



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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AFGHANISTAN  
IAA reference: IAA16/00867

Date and time of decision: 28 April 2017 09:39:00  
Jessica McLeod, Reviewer

**Decision**

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

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

*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 Hazara Shi'a citizen of Afghanistan. He lodged an application for a Safe Haven Enterprise visa (the SHEV application) [in] November 2015.
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] September 2016. While the delegate accepted the applicant was previously targeted by the Taliban, he was not satisfied that the applicant would be returning with a profile that would lead to a real chance of serious harm or a real risk of significant harm in Afghanistan. In particular, the delegate found the applicant could reside safely in Kabul and that this relocation would also be reasonable in the circumstances.

### Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. In October 2016, November 2016, January 2017 and March 2017, the IAA received submissions from the applicant's representative providing reasons they disagreed with the delegate's decision and inferring that a submission submitted prior to the decision and aspects of his claims had been overlooked. To the extent that the submissions contains legal and other arguments responding to the delegate's decision, reassert claims that were before the delegate and refer to policy advice and country information already before the delegate, I am satisfied that it does not constitute new information and have had regard to it.
5. The October submission contains some new information which was not previously provided to the delegate. This included a letter dated [in] September 2016 purportedly from persons in the applicant's village attesting to his wealth. I accept this is credible, personal information which may have affected consideration of the applicant's claims. However, the delegate questioned the applicant at the SHEV interview in April 2016 in the presence of his representative about his wealth and whether he could provide any documentary evidence of his [occupations] in Afghanistan and had previously explained that this may form part of the reason for refusing the decision. I do not accept the applicant was not put on notice regarding this issue. I also note the warning in delegate's preamble as to the limitations on providing new information to the IAA and I therefore reject the claim that the applicant was not cautioned. While I note the letter post-dates the decision, no explanation has been provided as to why such a letter could not have been obtained and provided in the four month period between the interview and the decision. On the evidence the applicant made no indication to the delegate that he was gathering further evidence on this issue. I consider the applicant had a substantial amount of time after the interview in which to provide further evidence or seek an extension and I am not satisfied in this case that there are exceptional circumstances to justify consideration of the letter in this review.
6. The October submission also included a letter from the applicant's doctor dated [in] September 2016 providing an update of the applicant's [health]. This post-dates the decision and I again note there were several months in which an update could have been provided. However, I accept it is credible personal information which may have affected consideration of the applicant's claims. Earlier information about the applicant's [medical] condition was before

the delegate however it does not appear this was factored into the assessment. I accept that the applicant's condition is serious and accept that updates on his situation are relevant to this assessment. In these particular circumstances I am satisfied there are exceptional circumstances to justify consideration of this information.

7. All of the submissions contain country information which post-date the delegate's decision and relate to attacks in Kabul and Balkh Province, the emergent threat of Islamic State in the country and the overall security situation and specifically how these factors may impact the risk facing the applicant in the reasonably foreseeable future upon return. I also obtained further country information on these issues and the broader security situation. On 28 March 2017, the IAA invited the applicant to comment on this information and on the reasonableness of relocation within Afghanistan. On 12 April 2017, the applicant's representative responded with a submission containing argument and further country information. The information I obtained and which was provided relates to ongoing developments in Afghanistan's fluid security situation and relocation considerations relevant to the applicant's claims. I am satisfied that the information could not have been provided to, and considered by, the delegate and / or is credible personal information and I am satisfied that there are exceptional circumstances to justify considering this new information.
8. The March 2017 submission contains a relevant update on the applicant's personal situation – the birth of his [newest child] in Australia in [year]. This information post-dates the decision and is also is credible personal information. I accept that updates of this kind are directly relevant to the applicant's case and there are exceptional circumstances to justify its consideration.

### **Applicant's claims for protection**

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9. The applicant's claims can be summarised as follows:
  - He is a Hazara Shia Muslim from Jaghatu District, Ghazni Province, Afghanistan.
  - In 1998 the Taliban took control of his area. They introduced Shari'a law, forced women and girls to cover up, kidnapped and raped them. He was forced to pray like a Sunni. Those who refused were beaten, imprisoned and killed.
  - At the time, he owned land and was self-employed as [occupation 1] and [occupation 2]. His family had a nice home and a [good] car.
  - In December 2008, he was informed the Taliban had asked for him by name. The next day they came while he was out and terrorised his family. The Taliban said that as Hazaras, they were not entitled to their wealth and they must be supporting the international forces or government. They pushed his wife over, tore off her hijab, destroyed their belongings and threatened to kill them if they left the area.
  - His [child] called him to come home. They packed their belongings and fled towards [Country 1].
  - They were stopped along the way in [location] by about [number] Taliban men. They ordered them out of the car at gunpoint. One Taliban identified him by name and badly beat him. His [child] was able to speak Pashto and begged to bribe the Taliban for their release.

- The Taliban ordered his family out of the car and put them in a nearby taxi. One Taliban got in the taxi with them and they headed towards the [Country 1] border. He was screaming and overwhelmed with fear for his family and himself.
- The Taliban tied him up and blindfolded him. They threw him in a vehicle and took him to an unidentified location and shackled him to a wall. They contacted his [family member] and demanded a bribe but his [family member] could not raise the money. He overheard them talking about this and about digging his grave.
- He was determined to escape. He dug the shackles out of the wall. On the [number] day he freed himself and escaped through a window.
- He ran through the mountains for [number] days. On the [number] day he flagged down a truck driver and was smuggled [to country 2].
- He lived in [country 2] illegally, fearing deportation. In 2011 he was captured in a police raid on his building and he was deported back to Afghanistan. He immediately escaped to [Country 1].
- In [Country 1] he learned that his family was alive in Australia. They had believed each other were dead. By the time he made contact with them they were permanent residents. His [child] had been granted a Protection visa in 2009 and sponsored the family. Believing he was dead, he had not been included in the family's application at that time. His wife lodged an application to sponsor him for a [specified] visa in February 2012.
- He fears being seriously harmed/killed by the Taliban and other AGEs in Afghanistan because he does not abide by their ideology and Shari'a law, because he is Hazara and Shia, because he is perceived as wealthy and this led to him being imputed as a government/ international community sympathiser and because he would be returning as a failed Shi'a Hazara asylum seeker who fled without permission from the Taliban.

## **Factual Findings**

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10. On the documentary evidence and consistent oral evidence provided by the applicant I accept his claimed identity and nationality and that Afghanistan is the receiving country for the purpose of this assessment. I accept the applicant is a Hazara Shi'a Muslim from Jaghatu District, Ghazni Province, Afghanistan.
11. The applicant's [child] was granted a Protection visa in 2009. His [child] sponsored the applicant's wife and the applicant's other children to come to Australia under the [specified migration] program. However the applicant was omitted from the applicant because he was presumed dead. I accept the applicant's wife and children are now all Australian citizens including the applicant's [newest child], born in [year]. I accept the applicant's only potential remaining family in Afghanistan is his [family member] however the applicant has no knowledge of his whereabouts and is no longer in contact with him.
12. The applicant's evidence regarding the events leading to his departure from Afghanistan is not without issue. I have given careful consideration to the plausibility of the Taliban imputing the applicant with an association to the international community or government based purely on his perceived wealth. However I accept he was a successful businessman and was comparatively wealthy. Country information supports that such connections have been made. I share the delegate's concern about the applicant being able to recall his [family member's] telephone number for negotiations with the Taliban but being unable to recall the details to

maintain contact with his [family member] after he escaped. I also have some concerns about the applicant's [family member's] apparent inability to raise the ransom money when the applicant at that time still retained local assets through land ownership and his businesses. However, the applicant has been generally consistent in his evidence since he arrived in Australia and at the SHEV interview he appeared to spontaneously recollect with an adequate level of detail the events leading up to his separation from his family and his departure from Afghanistan. The details of his claims are also corroborated by his [child's] Protection visa claims lodged in 2009 and are plausible when considered with country information about insecurity in parts of Ghazni, the motivations and targets of the Taliban, about insecurity on the road route travelled and in particular, about risks to those with actual or imputed association with the government or international community. I have also had careful regard to the applicant's evidence regarding his escape which involved freeing himself from shackles and escaping out a window of a house which was under Taliban custody. On the face of it, this scenario appears unlikely however, I found the applicant's account to be internally consistent, sufficiently detailed and I accept it was the account of someone recalling personal experience. I accept this occurred as claimed. I accept the applicant had a profile with the local Taliban in Ghazni at the time of his departure.

### **Refugee assessment**

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13. 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**

14. 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.

### **Risks in home region**

15. The applicant originates from Jaghatu a Hazara majority district in Ghazni Province. Security in the province is volatile and I note the applicant's district borders Ghazni district containing

Ghazni city which I note is strongly contested.<sup>1</sup> The applicant would also need to travel there from Kabul and I have therefore had regard to the (mixed) commentary regarding recent attacks against Hazaras on the roads, particularly on the roads linking Kabul and the Hazarajat (which includes Jaghatu) and the apparent motivations for those attacks. While I acknowledge the varied quality and objectivity in the reporting on relevant incidents, I give weight to DFAT's assessment that while ethnicity is rarely the primary motivating factor it can be a contributing factor or influence on the choice of target in road incidents.<sup>2</sup> In 2015 DFAT assessed that Hazaras travelling by road between Kabul and the Hazarajat do face a risk which is greater than other ethnic groups and that once a group of travellers is stopped, Hazaras are more likely to be selected for kidnapping or violence.<sup>3</sup> I have considered more recent information<sup>4</sup> and I find this assessment is still applicable. Additionally, UNHCR and DFAT both advise that Anti-Government Elements (AGEs) systematically target civilians associated with or who are perceived to be supportive of the Afghan government and international community.<sup>5</sup> UNHCR additionally notes that AGEs reportedly target individuals who are perceived to have adopted values and / or appearance associated with western countries due to their imputed support for the Government and the international community.<sup>6</sup> According to DFAT, Hazaras are widely perceived to be affiliated with both the government and international community<sup>7</sup> and while DFAT assesses that low-profile Hazaras who have spent time in western countries face a low risk of violence on the basis of those international links, it expressly exempts Hazaras travelling by road between the Hazarajat and Kabul from this assessment.<sup>8</sup>

16. I accept the applicant's appearance identifies him as a Hazara<sup>9</sup> and that as a Hazara Shi'a he is at greater risk while travelling to, and around his area. I have also accepted the applicant previously held a profile of interest to the Taliban before his departure and that it was local civilians who had informed on him to the Taliban, and that in addition to searching his house, they intercepted him in a different part of Ghazni province, on the road to [location]. Taking into account the applicant's previous profile and the country information about the risks facing Hazara Shi'as and those imputed with a government/international community association on the Hazarajat roads, I find the applicant faces a real chance of serious harm through being kidnapped, subject to physical ill-treatment and/or killed by insurgents on the road in Ghazni for these reasons.

### Risks in Mazar-e-Sharif

17. Section 5J(1)(c) of the Act requires that the real chance of persecution must relate to all areas of a receiving country. In this regard I have identified a place within Afghanistan with a

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<sup>1</sup> EASO, "EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 1 November 2016 (herein referred to as 'EASO November 2016 report')

<sup>2</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

<sup>3</sup> DFAT, "DFAT Country Information Report - Afghanistan September 2015", 18 September 2015, CISE96CF13366

<sup>4</sup> UNHCR "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660 (herein referred to as 'UNHCR 2016 Eligibility Guidelines'); DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

<sup>5</sup> UNHCR "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p41; DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 3.29

<sup>6</sup> UNHCR "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p41

<sup>7</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186 at 3.30

<sup>8</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186 at 3.31

<sup>9</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

substantial Hazara population<sup>10</sup> where the applicant could reside without a real chance of persecution: Mazar-e-Sharif city, the capital of Balkh province.

18. The security situation throughout in Afghanistan is fluid and complex and I am mindful that the situation deteriorated throughout 2015 and 2016.<sup>11</sup> There are widespread concerns about the Afghan government's capability and effectiveness in ensuring security and stability across Afghanistan. However, Balkh Province has maintained relative security for several years under its Governor Atta Mohammed who holds a monopoly on power, even in the province's most remote regions.<sup>12</sup> Mazar-e-Sharif, like Kabul, carries heavy political and economic weight and has a strong military and police presence. Mazar-e-Sharif has been described as one of the safest cities in Afghanistan, much more so than Kabul, and has been relatively isolated from the conflict in the preceding decade. While civilian casualty rates have increased, Mazar-e-Sharif and Herat have consistently been the urban centres with the lowest counts of civilian victims.<sup>13</sup>
19. Militant attacks have, nonetheless, occurred in Mazar-e-Sharif. Since 2014 there have been several attacks however I find they have been infrequent and have been aimed at government or international community targets or with no identifiable target.<sup>14</sup> In most cases, the perpetrator was also unclear, although I accept they were Anti-Government Elements (AGEs). Most recently, in April 2017, the Taliban claimed responsibility for an attack on an army base in Mazar-e-Sharif which killed or wounded more than 100 soldiers and which has been described as one of the deadliest attacks on a military site in Afghanistan.<sup>15</sup> I have had regard to this incident and the potential impact on security in the city however I am satisfied that the government maintains effective control<sup>16</sup> and I am not satisfied this indicates that such control would be lost in the reasonably foreseeable future.

*Risks arising from previous imputed association with government/ international community*

20. I accept the Taliban have the capability to track people to other locations. However its targets are of higher profile than the applicant.<sup>17</sup> The information does not support that AGEs seek to track low-profile individuals such as the applicant throughout Afghanistan. The applicant's experiences with the Taliban were frightening and tragic but it has now been eight years and I consider this a significant period in the fluid Afghan security environment. While I accept they would have the capability to find the applicant in Mazar-e-Sharif, even at the time he was captured, I consider his imputed link to the government / international community although real, was insubstantial and based only on his perceived wealth. While I accept there remains a risk for him in his home region, I am not satisfied that the Taliban nationally would have an interest in him, or that he would be identifiable to anyone (Taliban or otherwise) outside of Ghazni. I am not satisfied the Taliban or any other AGEs in Mazar-e-Sharif would have

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<sup>10</sup> EASO January 2016 report; EASO, "EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597 (herein referred to as 'EASO November 2016 report'); Lifos, "Hazaras in Afghanistan", 28 August 2015, CISEC96CF14239

<sup>11</sup> DFAT, "DFAT Thematic Report on Security Conditions in Afghanistan: 1 January – 31 August 2016", 5 September 2016, CIS38A80121778; UNHCR 2016 Eligibility Guidelines; UNAMA, "Afghanistan Annual Report on Protection of Civilians in Armed Conflict: 2016", February 2017 (herein referred to as 'UNAMA February 2017 report')

<sup>12</sup> EASO January 2016 report

<sup>13</sup> EASO January 2016 report EASO November 2016 report

<sup>14</sup> EASO January 2016 report; EASO November 2016 report; UNAMA February 2017 report

<sup>15</sup> BBC, "Mazar-e Sharif attack: Afghanistan mourns deadly Taliban assault," April 2017; Hindustan Times, "'Aim for their heads': Soldiers recount Taliban attack on Mazar-i-Sharif base", April 2017; Al Jazeera, "Taliban fighters attack Afghan army base, 'killing 140'", April 2017

<sup>16</sup> DFAT, "DFAT Thematic Report Hazaras in Afghanistan and Pakistan 26 March 2014", 26 March 2014, CIS2F827D91264

<sup>17</sup> UK Home Office, "Country Policy and Information Note - Afghanistan - Fear of anti-government elements", 1 December 2016, OGD7C848D96

knowledge of, or interest in the applicant. I am not satisfied any AGEs would be motivated to track the applicant and harm him outside his home region in relation to his previous imputed profile. I therefore find he does not face a real chance of serious harm in Mazar-e-Sharif in relation to this matter.

*Risks arising from Hazara Shi'a profile*

21. I have considered the submissions made by the applicant's representative regarding inter alia, the threats posed by Islamic State, the Taliban and other AGEs including from violent sectarianism in the reasonably foreseeable future.
22. I am aware that UNAMA has noted a six-fold increase in civilian casualties from attacks targeting places of worship in 2016 compared with 2015.<sup>18</sup> In Kabul, in 2015, an attack by unidentified perpetrators on a Sufi mosque killed 11 people and there were three attacks (one by Islamic State) on Shi'a sites with one person killed.<sup>19</sup> In 2016, there were three attacks against Shi'as/Hazaras in Kabul city - in July, October and November 2016 and one attack in Khojagholak, near Mazar-e-Sharif city, in October 2016. There were also two recent attacks in Herat city (November 2016, January 2017).<sup>20</sup> Approximately 170 people have been killed and over 620 injured in these attacks.
23. Islamic State claimed responsibility for the four attacks against Shi'a's in Kabul since October 2015 and the July 2016 attack has been described as the most deadly incident in Kabul since the Taliban's fall in 2001, the largest single attack on Hazaras since the Ashura procession attack in Kabul in 2011 and the largest attack carried out in Afghanistan by a group linked to Islamic State.<sup>21</sup> Islamic State has also released anti-Shi'a hate messaging/ propaganda threatening further attacks against Shi'as who it describes as apostates and accuses of fighting against Sunnis with the Syrian regime and being slaves to [country 2].<sup>22</sup>
24. Islamic State did not claim responsibility for the attacks in Herat. To date, attacks targeted against Shi'as in Balkh Province have been rare. There was an attack by Lashkar-e-Jangvi (LeJ) in Mazar-e-Sharif in 2011<sup>23</sup> and in September 2015, 13 Hazaras were kidnapped in Zari district by unknown gunmen.<sup>24</sup> The October 2016 attack occurred 20km outside of Mazar-e-Sharif (not in Mazar-e-Sharif itself as some reports on the incident suggested). I note there is suggestion that Islamic State was responsible, however of the wide commentary on this attack, most reported that no group had claimed responsibility.<sup>25</sup> I am not satisfied that Islamic State was responsible for these attacks.

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<sup>18</sup> UNAMA February 2017 report

<sup>19</sup> Afghan Analysts Network (AAN), "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", 19 October 2016, CX6A26A6E11358

<sup>20</sup> DFAT, "DFAT Thematic Report on Security Conditions in Afghanistan: 1 January – 31 August 2016", 5 September 2016, CIS38A80121778 ; UNAMA February 2017 report; AAN, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", 19 October 2016, CX6A26A6E11358

<sup>21</sup> DFAT, "DFAT Thematic Report on Security Conditions in Afghanistan: 1 January – 31 August 2016", 5 September 2016, CIS38A80121778 ; UNAMA February 2017 report

<sup>22</sup> [Deleted.]

<sup>23</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

<sup>24</sup> Al Jazeera, 'Gunmen kill 13 civilian passengers in north Afghanistan' (6 September 2015)

<sup>25</sup> Agence France Presse, "At least 14 dead, 24 injured as blast hits Shi'a mosque in Afghanistan", 12 October 2016, CX6A26A6E10840; The Washington Post, "2nd blast targets defiant Shiite worshippers in Afghanistan amid security fears", 12 October 2016, CX6A26A6E10827; Deutsche Welle, "IS claims responsibility for bomb attack that killed 14 in Afghanistan", 12 October 2016; Reuters, "Islamic State claims responsibility for deadly mosque attack in Afghan capital", 12 October 2016, CX6A26A6E10825; UNAMA February 2017 report



25. UNAMA has expressed grave concerns about what it describes as an emerging pattern of deliberate sectarian attacks against Shi'as and about Islamic State's increased capacity to strike beyond Eastern Afghanistan to further exacerbate the conflict.<sup>26</sup> Human Rights Watch (HRW) has taken a similar line suggesting that nowhere is safe for Hazaras.<sup>27</sup>
26. I accept that Islamic State is trying to inject sectarianism into the conflict in Afghanistan. I accept they have a presence in parts of Balkh Province, that there are active cells in Kabul, that they have launched attacks in Kabul city, that they have an operational presence beyond the nascent stage and have potential for future recruitment. However, the Afghanistan Analysts Network (AAN) estimates their current Kabul cell numbers to be only in the dozens.<sup>28</sup> The AAN states that Islamic State as an organisation has struggled to expand beyond the four districts in Nangahar, remaining so far, a limited threat. It assesses that Islamic State has the capability of carrying out fatal attacks on an occasional basis in the capital, although not yet at a sophisticated level and suggests that it is unlikely that Islamic State can single-handedly drive the conflict in a sectarian direction. The AAN identified 'reassuring' factors working against the rise of sectarianism such as that the attacks have been widely condemned by different actors in Afghanistan, including by the Taliban (discussed further below), and that the parties to the main conflict, the Afghan security forces and the Taliban, as well as Shi'a and Sunni religious leaders, and the population of the country more generally, remain opposed to sectarianism.<sup>29</sup> I accept Islamic State has aspirations for a leadership position in the insurgency above that of the Taliban but it has not achieved this and I am not satisfied that its overall influence is such that the Taliban or other key actors will support its sectarian slant in the reasonably foreseeable future. I am not satisfied that a violent sectarianism is likely to take hold in Afghanistan in the reasonably foreseeable future.
27. Previous DFAT advice has indicated that Islamic State has limited capacity and influence in Afghanistan, and that civilians in Afghanistan faced a low risk of violence from the organisation compared to the risks to high profile groups from other AGEs and the threat of violence generally in that country.<sup>30</sup> While this advice pre-dates the 2015 and 2016 attacks, other sources also indicate that Islamic State is struggling to control territory and its efforts to establish itself in other parts of Afghanistan have in large part failed.<sup>31</sup> By May 2016 its activities were limited to Logar, Nangahar and Kunar Provinces. In September last year EASO reported that Islamic State had only a limited presence outside Nangahar and that its attempts to infiltrate provinces other than Nangahar were short-lived.<sup>32</sup>
28. Since 2011 there have been two mass casualty attacks against Shi'as in and near Mazar-e-Sharif and a serious incident in Zari district of Balkh, and Shi'a's have recently been targeted in Kabul in serious attacks. There have also been attacks in other provinces, particularly, as noted above, on the roads. However there has been no further targeting of Shi'as in Mazar-e-Sharif city by LeJ since 2011. I am not satisfied the October 2016 attack outside Mazar-e-Sharif is attributable to Islamic State, Islamic Movement of Uzbekistan (IMU), Al Qaeda, Hezb-e-Islami,

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<sup>26</sup> UNAMA February 2017 report

<sup>27</sup> Human Rights Watch, "Afghanistan: Shi'a Bombing Spotlights Need to Protect", 21 November 2016, CX6A26A6E13632

<sup>28</sup> AAN, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", 19 October 2016, CX6A26A6E11358

<sup>29</sup> AAN, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", 19 October 2016, CX6A26A6E11358; DFAT, "DFAT Thematic Report on Afghanistan Security Conditions 1 January to 31 August", 5 September 2016, CIS38A80121778

<sup>30</sup> DFAT, "DFAT Country Information Report - Afghanistan September 2015", 18 September 2015, CISEC96CF13366

<sup>31</sup> IHS Jane's Intelligence Weekly, "Islamic State-aligned militants likely to struggle for operational foothold in Afghanistan despite first successful attack", 25 July 2016, CX6A26A6E7093

<sup>32</sup> EASO in UK Home Office, "Country Policy and Information Note - Afghanistan - Fear of anti-government elements", 1 December 2016, OGD7C848D96

Sunni extremists based in Pakistan or the Taliban, or that the incident is indicative of the onset of a sectarian campaign in Balkh by them or any other insurgent or terrorist groups. Recent security incidents in Mazar-e-Sharif have been infrequent and targets of other insurgents have generally been government or international community institutions or without a clear target.

29. The Taliban remains a significant force and present security risks throughout parts of the Hazarajat and other vast tracts of Afghanistan. There are high confidence Taliban support zones and Taliban activity in parts of Balkh province and government forces have been engaged in clearance operations.<sup>33</sup> I am satisfied that their recent attacks in urban centres including against the German consulate<sup>34</sup> and Afghanistan National Army base in Mazar-e-Sharif have been occasional and had no sectarian motivation. The Taliban's ideology has shifted. It has specifically condemned recent attacks against Shi'as and spoken out convincingly against sectarianism.<sup>35</sup> There is no recent evidence of the Taliban or other AGENs/insurgent groups targeting Shi'as in Mazar-e-Sharif.
30. The government maintains effective control in Mazar-e-Sharif and the Balkh provincial government has been actively managing clearance operations in the districts of Balkh.<sup>36</sup> Even taking into account the ANSF's shortcomings, the recent attack upon the Mazar-e-Sharif military base by the Taliban and the further withdrawal of international troops, I am persuaded that the continued efforts of the Afghan government, international community and even the Taliban's efforts to eliminate Islamic State and to counter its influence will likely limit any foothold expansion in the year ahead.<sup>37</sup> I consider DFAT's assessment about Islamic State having limited capacity and influence is still current. I accept the serious threatening nature of Islamic State propaganda and attacks and while they will probably continue to conduct attacks in urban areas of Afghanistan in consideration of the information before me I am not satisfied that such attacks will occur with such frequency in Mazar-e-Sharif as to lead to a real chance of serious harm for the applicant.
31. DFAT assesses that Shi'as' formal legal position and interests are largely respected and that official discrimination on the basis of religion – including between Sunni and Shi'a Muslims - is low.<sup>38</sup> DFAT also has no evidence of any official policy of discrimination pursued by the Government on the basis of ethnicity,<sup>39</sup> nor any information to suggest that Hazaras are significantly less able to avail themselves of state protection than other ethnic groups.<sup>40</sup> Ethnic minorities have their own media outlets, political parties and politically active representatives. While it is acknowledged that Hazaras are underrepresented in senior government positions, Hazaras are active in the Afghan community, particularly in politics, education and civil society, including by holding protests without government intervention.<sup>41</sup> I am satisfied that Hazara Shi'as are free to participate fully in public life and do not face discrimination from the government or authorities. I do not accept the Afghan government would be unwilling to protect Hazaras and / or Shi'as and even taking into account the recent attack on Afghan forces

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<sup>33</sup> EASO November 2016 report - in reference to a threat assessment from the Institute for the Study of War (ISW)

<sup>34</sup> UNAMA February 2017 report

<sup>35</sup> AAN, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", 19 October 2016,

CX6A26A6E11358

<sup>36</sup> EASO January 2016 report; EASO November 2016 report

<sup>37</sup> IHS Jane's Intelligence Review, "Assault on Shi'a shrine in Kabul likely to have been conducted by Islamic State, indicating resilient attack capability", 12 October 2016, CX6A26A6E11042; IHS Jane's Intelligence Review, "Islamic State-aligned militants likely to struggle for operational foothold in Afghanistan despite first successful attack", 25 July 2016,

CX6A26A6E7093

<sup>38</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

<sup>39</sup> DFAT, "DFAT Country Information Report - Afghanistan September 2015", 18 September 2015, CISEC96CF13366

<sup>40</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186,

<sup>41</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

in Mazar-e-Sharif, when considered with other information above and below, I consider it too speculative to suggest that AGEs would exercise control or otherwise render the government incapable of control in Mazar-e-Sharif in the reasonably foreseeable future.

32. At the societal level, DFAT describes ethnic based violence in Kabul as rare and there is no information to indicate the situation is different in Mazar-e-Sharif. Purely inter-faith violence across Afghanistan is also rare.<sup>42</sup> I note there have been clashes and various forms of societal discrimination against Hazaras, I am not satisfied they occur with such frequency and / or severity that it would lead to a real chance of serious harm for the applicant in Mazar-e-Sharif.
33. I am not satisfied the applicant faces a real chance of being seriously harmed in racial/ /religious/ sectarian attacks in Mazar-e-Sharif.

#### *Other risks*

34. I found above the applicant does not face a real chance of harm in Mazar-e-Sharif on the basis of his previous imputed association to government/international community. However, I have nonetheless considered whether his Hazara Shi'a identity and his return to Afghanistan as a failed asylum seeker who has lived several years in Australia (a western country) may contribute to a risk of harm.
35. Country information indicates that Hazaras are widely perceived to be affiliated with both the government and international community<sup>43</sup> and AGEs target individuals who are perceived to have adopted values and/or appearances associated with western countries, due to their imputed support for the Government and the international community.<sup>44</sup> DFAT notes there are occasional reports (including two from 2014)<sup>45</sup> of returnees from western countries including Australia allegedly being targeted for having spent time in a western country. However there have been no reports of individual returnees being targeted since those two sporadic incidents in 2014. I do not accept the incidents indicate systematic targeting of returnees. DFAT assesses that returnees from western countries are not specifically targeted on the basis of their being failed asylum seekers and that Hazara returnees who are not directly associated with the government or the international community currently do not face a higher level of risk upon return than returnees from other ethnic groups.<sup>46</sup>
36. While the applicant's previous attention from the Taliban originated from his perceived wealth, it is too speculative to conclude on the evidence before me that the applicant would be perceived as wealthy upon return. In any case, as above, I consider the applicant's low-profile is not consistent with those targeted by the Taliban in Mazar-e-Sharif. The applicant does not claim to have had any actual connection with the government or international forces and on the evidence I am also satisfied the applicant has no current association or connection with any political groups, international community or Afghan government. He also has not indicated that he would develop such association or connection or engage in political behaviour that would attract adverse attention from the Taliban or any AGEs in Balkh. I am not satisfied the applicant would have requisite proximity to persons with a direct connection to the government or international community as to give rise to a real chance of serious harm. Even taking into account that the applicant's large family have settled in Australia, I am not satisfied

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<sup>42</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

<sup>43</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

<sup>44</sup> UNHCR 2016 Eligibility Guidelines

<sup>45</sup> DFAT, "DFAT Country Information Report - Afghanistan September 2015", 18 September 2015, CISEC96CF13366; UNHCR 2016 Eligibility Guidelines

<sup>46</sup> DFAT, 'DFAT Thematic Report – Hazaras in Afghanistan', 8 February 2016, CIS38A8012186

that in a major urban area like Mazar-e-Sharif, which has a diverse, ethnic population and has seen growth from returnees and Internally Displaced Persons (IDPs) over the years, that the applicant would face a real chance of being seriously harmed as someone who lived several years in Australia, as a returnee from the west and who was previously imputed as pro-government/international community on the basis of his wealth, because he sought asylum, is of Hazara race and Shi'a religion.

37. I note however that ethnic, tribal and familial connections still play an important role in daily life such that discrimination occurs, primarily in the form of nepotism.<sup>47</sup> DFAT states the risk of discrimination may be significantly higher for returnees from western countries who do not maintain a low-profile such as by taking steps to conceal their association with the country from which they have returned.<sup>48</sup> The applicant has never lived in Mazar-e-Sharif and has no family or known networks there. I accept that upon meeting him, the applicant would be identifiable as an outsider there. I accept the applicant may face societal discrimination on the basis of his Hazara race and that this risk may be increased as a result of his return from a western country.<sup>49</sup> However I am not satisfied on the available information that the applicant would suffer ill-treatment of a nature amounting to a threatened capacity to subsist, or other harm amounting to persecution in Mazar-e-Sharif for these reasons.
38. Notwithstanding the seriousness and gravity of recent attacks, when having regard to the strong security presence and that the government maintains effective control, the limited capacity of Islamic State and its lack of territorial foothold in Balkh, the Taliban's shifted ideology and specific infrequent targeting within the city, the size and diversity of the population in the city, and the applicant's lack of other profile or proximity connected to government/international community/those in high profile groups targeted by other insurgents in Mazar-e-Sharif, and the infrequency of security incidents in the city, I find the chance of the applicant being seriously harmed on the basis of his race or religion, imputed association with government/international community by Islamic State, Taliban, other AGEs or others in Mazar-e-Sharif is remote, and therefore not real. I am satisfied the applicant does not face a risk of harm from authorities and that the chance that he would face serious harm at the community level is also not real.
39. Most returnees are returned to Kabul. I am satisfied the applicant would be able to safely and legally access Mazar-e-Sharif by air after being returned to Kabul.<sup>50</sup> I note there have been attacks in and around Kabul airport and on the road to the city. I consider that any period of time he would need to spend in and around Kabul city, or the airport in Kabul or in Mazar-e-Sharif, or on the road linking those airports to their respective cities would be brief. Having regard to the country information before me I am satisfied that there is a strong military presence in both cities and there is likely to be so in the reasonably foreseeable future. I am satisfied that such attacks have been infrequent and the government and security forces maintain effective control over both cities, including their airports and I am satisfied that this will not change in the reasonably foreseeable future.<sup>51</sup> The applicant does not have a high profile and I am satisfied he is not of personal interest to any AGEs. Even taking into account the attacks against Shia's in Kabul in 2016 and the recent attack on the Mazar-e-Sharif army base, when having regard to all the factors above, to the significant security and armed

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<sup>47</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186; DFAT, "DFAT Country Information Report - Afghanistan September 2015", 18 September 2015, CISEC96CF13366

<sup>48</sup> DFAT, "Country Information Report - Afghanistan September 2015", 18 September 2015, CISEC96CF13366

<sup>49</sup> DFAT, "Country Information Report - Afghanistan September 2015", 18 September 2015, CISEC96CF13366

<sup>50</sup> Zabihullah Ihsas, "Balkh airport terminal inaugurated", Pajhwok Afghan News, 9 June 2013

<sup>51</sup> DFAT, "DFAT Thematic Report Conditions in Kabul - September 2015", DFAT, 18 September 2015, CISEC96CF13367; EASO November 2016 report

presence and government control in the city and airport, and that it would be a transit point or journey only, I do not accept that such attacks preclude the possibility of the applicant being able to safely use the Kabul and Mazar-e-Sharif airports, nor the roads to those cities. I find the chance of the applicant being seriously harmed while in transit to Mazar-e-Sharif is remote. Accordingly, I am satisfied there is not a real chance of him facing serious harm before accessing Mazar-e-Sharif city.

40. Country information does not support that persons with the applicant's profile are targeted in Mazar-e-Sharif. I have noted above that the security situation in Afghanistan remains fluid and I accept it declined nationally in 2015 and 2016. However, while the country information cited above indicates that sporadic insurgent attacks do occur within the city and more broadly within Balkh Province, there is no indication that the Afghan government or security forces are losing control of Mazar-e-Sharif. Even taking in account the recent security incidents listed above, I am not satisfied that incidents are occurring with such frequency as to indicate that the applicant faces a real chance of violence targeted against him, nor getting caught up in attacks or other violence from insurgents/AGEs, or between such groups and Afghan government/international forces in the city or en route to it. I am not satisfied that he faces a real risk of suffering serious harm in the form of targeted or generalised violence in Mazar-e-Sharif, at its airport or in transit from the airport to the city.
41. On the evidence before me, I am not satisfied that the applicant faces a real chance of being killed, or otherwise suffering serious harm in Mazar-e-Sharif from AGEs, the government or members of the community on the basis of his previous imputed profile, nor for his profile as a Hazara Shi'a male with a [specified medical] condition who has lived outside Afghanistan for several years including in a western country such as Australia where his family all reside and from where he would be returning after having sought asylum. I am not satisfied he would face harm on the basis of any actual or imputed connection with or support for the Afghan government, western or international community. I also have not accepted he would face a real chance of serious harm from generalised violence. I am not satisfied that the applicant's circumstances would, individually or cumulatively, lead to a well-founded fear of persecution in Mazar-e-Sharif, or in accessing that city, in the reasonably foreseeable future.

#### **Refugee: conclusion**

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

#### **Complementary protection assessment**

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

#### **Real risk of significant harm**

44. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life

- the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.
45. I have found above that the applicant would face a real chance of being seriously harmed in his home region in Ghazni. For the same reasons, and applying the authority in *MIAC v SZQRB* (2013) 210 FCR 505, I am also 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 if he returns to and lives in his home area.
46. However, s.36(2B) of the Act provides that there is taken not to be a real risk that a person will suffer significant harm in a country if it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm.
47. I have found the applicant would not face a real chance of being killed or otherwise suffering serious harm from AGEs, the government or others in Mazar-e-Sharif on the basis of his previous imputed profile, nor for his profile as a Hazara Shi'a male with a [specified] condition who has lived outside Afghanistan for several years including in a western country such as Australia where his family all reside, and from where he would be returning after having sought asylum. I am not satisfied he would face harm on the basis of any actual or imputed connection with or support for the Afghan government, western or international community. For the same reasons and because 'real chance' equates to 'real risk', I am also not satisfied that the applicant faces a real risk of suffering significant harm in returning to, and residing in Mazar-e-Sharif.
48. While the applicant may face some societal discrimination, even if he is initially recognised as an outsider, and taking into account his [specified] condition, I do not accept he would face discrimination for any reason that would threaten his capacity to subsist. I am not satisfied the applicant would face discrimination or other mistreatment that would manifest in a way that would arbitrarily deprive the applicant of his life or have the death penalty carried out against him. There is also no evidence to indicate that he will be subject to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment intentionally inflicted. I do not therefore accept that he will face discrimination for any reason in Mazar-e-Sharif that would amount to significant harm for the purposes of s.36(2A).
49. I found above that the chance of the applicant suffering serious harm from violence targeted against him or from generalised violence in Kabul (en route to Mazar-e-Sharif) or Mazar-e-Sharif, including on arrival at the airports and in the course of accessing those cities, was remote (and therefore not real). As 'real chance' equates to 'real risk', for the reasons discussed above I am also not satisfied that the applicant faces a real risk of suffering significant harm in returning to, and residing in Mazar-e-Sharif.
50. Having regard to the applicant's personal circumstances, I have considered whether it is reasonable for the applicant to relocate to Mazar-e-Sharif.
51. UNHCR considers that relocation within Afghanistan is reasonable only where the individual has access to shelter, essential services (sanitation, health care, education) and livelihood opportunities, and a traditional support network of members of his or her (extended) family or

members of his or her larger ethnic community.<sup>52</sup> DFAT also notes that in Afghanistan, ethnic, tribal and family affiliations are important factors. Kinship is central to identity and acceptance in the community, including for finding shelter and employment, and therefore Afghans tend to reside in places their ethnic group constitutes the local majority.<sup>53</sup> Traditional extended family and tribal community structures of Afghan society are the main protection and coping mechanisms for people in Afghanistan, who rely on these networks for their safety and economic survival, including access to accommodation and an adequate level of subsistence.<sup>54</sup>

52. UNHCR advises that there are exceptions to the requirement of external support, being, single able bodied men and married couples of working age without identified specific vulnerabilities. UNHCR considers that such persons may, in certain circumstances, be able to subsist without family and community support in urban and semi-urban areas that have the necessary infrastructure and livelihood opportunities to meet the basic necessities of life and that are under effective Government control (as Mazar-e-Sharif is).<sup>55</sup> DFAT also assesses internal relocation is generally more successful for single men of working age - provided they are able to make use of family or tribal networks. DFAT has stated that a lack of financial resources and lack of employment opportunities are the greatest constraints on successful internal relocation<sup>56</sup>and that unemployment and underemployment are high across Afghanistan.<sup>57</sup>
53. While I have not accepted the applicant's poor physical health (his [specified] condition) would contribute to a real chance of persecution or real risk of significant harm I consider it is a relevant factor when considering whether his relocation to Mazar-e-Sharif would be reasonable. Country information that was before the delegate indicates that the Afghan health system has improved since 2001, albeit from a low base and that basic healthcare services are provided for free. However it also indicates that medications can be expensive and / or out of date, excluding the poor from treatment for common illnesses. The applicant has a serious [specified] condition for which he has received major surgery and regular treatment and medication in the past year. While the applicant has industry relevant experience in [specified occupations] which would be conducive to his employment prospects upon return, I am satisfied on the evidence that the applicant's condition has impaired his essential daily functioning. I have doubts about whether he would be returning as an able bodied man, such as envisaged in the UNHCR's guidance.
54. I also have concerns about the applicant's ability to adjust in an unfamiliar place without family networks or other support in the region. I note the applicant's [family member] was in Afghanistan when he departed in 2008 but has no knowledge of his current whereabouts. While separation from family does not necessarily of itself render relocation unreasonable, noting that the applicant's whole large family has settled permanently in Australia for protection reasons, I accept there is no real prospect of them joining him in Mazar-e-Sharif. I note he has a newborn baby and supports his wife with [a condition], and the letter from his doctor advises of the need for family support during his own recovery. I find these are all critical factors which would cumulatively affect the applicant's ability to successfully relocate. While the applicant's long term health is unknown, on the evidence before me I am not satisfied he will be in a position to establish himself in Mazar-e-Sharif in the reasonably

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<sup>52</sup> UNHCR 2016 Eligibility Guidelines

<sup>53</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186; DFAT, "Country Information Report – Afghanistan", DFAT, 18 September 2015, CISEC96CF13367

<sup>54</sup> DFAT, "DFAT Country Information Report – Hazaras In Afghanistan", 8 February 2016, CIS38A8012186

<sup>55</sup> UNHCR 2016 Eligibility Guidelines

<sup>56</sup> DFAT, "DFAT Country Information Report – Hazaras In Afghanistan", 8 February 2016, CIS38A8012186

<sup>57</sup> DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186

foreseeable future and I am not satisfied in his particular circumstances that it is reasonable for him to remain in Mazar-e-Sharif, apart from his family with no prospect of reunion.

55. In addition to Mazar-e-Sharif, I have considered whether it would be reasonable for the applicant to relocate to another area under government control where there are substantial populations of Shi'as such as Kabul or Herat. I note in particular, DFAT reporting that Kabul has better opportunities for employment, education and access to healthcare than in other parts of Afghanistan. However I find that he would also still face the same challenges in relocating to other locations. Taking into account the same reasons discussed above in relation to Mazar-e-Sharif, I am also not satisfied that it is reasonable for the applicant to relocate to another part of Afghanistan.

### **Complementary protection: conclusion**

56. There are 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.

### **Decision**

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

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.



## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

...

***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.

#### **91W Evidence of identity and bogus documents**

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
  - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
  - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
  - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
    - (i) refuses or fails to comply with the request; or
    - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
  - (b) either:
    - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

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**91WA Providing bogus documents or destroying identity documents**

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
  - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
  - (b) the Minister is satisfied that the applicant:
    - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
    - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
  - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
  - (b) either:
    - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
    - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

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