - He was born in India in [year] and is the only child of his parents. He is a citizen of India.
  - His father borrowed [amount] Indian rupees (INR) (about AUD [amount]) in 2004 from a Muslim money lender in the applicant's home city of Mehsana in Gujarat State to pay for medical treatment for the applicant's mother. The loan was to be repaid in three years.
  - The applicant's father died in 2005. As the debt had not been repaid, the money lender started to threaten them.
  - Because his father's employer agreed to pay compensation to the applicant and his mother after the father's death in the factory where he had worked, the money lender agreed that the debt could be repaid in four years.
  - However, the factory owner never paid the compensation and the applicant's mother said she would go to her [relative] to obtain money to repay the loan. She left in January/February 2007 but never returned.
  - The applicant felt obliged to repay his father's debt and he continued working.
  - After his mother had left in 2007, people hired by the money lender attacked the applicant twice at the [property] where he worked. He tried to explain to the attackers that he would repay the money.
  - The applicant left his home. From 2007 to 2011 he stayed at various places where he worked within 15 kilometres of Mehsana. He then lived in [Town 1], [number] kilometres from Mehsana, from 2011 until July 2012 when he departed India for Australia.
  - The applicant fears that the Muslim man from whom his father borrowed money will find him and kill him. This man has political support and the applicant found it hard to obtain help from the authorities.

- The applicant also claimed that the government mistreats his community and is threatening to kill them. The applicant claimed that everything happens in India politically, so when they went to the police station to complain, they were not helped because of political issues.

## **Refugee assessment**

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6. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

### **Well-founded fear of persecution**

7. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
  - the person fears persecution and there is a real chance that the person would be persecuted
  - the real chance of persecution relates to all areas of the receiving country
  - the persecution involves serious harm and systematic and discriminatory conduct
  - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
  - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
  - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
8. The applicant’s identity is not in issue and I accept on the basis of the various identity documents the applicant submitted to the Department of Immigration and Border Protection (now part of the Department of Home Affairs) (the Department) that he is a national of India and that his identity is as claimed. I find India to be the receiving country for the purpose of this application. There is nothing before me to suggest that the applicant has a right to enter and reside in any country other than India, and I find for the purpose of s.36(3) of the Act that he does not.
9. The applicant stated in the SHEV application that he speaks, reads and writes Gujarati and Hindi. He requested a Gujarati or Hindi interpreter for interviews. At the arrival interview, an interpreter in English and Hindi was present and assisted the interviewer. The interpreter stated that she can also interpret in Gujarati. At the protection visa interview, an interpreter in English and Hindi was present and assisted the delegate. The applicant also stated in the SHEV application dated 19 April 2017 that he reads, writes and speaks English. I am satisfied that the applicant was able to understand the interpreter at the Arrival and protection visa interviews and was able to understand the questions asked of him. Both interviews (Arrival and protection visa) were conducted on the telephone.

10. In the delegate's decision the delegate stated that the applicant arrived in Australia on 9 September 2012. The applicant stated in the SHEV application that he arrived in Australia on 10 September 2012. Whether the applicant arrived in Australia on 9 or 10 September 2012, I am satisfied that he had sufficient time to recover from the boat journey before the Arrival interview was held on 23 November 2012. The applicant stated in the SHEV application that he came to Australia illegally by boat with the help of a friend.
11. There were a number of inconsistencies between the evidence provided by the applicant in his written claims and those he provided at his Arrival interview in November 2012 and the protection visa interview on 7 December 2017. These inconsistencies give rise to concerns regarding the reliability of the applicant's evidence and his credibility as a witness.

*The applicant's residence in India*

12. Firstly there were inconsistencies in the addresses where the applicant claimed to have lived in India. At the Arrival interview, when asked to state his full address where he was living just before he started his journey to Australia, the applicant stated that he lived at an address in [Town 2], district of [Mehsana], Gujarat. He stated that he lived at that address from his birth in [year] to [July] 2012. When asked if he has worked or lived in any other part of India, the applicant stated "No". He stated that he worked at a [business] in [Town 1] for one year and it is 20 kilometres from his address.
13. His evidence at the Arrival interview was that he lived at the one address in [Town 2], district of [Mehsana], Gujarat from his birth [until] about two weeks before he left India to come to Australia. The duration of the Arrival interview was about 1 hour 40 minutes and I am satisfied that the applicant had sufficient time to provide information about any other addresses at which he had lived in India.
14. The applicant was questioned at the Arrival interview about the jobs he has done in India and he stated that from 2005 to 2011 he was [working] and his employer was [Mr A] and the applicant did this work in [Town 2]. Then from 2011 to 2012, until two weeks before he left India, he worked in a [business] in [Town 1].
15. The address in [Town 2], Mehiana, given by the applicant at the Arrival interview is consistent with his Driving Licence issued by Gujarat state to the applicant on [date] for 10 years. The Election Commission of India Identity Card was issued to the applicant and is dated [date]. It shows an address in [Town 2].
16. There were two Part C applications provided by the applicant. One was dated 18 March 2017 and the other was dated 19 April 2017. In both, the applicant stated (in answer to Question 81) that from [year] he lived in Mehiana, Gujarat, India. In Part C dated 18 March 2017, the applicant stated that he lived in Mehiana, Gujarat, India until September 2012. In Part C dated 19 April 2017 the applicant stated that he was in Australia from September 2012.
17. The applicant's evidence at the protection visa interview about where he lived in India was different. He stated that he lived in Mehiana, Gujarat State from the time he was born until 2005, 2007, 2008. The delegate asked the applicant when he stopped living in Mehiana and the applicant stated that he is not sure. His father died in 2005 and the people started troubling them. He left Mehiana two and a half, or three years, after 2005. The applicant claimed that he was working here and there and he stayed in many places for short periods. The delegate brought to the applicant's attention that in the SHEV application he stated that he lived in Mehiana from [year] to September 2012.

18. When asked by the delegate what year he left the family home in Mehsana, the applicant stated that he left his family home a year and six months after his father died in 2005. After further questioning by the delegate, the applicant stated that he left the family home in 2007. He claimed to have spent four years until 2011 staying at the various places he worked around Mehsana. He claimed that he stayed at some places for two to three months or one to two months and at some places he lived for six months. He was moving around. They were in a radius of ten to fifteen kilometres of Mehsana. He then lived in [Town 1] at his workplace, which was a [business], from the middle of 2011 to July 2012.
19. The applicant stated at the protection visa interview that the information he gave at the protection visa interview about where he lived in India is correct. The applicant stated that, at that time, he had this in his memory because at other places, he worked only for small periods but he spent a long time, six months, at that place, so he mentioned that place, [Town 2]. The delegate brought to the applicant's attention that in the Arrival interview, he stated that he lived at [Town 2] from birth until he left India.
20. I have considered the evidence and the inconsistencies in the evidence as to where the applicant claimed to have lived and I am satisfied that the information he gave to the Departmental officer at the Arrival interview is correct and he lived at the one address, his family home, in [Town 2], Mehsana, Gujarat from the time of his birth [until] he left his home to start his journey to Australia [in] July 2012. I accept that the applicant worked at a [business] in [Town 1], but as it is only about 20 kilometres from his home, I am satisfied that the applicant travelled to the [business] from his home to work and continued to reside at his home in [Town 2].
21. I find that the applicant did not live in other places for short periods of a month or several months before he left India. I find that the applicant is not being truthful about living in different addresses out of fear of being found by the money lender or those working for him. I find that the applicant always lived at the same address in India. I do not accept that the applicant was in hiding from 2007.

#### *Employment in India*

22. The applicant stated at the Arrival interview that he started working in 2005 when his father died. He was working [in] his village with a person who had some land. His employer's name was [Mr A]. The applicant stated that he worked for [Mr A] from 2005 to 2011 and he did this work in [Town 2]. In 2011, he started working in a [business] in [Town 2] and he finished working there two weeks before he left for Australia.
23. The Departmental officer asked the applicant at the Arrival interview whether he had any other jobs. The applicant stated that he did not.
24. This evidence at the Arrival interview that, in India, the applicant only had two jobs, one doing [work] on a [property] for [Mr A] and the other working in a [business], is significantly different from the applicant's evidence at the protection visa interview.
25. At the protection visa interview the applicant confirmed that he worked on a [property] from 2005 but he also claimed that from about 2007 to 2011, for four years, he worked at different places around Mehsana and he was in hiding.
26. The applicant's evidence is that, after his mother left him in early 2007, he worked on the [property] to finish work there for two or three months but during that period, the people

from whom his father borrowed money, beat him. He was beaten on two occasions and then he left his work at the [property] and lived here and there in hiding. He claimed that he then did [work] on different [properties] and then in 2011 he worked in a [business] in [Town 1] until he left India in July 2012.

27. I am not satisfied that the applicant was in hiding in India. I am satisfied that he worked at the same [property] in [Town 2] for the same employer from 2005 until 2011 when he started working in a [business] in [Town 1]. I consider that if he had indeed had other jobs besides the employment with [Mr A] on the [property] and at the [business], he would have told the Departmental officer at the Arrival interview when he was asked if had had any other jobs.

#### *The applicant's passport*

28. There were inconsistencies in the applicant's evidence about whether he has ever held a passport.
29. At the Arrival interview, the applicant did not hesitate to admit that he had a passport when he left India. He stated that [Mr B], the person who arranged his travel and aeroplane tickets to Australia, also arranged the passport for him and organised for a person called [Mr C] to pick up the applicant in [Country 1]. [Mr C] took the passport from the applicant in [Country 1]. The applicant stated that the passport was in his name and was issued in India, although the applicant did not know how [Mr B] arranged for the passport. The applicant stated that he did not have problems getting through the airport in [Country 1] where they checked his one month visa.
30. However at the protection visa interview, the applicant initially denied ever having had a passport. When asked if he has ever had a passport, he stated that he has not had a passport. However, he confirmed that he flew out of India by aeroplane. When asked by the delegate what document he used at the airport, the applicant stated that his friend helped him and gave him a document and told him that if someone asks, show this document and after showing it, he should put it in his bag. The applicant claimed that he does not know if it was a passport. He claimed that he saw the document but does not know if it was a passport. The applicant stated that it was like a book. He flew from India to [Country 1]. The applicant claimed that he did not look at the book. He showed it to the counter officer at [Country 1] Immigration and it was returned to him.
31. I am satisfied that the applicant departed India as the holder of a passport. I do not accept his statement as true in the SHEV application that he has never had, or used any other passport or travel document, including expired, lost or stolen documents.

#### *The loan to the applicant's father*

32. The applicant has consistently claimed that his father borrowed money from a money lender but died and did not pay back the money.
33. At the Arrival interview, the applicant claimed that he, himself, was not able to pay back that debt and the creditors threatened to kill him. When asked by the delegate how they threatened him, the applicant stated that they asked him to pay the money or he would be killed. He thinks this happened when his father passed away and then the people started "torturing" him.
34. At the protection visa interview the applicant stated that his father had borrowed money for the applicant's mother's medical expenses because she was very sick. He borrowed [amount]

Lakhs INR ([amount] INR) in 2004. In the SHEV application the applicant stated that his father borrowed the money from a Muslim man, named [Mr D].

35. The applicant stated in the protection visa interview that when his father died, they were facing financial difficulties. The money lender was troubling the applicant and his mother. The applicant also indicated at the protection visa interview that the money lender's people sexually assaulted his mother.
36. The applicant stated at the protection visa interview that his mother told him that she was going to talk to her [relative] about money. She left but never returned. The applicant worked in the field for two or three months and during that period, the people from whom his father borrowed money, harassed him and beat him. One time they attacked him with a steel rod and hit him with it [and] he still has that [mark]. Another time they attacked him with a sword and hurt [him] and he still has the [wound].
37. The applicant claimed at the protection visa interview that because he was being beaten and harassed by his father's creditors, he left the family home in 2007 and lived in different places.
38. I have already found that the applicant continued to live in the family home until just before he departed India for Australia in late July 2012. I do not accept that the applicant left his home in 2007 and lived in different places in India.
39. I have some concerns about the evidence of the loan because the applicant claimed that his father only earned about [amount] INR per month when he obtained the loan. At that time, his mother was very sick, she became very thin and her condition was very bad. She required surgery and other medical treatment. I am satisfied that she would not have been working during the period she was ill and would not have been able to contribute to the repayments. The applicant stated that the loan was for a period of three years.
40. I find it not credible that a money lender would lend [amount] Lakhs ([amount] INR) to the applicant's father for three years when he only earned, at the most, [amount] INR per month. It would take him five years to earn [amount] Lakhs, and he also had to pay for other daily expenses such as food. Although the applicant claimed that the money lender knew that his parents were hard working and it was considered that when his mother recovered she would be able to work again and contribute to the repayments, this is speculative and I am not satisfied that a money lender would have agreed to these terms when there was a significant risk he would not be repaid the money.
41. The applicant also claimed that because his mother was earning money and the factory owner, where his father had worked and where he died, agreed to pay compensation of [amount] Lakh ([amount] INR), the money lender agreed that the repayment of the loan would be extended from three years to four years. I find it surprising that the applicant paid [amount] Lakhs (that he had saved in India from his jobs) to leave India to come to Australia and did not repay the loan which he claimed was owed to the creditor to clear the debt. After all he claimed to fear threats and harm from the money lender and yet he did not take the opportunity of clearing the debt. His evidence at the Arrival interview was that the cost to come to Australia was [amount] Lakhs of which he paid [amount] Lakhs in cash
42. I also have significant concerns about the claims that the applicant was beaten by the money lender or people on his behalf on two occasions. In the SHEV application, the applicant stated (in part C in answer to Questions 89 and 91) that about a month after the death of his father, a Muslim creditor, [Mr D], began to threaten the applicant and his mother and during the first

threat, the applicant was hit on the [with] a large pipe. There was no mention in the SHEV application that the applicant had any stitches after the first assault. During the second incident when the applicant was attacked with a sword, he claimed that he had to get a few [stitches].

43. However, at the protection visa interview, the applicant claimed that there were two incidents. In the first incident which took place about one or two weeks after his mother left in January or February 2007, he was attacked with an iron bar and he has two or three [stitches]. Then in the second attack, the applicant was attacked with a sword. The applicant received a cut [and] he also has three stitches there.
44. This is a significant inconsistency as to whether the applicant had to have stitches on [his body] after the first incident when he was assaulted with a large pipe or an iron bar. I consider that if the applicant was assaulted in the way claimed, that he would remember if he had to have stitches on his [body] after the first time he was attacked, or the second time.
45. At the protection visa interview the applicant stated that nothing else happened to him while he was in India and both incidents happened in 2007. He claimed that he was hiding after that. I have already found that the applicant was not hiding and he continued to live in the family home in [Town 2]. This evidence that nothing further happened to him was significantly different from the evidence in the SHEV application where he stated that, even after moving to [Town 1], he continued to get threatening messages from [Mr D] and his "political friends".
46. The applicant claimed that they told him a couple of times that, even if he moves to another part of India, they will find him and get back the money that his father borrowed and if the applicant cannot pay back the money, they would kill him or continue to torture him. As previously stated, it is surprising that, if these threats were true, the applicant did not pay the money which he had [when] he made arrangements to leave India. I find that these threats were not true.
47. I have considered all the evidence and do not accept that the applicant's father borrowed money which was left unpaid because he died in 2005. The inconsistencies in the evidence about stitches the applicant required after assaults from the money lender's people or whether he continued to receive threatening messages from the money lender or his people after 2007, as well as the lack of credibility in the evidence that he did not pay the money lender even though he had enough money to discharge the debt and used it instead to leave India, or that a money lender would have agreed to lend such a sum in the first place to a person who was earning insufficient money to service such a debt, lead me to conclude that the applicant's father did not obtain a loan that remained unpaid. I find, therefore, that the creditor did not pursue the applicant and/or his mother and did not have the applicant attacked on two occasions or threatened at all. I do not accept that the applicant's mother was insulted or sexually assaulted by the money lender or those working on his behalf.
48. Because of the significant inconsistencies in the evidence and the lack of credibility about the loan, I do not accept that the evidence about the loan is true. I am satisfied that the applicant will not suffer harm if he returns to India because of the claimed loan which has remained unpaid. Furthermore the claim of fear of a money lender and his people because of an unpaid loan with assaults and threats from a money lender and his people is not for reasons of race, religion, nationality, membership of a particular social group or political opinion.

### *Discrimination by government*

49. I have also considered the applicant's claims that he was unable to obtain help from the government because the money lender and the factory owner paid the government. The applicant claimed that because of corruption, he and his mother did not receive compensation from the factory owner and the police did not assist the applicant. The applicant also claimed in the SHEV application that the factory owner did not pay compensation or money for their survival and the factory owner started to threaten them using his political background.
50. The applicant also claimed that he was discriminated against in his village and the people were threatening him. He stated at the protection visa interview that he is Hindu and does not belong to any ethnic group in India. He also claimed that his community has problems with the government and there is danger to his life. The applicant declared that the government does not support his community, there are issues between his community and political parties, and there are problems with food distribution.
51. At the protection visa interview the delegate asked the applicant questions to clarify these claims. The applicant referred to having seen in the news, two or three weeks before, that the government is not helping them. The applicant claimed that the government is threatening to kill "our people" and because everything happens in India politically so when they went to the police station to complain, the police did not help them because of that political issue. When asked what the political issue is, the applicant stated that other people are trying to finish their community and they are not helping their community and that is why the police did not help them because of the political issue. When asked by the delegate what the political issue is, the actual reason for the government mistreating people, the applicant stated that he does not know because he is working here and after he finishes work, he comes home and cooks his food and does not know what is actually happening. When asked why his community was treated differently, the applicant stated that he is not fully aware but there are issues going on between his community and other political parties. He is not sure what is happening but he knows that communication is going wrong with his community and political parties.
52. I have considered the applicant's evidence about discrimination, which was rather vague. I am not satisfied on the evidence that the applicant was discriminated against by the government. I do not accept that the money lender or the factory owner paid the government so that the government did not help the applicant or his mother. There is no credible evidence before me that either the money lender or the factory owner bribed the government. I am not satisfied on the evidence that the factory owner did not pay compensation to the applicant and his mother because of corruption. The applicant was unable to state clearly the political issue affecting his community. Also it is not clear what his community was. I am satisfied that the applicant does not fear harm from the government for the reasons that he has claimed. I am also not satisfied that the factory owner started to threaten the applicant and his mother. I am not satisfied that the applicant was affected by any problems with food distribution by the government. The applicant worked in India from 2005 until just before he departed India. He had earned and saved sufficient money to come to Australia and pay an agent, [Mr B], [amount] Lakhs INR.
53. I have considered all the evidence and I am not satisfied that there is a real chance that the applicant will be harmed if he were to return to India in the reasonably foreseeable future for the reasons that he claims. I am not satisfied that the applicant was threatened or harmed by a money lender and people acting on his behalf. I am not satisfied that the applicant was threatened by the factory owner. I am not satisfied that there is a real chance that the applicant will be harmed because of the claim that his late father borrowed money from a

money lender in 2004 and did not repay the money. I have found that his father did not borrow money from a money lender and I do not accept that the applicant was beaten or threatened by people on behalf of the money lender or by the money lender. Furthermore I find that the applicant's claimed fear of the money lender and the factory owner is not for reasons of his race, religion, nationality, membership of a particular social group or political opinion. I have considered these matters cumulatively and I am not satisfied that there is a real chance that the applicant will suffer any harm for the reasons he has claimed or for any other reasons if he returns to India.

### **Refugee: conclusion**

54. I have had regard to all of the evidence before me and I have considered the applicant's claims individually and cumulatively, as well as considering the personal circumstances of the applicant. I am not satisfied the applicant has a well-founded fear of persecution for reasons of his race, religion, nationality, membership of a particular social group or political opinion now or in the reasonably foreseeable future, if he returns to India.

55. 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**

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56. 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**

57. 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.

58. I have not accepted that the applicant was harmed in India and I do not accept that there is a real chance that he will be harmed for the reasons that he claims if he returns to India. I have found that there is not a real chance that the applicant will be harmed. The threshold for the 'real risk' element in the complementary protection criterion in s.36(2)(aa) is the same as that for the 'real chance' test in the refugee criterion in s.36(2)(a)<sup>1</sup>. Considering the factual findings set out above, I am not satisfied that there is a real risk of the applicant being subjected to significant harm in the nature of the death penalty, arbitrary deprivation of life, torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment, whether at the hands of a money lender, a factory owner or any other groups or persons as a consequence of being removed from Australia to India.

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<sup>1</sup> *MIAC v SZQRB* (2013) 210 FCR 505

59. I am satisfied that there is not a real risk that the applicant will suffer significant harm if he returns to India.

**Complementary protection: conclusion**

60. 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**

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

## Applicable law

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

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

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

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

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

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

...

## 5J Meaning of well-founded fear of persecution

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

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

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

## 5K Membership of a particular social group consisting of family

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

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

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

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

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

#### **5L Membership of a particular social group other than family**

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

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

#### **5LA Effective protection measures**

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

...

#### **36 Protection visas – criteria provided for by this Act**

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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