



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

NEPAL

IAA reference: IAA18/04864

Date and time of decision: 3 July 2018 15:38:00

M Anderton, 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 applicant is a Nepalese citizen who arrived in Australia on 2 May 2013 who applied for a Safe Haven Enterprise visa on 13 February 2017.
2. In essence, he fears harm from a Maoist political party, Maoists People's Liberation army, Maoists and splinter groups due to his work as [Occupation 1] with [a professional] Association and [Occupation 2] of the Communist Party of Nepal (Unified Marxist-Leninist (CPN – UML).
3. On 26 April 2018 the delegate refused the application because he was not satisfied the applicant faced a real chance of serious harm or real risk of significant harm upon return to Nepal.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. No further information has been obtained or received.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - He is a married Nepali Hindu male [Occupation 3] who arrived in Australia by boat [in] May 2013.
 - He has been politically active since he was a teenager and democracy was reinstated in Nepal. When he was [age] years old he became a member of [a union] which campaigned for student rights and was aligned with CPN-UML.
 - In 1997 he became a CPN-UML party member and [Occupation 3]. In 1999 he was involved with the [Association] and ran meetings. The Association was in conflict with [another] Association which was backed by the Maoists. He was physically attacked six or seven times in [Village 1] and [City 1] due to his affiliation with CPN-UML and the [Association]. In 1999 when running a meeting he was hit with the gun butts by members of the Maoist party. The attacks were reported to police, but nothing was done.
 - In 2001 he was [Occupation 1] of the [Association] and also became [Occupation 2] for the CPN-UML in his village. He was involved in campaigning and organising meetings and held the position for 10 years until 2011.
 - In 2006 he was physically attacked by Maoists because he was involved in [a] Union. Fifteen to twenty people broke into his home and hit him on the head and chanted the name of the Maoists party. They left when the neighbours woke to his screams. The applicant and his family moved from [Village 1] to [City 1] which meant he had to walk two hours to get to work. He was attacked on his way to work and hit with stones by a group chanting Maoists slogans. He ran to a nearby village. His wrist was broken. He was attacked because he was working for the CPN- UML.

- From 2006 until 2013 Maoists approached him in the street asking for donations. They assumed he had money as he was [Occupation 2] and head of the [Occupation 3] Association. When he refused they would beat and threaten him. He made complaints to the police but they could not find the Maoists. He tried to modify his behaviour to avoid ambush and tried not to leave his home alone. He only went to work or CPN-UML or [Occupation 3] Association meetings. Sometimes they would attack him outside meetings.
 - He was particularly targeted because he was influential in both organisations and because [Occupation 3s] have a special status in Nepal. He knows other prominent members who were targeted.
 - In 2007 he secured a transfer to [another workplace] for his safety.
 - In 2013 he started campaigning for more [Occupation 3s] in the rural areas. He was part of the executive committee who decided to send [Occupation 3s] to the villages in May 2013.
 - [In] October 2013 he was attacked at [an] Association meeting. There were 100 people in attendance. As he was taking the minutes two men started to hit him. Others joined in the attack until the police arrived. Some attackers were arrested, but he heard they were later released after 1.5 hours. After the attack he realised he could not stay in Nepal and took a plane to [two countries] and later travelled by boat to Australia.
 - Since he has been in Australia he has developed an alcohol problem. He is a recovering alcoholic and is taking Camprol which assists with his withdrawal effects. He also receives counselling. He is not able to receive this treatment in Nepal and does not think this kind of treatment is provided by hospitals there. [In] April 2017 he was having a [procedure] and does not know how long it will take to recover from the operation.
 - He fears physical assault and death upon return from Maoists political party, Maoists people's liberation army and their supporters in Nepal and India. He fears his family will also be at risk of harm due his association with them. He cannot reside in India as Nepalese Maoists have a nexus with Indian Maoists and he could be found. He does not have any connections outside his Nepal village.
7. Supporting documentation was also provided which included his citizenship certificate, photographs of meetings and demonstrations, correspondence from Maoists requesting financial support, and information about [another] Association. Post interview submissions and documents were provided also which included letters of support from [the] Association and Nepal Communist Party United. A letter from the care co-ordinator of [a] Health Centre dated [in] April 2018 stated the applicant had a diagnosis of [a mental illness] with [other symptoms]; a history of alcohol use disorder but in 2016 attended detoxification and rehabilitation and is abstinent; is compliant with his depot medication and is stable in his mental state and making gains in his recovery. The care coordinator noted it was believed he may not have access to similar support and psychiatric treatment in Nepal as he received at the [health] centre.
8. It was submitted the reasons for the feared persecution were the applicant's real and imputed political opinion as [Occupation 2] of the Communist Party of Nepal (Unified Marxist-Leninist) (CPN-ML); and as [Occupation 1] of the [Association] and being a person who suffers from [a mental illness] with [other symptoms], inability to receive assertive mental health care and the risk that without this care his medical condition may cause him to act erratically and suspiciously in front of Maoist party supporters, whom he fears.

9. It was submitted despite plans to reunify the communist parties of Nepal there was a long history of conflict and given the applicant's executive position and active support and being well known there is a risk that he will be targeted for his political opinion. It was submitted even if reunited there is a risk of harm from splinter groups or disillusioned groups that have split from the Maoist party. The applicant does not believe the [Occupation 3s] associations are working together as claimed in the news article referred to by the delegate in the interview as they have different demands and are not supported by each other. The applicant was high profile as there were approximately 75 district secretaries in the association and he will be recognised because he is quite famous.
10. While his mental health has improved, it was submitted even if medication is available in Nepal, it was highly unlikely he would not be able to receive essential assertive treatment required to administer the medication and manage his illness. His paranoid ideation and hallucinations also puts him at high risk of drawing unwanted attention and there is a real risk that his erratic and disordered behaviours from [a mental illness] would antagonise Maoist supporters which increases the likelihood of being targeted.
11. It was submitted he did not have a presently enforceable right to enter India and was not able to avail himself of any right to enter or reside in India. In any event there is a real risk he will suffer significant harm because the border is porous and Maoists operate in both countries.

Refugee assessment

12. 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

13. 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.
14. I accept the applicant is a Nepali citizen and was [an Occupation 3].

15. Given country information I accept that the applicant, like many others, was asked for financial donations by the Maoists as this was not uncommon and is the only form of fundraising for political parties. I accept that he refused to provide donations.
16. I have considered the letter regarding financial support dated [in] February 2018 which was provided after the interview. However, I place no weight on it. The applicant had not previously claimed that his family had continued to be extorted. Further if his wife had received such a letter it is difficult to believe that he would not have mentioned it at the April 2018 protection interview or provided it then. Given the country information regarding the prevalence of documents in Nepal, the timing of the document and the lack of prior claim in this regard, I place no weight on the document and I do not accept his wife has received extortion threats since his departure.

Communist party claims

17. I have considered the applicant's claims in his earlier arrival interview, protection interview and written claims and submissions, which were considered by the delegate. I consider the applicant has consistently claimed he was [Occupation 3] who organised placements of other [Occupation 3s] as he was part of the [Occupation 3] Association.
18. However, he had not claimed or mentioned any association with the CPN-UML in his 2013 interviews. It is difficult to believe that if he were also a member of the party and the [Occupation 2] of the party who organised meetings and campaigns that he would have mentioned that when asked whether he or any family member was involved in any political group. When asked about his political involvement in his arrival interview the applicant only mentioned he was a member of the [association], but did not mention any other party. I consider if he had been [Occupation 2] of the CPN-UML party or a member and politically active since he was a teenager, he would not have responded in that way.
19. Further, I consider the applicant's account of his political involvement in the Nepal communist party was vague and lacked details. For instance, when asked about what he did, the applicant's response was hesitant and vague, saying he did party activities, organised meetings and did process and things. When asked what he did for the party after he moved from [City 1], the applicant reiterated he did party work activities. When asked for specifics, he added, training and giving speeches. When asked about the type of training, the applicant could not provide any examples or detail other than what was given from the centre. I consider the applicant's limited details and vague description of his role is inconsistent with a claim to have been [Occupation 2] for 10 years.
20. Further, his evidence about his role, how and why he became the [Occupation 2] lacked details and credibility. For instance, at the protection when asked what he did and how he became [Occupation 2], the applicant said he was not too sure but it was related to the [Occupation 3] association. Further, he said he became [Occupation 2] in 2006 in [City 1], just after he moved to there. However, I consider such an appointment is lacking in credibility given the applicant had just moved there and would not have been well known and it was also a bigger city.
21. The applicant had no documentation at interview to corroborate his membership of either organisation, and I find it difficult to believe that he would not have party identification card or some evidence of his role as [Occupation 2] of the communist party or [Occupation 1] of the [Occupation 3] association at the time.

22. I have considered the letters of support provided after interview from the [Occupation 3] association and the Communist party. However, I place no weight on them as they have a number of anomalies. For instance, while they are purported to have been written by two different organisations and two different authors, they bear the same letter reference number. Further, their wording is almost identical. The chairperson stamp is the same for both organisations and the layout of the letter and letter heading, the font and spacing of the signature block are the same. The dates of his memberships are not consistent with his claims either. The agent submitted there may have been a difficulty with the conversion of dates in the Nepali calendar. However, I do not accept this explanation as the applicant had no difficulty identifying the western dates for his membership as 2001 to 2011 and I do not accept as credible that such organisations would not know how to properly make the conversion also. Given the anomalies and prevalence of fraudulent documents and the late provision of the documents I place no weight on the documents.

Attacks

23. I consider the applicant's claims of attack and harm have been inconsistent. For instance in his arrival interview the applicant claimed he was attacked 6 - 7 times by the Maoists, including a roadside attack in which he escaped. However, in his statement he claimed he was attacked with gun butts at a meeting in 1999 by Maoists and in 2006, was hit with stones on his way to work and his wrist was broken. In 2006 he was attacked by 15 – 20 people in his family home at night and hit in the head, which led him to move to [City 1]. I consider the applicant's claims about his attacks were not consistent. Even if the applicant was expanding on his claims, I consider it is difficult to believe that he had not mentioned such significant events such as at attack in the family home, or a broken wrist.
24. Further, the applicant's account was different in his protection interview. He did not mention that he was attacked at home. Instead he claimed the attack that precipitated his move to [City 1] occurred when he was going down to the village and his wrist was broken. I consider this was inconsistent with his claim that he was attacked at home. Further, even if he mixed up the attacks in relation to when his wrist was broken, the applicant's account was still not consistent as the wrist injury occurred due to stones being thrown when he was on his way to work, not in the village. Further, his statement indicated the stone attack occurred after he had left [Village 1] and had gone to [City 1], not before. I consider it is particularly difficult to believe that the applicant did not mention the family home attack at the protection interview, as it would have been a significant event, if true. I consider the applicant's account was inconsistent and lacked details such that the applicant was not recounting a lived experience.
25. Further, I do not accept his claims he kept a low profile to avoid being ambushed by Maoists and tried not to leave the home alone. I find his explanation unconvincing. Further, it was inconsistent with his claims that he continued to attend communist party and [Occupation 3] association meetings. It was evident that he continued to live and work in the area.
26. Further the applicant's account of the 2013 attack lacked details and was inconsistent. Firstly, the applicant claimed in his statement the attack occurred in October 2013. However, he was in Australia at that time. In the arrival interview he claimed it occurred on [date] which would be in January 2013. I place little weight on the discrepancies in dates given the difficulties with Nepali calendar conversion.
27. However, there were other inconsistencies in his account. For instance, in his statement he claimed there were 100 people in attendance, two men started hitting him and people in the

meeting started to join the attack and some came from outside and the attack lasted until the police arrived. However, at the protection interview he claimed there were 20 people there and two attacked him with chairs, and everyone ran away scared. I consider the account was inconsistent as to the numbers of people there, involved, how they were involved, how the applicant was hit, whether the police arrived or not and how the attack ended. Further, his protection interview account that he was the only one attacked and no one came to his aid lacked credibility. Given the inconsistencies, I consider the applicant has embellished his claims.

28. Given my concerns above, I do not accept the applicant is a credible witness. I do not accept he was a member or [Occupation 2] of CPN – UML or any political party. I do not accept he was attacked by Maoists or opposition [professional] association. I do not accept he has a political profile or was politically active. I do not accept he was personally or physically attacked in 2013 .I do not accept he moved to [City 1] due to any attack or physical assault or that he was beaten or attacked for refusing to pay donation.
29. Rather I consider he moved because he refused to pay donations to the Maoists and so could not work as [Occupation 3] in his village. As a result he had to resign and took them to court, won, and was transferred to a new [workplace]. I consider the applicant has been consistent about this in his detention, arrival and protection interviews and I accept that this occurred. I note he was successful in court and also was given another job. Further, I consider this was in the context of civil conflict and pre- democratic and constitutional government and prior to the 2013 elections.
30. The country information indicates and I accept that the political and security situation is very different now and has dramatically improved. There is a coalition government and Constitution and the Communist Party won 121 of the 275 seats in the lower house. I have considered the country information about allegations that groups associated with political parties have committed acts of violence, extortion and intimidation. However, I do not accept the applicant was a member of the communist party or was attacked as claimed.
31. Further, DFAT assesses Nepal has a lively political environment which provides for diverse view and politically activity is generally well respected. DFAT assesses while there was some violence in the aftermath of the new Constitution in 2015 and Maoists and splinter groups continue to threaten violence, the overall risk is low. According to the DFAT report there are widespread reports of threats against businesses for donations, but credible sources told DFAT that the most common occurrence of forced donation was generally seen as part of ‘doing business’ in Nepal. It also reflects the inability of political parties to formally and directly raise funds. DFAT assesses while business may be targeted, individual members are ordinarily free from harassment and intimidation. While the applicant’s wife runs a small shop, as discussed above, I have not accepted there were any forced donations or threats.
32. Given the time elapsed since the request for donations and the new Constitution and the improvement in the political and security environment, my findings in regard to past harm, and the applicant’s circumstances I am not satisfied that the applicant faces a real chance of extortion by Maoists, splinter groups or anyone. Further, and in any event, I do not accept such requests for forced donation (which is not accepted) would amount to serious harm as it generally seen as part of ‘doing business’ in Nepal.

[Professional] association

33. Given the applicant's consistent claims and that he was [Occupation 3], I accept the applicant was involved with the [Association]. The country information in the review material and provided by the applicant indicates it was union type organisation to unite [Occupation 3] for the benefit of [Occupation 3] and ensure quality [service] and maintain harmonious relationships with [others] and have working relationships with trade unions and professional organisations in and outside Nepal.
34. However, as discussed above, I place no weight on the [Occupation 3] association letter and find it difficult to believe that the applicant would not have some contemporaneous relevant correspondence or identification of his role as [Occupation 1]. I do not accept he was the [Occupation 1]. I accept he had some involvement in discussions about assigning more [Occupation 3s] to rural areas as he has been consistent throughout the application process in this claim. In his arrival interview he claimed the motivation for the threats or claimed attack was because the [Occupation 3s] did not want to go to the village or rural areas.
35. I do not accept he was targeted or attacked due to political affiliations, membership of the communist party or membership of the [Occupation 3] association or because he was [an Occupation 3]. I accept other [Occupation 3s] may have been unhappy about transfers to rural areas and there may have been conflict in that regard. However, I consider it was a one off issue. Further, I do not accept that the applicant was specifically targeted or that he faces a real risk of any future harm in that regard. As discussed above, I consider the applicant's account of the 2013 attack on him was inconsistent. I do not accept he was personally attacked.
36. Further, the country information in the review material about the pooling of resources of both [Occupation 3] associations further reinforces my view that the applicant does not face a real chance of any harm in the future if he were to join the association again.

Health issues

37. I accept the applicant suffers from [a mental illness]. It is unclear how long he has suffered from it. However, it is evident that his condition is being managed with medication and case management every two or three months (according to the applicant at interview). I accept he is a recovering alcoholic and has been abstinent since 2016. I accept he has had a [procedure] and may have some pain. However, I do not accept the applicant could not receive treatment for those conditions upon return to Nepal. Country information is that access to basic health services is a fundamental right in Nepal. They have public and private hospitals and centres. In 2007 the government introduced free essential health care services for the poor and vulnerable citizens. In 2008 it was extended to all citizens. In 2009 free essential services in health care centres and district hospitals became available and no charges are levied for emergency, inpatient or essential drugs. While the [health] centre letter noted a belief that the applicant may not have access to similar support in psychiatric treatment in Nepal, but no evidence for that opinion or belief was provided. Having considered country information, while access in remote regions may be less available or sophisticated and the general standard may not be the same as in Australia, I do not accept the applicant would be denied access to treatment.
38. The applicant was well educated, with a [degree] and worked as [Occupation 3] for 17 years. I note the [health] letter indicates he can no longer function at that level due to psychosocial impact of his illness. However, his mental state has been stable and he has been abstinent from alcohol since 2016. Upon return to Sri Lanka with his family support, I am not satisfied that he could not return to some form of employment. Further, the applicant confirmed his

family owned property in his mother's name. The applicant's wife has a shop and presently provides for the family and the evidence does not indicate she would be unable to assist or provide support. I do not accept the applicant has any difficulty in terms of his capacity to subsist. Further, I do not accept his illness puts him at risk of harm from Maoists, as I consider his mental state is stable, he can continue to rely on treatment in Nepal and the evidence does not indicate that he would be unable to rely on the support of his wife and family. Further, I do not accept that Maoists are or would be interested in him.

39. Further, in respect of his health issues, I do not accept he faces any harm for a s.5J reason.
40. Having regard to the country information, the applicant's past involvement in [Occupation 3] associations and his low level political interest I do not accept he faces a real chance of harm from Maoists political party, Maoists people's liberation army, Maoists or splinter groups or opposition groups or any political groups. I do not accept he faces any harm from opposition [Occupation 3] groups or associations or members of such groups. Even if he decides to participate in politics or return to [Occupation 3] association, I do not accept he faces any harm in the future as the situation has significantly improved since his departure. Further, it is evident from the country information that Nepal provides for diverse political views and parties and persons so involved are generally respected. Even considering Maoist or splinter groups threats to return to violence, DFAT assesses the overall risk of harm is low. Further, as discussed above, I do not accept the applicant has a profile or would likely have one in the future that attracted adverse interest from Maoists, splinter groups or opposition parties or supporters or extortion or donations demand. I do not accept the applicant faces a real chance of harm in that regard upon return.
41. Having considered the country information and the applicant's circumstances, I do not accept that the applicant faces a real chance of any harm on the basis of any of the reasons claimed or at all.

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 considered the applicant's circumstances whether he faces a real risk of significant harm upon return to Nepal.
46. While I accepted the applicant was involved with the [Occupation 3] association and there may have been conflict regarding the assignment of [Occupation 3] to rural areas, I have not accepted the applicant was personally attacked or targeted. Further, I do not accept he faces any future harm in that regard, as I consider it was a one off issue and he did not face significant harm. Further, I have not accepted that he was [Occupation 1] or high level. Further, the country information indicates the two [Occupation 3] associations have pooled resources and I am not satisfied that the applicant faces a real risk of significant harm should he return or be involved in the [professional] association or politics as the political situation is different and political activism is generally respected. As discussed above, I have not accepted that he faces a real chance of Maoists or other demanding donations.
47. Further, while he faced employment problems when he refused to pay donations more than 10 years ago, the applicant went to court, won, and was given another position. As discussed above, I do not consider there is a real risk of future extortion or requests for donations given I have not accepted he was targeted or had political positions or political involvement as claimed and the political and security situation has significantly improved. Further, as discussed above, I do not accept the applicant has a profile or would likely have one in the future that attracted adverse interest from Maoists, splinter groups or opposition parties or supporters. I do not accept the applicant faces a real risk of harm in that regard upon return.
48. I have considered the applicant's health issues but I do not accept the applicant will be unable to access medical treatment as needed, or that he faces a real risk of significant harm that amounts to the death penalty or arbitrary deprivation of life or torture. I am also not satisfied that as a consequence of his health, he faces a real risk severe pain or suffering, pain or suffering that is cruel or inhuman in nature or extreme humiliation, intentionally inflicted or caused as required by the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. Furthermore, any shortcomings in the Nepali health system are ones faced by the population general and I do not accept they are intentionally inflicted or caused.
49. Further, the evidence does not indicate the applicant could not rely on assistance from his wife, who has a shop and provides for the family or his mother who owns property. I do not accept he has any difficulty in terms of the capacity to subsist. I do not accept his illness puts him at a real risk of harm from Maoists, as I consider his mental state is stable, he can continue to rely on treatment in Nepal and evidence does not indicate that he would be unable to rely on the support of his wife and family.
50. As discussed above, I have not accepted the applicant's claims about membership of a political party or threats or attacks or harm from Maoists, Maoist parties or political groups, Maoist [Occupation 3s] or any opposition groups. I have not accepted he faces a real chance of any harm on the bases claimed or at all. For the same reasons and applying the authority in *MIAC v SZQRB* [2013] FCAFC33, I am not satisfied the applicant will face a real risk of harm of if removed to Nepal.

Complementary protection: conclusion

51. 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.