



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA21/09654

Date and time of decision: 24 September 2021 16:00:00

C Wilson, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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. He arrived in Australia as an unauthorised maritime arrival [in] March 2013. He applied for a Safe Haven Enterprise Visa (SHEV) on 18 May 2016.
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused the application on 10 May 2017. The delegate accepted the applicant had been taken off a bus and detained by the Taliban, before escaping, but did not accept he was of ongoing adverse interest to the Taliban. The delegate found the applicant did not face a real chance of persecution or real risk of significant harm in Kabul for reason of his ethnicity, religion, past work, imputed political opinion, or returning from a western country.
3. A reviewer of the IAA affirmed the delegate's decision on 16 February 2018¹ and the applicant sought judicial review. By order of [a named judge] dated [in] June 2021 the first IAA decision was quashed and the matter remitted for redetermination.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. During the first review the applicant's previous representative provided a large amount of country information relevant to the security situation in Kabul, Herat, and Mazar e -Sharif that post-dated the delegate's decision. I accept this information could not have been provided before the decision was made. Some of the reports contain reference to identified persons, but they were provided as country information relevant to the security situation and reasonableness of relocation in Afghanistan. They are not credible personal information that may have affected the consideration of his claims. Although s.473DD(b)(i) is met, I am not satisfied there are exceptional circumstances to justify considering this information as it is now dated information from more than 3 years ago, there have been significant changes in Afghanistan since that time, and (as discussed below) I have more recent country information before me. I have therefore found s.473DD(a) is not met and I must not consider this information.
6. On 26 August 2021 the applicant provided 6 annexures comprising bundles of new country information.
7. The first annexure contains articles and reports on the current security situation in Afghanistan. The information is recent, post-dates the delegate's decision in 2017, and therefore could not have been provided before the decision was made. In the circumstances where there has recent significant changes in Afghanistan, I am satisfied there are exceptional circumstances to justify considering the new country information regarding the current security situation in the country.
8. The second annexure includes articles regarding the security situation in Maidan Wardak. The information is recent, post-dates the delegate's decision in 2017, and therefore could not have been provided before the decision was made. It is not credible personal information

¹ IAA17/02658

that may have affected the consideration of his claims. Although s.473DD(b)(i) is met, I am not satisfied there are exceptional circumstances to justify considering this information as I have not needed to consider the security situation in Maidan Wardak. I have therefore found s.473DD(a) is not met and I must not consider this information.

9. The third annexure concerns the situation at Hamid Karzai International Airport during the recent evacuations of thousands of people in August 2021. The information is recent, post-dates the delegate's decision in 2017, and therefore could not have been provided before the decision was made. It is not credible personal information that may have affected the consideration of his claims. Although s.473DD(b)(i) is met, I am not satisfied there are exceptional circumstances to justify considering this information as I consider the situation at Hamid Karzai International Airport in August 2021 is no longer relevant information, as evacuations have ceased and the Taliban have taken control of the airport. I have therefore found s.473DD(a) is not met and I must not consider this information.
10. The fourth and sixth annexures include articles concerning the situation for Hazara Shias in Afghanistan. The information is recent, post-dates the delegate's decision in 2017, and therefore could not have been provided before the decision was made. In the circumstances where there has been a recent significant change in government in Afghanistan and the applicant's ethnicity and religion are central to his claims to fear persecution in Afghanistan, I am satisfied there are exceptional circumstances to justify considering the new country information regarding the current situation for Hazara Shias in Afghanistan.
11. The fifth annexure is a copy of DFAT's Smarttraveller advice for Afghanistan dated 26 August 2021. The information is recent, post-dates the delegate's decision in 2017, and therefore could not have been provided before the decision was made. It is not credible personal information that may have affected the consideration of his claims. Although s.473DD(b)(i) is met, I am not satisfied there are exceptional circumstances to justify considering this information as the purpose of the information is to advise Australians travelling to Afghanistan, not provide country information relevant to protection claims or the consideration of returning Afghans. Any information contained therein regarding the general security situation is already covered in other recent reports I have before me. I have therefore found s.473DD(a) is not met and I must not consider this information.
12. Having regard to the evolving situation in Afghanistan, I have obtained new country information on the current security situation and the treatment of Hazaras and returnees. This includes the following: the United Nations Assistance Mission in Afghanistan (UNAMA), Afghanistan Annual Report on Protection of Civilians in Armed Conflict 2020, February 2021; UNAMA, Afghanistan Protection of Civilians in Armed Conflict Midyear Update: 1 January to 30 June 2021; the European Asylum Support Office (EASO), Afghanistan Security situation update, September 2021; UNHCR, Position on Returns to Afghanistan, 16 August 2021; Danish Immigration Service, Afghanistan Recent Developments in the Security Situation, Impact on Civilians, 10 September 2021; Reuters, Taliban are rounding up Afghans on blacklist – private intel report, 19 August 2021; and Reuters, Taliban would take back Europe's Afghan deportees to face courts says spokesman, 31 August 2021. I am satisfied there are exceptional circumstances to justify considering this new information given it has been 4 years since the delegate's decision and that there have been recent significant changes in Afghanistan.

Applicant's claims for protection

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

- The applicant is of Hazara ethnicity and follows the Shia religion. He was born in [a named] Village, Maidan Wardak province. He married in 2005 and has [number] children.
- As a child his family fled to Pakistan in 1999, because of the Taliban. They returned to Afghanistan in 2002 after the Taliban lost power following the US military invasion.
- Between 2002 and 2009 his family suffered attacks from the Kuchi nomads of Pashtun ethnicity who were targeting Hazaras in the area. In 2009 the family, including his parents, [siblings], his wife and [children], all moved to Kabul to escape the threats from the Kuchi nomads. His father returned to Maidan Wardak to sort out their farm and sell the remaining animals, but went missing on his return. He is presumed deceased.
- The applicant worked as [an Occupation 1] in Kabul. In 2012 he took a job in the Farah province with a company called [name], an American company undertaking construction work to support the international military forces in Afghanistan. When he was travelling from Farah province home to Kabul his bus was stopped by the Taliban. He was taken from the bus and when they saw his payslip showing he worked for the Americans, they detained him. He was told a Mullah was coming to formalise his capital punishment. He managed to escape the detention by removing some bricks from an outer wall and running away. He made his way first to Kandahar and then home to Kabul. He remained in hiding at home for 6 months before arranging with a people smuggler to come to Australia.
- He fears the Taliban will kill him if he returns to Afghanistan because they took his information, including photographing him, when they abducted him in 2012. The Taliban and Islamic State will target him because he is Hazara Shia and has an imputed political opinion for his past work for an American company and for returning as failed asylum seeker from a western country. He also fears Kuchi nomads will kill him if he returns to the family's farmland.

Refugee assessment

14. 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

15. 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.
16. I accept the applicant is a citizen of Afghanistan, based on the copy of the Afghan passport provided by the applicant to the Department. The applicant was born in Maidan Wardak province, but moved with his family to Kabul in 2010. His wife, children, mother and siblings all continue to live in Kabul. Returnees from western countries are almost exclusively returned to Kabul, and many remain there for economic reasons. Given the applicant previously lived in Kabul, and his family are there, I consider he would remain there on return and would not return to his family's previous residence in Maiden Wardak. I find Afghanistan is his receiving country and Kabul is the place he is likely to return to.
17. The applicant claims he left Afghanistan after being detained and threatened with capital punishment by the Taliban. He claims at that time to have been working for an American company, but admits he was initially stopped by chance and only detained when the Taliban realised he was a Hazara working for a western company. His description of how he says he escaped appears unlikely. However, he has been consistent in his claims to have been stopped and detained by the Taliban, threatened with serious harm, and that he remained in hiding in Kabul until he could arrange to leave the country. I note the delegate accepted the claim after questioning him about it at an interview. The applicant says the Taliban will remember him because they took his payslip and have his name and photograph. I consider it unlikely however that the applicant was of sufficient interest that these details have been kept for nearly 10 years and that members of the Taliban would still look for him or recognise him on return. I consider that he was not pursued or contacted in any way in the 6 months before he left Afghanistan is supportive of a finding that he was not a high profile target of the Taliban. I do not accept he faces a real chance of harm on return because he was briefly detained and threatened by the Taliban in 2012.
18. The applicant fears harm if returned to Afghanistan for reason of being Hazara Shia cumulatively with an imputed political opinion for having worked for an American company and returning after a long period of time living in a western country.
19. I accept the applicant is Hazara Shia, noting from the identity photographs provided to the Department that he has distinctive facial features consistent with his claimed ethnicity, is a fluent speaker of Hazaragi, and that persons of Hazara ethnicity are almost exclusively followers of the Shia faith. Hazaras are a minority ethnic group in Afghanistan and account for approximately 9 percent of the population. There is a large population in Kabul however, up to 2 million Hazaras, comprising about 40 percent of the population in the city. Hazaras in Kabul live primarily in the west of the city.²
20. Under the previous Taliban rule, Hazaras faced systemic official and societal discrimination and violence. The worst single massacre occurred in Mazar-e Sharif in August 1998 when the Taliban killed at least 2,000 Hazaras. Many Hazaras fled Afghanistan in the years that

² DFAT, Thematic Report – Hazaras in Afghanistan, 8 February 2016.

followed, however significant social, political and economic gains were made by the Hazaras after the fall of the Taliban in 2001.³

21. In recent years the Taliban, and increasingly the Islamic State in Iraq and Levant-Khorasan Province (ISKP), have conducted major attacks in the applicant's home city of Kabul. In 2020 UNAMA documented 10 ISKP attacks targeting Shias, most of whom were ethnically Hazara, resulting in 308 civilian casualties. These attacks included: a rocket attack in March 2020 on a Hazara gathering in Kabul commemorating the death of a former political leader, killing 33 people; and in October 2020 a suicide attacker detonated his explosives near the exit of a Hazara educational centre killing 40.⁴ In the first 6 months of 2021 UNAMA documented a nearly threefold increase in civilian casualties and expressed ongoing concern regarding a resurgence of deliberate sectarian-motivated attacks against Shias, most of whom were Hazara. There were 20 incidents targeting Hazara Shias in the first half of the year resulting in 500 civilian casualties. In May 2021 there was a significant attack on a girls' school in a Hazara neighbourhood, killing at least 85 people.⁵ In June 2021 at least 7 were killed when two bombs exploded in front of a hospital in a Hazara neighbourhood in western Kabul.⁶ In July and August 2021 the Taliban killed 9 Hazaras in Ghazni province and 14 Hazaras in Daykundi province.⁷
22. The numbers of Shias and Hazara Shias harmed in sectarian motivated violence in Kabul, compared to the large population, may indicate the applicant's chance of being targeted or caught up in such violence is remote. However, the conditions in Kabul at present are significantly changed and unpredictable. After the announcement of the United States in April 2021 that they would withdraw their troops by September 11, the Taliban launched an offensive against the Afghan government. During the summer months the Taliban swept over Afghanistan and took control of several districts., including the northern provinces and districts surrounding the provincial capitals. In the first week of August the Taliban advanced and key cities fell as Afghan security forces surrendered. By 14 August the Taliban had control of Kandahar, Herat, Mazar-e Sharif and Jalalabad. On 15 August President Ashraf Ghani fled the country and Taliban fighters entered the capital. Taliban leaders entered the presidential palace and on 16 August they addressed the media, declaring the war to be over. On 19 August an official Taliban spokesperson declared the creation of the Islamic Emirate of Afghanistan and an intention to form a new government.⁸
23. Since seizing control in Afghanistan the Taliban have publicly declared that human rights would not be violated and that they have pardoned 'all of those who fought against us'.⁹ However, despite this there have been credible reports of revenge killings and of the Taliban going house to house searching for people.¹⁰ A reliable source told the Danish Immigration Service that Hazaras would face discrimination going forward, as the Taliban still views them as infidels. Human Rights Watch report that since the Taliban takeover members of ethnic minorities and Shia Muslims, in particular Hazaras, are at greater risk.¹¹ It is noted the Taliban

³ DFAT, Country Information Report Afghanistan, 18 September 2015.

⁴ UNAMA, Afghanistan Annual Report on Protection of Civilians in Armed Conflict 2020, February 2021.

⁵ UNAMA, Afghanistan Protection of Civilians in Armed Conflict Midyear Update: 1 January to 30 June 2021.

⁶ EASO, Afghanistan Security situation update, September 2021.

⁷ Danish Immigration Service, Afghanistan – Recent Developments in the Security Situation, Impact on Civilians, 10 September 2021.

⁸ EASO, Afghanistan Security situation update, September 2021.

⁹ EASO, Afghanistan Security situation update, September 2021.

¹⁰ EASO, Afghanistan Security situation update, September 2021; Reuters, Taliban are rounding up Afghans on blacklist – private intel report, 19 August 2021.

¹¹ Human Rights Watch, Afghanistan: At Risk Civilians Need Evacuation, Protection, 13 August 2021.

leadership claim they have tried to reach out to the Hazara community since their takeover¹² but I consider it is too early to know how the Taliban will treat Hazaras and Shias generally. In any event, the Taliban are not the only group who have targeted Hazaras and Shias, with ISKP claiming responsibility for a number of fatal attacks on them as described above. It is unknown at this time how ISKP will act under this new Taliban regime in Afghanistan, but they did claim responsibility for the bomb attack at Hamid Karzai airport on 26 August 2021 that killed more than 170 people.¹³

24. There are reports the Taliban are going house to house searching for people who cooperated with or are otherwise connected with the Afghan government, security forces, and international forces and organisations.¹⁴ Many in Afghanistan are clearly fearful of the Taliban, with thousands rushing to leave from Hamid Karzai international airport once the Taliban entered Kabul. Around 114,000 people were evacuated by 30 August 2021.¹⁵ A Hazara woman in Canada reported three men were taken from her family in Kabul when the Taliban came looking for them.¹⁶ Persons working for international and foreign forces were targeted, such as interpreters and translators. Summary executions of both civilians and soldiers associated with the previous administration and foreign forces have been reported.¹⁷
25. Afghanistan has long seen large numbers of people moving in and out of the country. In recent years there have been few reports of failed asylum seekers from the west, including Hazara Shias, facing any harm as returnees. Although DFAT assessed western returnees were not targeted merely for time spent in the west¹⁸, the UNHCR advised persons perceived as westernised had a potential risk profile.¹⁹ Since the takeover by the Taliban, the UNHCR has advised no Afghan nationals should be forcibly returned to Afghanistan, including failed asylum seekers, given the volatility, uncertainty, and unfolding humanitarian emergency in the country.²⁰ Whilst there have been very few reports of western returnees being targeted for this reason in recent years, this may have little relevance to what may unfold under the new Taliban regime. The Taliban issued a statement on 31 August 2021 saying they would accept failed Afghan asylum seekers from Europe but that they would be taken to court on return and the court would decide what to do with them.²¹ It is unknown what charges or judgment these failed asylum seekers will face. There is no evidence this is occurring, but there is also no information that failed asylum seekers have returned to Afghanistan since the Taliban took control. The Taliban have given assurances of an amnesty for people who worked with the previous government or international community and that women's rights will be respected, yet there are still credible reports of revenge killings and serious discrimination against women.²² Having regard to the Taliban's adverse interest and revenge attacks on persons associated with western security forces and organisations, I consider it is not farfetched that this adverse interest may extend to persons who spent long periods of time living in the west.

¹² Danish Immigration Service, Afghanistan – Recent Developments in the Security Situation, Impact on Civilians, 10 September 2021.

¹³ EASO, Afghanistan Security situation update, September 2021.

¹⁴ Reuters, Taliban are rounding up Afghans on blacklist – private intel report, 19 August 2021; EASO, Afghanistan Security situation update, September 2021.

¹⁵ EASO, Afghanistan Security situation update, September 2021.

¹⁶ The Globe and Mail, Hazara minority community facing old horrors amid Taliban's return to power, 24 August 2021.

¹⁷ EASO, Afghanistan Security situation update, September 2021.

¹⁸ DFAT Thematic Report – Hazaras in Afghanistan, 8 February 2016.

¹⁹ UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan, 19 April 2016.

²⁰ UNHCR, Position on Returns to Afghanistan, 16 August 2021.

²¹ Reuters, Taliban would take back Europe's Afghan deportees to face courts says spokesman, 31 August 2021.

²² EASO, Afghanistan Security situation update, September 2021.

26. I have taken into account the volatile and unstable security situation in Afghanistan, the discrimination and violence by the Taliban against Hazaras when they controlled Afghanistan pre-2001, the unreliability of assurances by the Taliban, and the uncertainty of how the Taliban will treat ethnic and religious minorities and failed asylum seekers returning from the west. Given this volatility and uncertainty, as this time I cannot be satisfied the applicant as a Hazara Shia returning from the west would not face serious harm from the Taliban. As the Taliban have control of the country and the international airport, his return would be known to them, and I note their stated intention to detain and try western returnees. I consider it is not too remote a chance that should the applicant return now or in the reasonably foreseeable future that he would face a real chance of arbitrary detention and physical mistreatment amounting to serious harm for reason of the cumulative effect of his membership of the minority Hazara Shia group and an imputed political opinion due to his failed asylum claim and long period of residence in the west. I am satisfied the persecution would involve systematic and discriminatory conduct. I find the Afghan authorities cannot offer protection in circumstances where the current authorities are the agent of persecution. I also find the real chance of persecution relates to all areas of Afghanistan, given the Taliban's control of the country.
27. I find the applicant's fear of persecution in the current situation in Afghanistan is well-founded. Given this finding I have not found it necessary to consider the remainder of his claims.

Refugee: conclusion

28. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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.