



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA18/05826

Date and time of decision: 19 December 2018 14:29:00

M Brereton, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Sunni Pashtun of the Noorzai tribe from Kandahar Province, Afghanistan. He departed Afghanistan illegally in February 2013 and arrived [in Australia in] July 2013. On 27 February 2017, he made a valid application for a Safe Haven Enterprise Visa (SHEV). A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 10 October 2018.
2. The applicant claimed to fear harm from the Taliban because he had refused to provide them food and had been assaulted by them, and because he has assisted or is suspected of assisting the international forces. He claimed to fear harm from criminal groups who kidnap people for ransom. He claimed to fear harm as a returnee from the West.
3. The delegate accepted the applicant's claims as to ethnicity, religion and origin. The delegate also accepted that the applicant was beaten by the Taliban for refusing to supply food but did not accept that the applicant had an ongoing adverse profile arising from this. The delegate accepted that the applicant may face harm in Kandahar as a returnee from the West but found that he could safely relocate to Kabul and that it was reasonable for him to do so. The delegate found that the applicant did not face a real chance or real risk of relevant harm in Kabul and that he was not a person in respect of whom Australia has protection obligations.

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) (the review material).
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 Sunni and Pashtun who was born and raised in a village near [Town 1], Kandahar Province, Afghanistan. His family belong to the Noorzai tribe. His father died when he was very young. His wife and children remain in the family home with his [family members], who provide for the family and protect them. [Other married family members] live nearby.
 - When he was very young his family fled across the border to Pakistan, to escape the Soviet occupation. They returned after about six years. The applicant has not been back to Pakistan since that time.
 - He completed [number] years of education and then worked for about ten years in the family business, selling [items]. His brothers still operate this business.
 - In about 2003, his brothers helped him to start his own business. He rented a shop and sold [other items]. The shop was about a five minute drive from his home.
 - In 2012, a group of about eight or nine Taliban came to the family home and asked to be fed. The applicant agreed to do so. A few days later the group came back but this

time the applicant refused to feed them. He said that if he did, the village would become a target for the Afghan and international security forces.

- The Taliban said that he must help them and if he did not do so, he must join them for jihad. If he did not, he would be seen as a government supporter and an infidel. He did not help them or join them and they left.
- Three or four days later he was returning home from work. He stopped his motorbike outside the house and was ambushed by a group of men. He was hit [with] the stock of a gun and became unconscious. He thinks the men believed they had killed him. He thinks his brothers took him to the medical clinic.
- He regained consciousness at the clinic and received a dressing and medication. He went home the same day.
- He did not return to his shop because the Taliban now wanted to kill him and would not leave him alone. He stayed at his family house and his brother sold the stock and closed the shop. The applicant went to Pakistan and then came to Australia.
- Men from the Taliban have told his brothers that they will kill the applicant because he was helping the NATO forces. The Taliban has asked where he is and now knows that he is in Australia.
- His family has not reported being threatened or harmed but he is not confident that they tell him everything. His brothers still run [their] business but their lives are at risk.
- The Taliban knows he has lived in Australia and would impute him to be an infidel and a Western spy. His escape to Australia will make the Taliban think he assisted the international forces.
- His time in Australia will lead people to think he has converted to Christianity. They will also think he is an infidel because he has shaved his beard, and that he has committed sins while abroad. This puts him at risk of being informed on to the Taliban.
- He will be kidnapped for ransom by criminal groups who believe returnees from the West are wealthy. He will be killed because he cannot pay a ransom.
- He could not relocate to Kabul because it is only safe if he does not go out and he would not be able to survive. The Taliban has networks and would find him there and he will be kidnapped for ransom. He has no family, friends or networks in Kabul and does not speak Dari well. His employment prospects would be low and he would have to take his family there, so he would struggle to find accommodation, access services and meet his needs.

Refugee assessment

7. 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

8. 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.
9. The applicant has made consistent claims as to his identity, origin, ethnicity and religion. He has provided documentation including a *taskera*¹ and an Afghan driver's licence in support of his claims. I accept that the applicant is a Sunni Pashtun from the Kandahar Province and that Afghanistan is the receiving country for the purposes of this review.
10. The delegate noted that the applicant's false Pakistani passport had been taken and destroyed by the people smugglers, accepted that this was a reasonable explanation for the destruction of this document, and found that s.91WA(1) of the Act did not apply to the applicant. I agree with the delegate and I am also satisfied that s.91WA(1) does not apply to the applicant.
11. The applicant's claims have been generally consistent throughout the application process, including at the interview with the delegate on 26 June 2018 (the interview). The applicant told the delegate that [specified family members] have passed away from natural causes, and said that if he was lying or inventing claims, he would have said that the Taliban had killed them. Although there are some small inconsistencies (considered further below), overall I am satisfied that the applicant is a credible witness.
12. At the entry interview on 29 July 2013 (the entry interview), the applicant claimed that the Taliban was targeting him because he refused to help it, and because he sold goods to the international forces. I have considered the refusal to help further below. In relation to selling goods, the applicant did not further describe what these goods were or how he came to sell them to any international forces. He did not refer to this claim in his SHEV application, which was prepared with the assistance of a migration agent. He did not refer to this claim at the interview, during which the delegate asked a number of questions about the applicant's shop and his claims to fear harm. The applicant's claims as raised in the application and at the interview all relate to his refusal to assist the Taliban in 2013. He did not claim that the Taliban knew of his customers, or accused him of selling goods to the foreign forces. There is no other evidence or information before me in relation to the claim. Even if I accept that the applicant had sold goods to the foreign forces, the evidence before me does not indicate that the Taliban or any other insurgent group was, or has now become aware of this, or that the

¹ Afghan identity document

applicant has suffered any threats or harm for that reason. I am not satisfied on the evidence before me that the applicant had, or has, any adverse profile with any group or person for selling goods to the international forces.

13. The applicant has not claimed that he or any member of his family has suffered any harm, threats, harassment or adverse attention from any group or person prior to 2012. He claims, and I accept, that in 2012, some Taliban came to the family home and asked to be fed. The applicant agreed to do so and the Taliban left. The same men came back a few days later and asked again for food. This time the applicant refused, saying that if he did so the village would be seen as assisting the Taliban and would be bombarded by the Afghan and/or international security forces. The Taliban told the applicant that Afghanistan did not belong to the foreign forces and that he should help the men or join them for jihad. If he did not do this, he would be suspected of working with the government and of being an infidel. He again refused to feed the men and they left.
14. A few days after these events, the applicant was returning from work. He parked his motorbike near his home and was ambushed by a group he says were the Taliban. They struck him [with] a gun and he fell unconscious. When he woke up he was at a private clinic, where his wound was dressed and he was given medication. The delegate asked what the reason for the attack was and the applicant said that the Taliban wanted to kill him because he had refused to help or join them. The delegate asked why the Taliban had not shot him and had left him alive. The applicant said he thought the Taliban may have believed he was dead and that is why the men left him.
15. I accept that the applicant refused to help the Taliban and that he was criticised and threatened as a result. I do not consider it plausible, and I do not accept, that the Taliban believed the applicant had been assisting the government or the international forces. I consider that if he had such a significant profile, the Taliban would have killed him. While I accept that he was ambushed and beaten as he has claimed. I am not satisfied that the men intended to kill him in this attack. As there were a number of armed men and the applicant was alone, the men had ample opportunity to kill him if they wished to do so. I do not consider it plausible that, if this was their intention, they would have hit him and then left without determining whether he was in fact dead. Having regard to all of the above, while I accept that the applicant suffered injuries at the hands of the Taliban, I am satisfied that this was a single incident of revenge for not providing food. Further, I note that the Taliban did not return to the house, look for the applicant or approach his brothers at any time during the months that the applicant remained in Afghanistan after this incident. Having regard to all of the above, I am not satisfied that the applicant had any adverse profile with the Taliban, or that his surviving this attack would lead to him being targeted for further harm now.
16. The applicant will be returning as a returned asylum-seeker who has been in a Western country. He told the delegate that his children are aware that he is in Australia and have told other people this. It is plausible, and I accept, that persons outside his family know that he is in Australia. He also claims that the Taliban knows he is in Australia and that the Taliban has been asking about him and has said this to his brothers. I do not accept that the applicant was of ongoing adverse interest to the Taliban after the incident outside his house and I note that the Taliban did not look for him or approach his family while he was still in Afghanistan. I do not accept that his profile with the Taliban is of such degree that the Taliban would be seeking him or asking about him after he left Afghanistan. I do not accept that the Taliban has spoken to his brothers about him, accused him of supporting foreign forces, or that it has commented on, or is otherwise aware of, his presence in Australia.

17. The Australian Department of Foreign Affairs and Trade (DFAT) reports that it has no information to suggest that returnees from western countries attract negative attention from state authorities for having sought and failed to gain asylum, although DFAT is aware of occasional reports alleging that returnees from western countries have been kidnapped or otherwise targeted by insurgent groups based on their having spent time in a western country. However, DFAT also states that it understands that most returnees take measures to conceal their association with the country from which they have returned, and keep a low profile on return. DFAT further states that people in this situation do not face a "significantly higher risk" of violence or discrimination than other Afghans with a similar ethnic and religious profile.² I am not considering whether the applicant faces a "significantly higher risk" but rather, whether he faces a real chance or real risk of relevant harm.
18. The applicant claims that his time in Australia will lead people to believe that he has converted to Christianity and/or has committed sins here, and that this may in turn lead these people to inform on him to the Taliban. He also claims that he will be considered to be an infidel because he has shaved his beard. The information before me does not indicate that merely having been in the West will, of itself, lead to such suspicions. The applicant has not claimed that any person in his village has made any accusations about him to his family. I am not satisfied that the applicant's fear is any more than speculative and I am not satisfied that he faces a real chance of being imputed as a Christian or to have committed sins.
19. The applicant told the delegate that he has shaved his beard and that this will mark him out for harm as an infidel. The delegate asked why he could not grow his beard back but the applicant did not answer. The information before me does not indicate that being clean shaven is of itself, reason to impute someone as having returned from the West or being an infidel. In any event, the applicant has not claimed that he has abandoned his religion or that he shaved his beard for any religious, anti-religious, or any other reason. He has not claimed that he is unable, or unwilling, to re-grow his beard. I am satisfied that the applicant could re-grow his beard, that doing so would not be an impermissible modification of behaviour as contemplated by s.5J(3), and that it would be reasonable in all of the circumstances.
20. The applicant's family resides in the same house and the applicant's village and the nearby town are both relatively small. I accept that the applicant's return to his village may generate discussion and comment amongst the villagers but, as I do not accept that the applicant will be imputed with any adverse profile by the villagers or other local people, I do not accept that they will inform on him to the Taliban for that reason.
21. I accept that even if he is not reported to the Taliban, the applicant may nevertheless be stopped by the Taliban in his home area. Even if he is stopped, I am not satisfied that he has any adverse profile arising from his previous interactions with the Taliban. While he claims that he may be harmed because of having been in the West, he would need to be identified as such to suffer harm from the Taliban for that reason. The applicant has not claimed that he has, or displays, any other feature, accent, mannerism, characteristic or any other indications that he has been in the West. He has not claimed that he will need, or want, to carry any documents or any other evidence that may link him to the West.
22. Having regard to all of the above, I am not satisfied that there is any more than a remote chance that the applicant will be identified by or to the Taliban as having been in the West, or that he will be imputed as being a Christian, an infidel, or having committed sins in the West.

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

I am not satisfied that he faces a real chance of harm for these, or any combination of, these reasons.

23. The applicant has claimed that he may be imputed as being wealthy because he has been in the West and that he could be kidnapped for ransom and harmed as a result. He has not claimed to fear harm for this reason from local villagers or groups who know him, or who know that he has been in Australia. I have noted above that he has not claimed that he has, or displays, any feature, accent, mannerism, characteristic or any other indications that he has been in the West (apart from being clean shaven). He has not claimed that he will need, or want, to carry any documents or any other evidence that may link him to the West. The information before me does not indicate that persons who are clean shaven are imputed as having been in the West and being wealthy but in any event, the applicant could re-grow his beard. Having regard to all of these factors, I am not satisfied that there is more than a remote chance that the applicant will be imputed with being wealthy and being targeted for kidnapping.
24. The applicant told the delegate that his brothers continue to operate [their] business and said that their lives are at risk. He has not provided any further evidence in relation to this claimed risk, nor has he claimed that it is any way related to his claimed personal profile. I am satisfied that the applicant's reference to this risk is a reference to a risk of general harm and is not a claim that his brothers have any other adverse profile with any insurgent or other group.
25. The applicant is a Sunni Pashtun and a member of the Noorzai tribe from Kandahar. Information before me indicates that Kandahar was the birth place and de-facto capital of the Taliban and it is considered to be a politically and strategically important province. As of 2017, it continues to have a Taliban presence and violence in the area remains high. It is regarded overall as a high-combat area, one of Afghanistan's most conflict-affected provinces, and to have a high intensity of security incidents. Kandahar city was the scene of a major bombing in January 2017 which killed the deputy governor, the United Arab Emirates Ambassador and five Emirati humanitarian workers. This attack was later claimed by the Taliban. I am satisfied that the Taliban remains present and active in Kandahar, but the information does not indicate that Sunnis, Sunni Pashtuns, or members of the Noorzai tribe have been targeted for harm in sectarian violence in Kandahar because of their ethnicity or religion.
26. According to information before me³, Pashtuns are historically the dominant ethnic community in Afghanistan, and they have actively fought to keep their predominance throughout Afghan history. The Taliban, which arose following the Soviet invasion and subsequent withdrawal, is mainly Pashtun. Since the fall of the Taliban in 2001, however, there has been a shift in power and the central government is largely dominated by Uzbeks and Tajiks. Nevertheless, Pashtuns remain the largest ethnic group in Afghanistan and are assessed as likely to regain their influence.⁴
27. The same report notes that there have been reports of Pashtuns in minority Pashtun areas being subjected to violence by dominant Uzbeks and Tajiks, often in revenge for the Taliban's past actions; however, as noted above, Kandahar is a Pashtun majority area and the spiritual

³ European Asylum Support Office (EASO), "Afghanistan: Security Situation December 2017", 1 December 2017, CISEDB50AD8102; DFAT, "DFAT Country Information Report Afghanistan 18 September 2017", 18 September 2017, CISEDB50AD5680.

⁴ Minority Rights Group International (MRG), "Afghanistan - Pashtuns", 1 January 2018, CXBB8A1DA32610

home of the Taliban. I am not satisfied that there is a real chance that Pashtuns in Kandahar will be targeted by other ethnic groups.

28. The two major Pashtun tribal groups in [Town 1] area are the Noorzai (the applicant's group) and the Achekzai. These groups are reported to be involved in a feud which traces its origins back to the Noorzai control of the border crossing into Pakistan during the Taliban era.⁵ It has been reported that members of the Noorzai tribe have turned to the Taliban because of marginalisation by the government.⁶ The information does not indicate that the Noorzai are targeted by the Taliban and I also note that the applicant has not made any claims to fear harm for any other reason because of being Noorzai.
29. In relation to generalised violence, information before me⁷ indicates that during the period 1 September 2016 to 31 May 2017, Kandahar province experienced 1,762 security incidents. The majority of these (1,036) were armed confrontations between military and insurgents, or airstrikes against insurgents. The [Town 1] district reported [number] incidents and although these are not further broken down, the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) did not include [Town 1] in its list of severely conflict-affected or high civilian casualty districts in Kandahar.
30. The same report notes that Kandahar has the highest number of civilian casualties in Afghanistan after Kabul and Helmand but it has nevertheless seen a reduction in the total number of civilian casualties. In the first six months of 2017, the province reported 162 civilian deaths and 233 injuries (out of a population estimated at 1,279,520). The leading cause of civilian casualties in Kandahar province was improvised explosive devices (IED), and Kandahar also recorded the highest number of civilian deaths from unexploded ordnance in Afghanistan. Civilians were also killed and injured as bystanders in targeted attacks against the security forces or government, or indirectly during ground fighting. The United Nations Assistance Mission Afghanistan (UNAMA) also documented civilian casualties in the [Town 1] district caused by cross-border shelling by Pakistan. [Details deleted.]
31. I accept that there remains a risk to civilians from generalised violence in Kandahar. As the information above indicates, this is mostly attributed to indirect violence or being harmed as bystanders, rather than direct attacks on civilians themselves, while IED and other explosive ordnance add to the civilian casualties. I take into account the overall number of civilian casualties against the population of Kandahar, that the applicant's family has remained in the family home in [Town 1] and the applicant has not claimed that they have ever been affected by generalised violence, and the information above that [Town 1] has not been identified as one of the more conflict-affected parts of Kandahar. Having regard to all of these factors and the information above, I am not satisfied that the applicant faces any more than a remote chance of being harmed as a result of generalised violence in Kandahar.
32. I have considered whether the applicant faces a real chance of harm accessing Kandahar. According to DFAT, most returnees to Afghanistan arrive at Kabul airport. There have been a number of attacks in and around Kabul airport but these have been mainly targeted against government or security facilities or personnel, and do not appear to have targeted civilian passengers or returnees. Violent attacks have also continued throughout Kabul city but the information before me indicates that these have targeted the government or police and

⁵ Naval Postgraduate School, Program for Culture and Conflict Studies, "Kandahar - Provincial Overview", 1 September 2010, CIS21222.

⁶ Afghanistan Research and Evaluation Unit (AREU), "Politics and governance in Afghanistan: The case of Kandahar", 22 June 2015, CISEC96CF14884.

⁷ [Source deleted].

security services, workers or contractors employed by foreign government operations, and members of the Shi'a and/or Shi'a Hazara communities.⁸ Given the nature of the targets attacked in Kabul, and the short period of time that the applicant would need to spend there before travelling on to his home area, I am not satisfied that the applicant will face more than a remote chance of harm in Kabul before travelling on to Kandahar.

33. There is no information before me which indicates that Kandahar is accessible by air from Kabul and I accept that the applicant will need to travel by road to access his home area. The DFAT and EASO reports indicate that road travel is dangerous in parts of Afghanistan, but they do not indicate that Sunnis or Sunni Pashtuns, who have no links to the government, security or foreign forces, or no adverse profiles with militant groups, are targeted for harm on the roads. The applicant has not claimed that he or his family have any links to the government, security or foreign forces and I am not satisfied that he will be imputed with any such links, or be of any other adverse interest to any militant group, for any reason, including his past history. I have also noted above that apart from being clean shaven, the applicant does not claim to display any characteristic or mannerism which will lead to him being suspected of having been in the West, or that he will need, or want, to carry or display any document or other information which might so identify him. There is no information before me which indicates that being clean shaven, of itself, will lead to any adverse interest by any group (including criminal groups), any suspicion that the person has been in the West, or any suspicion that the person is wealthy as a result. Even if the applicant was to be stopped during the single journey he would need to make from Kabul to Kandahar, I am not satisfied that he would be seen as anything more than a Sunni Pashtun civilian with no other profile and as such, I am not satisfied that he would be targeted for harm by any insurgent group, organisation or criminal element.
34. Having regard to all of this, as well as the applicant's background, profile and experiences, I am not satisfied that the applicant faces a real chance of harm: from the Taliban or any other militant, insurgent or criminal group for any reason; as a Noorzai, a Sunni or a Pashtun; accessing and remaining in Kandahar province; or as a returned asylum-seeker who has been in the West.

Refugee: conclusion

35. 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

36. 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

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

⁸ DFAT, "DFAT Country Information Report Afghanistan 18 September 2017", 18 September 2017, CISED50AD5680.

- 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.

38. I have found above that the applicant does not face a real chance of harm: from the Taliban or any other militant, insurgent or criminal group for any reason; as a Noorzai, a Sunni or a Pashtun; accessing and remaining in Kandahar province; or as a returned asylum-seeker who has been in the West. As 'real chance' and 'real risk' equate to the same threshold⁹ and for the same reasons as given above, I am not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's removal to Afghanistan, the applicant will face a real risk of significant harm for any of, or any combination of, those reasons.

Complementary protection: conclusion

39. 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.

⁹ *MIAC v SZQRB* (2013) 210 FCR 505.

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.