



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA18/05026

Date and time of decision: 3 December 2018 10:39:00

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 Hazara Shia from Afghanistan. On 20 June 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV).
2. On 23 May 2018, the delegate refused to grant the visa. The delegate found that the applicant would not face a real chance or real risk of harm in Afghanistan as a result of being a Hazara Shia and that he could safely reside in Kabul. The delegate also found that he would not face a real chance or a real risk of harm on account of being a returnee from a western country.

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 19 June 2018, the IAA received a submission from the applicant's representative 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 or clarifies a number of claims made to the delegate.
5. The agent's submission to the IAA also includes links to a number of information sources in footnotes on the second and third pages. Some of the articles or information quoted were not before the delegate and are new information. A number of the articles are put forward to demonstrate that the applicant would have a real chance of serious harm if he were to relocate to Kabul. However, for the reasons given below, I have found that the applicant can relocate to Mazar-e Sharif. In these circumstances, I am not satisfied there are exceptional circumstances to justify considering any of the information above.
6. The applicant has also quoted from the US Department of State's 2014 Report on Human Rights Practices for Afghanistan. The original report has not been provided. This was not before the delegate and is new information. The agent quotes just a single line from this report in asserting that Hazaras are subject to a range of abuses. No context is given for the very brief quote cited. The agent further raises concerns, without any supporting excerpt from the report, about the nature of Hazara representation in the Afghani government. This report is also now three years old which also limits its value. The delegate quoted from a range of equally reputable and more current sources (including a 2016 report from the US Department of State) in the decision record. It is not clear why the information in the 2014 report could not have been provided to the delegate, given the report was released around June 2015. Given all of the above, I am not satisfied there are exceptional circumstances to justify considering this information.
7. The agent also refers to a US Department of State "International Religious Freedom Report for 2017". The agent asserts that the report concludes that "underrepresentation of Shia in government is due to Hazara ethnicity". It is not clear what this statement means, or how it relates more specifically to the applicant's claims, other than the very broad statement that it is indicative of the link between religion and ethnicity and that the applicant is likely to face persecution due to both his religion and ethnicity. No quote or direct extract of any kind from the report has been included in support of this assertion, and its context is not clear. Practice Direction 1 states that if new country information or media articles are being put forward, a

copy or relevant extracts of the information must be provided. It further states that hyperlinks to the documents are not acceptable. The agent would be well aware of the requirements of the Direction, and I do not consider that the one line summation of the report represents a relevant extract of the information. As per s.437FB(5), I have decided not to accept this information.

8. The submission to the IAA also refers to a number of decisions from the Administrative Appeals Tribunal (AAT) and the Immigration Assessment Authority (IAA). These decisions have been put forward as demonstrating that Kabul is not a safe or viable relocation or return option for Hazara Shia. Each of these decisions was based on the particular personal circumstances of the applicants in question, and were not written as general guidance or intended to be applied to whole classes of persons. Beyond asserting that the decisions deal with “individuals with a similar profile to the applicant”, the agent has not demonstrated how these decisions are applicable or relevant to the applicant. I am not satisfied that there are exceptional circumstances that justify consideration of this information under s.473DD.
9. The agent has also submitted a statement from the applicant’s partner, along with a photocopy of her [passport] to verify her identity. In her statement, the applicant’s partner indicates that, to her knowledge, the applicant has no family in Australia. This information is presumably put forward to address concerns raised by the delegate that the applicant has not been completely forthcoming about his family composition and the location of his family members. The applicant’s partner does not indicate on what basis she has information regarding the location of the applicant’s family. If her views are based solely on information relayed to her from the applicant, then her statement is entirely dependent applicant’s veracity in regard to his family composition and does not provide an objective evidentiary basis on which to accept the applicant’s statements in regard to his family. Further, I note the applicant’s partner has been in a relationship with the applicant since September 2014. Though it is possible that during that time she has gained some insight into the applicant’s familial links in Australia, it does not explain why such information was not provided to the delegate in the response to the issues set out in the natural justice letter sent by the delegate on 21 September 2017 (and to which the applicant’s then agent responded on 27 September 2017) or at any time up until a decision was made by the delegate on 23 May 2018. I am not satisfied that there are exceptional circumstances that justify consideration of this information under s.473DD.

Applicant’s claims for protection

10. The applicant’s claims can be summarised as follows:
 - The applicant’s parents were originally from Lashkar Gah in Helmand province, Afghanistan.
 - Due to the threat of Taliban, the applicant’s parents moved the family to [Country 1] when the applicant was around [age] years of age.
 - He grew up and spent all his life in [a city] in [Country 1].
 - In 2008, the applicant’s father went missing in [another country] where he had gone to find work
 - In 2011, the applicant’s Eidgah (place of prayer) was targeted by a bomber while he was present. The applicant was not injured in the attack but there were many casualties and the experience caused him shock and distress.

- In 2012, the applicant was beaten by Sunni extremists as he left the [workplace] where he worked and was only saved when some passers-by intervened to stop the beating.
- The applicant does not feel safe in either [Country 1] or Afghanistan.
- The government of [Country 1] will not accept him back and even if he did return there he would be targeted by Sunni extremists who could identify him due to his Hazara physical features.
- He does not speak the language or have any networks or connections in Afghanistan and could not safely relocate there due to the threat posed by the Taliban, ISKP and other Sunni extremist elements.

Refugee assessment

11. 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

12. 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.
13. I accept that the applicant is a Hazara Shia and an Afghani national and that Afghanistan is the receiving country for the purposes of this assessment.

Targeting by Sunni Extremists in [Country 1]

14. The applicant’s claims to have suffered at the hands of Sunni extremists while in [Country 1] and to similarly fear harm at the hands of the Taliban or other Sunni extremist elements if returned to Afghanistan.
15. The actual instances of harm suffered by the applicant all took place in [Country 1]. The applicant said that in 2011 [his] Eidgah (or place of prayer) was targeted by a bomber. He said

that a person attempted to enter the Eidgah but was stopped for some reason by men at the entrance who asked him what he wanted. The man then exploded a bomb.

16. The applicant said that after the explosion he walked back to entrance. People were running everywhere. They were bodies everywhere and body parts. Cars were burning. The applicant said that he even had blood on him but was completely unharmed. Some men saw him and urged him to return home. The applicant stated that he was in shock and was later sick.
17. The second incident happened in 2012. The applicant stated that he was working at a [workplace] in [Country 1]. There was a protest by some Hazara Shia about a recent attack. The applicant thinks that there was a clash between the Hazara and Sunni extremists. As he left the [workplace], some Sunnis began beating him badly and taunting him about his Hazara ethnicity. Some older men saw what was happening and told them to stop. One of the Sunnis at the [workplace] where he worked also showed up and eventually they were able to rescue him.
18. The applicant did not see a doctor after the attack but was treated at the [workplace]. The applicant took a couple of days off work. When he returned to work, he was informed that men had been looking for him. His boss said that if he kept working at the [workplace], it would be bad for business and would put the applicant's life in danger and he was told not to come there anymore.
19. Both these incidents occurred in [Country 1]. The applicant's country of reference is Afghanistan. He has not made any claim that the incidents in [Country 1] have given him any sort of profile or would follow him [into Afghanistan]. Therefore, I will move on to assess the applicant's claims against Afghanistan.

Afghanistan

20. The applicant has stated that he would be targeted by the Taliban, Al-Qaeda or other Sunni extremist elements if he was returned to Afghanistan.
21. The applicant refers to the targeting of Shia Muslims in Afghanistan by the Taliban and other extremist elements. However, the available country information does not support the view that people are targeted by the Taliban solely on the basis of their Shia faith. The Afghan Analysts Network (AAN) has pointed to the Taliban's repeated denunciation of sectarian attacks as evidence that the group has no appetite for inciting sectarian violence¹. DFAT notes that there have been Taliban attacks on both Sunni *and* Shia religious leaders, but these have generally targeted those seen as supportive of the government "rather than due to any religious motivation"².
22. Attacks that did focus on Shia were almost exclusively laid at the door of the Islamic State in Khorasan province (ISKP). None were claimed by the Taliban³. Country information notes the limited range and scope of the ISKP operations, with attacks deliberate sectarian attacks against Shia limited to Kabul, with unclaimed attack in Herat city and Balkh province⁴. The US

¹ Borhan Osman, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", Afghan Analysts Network (AAN), 19 October 2016, CX6A26A6E11358

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Afghanistan 18 September 2017", 18 September 2017, CISED50AD5680

³ Ibid

⁴ UNAMA, "Afghanistan Annual Report on Protection of Civilians in Armed Conflict: 2016", 06 February 2017, CISED50AD201

Military assessed that “a combination of military pressure and lack of local support had caused IS to decline in size, capability, and ability to hold territory”⁵.

23. The available information does not suggest that the Government of Afghanistan would seek to target the applicant on the basis of his ethnicity. DFAT has stated that it is “not aware of any official policy of discrimination against Hazaras or any other group based on ethnicity”⁶. The US Department of State has said that there are indications that societal discrimination against Hazaras among the general Sunni population is on the decline, citing an example where hundreds of Sunnis lined up to give blood after Shia were injured in a suicide attack⁷.
24. DFAT assesses that the key risk groups remain those associated with the government or international community (or seen as supporting them), those working for civil society (CSOs) and non-government organisations (NGOs), and journalists and other members of the media. Women also remain a group at risk, as do those actively advocating for women’s rights. The applicant has not indicated that he has any particular profile with any anti-government elements (AGEs) in Afghanistan, never having resided there. He has made no claim to be politically active or to have made any public statements on Afghani politics (or any other matter).
25. The applicant stated that he comes from Helmand Province in Afghanistan. Helmand province remains a troubled area of Afghanistan. UNAMA reported that in 2016 Helmand province had the highest number of civilian casualties caused by ground engagements, and was one of the regions most affected by explosive remnants and deaths from aerial operations⁸. UNAMA also noted with some concern the use pressure plate IEDs by AGEs on roads into population centres, especially in Helmand⁹. While some of these issues are related to a concerted Taliban offensive in Helmand province between August and October 2016, the ongoing strategic interest of the Taliban in the region is clear¹⁰, potentially compounded by its relevance as an area of poppy cultivation¹¹.
26. However, by the applicant’s account he has no links, familial or otherwise, in Helmand. He has not indicated that he has any other ties to the province. The applicant has not indicated or inferred that he would seek to access Helmand province if returned to Afghanistan. Apart from the fact that the applicant claims to have been born there, no apparent link to the area suggests itself on the information before me, and I am not satisfied it is the area to which he will return. I note that Afghani returnees are almost invariably returned to Kabul.¹² I am satisfied that this is the area to which he will return.
27. However, the country information before me indicates that security situation in Afghanistan is fluid and complex. The risk to a particular individual can vary according to the personal circumstances and location within Afghanistan. I note that there have been a series of attacks

⁵ United States Department of Defense, "Enhancing Security and Stability in Afghanistan June 2017", 19 June 2017, CISED50AD4660

⁶ DFAT, "DFAT Thematic Report - Hazaras in Afghanistan 18 September 2017", 18 September 2017, CISED50AD5681

⁷ US Department of State, "Afghanistan 2016 International Religious Freedom Report", 15 August 2017, OGD95BE927101

⁸ United Nations Assistance Mission in Afghanistan (UNAMA), "Afghanistan Annual Report on Protection of Civilians in Armed Conflict: 2016", 6 February 2017, CISED50AD201

⁹ UNAMA, "Afghanistan Annual Report on Protection of Civilians in Armed Conflict: 2016", 6 February 2017, CISED50AD201

¹⁰ US Department of Defense, "Enhancing Security and Stability in Afghanistan June 2017", 19 June 2017, CISED50AD4660

¹¹ Ibid

¹² DFAT, "DFAT Country Information Report Afghanistan 18 September 2017", 18 September 2017, CISED50AD5680

in Kabul, and that some of these have targeted Shia in recent times¹³. This raises questions as to whether the applicant would face a real chance of harm on account of his ethnicity or religion if he were to reside there. However, even if it is concluded that the applicant faces a real chance of serious harm in Kabul as a Hazara Shia, I am not satisfied that the applicant has a well-founded fear of persecution in relation to all areas of Afghanistan. In particular, I am not satisfied the applicant faces a real chance of persecution in Mazar-e Sharif.

28. From Kabul, the applicant would be able to access a direct flight to Mazar-e Sharif. While I accept that the security outlook overall for Shia Hazaras in Kabul sounds at least a cautionary note¹⁴, I consider the applicant would only need to stay briefly in Kabul in order to facilitate his travel to Mazar-e Sharif. Mazar Mawlana Jalaluddin Balkhi International Airport in Mazar-e Sharif is operational and EASO indicates recent evidence of flights to Mazar-e Sharif from Kabul via a number of airline carriers¹⁵. The road from the airport to Mazar's city centre is well-patrolled and generally safe during daylight hours¹⁶. I note also that the Memorandum of Understanding (MOU) between Australia and Afghanistan includes funding IOM to provide tailored reintegration assistance for individuals. This can also include assistance on arrival in Kabul with customs procedures, medical consultations where necessary, and arranging onward travel to the individual's final destination¹⁷.
29. Mazar-e Sharif is located in Balkh province and is Afghanistan's third largest city. I note that the population of Mazar-e-Sharif is around 590,000 people¹⁸. Mazar-e-Sharif is an ethnically diverse city with Hazaras forming one of several large ethnic groups within the city¹⁹. Various communities live partially mixed within the city, and over a third of the city's population are migrants²⁰. More than one in six residents is a returnee from abroad²¹. The information before me does not support the view that serious harm or systematic discrimination against Hazaras or Shia occurs within the city or that the applicant would face serious harm on account his Hazara ethnicity or faith in Mazar-e Sharif. The European Asylum Support Office (EASO) notes that recent arrivals can be at a disadvantage relative to those already living in the city who can make use of existing networks to procure work²², but does not indicate that Hazaras are singled out for discrimination. EASO quotes UNHCR confirmation that the civil registry department in Mazar-e Sharif is functional and it had not observed discriminatory practices in regard to those attempting to obtain proof of status or other civil documentation²³.
30. In terms of the security situation in Mazar-e Sharif, UNAMA did not list any sectarian Shia attacks occurring in Mazar-e Sharif, and just one unattributed sectarian attack on Shia in Balkh province as a whole in 2016²⁴. Mazar-e Sharif itself only had one major attack for 2016, which

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

UNAMA, "Afghanistan Annual Report on Protection of Civilians in Armed Conflict: 2016", 6 February 2017, CISED50AD201

¹⁴ DFAT, "DFAT Country Information Report Afghanistan 18 September 2017", 18 September 2017, CISED50AD5680

¹⁵ EASO, "Key socio-economic indicators, state protection, and mobility in Kabul City, Mazar-e Sharif, and Herat City", European Asylum Support Office, 1 August 2017, CISED50AD5465

¹⁶ Ibid

¹⁷ Australia: Department of Immigration and Citizenship (DIAC), "Memorandum of Understanding between the Government of Australia, the Government of the Islamic Republic of Afghanistan and the United Nations High Commissioner for Refugees (UNHCR) on migration and humanitarian cooperation", 17 January 2011, CX256576

¹⁸ EASO, "Key socio-economic indicators, state protection, and mobility in Kabul City, Mazar-e Sharif, and Herat City", European Asylum Support Office, 1 August 2017, CISED50AD5465

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid

²² Ibid

²³ Ibid

²⁴ UNAMA, "Afghanistan Annual Report on Protection of Civilians in Armed Conflict: 2016", 6 February 2017, CISED50AD201

focused on the German consulate and was attributed to Taliban retaliation for German involvement in anti-Taliban operations²⁵.

31. I am not satisfied that the applicant faces a real chance of harm in Mazar-e Sharif on the basis of his Shia faith and Hazara ethnicity, or due to the general security situation there.

Returnee from a western country / Unauthorised disclosure of personal information

32. I accept that the applicant may be regarded as a returnee from a western country.
33. The 2017 DFAT Country Information report notes that DFAT has no information to suggest that returnees from western countries attract negative attention from state authorities for having sought and failed to gain asylum²⁶. The same report says that DFAT assesses western returnees as not facing a significantly higher risk of violence or discrimination than other Afghans with a similar ethnic and religious profile²⁷.
34. The applicant has shown the ability to successfully integrate into a country with a very different culture and whose language he did not speak on arrival. He has been able to not only sustain himself but remit money back to his family. He is able to speak, read and write Hazaragi and Urdu. In Mazar-e Sharif, he will have the advantage of residing in a city with a significant Hazara population whose language he shares. I note that he may have acquired an accent in Australia. However, as noted above, a third of Mazar-e Sharif's population are migrants and one in six of the population has returned from abroad. The information before me does not support the view that people are discriminated against or targeted in Mazar-e Sharif on the basis they have an accent. Although the applicant has spent time in Australia and been exposed to Australia attitudes, he remains a practising Shia. I note, too, that there is a sizeable Hazara contingent in Mazar-e Sharif²⁸.
35. I accept that the applicant was subject to unauthorised disclosure of his personal details (the "data breach") by the Department of Immigration. It is possible this information may have been accessed and viewed by the Afghani government, and also by anti-government elements. However, there is nothing to indicate that the applicant would be subject to undue attention from the Afghani Government on account of seeking protection in Australia. Article 39 of the Afghani constitution guarantees the right of Afghani citizens to travel outside the country and return²⁹. The Afghani Government is well aware that some of its nationals have sought protection in Australia and is willing to accept such people back in to the country, as evidenced by the MOU cited above. Even if that data was somehow in the hands of AGEs, there is nothing to indicate that they would have any interest in targeting the applicant on that account, any way of relating that data back to a specific individual or any way of knowing if and when the applicant had re-entered the country. The data breach occurred while the applicant was detained and some years before the applicant made a SHEV application in June 2017. I am not satisfied the information released about the applicant would have disclosed whether or not the applicant had sought protection in Australia, or the nature of his claims. The information before me does not suggest that any individuals returning to Afghanistan have been targeted for reasons relating to the data breach.

²⁵ UNAMA, "Afghanistan Annual Report on Protection of Civilians in Armed Conflict: 2016", 6 February 2017, CISED50AD201

²⁶ DFAT, "DFAT Country Information Report Afghanistan 18 September 2017", 18 September 2017, CISED50AD5680

²⁷ Ibid

²⁸ EASO, "Key socio-economic indicators, state protection, and mobility in Kabul City, Mazar-e Sharif, and Herat City", European Asylum Support Office, 1 August 2017, CISED50AD5465

²⁹ Ibid

36. I am not satisfied that the applicant faces a real chance of harm in accessing or residing in Mazar-e Sharif as a Hazara Shia returnee from a western country whose personal details were disclosed.

37. I am not satisfied the applicant has a well-founded fear of persecution in Mazar-e Sharif.

Refugee: conclusion

38. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a)

Complementary protection assessment

39. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

40. Under s.36(2A), a person will suffer 'significant harm' if:

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

41. I have found that while the applicant may face a real chance of persecution in Kabul that risk does not extend to the entire country, and I am not satisfied he faces real chance of any harm in, or in accessing Mazar-e Sharif from the Afghani government, the Taliban, Sunni extremists or other AGEs on account of his profile as a Hazara Shia his time spent abroad, due to him being a returning asylum seeker, the data breach, or the general security situation. Based on the same information, I find that the applicant does not have a real risk of suffering significant harm in Mazar-e Sharif.

42. In accordance with s.36(2B) of the Act, there is taken not to be a real risk of significant harm if it would be reasonable for the person to relocate to another area of the country where there would not be a real risk of significant harm. Mazar-e Sharif is such a place. For the following reasons, I am satisfied it is reasonable, in the sense of practicable, for the applicant to relocate to Mazar-e Shari.

43. I have taken careful note of the challenges present for internally displaced persons (IDPs) or returnees in that city, including a lack of humanitarian aid and an economic downturn in the

area³⁰. However, the applicant has shown the ability to successfully integrate into a country with a very different culture and whose language he did not speak on arrival. He has been able to not only sustain himself but remit money back to his family. He has worked as [an occupation], performed a range of jobs at [workplace], and worked in retail. He possesses English skills through the acquisition of a [qualification] in English, as well as speaking, reading and writing both Hazaragi and Urdu. He is young and in apparent good health. I consider that all these factors will assist him in securing employment.

44. I note the contention in the agent's submission that the applicant has "no familial links or societal connections" to Kabul and that this might equally apply to Mazar-e Sharif. However, the applicant has managed to live separately from his family for some years in another country. He is now older and more mature than he was when he left his family to undertake the voyage to Australia. I also note his employment experience and demonstrated capacity to work, and the other advantages listed above. EASO quotes research that indicates some returnees have benefited from their migration, and the skills and experience acquired overseas have increased their employability in the job market³¹. The applicant has acquired English language skills and experience in [different industries] since his arrival in Australia.
45. I accept that the agent's argument that upon arrival as a minor, the applicant received an elevated level of support. However, it is also clear that upon reaching legal adulthood he has successfully begun living independently - completing a course of English study, maintaining employment and commencing a relationship. I note that he appears to have moved off Centrelink benefits and into paid employment almost as soon as he was legally allowed to work, which further attests to his general adaptability and resilience. In the first six months of 2017 alone, he was able to remit several thousand dollars back home to his family in [Country 1] while also supporting himself in Australia.
46. I am satisfied that in the circumstances it is reasonable for the applicant to relocate to Mazar-e Sharif, an area of the country where there is not a real risk that he will suffer significant harm.

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.

³⁰ EASO, "Key socio-economic indicators, state protection, and mobility in Kabul City, Mazar-e Sharif, and Herat City", European Asylum Support Office, 1 August 2017, CISEDB50AD5465

³¹ Ibid

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.