



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA18/04806

Date and time of decision: 3 October 2018 16:37:00

D Power, 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 a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Sunni Pashtun from Paktya province in Afghanistan. On 15 December 2016 he lodged an application for a Safe Haven Enterprise visa (SHEV).
2. On 20 April 2018, a delegate of the Minister for Immigration and Border Protection (the delegate) made a decision to refuse to grant the applicant a protection visa. The applicant claimed to have been targeted by the Taliban as a result of his work as a driver transporting goods from Pakistan back to Afghanistan. Although the delegate found the applicant to be Afghani, he also found that the applicant had been born in Pakistan. The delegate did not accept that the applicant had been born in Afghanistan or that he had permanently returned there. The delegate did not accept that the applicant had been involved in transporting goods across the border, pointing to a significant disruption to border access during an extended conflict in the region and inconsistencies in the applicant's narrative. He also found that the applicant would not face harm on account of his tribal affiliation, or because he had previously sought asylum in the west.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 23 May 2018, the IAA received a submission from the applicant's new migration agent which refutes a number of the delegate's findings. These matters may be regarded as argument rather than information to which I have had regard. The submission also reiterates a number of claims made to the delegate.
5. The submission also includes additional country information from the Australian Department of Foreign Affairs and Trade (DFAT), *The UNHCR Eligibility Guidelines for Assessing the Internal Protection Needs of Asylum Seekers from Afghanistan*, and the Refugee and Immigration Board of Canada (RIBC). The DFAT and UNHCR material was before the delegate and is not new information. The RIBC material was not before the delegate and is new information. The RIBC report is dated 31 August 2017 and pre-dates the delegate's decision by more than seven months. The agent has made no explanation as to why this information is only now being provided. The information is put forward as demonstrating that the Taliban will target those seen as supporting the Afghan National Army (ANA). However, the report does not mention the applicant's home province of Paktya. The delegate also had access to information of similar currency from what I regard as equally reputable governmental organisations. I am not satisfied that there are exceptional circumstances that justify consideration of this information under s.473DD.
6. The agent has included a new taskera for the applicant date stamped [in] 2018. However, I accept the applicant is an Afghani citizen and as such this issue does not arise for consideration. In these circumstances I am not satisfied there is exceptional circumstances to justify considering the information.
7. The applicant's agent made a second submission on 12 June 2018. The agent addresses the issue of the route the applicant claimed to have used when transporting goods in Afghanistan

and assertions on the part of the applicant as to the accessibility of the route in question. This information was not before the delegate and is new information. In their first submission to the IAA the agent states that the road was only closed to Shias and was controlled by Sunnis. Therefore, the applicant was able to pass through “but obviously it remained unsafe”. The agent then made a further clarification by email stating that the roads were also closed to Sunnis in [Town 1] due to fighting but there were “no problems with passing the road between [Town 2] and [District 1]”. These assertions relate to incidents that were allegedly experienced by the applicant directly. The agent has not indicated why this information was not put before the delegate at interview or in subsequent submissions to the delegate. I note that email correspondence took place between the delegate and the applicant’s current representative as recently as February 2018 (some seven months after the PV interview) and none of these clarifications were provided at any point, despite the issues with the applicant’s transport activities being discussed at interview and the delegate raising a number of concerns. The significant delay in supplying these clarifications regarding issues that should be matters of personal recall also raises concerns as to the credibility of this information. I am not satisfied that there are exceptional circumstances that justify consideration of this information under s.473DD.

8. The applicant claims to have been born in Afghanistan, although the delegate found that the applicant was born in Pakistan. The delegate appears to accept the fact that merely being born in Pakistan would not entitle an Afghani to Pakistani citizenship but appears to have based this on their own personal knowledge. As there is no country information referenced to support this view, I have sourced country information from the European University Institute on Pakistani citizenship provisions to clarify whether Afghani nationals born in Pakistan are entitled to or could acquire Pakistani citizenship. As the question of the applicant’s nationality is central to matters such as the applicant’s country of reference and the possibility of third country protection, I am satisfied that there are exceptional circumstances that justify consideration of this information under s.473DD.

Applicant’s claims for protection

9. The applicant’s claims can be summarised as follows:
 - The applicant is a Sunni Pashtun male, born in Paktya Province in Afghanistan
 - When he was very young his family moved across the border into Kurram Agency in Pakistan to escape conflict
 - The applicant stayed with his family in Pakistan until 2005 when he moved back to Paktya province in Afghanistan
 - In 2010, he began working as a driver, transporting goods from Pakistan back to business in [Town 3] bazaar in [District 1] in Paktya
 - He became friendly with Afghan National Army (ANA) personnel guarding the border and eventually began delivering items to them
 - He was stopped by the Taliban who warned him that they regarded his deliveries to the ANA as a form of support to the army
 - The Taliban warned the applicant to stop making any deliveries to the ANA or he would face serious consequences
 - The applicant became frightened and, after consulting his family, he fled Afghanistan and came to Australia.

Refugee assessment

10. 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

11. 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.
12. The applicant has spent most of his life in Pakistan. By his own admission, he grew up and went to school in Kurram Agency in Pakistan and continued to reside there until at least 2005. The delegate regarded the fact that the applicant knows his exact date of birth as an indication that the applicant was born in Pakistan, as record keeping practices are more thorough there. However, I note that Pakistani born children of Afghani citizens are not entitled to Pakistani citizenship, so even if the applicant was in fact born in Pakistan it would not alter his citizenship¹.
13. I accept that the applicant resided in Afghanistan at some point and is an Afghani citizen. He showed a good general knowledge of areas in Paktya province. There is evidence that [Town 4] was destroyed during the Soviet occupation of Afghanistan, and that many residents of the area sought refuge in Pakistan at the time², which supports his narrative at interview. There is no information before me to demonstrate that he holds any other nationality.
14. I accept that the applicant is a national of Afghanistan.

¹ European University Institute, "Report on Citizenship Law:Pakistan", Country Report 2016/13, 1 December 2016, CIS38A80125116

² IRC Rehabilitation Program for Afghanistan, "Report Of The Water Sanitation (Primary) Survey of Paktia Province 1988"

Issues with the Taliban and the Afghan National Army

15. The applicant claimed that his family moved across the border from Afghanistan into Pakistan to escape conflict during the years of the Soviet occupation. After growing up in Pakistan, he claims that his family returned to Afghanistan in 2005, settling in Paktya province.
16. The first year in Afghanistan was taken up with settling in and building a house. The applicant claimed that he began work as a driver in 2006. He procured basic goods in Pakistan, such as [products], to re-sell in Afghanistan. He bought the goods at [Town 2], a town just over the border in Pakistan, and ferried them back to [Town 3] bazaar in Paktya. The delegate also confirmed with the applicant that he made the drive from [Town 3] bazaar into Kurram Agency (Pakistan) every day for six years, until 2012. He further stated that he never had any issues, save for the occasional seasonal problem in winter.
17. The delegate put to the applicant country information that a significant conflict in Kurram Agency affected access to the border between 2007 and 2011. The applicant stated that this conflict had not been an issue for him and that the border was open every day.
18. Country information confirms the significant and widespread nature of the long-running Kurram dispute³. Constant fighting saw tens of thousands of people killed and injured and 43 villages destroyed⁴ in a conflict that ran from April 2007 until February 2011. A feature of the conflict was an ongoing siege of the key Thall-Parachinar highway⁵. When the delegate raised the issue of the Kurram conflict with the applicant, he stated that the conflict was in Upper Kurram and he did not get anywhere near the conflict. However, news reports at the time confirm that [Town 2] was significantly affected by food shortages and lawlessness stemming from the conflict⁶.
19. The applicant's responses at interview seem to indicate that he had little first-hand awareness of the conflict. The delegate prompted him several times to indicate whether he had ever had any issues transporting goods from [Town 2] to [Town 3] at this time and the applicant did not raise any issues. It is difficult to believe that the applicant could have worked as a driver transporting goods daily from [Town 2] during this period and not have been significantly affected by this conflict at some stage. The lack of detail about or acknowledgement of the Kurram dispute in his responses raises considerable doubts about his claims to be involved in transporting goods in that area at a time when he would have been right at the heart of this conflict. I note that the country information cited above indicating that [Town 2] itself was directly affected by the conflict. A further news report from 2012 indicated that [Town 2] was one of four outposts in the process of being re-opened that had [been closed since 2007]⁷.
20. The applicant also claimed that at some point he became acquainted with ANA personnel that were guarding the border. He started taking requests from the soldiers and delivering goods to them, mostly small items such as [products]. This arrangement continued for some time until eventually he was stopped by the Taliban. The applicant said this happened somewhere between the border and [Town 3] bazaar. The actual location the applicant specified was another bazaar, which he said no longer exists. The applicant was warned by the Taliban to stop making deliveries to the soldiers or he would face serious consequences.

³ "The battle for Kurram", News on Sunday, The, 24 August 2014, CX1B9ECAB10680

⁴ Ibid

⁵ [Deleted]

⁶ Ibid

⁷ [Deleted]

21. The applicant made it clear that the Taliban were warning him to stop delivering supplies to the military. He stated that the Taliban told him “If you continue to supply this, we will take action against you”. Later he stated that they had warned him and said “we will let you go this time”. This mirrors his written claims where he stated that he was given a “fierce” warning to stop or face serious consequences. All these statements suggest that the Taliban’s aim was to change his behaviour. If they wanted to make an example of him, they could have killed him outright. The applicant was warned not to do something by the Taliban and he promptly complied. It is hard to see why the Taliban would continue to target him, given his apparently prompt compliance with their demands. It is even harder to see why the Taliban would be interested in (or even aware of) the applicant if he were to return to the country some six years later.
22. The applicant claimed to have been targeted by ANA soldiers after telling them he could no longer bring them goods. This is not mentioned anywhere in the applicant’s written claims. This claim was not put forward by the applicant at any point in the interview until the delegate questioned why he would remain of interest to the Taliban. In any case, as I do not accept that he was involved in transporting goods to and from the border, it follows that I do not accept that he was threatened by soldiers for expressing an intention to cease that work
23. If the applicant had a genuine fear of returning back to [Town 4], it is also difficult to see why he would have moved his family back there after he travelled to Australia. The applicant indicated that his family was safe with an uncle in [Town 1] in Pakistan, but moved back to [Town 4] eighteen months ago (at time of his SHEV interview). The applicant stated that his sons are now working and are engaged in [a trade] in [Town 4] and he wanted them back in [Town 4] because it is their home. This seems a relatively slender premise for moving his wife and children back to an area in which the applicant himself purports to fear for his life. The applicant and his wife lived and worked in [Town 1] previously. That the applicant was willing for his family to return to [Town 4] and reside there is a further indication that his claims to have been targeted by the Taliban are not credible.
24. Given the above, I do not accept that the applicant was ever involved in transporting goods between [Town 3] bazaar in Afghanistan and [Town 2] in Pakistan. It therefore follows that I do not accept that he ever delivered goods to soldiers on the border or that he came to the attention of the Taliban or any other group for so doing.
25. I am not satisfied that the applicant faces a real chance of harm in connection with these claims.

Tribal Affiliation

26. The delegate also considered whether the applicant would be targeted on the basis of his membership of [Tribe 1].
27. It is not entirely clear from the interview what tribal affiliation the applicant claimed. At interview, the applicant was vague about his tribal affiliation. He appeared at times to conflate [Tribe 2] and [Tribe 1] in his responses. Tribal affiliations can be complex matters and I do not draw any adverse inference around the ambiguity of the client’s responses, especially where these were relayed through an interpreter. However, I note the following:
 - The applicant has not articulated a claim to fear harm on account of his tribal affiliation or referred to any instances in which his tribal affiliation affected the way he was treated in Afghanistan

- Both [Tribe 2] and [Tribe 1] have a Sunni Muslim affiliation
- Country information ("IHS Jane's World Insurgency and Terrorism") demonstrates that the Taliban itself has a Sunni Pashtun affiliation and orientation⁸.
- Available country information does not support the view that any persons have been targeted in Paktya on the basis of either of these tribal affiliations.

28. Given the above, I am not satisfied that the applicant faces a real chance of harm on the basis of his tribal affiliation.

Returnee from a western country

29. I accept that the applicant may be regarded as a returnee from a western country.

30. The applicant is a Sunni Muslim male of Pashtun ethnicity. In that respect he belongs to both the dominant religion (85% of Afghans are Sunni Muslim) and the predominant ethnic group (40% of Afghans are Pashtuns)⁹. Country information confirms that the Pashtun are especially in the majority in the Southern and Eastern provinces such as the applicant's home province of Paktya¹⁰.

31. The applicant does not claim to be politically active or to have made any public statements on Afghani politics and there is no information before me to suggest that the applicant has any sort of public profile. The delegate asked the applicant if he had any concerns or knew of any other risk he faced in Afghanistan, the applicant confirmed that his claimed profile with the Taliban stemming from his sale of goods to ANA personnel was "the only risk that applied to me". As set out above, I do not accept that the applicant was involved in transporting goods across the border or that he ever came to the attention of the Taliban in that capacity.

32. 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 asylum¹¹. The European Asylum Support Office notes that "Documented instances of individual targeting of returning Afghans on the basis of 'Westernisation' due to having travelled in or lived in the Europe, holding Western ID documents, or adopting ideas that are seen to be 'un-Afghan', 'Western' or 'European' following time spent outside Afghanistan were scarce".¹² It could find no reports of such targeting by the Afghani government or state actors.

33. I note that the applicant spoke Pashto at interview and confirmed that he stays in touch with his family. Notwithstanding that he may have acquired an accent, he is nonetheless proficient in Pashto and maintains regular contact with native Pashto speakers. Although the applicant has spent time in a western country, I am not satisfied that he has taken on western values or been 'westernised' to any discernible degree or that he would be viewed that way on his return. Nothing about his ethnicity or religious affiliation is likely to give him a heightened profile where none otherwise existed.

⁸ "Taliban", IHS Jane's World Insurgency and Terrorism, 28 September 2016, CIS38A80122216

⁹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Afghanistan 18 September 2017", 18 September 2017, CISED50AD5680

¹⁰ Ibid

¹¹ DFAT, "DFAT Country Information Report Afghanistan 18 September 2017", 18 September 2017, CISED50AD5680

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

34. The applicant states in his SHEV application that due to the communal structure of Afghan society, his return to Afghanistan would be common knowledge and reported back to militants. I accept that if he returns to his home village, his return would be noticed. However, the information set out above does not support the view that the fact of his return to Afghanistan would lead to a real chance of him being targeted or subject to harm on that basis alone. As set out above, I do not accept that he was previously targeted by militants or that he would be a subject of interest to militants for that or any other reason.
35. I am not satisfied that the applicant faces a real chance of harm as a returnee from a western country.

Security situation in Paktya

36. Although I do not accept that the applicant was ever personally targeted by the Taliban, I have also considered whether the applicant faces a real chance of harm due to the overall security situation in Paktya province.
37. As set out above, I do not accept that the applicant was engaged in transporting goods to and from the Pakistani border. Apart from that, the applicant has not indicated any concerns relating to his personal security in Paktya. The applicant has family in the province and considers the area safe enough to return his wife and children back to the area. They have been able to establish themselves there, with [his sons] now employed in [a trade]. I note that the applicant himself is still relatively young, in apparent good health, and able to work.
38. DFAT assesses that those most at risk of harm or targeting by anti-government elements (AGEs) are Afghan security and law enforcement personnel, foreign troops, civil society and non-governmental organisations (especially those advocating human rights causes or the rights of women), and elements of the media¹³. Paktya was not among those provinces listed by UNAMA as most affected by civilian deaths in the first half of 2017¹⁴. The report details 160 casualties overall¹⁵ in a province whose population numbers well over half a million people.¹⁶ The applicant does not belong to (and did not make any claim to belong to) any of the groups most commonly targeted in those incidents that did take place in the province.
39. Afghan returnees are almost invariably returned to Kabul¹⁷ and I accept this is very likely the starting point for the applicant's journey back to his home region. There have been serious attacks in Kabul, but given their relatively infrequent nature and the very limited duration of the applicant's stay there, I do not consider that he would face a real chance of serious harm for any reason during his brief stay in Kabul prior to travelling to Paktya.
40. Given that the applicant is not associated with any of the groups most commonly targeted by AGEs, and taking into account the nature and number of incidents, I am not satisfied that the risk to the applicant in Paktya province rises beyond remote.
41. I am not satisfied that the applicant faces a real chance of harm due to the security situation in Paktya province.

¹³ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Afghanistan 18 September 2017", 18 September 2017, CISED50AD5680

¹⁴ United Nations Assistance Mission in Afghanistan (UNAMA), "Afghanistan - Protection of Civilians in Armed Conflict Midyear Report 2017", 01 July 2017, CISED50AD4852

¹⁵ Ibid

¹⁶ EASO, "EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 01 November 2016, CIS38A80122597

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

Refugee: conclusion

42. 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

43. 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

44. 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.

45. I have concluded that the applicant was not threatened by the Taliban and is not a person of interest to the Taliban, or any other group in Afghanistan, nor would he face a real chance of harm on that basis or on account of his profile as a Sunni Pashtun male. I have also concluded that the applicant does not face a real chance of harm for any other reason including being a returning asylum seeker who has resided in a western country or on account of the general security situation in Paktya province or his tribal affiliation. Based on the same information, and for the reasons set out above, I find that the applicant does not have a real risk of suffering significant harm in Paktya or elsewhere in Afghanistan.

46. After having regard to the applicant's circumstances, I am not satisfied that he faces a real risk of suffering significant harm on return to Afghanistan.

Complementary protection: conclusion

47. 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.