



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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PAKISTAN  
IAA reference: IAA18/05122

Date and time of decision: 13 September 2018 11:08:00  
K Allen, Reviewer

**Decision**

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

*Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Pashtun Sunni Muslim man from the Federally Administered Tribal Areas (FATA) in Pakistan. On 13 July 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. On 9 June 2018 a delegate of the Minister for Immigration refused to grant the visa on the basis that the applicant was not owed protection.

### 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 10 July 2018 the applicant provided a nine page submission in relation to his claims and a statutory declaration. This submission was prepared by a migration agent and contains argument about the applicant's protection claims and the delegate's findings and also makes arguments about accepting new information and provides reasons for exceeding the limits set by the *Practice Direction for Applicants, Representatives and Authorised Recipients*. In short the agent states that he cannot provide ongoing representation to the applicant but notes that the applicant faced a number of barriers to presenting his claims to the delegate including that the applicant: has limited English and experience with migration law; was not legally represented; was misunderstood by the delegate in relation to aspects of his claim; had difficulty with dates and details due to the passage of time; and had personal family stressors that impacted him at interview. I accept that the applicant was not represented at the SHEV interview and that the delegate challenged his claims about working for a Non-Government Organisation (NGO) for which the applicant has subsequently provided some evidence. I have considered his submission in full.
5. Pages one to three of the submission contain argument about whether the content of the submission includes new information or whether it is merely further detail and clarification. In the case that the IAA considers that the applicant has provided new information, the applicant submits that the IAA should consider the argument in IAA decision IAA17/03061 of 3 May 2018, which it is purported considered whether an unrepresented applicant could provide country information. This in itself is new information which was not before the delegate. This information pre-dates the delegate's decision and as it was provided to the IAA, I am not satisfied that it could not have been provided to the delegate prior to the decision being made. The applicant secured the assistance of a migration agent to prepare his SHEV application and his submission to the IAA and he has not explained why he did not use the services of the same agent or another agent to prepare a submission of information including country information for the Department. Further, I am not satisfied that the applicant could not have sourced and provided his own country information without representation. I am also not satisfied that this case reference is credible personal information about the applicant, which was not previously known and, had it been known, may have affected the consideration of the applicant's claims.
6. Pages seven and eight of the submission contain argument about the applicant's fear of harm as a result of his Pashtun ethnicity and working for an NGO. In support of the argument the agent has referred to news articles about rallies for Pashtun rights in Lahore and Peshawar in

Pakistan in April 2018 and risks for aid workers in Pakistan in January 2013. This information does not appear to have been before the delegate. Only the very briefest of quotes have been given. A copy of the materials has not been provided. From the information provided the articles all pre-date the delegate's decision and could have been provided in the period between April 2018 when the last article was published and June 2018 when the decision was made. On page four of the submission the applicant argues that the country information provided in the submission is objectively personal and credible as is provided by the applicant and is from credible sources. I am not satisfied that the information provided is personal as it refers to country information about the treatment of Pashtuns generally by the police and the security conditions for aid workers. The applicant has not satisfied me as to either of the limbs of s.473DD(b) and I have not considered this new information.

7. Page eight of the submission contains a request for the IAA to interview the applicant for reasons including the applicant's lack of English language skills, unfamiliarity with Australian migration law, lack of legal representation and relatively short length of SHEV interview. Section 473DB of the Act sets out that the IAA must review the decision on the papers without accepting or requiring new information and without interviewing the applicant. This is subject to the other provisions of Part 7AA of the Act, including Division 3 which provides for discretion to get new information and an obligation to seek comment on certain adverse new information. In considering this submission I have had regard to the fact that the applicant was previously interviewed by the Department with an interpreter and he would still not necessarily have legal representation if interviewed again. I consider that the applicant has had the opportunity to set out his claims in full and has provided documentation in support of those claims. He has also provided additional argument directly to the IAA in his written submission and statement. There has not been any claim of a change in the applicant's circumstances and the reasons put forward as to why the applicant needs an interview do not in my opinion, warrant it. I decline to interview the applicant.
8. The applicant's statutory declaration contains argument about why he disagrees with the delegate's decision and provides clarification of matters raised by the delegate which I do not consider to be new information. The applicant also advised that his partner has had their baby and that the birth was a stressful time for him. The fact that the applicant's partner was due to give birth was raised in the SHEV interview but the fact of the birth, and associated stress was not before the delegate. While I appreciate the considerable stress that the applicant faces at the prospect of being a new parent and being separated from his family in Australia, I do not consider that information may be relevant to my review of the delegate's decision or my assessment of the applicant's claims for protection.
9. The applicant's statutory declaration also includes a new claim that if he is forcibly returned to Pakistan his partner and child would not be able to go with him. He claims the Taliban would target them because of his former employment with [NGO 1] and he claims that the community does not look favourably on interracial relationships and would subject them to psychological and physical harm. The fact that the applicant is concerned about being separated from his wife and child was previously raised by the applicant at the SHEV interview and is not new information. His claim that his family would be targeted by the Taliban is a new claim and his claim that they would be harmed for being in an interracial relationship is also a new claim. The applicant's wife and child are not a party to his SHEV application so I have not considered the claims of harm against them in this decision.

## Applicant's claims for protection

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10. The applicant's claims can be summarised as follows:

- He was born into a Pashtun, Sunni family in [his home] village in the Lower Kurram Agency District of the FATA in Pakistan on [date].
- He attended school in Lower Kurram Agency until [grade] and then worked as [an occupation] until the age of [age] when he heard that there was work available at [NGO 1] in nearby [named town].
- In 2012 he obtained six months work with [NGO 1] as a volunteer [for] [a certain task]. In January 2013 he was placed on a contract to do the same role as a paid employee.
- About two or three weeks after he began paid work at [NGO 1], he received a letter from the Taliban warning him to stop working for [NGO 1] because he was helping people who were running away from the Taliban. The Taliban asked him to join them.
- He believes another employee at [NGO 1] received a similar letter from the Taliban and that man ran away to Karachi to avoid joining the Taliban and was subsequently killed by them.
- The letter he received gave him a three month deadline to join the Taliban. During that time he continued to work at [NGO 1], obtained a further three pay-checks, and obtained a passport and visa. He left Pakistan via Lahore before the end of the deadline.
- After he left Pakistan his father was approached by a Taliban representative who asked about his whereabouts. In order to keep his family safe, his father told the Taliban that he did not know where his son was, and that he had disowned and disinherited him. There was a document signed and witnessed to this effect which was accepted by the Taliban.
- He cannot return to Pakistan because he will be killed by the Taliban because he refused to join them and he is at increased risk if they find out he sought asylum and lived in a Western country.

## Factual findings

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### Identity

11. The applicant claims to be of Pashtun ethnicity and is a Sunni Muslim who was born and lived in [his home] village in the Lower Kurram Agency District of the FATA in Pakistan. He had not lived anywhere else before fleeing to Australia. The applicant gave a reliable account of life in the FATA and country information confirms that the population in lower Kurram Agency is predominantly Sunni<sup>1</sup>. In support of his claimed identity the applicant has provided a copy of his Pakistani passport, which is still valid, and a copy of his National Identity Card. I consider that the applicant has given a truthful account of his identity. I accept his identity, ethnicity and religion are as claimed. I consider that [his home village] in the FATA is the area that I am assessing his claims against and Pakistan is the receiving country.

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "Pakistan Country Information Report 1 September 2017", 01 September 2017, CISED50AD5515, 3.61

## Employment at [NGO 1]

12. The applicant claims that he worked for [NGO 1] voluntarily for approximately six months in the hope of obtaining paid employment. He claims he obtained paid employment with [NGO 1] in January 2013 as a [volunteer] for [a certain task]. In support of his claim he provided a letter of appointment noting his paid employment commencement date as [being in] January 2013 at the location [in] Kurram Agency and that his salary was [amount] rupees per month. He also provided a copy of his signed employment contract which notes that [NGO 1] is a non-governmental, not for profit humanitarian organisation that is funded by different local and international donor agencies. The contract appears to be genuine and I have no reason to consider that it is a fake.
13. At the SHEV interview the applicant provided further detail about his work at [NGO 1] including information about his role, his colleagues and details of what he did each day. He stated that the program receives funding from [Aid Agency 1] and [details deleted]. [Details of task deleted]. In the referred material there is a print out from [NGO 1's social media site] and a news article from [media source] dated [in] February 2010 which states that [Aid Agency 1] signed an agreement with [NGO 1]. I accept that the applicant was able to obtain paid employment with [NGO 1] in January 2013 after undertaking a period of voluntary employment and that [NGO 1] is funded by a range of donors including [Aid Agency 1] to provide [a certain service].

## Letter from the Taliban

14. The applicant claims that he began having problems after he commenced paid employment with [NGO 1] when after about two or three weeks he received a letter from the Taliban. At the SHEV interview he elaborated on receiving the letter by explaining that the letter addressed to him had been passed to his father by a Taliban representative in the mosque. The letter had the stamp of the Taliban and the name and signature of the Taliban regional leader. The letter said that he must stop working for [NGO 1] as he was helping people that were running away from the Taliban. The letter demanded that he go and work for the Taliban and said that they would give him new training and tasks to do. The letter said that, if he did not leave [NGO 1] and join the Taliban, they would 'do something bad ' to him. Although the letter did not clearly state the consequences of not joining the Taliban, he understood that this was a threat and he was at risk of harm if he did not follow the instruction. He feared that if he refused to follow the demand and join the Taliban he would have been killed. If he joined the Taliban he feared he would be killed by other forces such as the Pakistan or US Army that were fighting the Taliban. He claims that his father told him not to speak to anyone about the letter and to let him deal with it. He thinks his father destroyed the letter.
15. Country information supports the applicant's account of the involvement of the Taliban in daily life in the FATA and notes that there has been an increasing Talibanisation of the region since the toppling of the Taliban in Afghanistan in 2001. Many Afghan Taliban settled in the FATA and are mostly Pashtun. Their policies include a strict application of conservative Islamic principles and this has resulted in violence against civilians<sup>2</sup>. In light of the presence of the Taliban in the FATA and their views about the US, it is plausible that applicant's activity may have raised the interest of the Taliban and resulted in them sending a letter to the applicant to request that he stop working for [NGO 1].

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<sup>2</sup> European Asylum Support Office, "EASO Country of Origin Information Report: Pakistan Security Situation", 1 July 2016, CIS38A80121710, 1.1.1

16. I do not accept the applicant's claims that the Taliban sought to recruit him to their organisation or face death and that they gave him a three month deadline to both cease work with [NGO 1] and decide to join them. The claimed of an implied death threat is not consistent with allowing the applicant to resume his employment for a further three months while he decided what to do. Further the applicant has not provided a clear timeline as to when he finished his employment and where he resided after the deadline. In his SHEV application he claims he received the threat in January and he provided documentary evidence that he was issued a passport in [2013] but continued working until his departure in May 2013. I consider that if he was in fear of his life he would have departed as soon as he received his passport. In his SHEV interview he stated that he continued working after receiving the letter, arranged his passport and his father arranged for his passage with a smuggler. He says he hid but provided no detail of when or where he was in hiding and he did not explain why he did not leave in February. In statement to the IAA he clarified that he left his job before the deadline expired and went into hiding. He provided no detail about how long or where he was in hiding. He stated that he had to remain in Pakistan until mid-May as he was waiting for his passport. I am not satisfied that the applicant provided a truthful and complete account of his time between January 2013 when he received the letter to stop working at [NGO 1] and May 2013 when he departed the country. I consider that the applicant ceased working as requested and I do not accept that he was fearful of being harmed but the Taliban after that time.

#### **Co-worker letter**

17. The applicant claims that a factor that contributed to his fear of harm from the Taliban was the fact that he heard that one of his more senior co-workers at [NGO 1] received a similar letter from the Taliban. This man ran away to Karachi to avoid joining the Taliban and was killed by them as a result. His body was returned to a village near where he lived and the Taliban sent a letter to his family stating that they had killed him as he had not followed their instruction to join the Taliban. The applicant was asked about this aspect of his claim at the SHEV interview. He was unable to explain when exactly when his colleague received the letter, but considers that it must have had the same three month deadline. He was told that the body was returned in February 2013 and a letter sent to the Iman by the Taliban accepting responsibility. He claims he did not see the letter and is speculating as to the contents. He does not claim that other co-workers received these letters. I consider that his responses when questioned about this claim were vague and speculative, even allowing for the passage of time, and while I accept that the applicant may have been told about this claimed event, I am not to be satisfied that it occurred or that his colleague's circumstances were the same as that of the applicant or that his colleague was killed because he refused to join the Taliban.

#### **Approaches to father**

18. The applicant claims that shortly after he left, his father was approached by a Taliban representative in the mosque who asked about his whereabouts. He understands that his father said he did not know where he was. He claims the Taliban subsequently came to his family home to find out where he was and his father told them that he had disowned him and that he was no longer his son and could no longer inherit the family's property. He claims there was a document signed and witnessed to this effect which was accepted by the Taliban and his father did this to protect the rest of his family, and particularly his brothers, still living in Pakistan. He claims that this information was conveyed to him by his father but there is no independent evidence to support that this occurred. As I do not accept the applicant's claim

that the Taliban wanted to recruit him, I therefore do not find it logical, nor do I accept that the local Taliban approached his father who told them that he has been disowned by him in order to assure the safety of his family.

## **Refugee assessment**

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19. 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**

20. 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.

### *Anti-Taliban political opinion*

21. I accept that the applicant was employed by an NGO that was being funded by [Aid Agency 1] and was potentially aiding people fleeing from the Taliban. I accept that the Taliban sent him a letter telling him to cease working for the NGO and I am satisfied that he did cease his employment and is no longer working for [NGO 1]. He has not indicated that he has worked in any similar capacity since then and he has not proposed returning to this kind of employment on his return to Pakistan. Given all these factors I do not consider that the Taliban has any ongoing interest in the applicant because of his past brief employment with [NGO 1].
22. I accept that the applicant departed Pakistan [in] May 2013 and has concerns about his security on his return including fear of harm from the Taliban. Over five years have passed since the applicant left Pakistan and DFAT assesses that the security situation has improved in Pakistan since then and particularly since June 2014 when the Pakistan Armed Forces launched Operation Zarb-e-Azb, a major offensive against terrorist groups across the country. Operation Zarb-e-Azb initially targeted terrorist groups in North Waziristan in the FATA, including the Tehreek-e Taliban Pakistan (the Pakistani Taliban or TTP), and gradually spread to other parts of the FATA and Khyber Pakhtunkhwa province, with smaller, intelligence-

based operations taking place across the country. The term Zarb-e-Azb has also expanded to refer to operations by the army and the Rangers, a paramilitary security force, in Balochistan and Karachi against various other terrorist, separatist and criminal groups. DFAT assess that violence in the FATA generally declined during 2016. According to the FATA Research Centre, the number of violent incidents (of all types) declined by 25 per cent across the FATA in 2016, leading to a 60 per cent decline in the number of casualties compared to 2015. Despite the relative decline in violent incidents, violence across the region was still prevalent. The FATA still had the third-highest number of deaths from terrorism-related incidents across all regions of Pakistan according to the Pak Institute for Peace Studies, with 163 people killed and 221 people injured in nearly 100 terrorism-related incidents during 2016. This represents around 18 per cent of all terrorism-related deaths in Pakistan in 2016, despite the FATA only having around two per cent of Pakistan's population<sup>3</sup>. I accept that there has been a general improvement in the security situation in Pakistan but that there are still incidents of violence in the FATA.

23. I am not satisfied that the applicant has the kind of profile that would place him at a risk of being a target for violence in Pakistan. As noted above, the applicant was formerly employed as a [volunteer] for an NGO briefly in 2013 and he held no position of influence in the organisation. He ceased this employment at the behest of the Taliban and has not resumed, or indicated that he plans to resume that work. The applicant is ethnically Pashtun and a Sunni Muslim and is not a member of any religious or cultural minority group that the Taliban are known to target for sectarian purposes<sup>4</sup>. The applicant has no identifiable links to the Pakistani government, security forces, or any other organisation that Taliban are known to target for political purposes. I am not satisfied that there is a real chance would suffer serious harm the form of injury or death, on the basis of his imputed political opinion as being anti-Taliban.
24. In the SHEV interview the applicant has raised his concern that, if he is returned to Pakistan, he will be separated from his [wife] and Australian baby, and if he is killed by the Taliban he will not be able to support his family. As noted above, I do not consider that the applicant faces a real chance of harm from the Taliban. I am not satisfied that his family would be precluding from travelling to Pakistan with him and I consider that his fears in relation to his family are purely speculative and unsupported by any evidence. I do accept that if he does move back to Pakistan without his family that this will cause him and his family great distress but I consider that it is a matter for the family to decide where they live and I do not consider that he is at risk of harm from the Pakistani authorities on this basis of having a family in Australia.
25. Having considered the applicant's personal characteristics and circumstances, and the range of other evidence before me, I am not satisfied that there is a real chance of harm to the applicant as a former NGO employee, as a person imputed with an anti-Taliban political opinion, as a result of the security situation in Pakistan or being separated from his family in Australia.

*Returning asylum seeker who spent time in a Western country*

26. I accept that the applicant will be returning to Pakistan as an unsuccessful asylum seeker who left Pakistan and has been living in Australia for more than five years. The most recent

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<sup>3</sup> DFAT, "Pakistan Country Information Report 1 September 2017", 1 September 2017, CISED50AD5515, 3.62; Pak Institute for Peace Studies 9, "Pakistan Security Report 2016", 1 January 2017, CISED50AD63

<sup>4</sup> DFAT, "Pakistan Country Information Report 1 September 2017", 1 September 2017, CISED50AD5515, 3.61-3.65

country report from DFAT sets out the treatment of returnees to Pakistan<sup>5</sup>. I consider that the applicant departed the country legally from Lahore airport and, as such, he does not appear to have committed any immigration offences which would draw the attention of the Pakistani authorities. He still has a valid Pakistani passport which expires in 2023. DFAT assesses that those who return voluntarily and with valid travel documentation are typically processed like any other citizen returning to Pakistan. Only those who are returned involuntarily or are travelling on emergency travel documents are likely to attract attention from the authorities upon arrival. As the applicant may be returning involuntarily he will likely be questioned on return at the airport to ascertain whether he is wanted for crimes in Pakistan or whether he committed any offences while abroad. Those who left Pakistan on valid travel documentation and have not committed any other crimes are typically released within a couple of hours and, as the applicant does not have any profile of interest, I consider that this is what would happen to him.

27. Returnees are typically able to reintegrate into Pakistani community without repercussions stemming from their migration attempt and DFAT assesses that returnees to Pakistan do not face a significant risk of societal violence or discrimination as a result of their attempt to migrate, or because of having lived in a western country. There is no information before me to indicate that the Taliban are alerted to the arrival of ordinary people returning from the West and I do not consider that they would be alerted to the fact that the applicant had spent time in Australia for a number of years. DFAT assesses that individuals in Pakistan are not subject to additional risk of discrimination or violence on the basis of having spent time in western countries or because of perceived western associations (such as clothing or accent), despite a generally increasing conservatism and religiosity across the country<sup>6</sup>. I am not satisfied that the applicant faces any chance of harm as a result of seeking asylum, or having spent time in the west.

### **Refugee: conclusion**

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

### **Complementary protection assessment**

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29. 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**

30. 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

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<sup>5</sup> Ibid, 5.18-5.21

<sup>6</sup> DFAT, "Pakistan Country Information Report 1 September 2017", 01 September 2017, CISED50AD5515, 3.140

- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

31. As set out above, I have found that there is not a real chance that the applicant will face harm on his return to Pakistan because of his former employment with [NGO 1], any imputed anti-Taliban political opinion, as a result of the security situation in Pakistan or being separated from his family in Australia or as a failed asylum seeker who spent time in a western country. Real chance and real risk involve the same standard<sup>7</sup>. On the same factual findings, I am similarly not satisfied that the applicant faces a real risk of suffering any harm on those grounds, including significant harm, should he be returned to Pakistan.

#### **Complementary protection: conclusion**

32. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

#### **Decision**

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

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<sup>7</sup> *MIAC v SZQRB* (2013) 210 FCR 505

## Applicable law

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### ***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.