



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN
IAA reference: IAA16/01192

Date and time of decision: 1 August 2017 12:12:00
Matthew Tubridy, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a national of Afghanistan. [In] June 2016 he lodged an application for a Safe Have Enterprise visa (SHEV). A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] October 2016, and the Department of Immigration and Border Protection (the Department) referred the matter to the IAA [in] October 2016.

Information before the IAA

2. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. I have also obtained new information¹ about classes of person of which the applicant is a member, including Afghan Shia Muslims and/or Hazaras, and also Afghans who have lived and sought asylum in western countries. This new information is sourced from reports which were published after the date of the delegate's decision. Given that these reports provide new information about the situation for such classes of persons in the context of the developed security situation in Afghanistan, and given the fact that this information was not available at the time the delegate made his decision, I am satisfied that there are exceptional circumstances to justify considering this information.
4. On 23 December 2017 the applicant's representative provided a submission to the IAA which included a five page submission from the applicant's representative and a four page statutory declaration from the applicant. Much of the information contained in these documents amounts to argument with the delegate's decision and I have had regard to these arguments.
5. The applicant's statutory declaration also submits that because of the issues he faced in Afghanistan his family have moved back to [Country 1] again. Previously it has been the applicant's claim that he had a [sibling A] in [Country 2] and a [sibling B] in [Country 3] but that his family were otherwise all living in Afghanistan, in the Kabul neighbourhood of [Town 1]. The claim that his family are now in [Country 1] is new information. No reasons have been provided as to why this information could not have been provided before the date of the delegate's decision or why it should be considered credible personal information. The applicant has not satisfied me that this information could not have been provided before the date of the delegate's decision or that this information is credible personal information. I am not satisfied that s.473DD(b) is met or that there are exceptional reasons to justify considering this information.
6. The applicant has also submitted that the delegate did not consider his claim to fear harm because he would be perceived as anti-Government because he has been critical of the Afghan

¹ UNAMA, "Afghanistan: Protection of Civilians in Armed Conflict – Annual Report 2016", 6 February 2017, CISEDB50AD201; UNAMA, "Afghanistan: Protection of Civilians in Armed Conflict – Midyear Report 2017", 1 July 2017, CISEDB50AD4852; "Key ISIS figures involved in recent Kabul attacks arrested ", Khaama Press, 15 December 2016, CX6A26A6E15727; "2 ISIS suicide bombers arrested in Kabul city", Khaama Press, 28 November 2016, CX6A26A6E14124; Joscelyn, T. "Islamic State continues to target Shiite civilians in Kabul", The Long War Journal, 15 June 2017, CXC9040669201; Foschini, F. "Kabul And The Challenge Of Dwindling Foreign Aid", US Institute of Peace, 1 April 2017, CISEDB50AD4472; Afghanistan Analysts Network, "Afghan Exodus - Afghan asylum seekers in Europe (1) – the changing situation", 13 February 2017, CXC9040661658; Afghan Analysts Network, "Voluntary and Forced Returns to Afghanistan in 2016/17: Trends, statistics and experiences ", 19 May 2017, CXC9040667688.

government since his arrival in Australia, including on Facebook. It is also submitted that he has been active against the Taliban in Australia, and that he would face harm from both the Taliban and the Afghan government if they learn of his activities in Australia. All of this is new information. The applicant has submitted that the delegate did not ask him questions about these matters at the interview; and the applicant's representative has submitted that the applicant was unaware that he could make claims to protection with regard to his activities in Australia, and for this reason he only made claims about why he had departed Afghanistan. I am not persuaded that the applicant was under such a misunderstanding given that he had claimed to the delegate that he feared being targeted by the Taliban or Islamic State because he had spent the preceding four years in Australia. Further, it was made clear to the applicant that it was his responsibility to provide all his claims to protection and any evidence to substantiate those claims, and the delegate provided the applicant with the opportunity to do this. The applicant has not satisfied me that this information could not have been provided before the date of the delegate's decision or that this information is credible personal information. I am not satisfied that s.473DD(b) is met or that there are exceptional reasons to justify considering this information.

7. The applicant has also submitted that he has been attending English classes at a church near his home and that although he is a Shia Muslim he has leaned to respect other people's religious views and that if he returned to Afghanistan the Taliban or the Afghan government may learn of his activities and will think that he has converted to Christianity and would harm him on this basis. In support of this claim the applicant has provided a letter from a pastor of a Presbyterian Church which confirms that the applicant has been attending English classes at the church since the middle of 2013, and that he respects the religious views of Christians. The applicant's representative has submitted that the applicant was unaware that these activities in Australia could be added as a claim in his application. However, and as noted above, I am not persuaded that the applicant was under such a misunderstanding given that he had claimed to the delegate that he feared being targeted by the Taliban or Islamic State because he had spent the preceding four years in Australia. Further, it was made clear to the applicant that it was his responsibility to provide all his claims to protection and any evidence to substantiate those claims, and the delegate provided the applicant with the opportunity to do this. While it may be that the applicant's respect for Christianity, and his attendance of English language classes at a church, is credible personal information, the applicant has provided no reasons why his claim to fear harm on this basis could not have been provided before the date of the delegate's decision or why his claim to have such fears should be considered credible personal information. The applicant has not satisfied me that his claim to have fears of this kind could not have been provided before the date of the delegate's decision or that his claim to have such fears is credible personal information. I am not satisfied that s.473DD(b) is met or that there are exceptional reasons to justify considering this information. Given this, I am not satisfied that there are exceptional circumstances to justify considering the associated new information regarding his attendance of English language classes at a church or his respect for Christianity and the religious views of non-Muslims more broadly.
8. Also submitted is what purports to be an undated letter from an Afghan police [officer], Mr [C], who is the [relative] of a martyred police officer, Mr [D]. The letter states that [the] applicant clashed with a Police [officer], [Mr E], and that this incident ended with joint mediation efforts from Mr [C] and locals. A copy of Mr [C]'s purported police ID card is attached giving his [rank]. These documents were not provided to the delegate and are new information. No reasons have been provided as to why this document could not have been provided before the date of the delegate's decision or why it should be considered credible personal information. The credibility of the applicant's claim to have clashed with a [Mr E] was squarely at issue at his SHEV interview, and the applicant had been informed that it was his responsibility to provide

any evidence that he could to support his claims before a decision was made. The applicant has not satisfied me that this information could not have been provided before the date of the delegate's decision or that this information is credible personal information. I am not satisfied that s.473DD(b) is met or that there are exceptional reasons to justify considering this information.

9. The applicant's representative's submission also refers to a number of reports which were not before the delegate and which are new information. One of these reports was published after the date of the delegate's decision, and I am satisfied that this report could not have been provided before the date of the delegate's decision and, given that it provides information on the developed security situation in Afghanistan, I am satisfied there are exceptional circumstances to justify considering this information. However, of the other new reports, both were published before the date of the delegate's decision the applicant has not satisfied me that this information could not have been provided before the date of the delegate's decision or that this information is credible personal information. I am not satisfied that s.473DD(b) is met or that there are exceptional reasons to justify considering this information.

Applicant's claims for protection

10. The applicant's claims are contained in the information referred and subsequently given to the IAA. They can be summarised as follows:

- He is a national of Afghanistan, an ethnic Hazara and a Shia Muslim who originates from the [District 1] of Afghanistan's Wardak Province. In about 1987, when he was [age], his family moved to [Country 1] and he thereafter resided in [Town 2].
- In about 2004 he returned to Afghanistan, and [District 1], with his family but they found that they could not live there as their home had been demolished and their family land destroyed by the Kuchi Taliban. They then moved to the [Town 1] area of Kabul.
- The applicant fears that he will be harmed / mistreated because he has publically accused a well-known Pashtun police officer, [Mr E], of murdering a Hazara police officer, [Mr D]. He fears he will be harmed in this regard by [Mr E] and his family. [Mr E] is a not only an officer of the [police] force but also a Pashtun who comes from a powerful family. [Mr E]'s [father] is also a high ranking police officer. The applicant fears that [Mr E] and his family have contacts within the Taliban due to his Pashtun ethnicity. He cannot access protection from the government of Afghanistan because the authorities would inform [Mr E] that the applicant has made official complaints against him. He fears that [Mr E] and his family have contacts throughout Afghanistan which they can use to harm him.
- The applicant also claims to fear the Taliban, Islamic State and their supporters because people in Kabul know that he has lived in Australia for the last four years. He fears being harmed by way of being considered anti-Taliban or pro-Western. People in Kabul including the Taliban and members of other terrorist organisations assume that returnees from western world are rich, therefore they kidnap returnees from the western world. He fears that he would not be spared from the harm and that upon arrival in Kabul he will be kidnapped and harmed by the Taliban or kidnappers. He also fears the social ostracisation he will face for being a failed Afghan asylum seeker.
- He also fears that the Kuchi Taliban (who destroyed his family home and farming land in [District 1]) will inflict serious and significant harm if he returns to his home village.

Refugee assessment

11. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

12. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:

- the person fears persecution and there is a real chance that the person would be persecuted
- the real chance of persecution relates to all areas of the receiving country
- the persecution involves serious harm and systematic and discriminatory conduct
- the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
- the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
- the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

13. The applicant claims to be a national of Afghanistan, an ethnic Hazara and a Shia Muslim who originates from the [District 1] of Afghanistan’s Wardak Province. In about 1987, when he was [age], his family moved to [Country 1] and he thereafter resided in [Town 2]. In about 2004 he returned to Afghanistan, and [District 1], with his family but they found that they could not live there as their home had been demolished and their family land destroyed by the Kuchi Taliban. They then moved to the [Town 1] area of Kabul where he resided until he departed Afghanistan in September 2012. The applicant’s claim to be a national of Afghanistan is not in dispute. I find that the applicant is a national of Afghanistan and that Afghanistan is the applicant’s receiving country for the purpose of this review. Given that the applicant was born in [District 1], and given that he made his home in Kabul for some eight years prior to departing Afghanistan, I find that both of these locations are home areas for the applicant.

14. The applicant claims to fear harm from a well-known Pashtun police officer, [Mr E], who he claims to have accused of murdering a Hazara police officer, [Mr D], who was the applicant’s [friend]. The applicant claims to have been told that [Mr E] murdered [Mr D] on [date] 2012 in the course of the disturbances which occurred on that day in [Kabul]. [information deleted]² [information deleted]. On [date] 2012 it was reported that [number] Hazaras protested when a [group] of [supporters], who were mainly Tajiks, tried to drive through a Hazara neighbourhood in western Kabul. Fighting broke out involving [many] police officers, and the police said [number] people had been shot, including a police officer.³ The applicant claims that he witnessed a Hazara man, [Mr F], being shot dead by police at the scene of these

² Human Rights Watch (HRW), [information deleted].

³ DIBP COIS, [information deleted].

[events]. Following this, Hazara people began to protest in front of the police station. At the SHEV interview the applicant said that he did not witness the protest at the police station as he was at his home at the time, but that he could hear the protest from his home. In his written statement it is stated that during that protest [number] Hazara officers who were on duty inside the police station were shot by an unknown gunman, and that one of these was [Mr D] and he died as a result, while the other [number] men were seriously wounded. Sometime later [Mr D]'s brother, Mr [C], told the applicant that [Mr D] had been killed by a shot fired by a well-known Pashtun police officer, [Mr E].

15. A few days later a service was held for [Mr D] with many of [Mr D]'s colleagues in attendance. [Mr E] was also there and Mr [C] pointed him out to the applicant. The applicant called [Mr E] outside and confronted him, and when the discussion became heated the applicant was so angry that he punched [Mr E] in the face. The applicant was stopped by other people who were present at the time. [Mr E] threatened the applicant before leaving the mosque with his friends. A few days later Mr [C] called the applicant and told him to be vigilant and take extra care because [Mr E] and his family were very upset about the incident at the mosque and that [Mr E] had sustained injuries from the applicant's punch which required treatment. The applicant felt concerned for his own safety and went to hide at his [sibling's] home in [Town 1], and ceased going to work at his [business]. He remained in contact with Mr [C] who told the applicant that he had seen [Mr E] around the applicant's home in [Town 1]. The applicant decided to leave the country.
16. In support of his application the applicant has provided a document which presents as a report made available by the Afghan Ministry of the Interior [in] November 2012 concerning the martyrdom of [Mr D] [in] 2012 as a result of verbal argument with mourners. The report describes the manner in which some [number] persons chanting [slogans] had attacked the [Police Station], and that shots had been fired at headquarters personnel resulting in the death of [Mr D] who died of his wounds on the way to the hospital, while [number] other officers were wounded and taken to hospital. The report then lists the property damage that was inflicted upon the police station by the attack. At the August 2016 SHEV interview the applicant was asked how he had obtained this document. He said that Mr [C] had provided it to him. Asked why the report itself was issued, the applicant said that he did not know, but that Mr [C] had given to him the preceding year. Asked if he had requested that the document be sent to him he said he had. Asked about what had occurred, the applicant said that he had been told that, after [Mr F] had been killed, many angry Hazara people gathered in front of the police station and that people opened fire and his neighbour, [Mr D], was killed and a few Hazara men were killed and injured. Asked who opened fire, he said that [Mr E] opened fire and killed [Mr D]. He said that [Mr D] was a Hazara who went outside the police station to talk to the Hazara protesters and that [Mr E] opened fire and killed [Mr D] and another Hazara policeman was injured at the same time. Asked if people saw this, the applicant said that two men who were [Mr D]'s colleagues saw [Mr E] shoot and kill [Mr D]. It was put to the applicant that if [Mr D] came out to speak to a [number] of protesters that this would have been seen by many people. The applicant said that he did not know, but that this was what he had been told
17. Asked about his confrontation with [Mr E] at the mosque, the applicant said that he told [Mr E] that he knew from other people that he ([Mr E]) had killed [Mr D]. Asked why he became so angry about the death of [Mr D] the applicant said that [Mr D] was like a brother to him. Asked if he was arrested or charged after he struck [Mr E] he said he was not and that maybe [Mr E] just thought that the applicant was very angry and was [Mr D]'s good [friend] and so [Mr E] forgave him (the applicant) for some reason, but that [Mr E] had threatened him as he departed. The applicant said that he left Afghanistan some two weeks later, and that following his confrontation with [Mr E] he had hid at his [sibling's] home. It was put to the applicant that

if [Mr E] was a policeman, and as influential and powerful as the applicant claimed, it would have been simple enough for him to locate the applicant at his [sibling]'s home. The applicant said that his [sibling]'s home was a long way away from his own [home], and that because Kabul did not have proper street-addresses it was very difficult to locate anyone. At the outset of the interview the applicant was asked when he had obtained the passport which he used to depart Afghanistan. He estimated that he obtained this [period] before his departure. Asked why he would have obtained a passport at that time he said that he wanted a passport in case he decided to travel. Asked when he departed Afghanistan and how long it took him to prepare he estimated that it was the end of September 2012 and that it took him about [number] weeks.

18. The applicant arrived in Australia [in] November 2012. Some [number] weeks later, [in] November 2012, he participated in a departmental entry interview. The interviewing officer asked the applicant to tell her briefly about why he had to leave Afghanistan. She said it did not have to be his entire story because he would be asked about that later on, but just a few sentences. The applicant replied that there were three main reasons why he departed Afghanistan and came to Australia. He said that the first reason was the Taliban who were attacking everywhere in Afghanistan, and that the whole area was insecure. He said that the other reason was that in [District 1], where he was born in [Town 3], that every year it was occupied by Kuchi people who are Pashtuns and who come there every year and kill people. He said that the third reason was discrimination, racial and religious discrimination. Asked if he had ever attended any activities or protests against the government he said he had not. Asked if the police or security or intelligence organisations impacted on his day to day life in Afghanistan, he said that they did. Asked to explain, he said that it goes back to racial discrimination and that three months ago police had killed a Hazara just because he was a Hazara and that he himself had seen this man's dead body. He said that he had begun to make arrangements to depart Afghanistan some four months ago (which would be around mid-July 2012). He said that he had departed Afghanistan [in] September 2012. Asked what he thought would happen to him if he returned to Afghanistan, he said that he thought his life would be in danger sooner or later.
19. At the SHEV interview the delegate put it to the applicant that at his entry interview he had not said anything about the incident with [Mr E]. The applicant responded that at the entry interview he was told not to go into detail and that he could give the other details later, and to just give the main reason why he had departed Afghanistan, which he did and this was that he was a Hazara. It was put to the applicant that his fear of [Mr E] was now being presented as the major reason why he had departed Afghanistan. The applicant said that at the entry interview he was told to give his claims in short sentences and that he could give all the details later. Although it is true that at the entry interview the applicant was told to provide a brief account of why he had departed Afghanistan he nonetheless provided three reasons, going into some detail about each, but said nothing about having had a confrontation with [Mr E], even though it is plain that he is now claiming that this was the most significant reason which motivated his departure from Afghanistan. When at the entry interview he was asked a direct question about whether police had impacted upon his day to day life he said that they had and he stated that three months ago police had killed a Hazara just because he was a Hazara and that he himself had seen this man's dead body. But again, the applicant said nothing to indicate that this dead persons was known to him personally, or that he had seen this man being killed ([Mr F]), or that this man had himself been a police officer ([Mr D]) who was killed by a Pashtun police officer, or that the applicant confronted the police officer who did this, or that this affected him by leading him to fear for his life and to depart the country.

20. Furthermore, the applicant's claim to have assaulted a powerful police officer in public and in front of the police officer's friends, without suffering any immediate reprisals, seems doubtful given the manner in which senior Afghan police are known to exercise power.⁴ When questioned about why the Ministry of Interior document had been issued the applicant appeared to have no knowledge of, and no interest in, why this was. When asked about the current circumstances of Mr [C] and his family the applicant could provide no substantive information about them or their situation, and when asked if Mr [C]'s family had subsequently lodged a complaint about the death of [Mr D] the applicant said he had no idea. The applicant's claim to have loved [Mr D] like a brother and to have moved to confront a powerful police officer with violence and accusations of murder seemed at odds with the applicant's lack of knowledge and lack of engagement with regard to these matters. I consider that the credibility of the applicant's claim to have had a personal involvement in these matters is seriously undermined by the fact that he gave no indication of any such events or fears at his entry interview, and these doubts are not overcome by the applicant's unconvincing evidence at his SHEV interview.
21. The report released by the Afghan Ministry of Interior has the appearance of being a copy of an authentic report and I accept that it is. The report indicates that some [number] persons chanting [slogans] had attacked the [Police Station], and that shots had been fired at headquarters personnel resulting in the death of [Mr D] who died of his wounds on the way to the hospital. I accept that this occurred. I also accept that prior to this a Hazara man was killed by police firing during the violence which occurred when police were deployed to quell the clashes which had broken out in Kabul's [neighbourhood] as a consequence of the clashes which occurred [in] 2012. I am willing to accept that the applicant, as per his evidence at the entry interview, did see the dead body of a Hazara man who was killed in this violence. However, I am not persuaded that the applicant had a personal involvement in these matters as he has now claimed in his SHEV application. I do not accept that the applicant was in Kabul's [neighbourhood] on the day of the [2012] clashes or that he witnessed a Hazara man being killed when police were deployed to quell these disturbances, or that he knew the man who was killed personally. I do not accept that the applicant was knew [Mr D] who died of his wounds on the way to the hospital after shots were fired during a disturbance at the Kabul [Police Station]. I do not accept that the applicant subsequently had a confrontation with [Mr E]. I am therefore not satisfied that the applicant would, if he returned to Afghanistan, face a real chance of harm from [Mr E] or his family.
22. The applicant also claims to fear the Taliban, Islamic State and their supporters because he is a Shia Hazara. In February 2016 DFAT reported that some Hazara groups expressed serious concerns about their safety and security during DFAT consultations, fearing that they will be targeted for violence or discrimination because of their ethnicity and/or religion. DFAT observed that these concerns were partly driven by the historical treatment of Hazaras in Afghanistan, particularly during the period of Taliban rule in the years preceding 2001.⁵ Since the overthrow of the Taliban regime in 2001 there have sometimes appeared accusations that Hazaras have been abducted by while travelling through Pashtun dominated areas, and that the Taliban, and more recently Islamic State, have perpetrated abductions of this kind. All persons travelling roads in insecure areas of Afghanistan can face some risk of encountering harm from anti-government elements (AGEs) and/or criminal groups. Although reports of abductions involving Hazaras are often presented as being perpetrated along ethno-sectarian lines, DFAT and other credible sources have reported that there is some doubt about the

⁴ HRW, "Today We Shall All Die: Afghanistan's Strongmen and the Legacy of Impunity", 3 March 2015, CISEC96CF1289, pp.4-5, 18-19; DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 3.2-3.3.

⁵ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 2.16.

extent to which this is the case, and whether the perpetrators have any association with the Taliban or Islamic State.⁶ In most cases the persons abducted were subsequently released for money or as part of a prisoner exchange with the Afghan authorities, but in some cases the abducted Hazaras were killed and at least some these attacks would appear to have targeted Shia Hazaras for ethno-sectarian reasons. In 2015, UNAMA observed a sharp increase in the abduction and killing of civilians of Hazara ethnicity by anti-government elements (AGEs) with at least 146 members of the Hazara community abducted in 20 separate incidents.⁷ Abductions of this kind decreased in 2016, and no Hazara abductions were reported over the first half of 2017.⁸ In February 2016 DFAT assessed that Hazaras travelling by road between Kabul and the Hazarajat face a greater risk than other ethnic groups.⁹ No abductions of this kind have been reported as having occurred in government controlled Kabul.

23. Until mid-2016 the most significant attack to have been perpetrated in Kabul against the Shia Muslim and/or Hazara population had been the December 2011 bombing of Ashura commemorations at Kabul's Abu Fazl Mosque which had killed some 80 persons, with responsibility being claimed by the avowedly sectarian Pakistani militant group Lashkar-e-Jhangvi (LeJ).¹⁰ In July 2016 Islamic State Khorasan Province (ISKP) perpetrated an attack upon a Hazara political demonstration in Kabul which killed some 85 civilians and injuring 413 others, with ISKP stating that the attack was retaliation for alleged Hazara participation in fighting in Syria on the side of the government, with anti-Shia Muslim statements delivered in the same message. ISKP then perpetrated an 11 October 2016 attack upon a Kabul Shia Muslim mosque in Karte Sakhi during Ashura commemorations which killed some 19 civilians and injured 60 others, and another on 21 November 2016 upon Kabul's Shia Muslim Baqer-ul Ulum mosque during Arbæen commemorations which killed 40 civilians and injured 74 others. Balkh District and Herat city both saw instances of attacks of a similar nature but without any claims of responsibility.¹¹ In the aftermath, Afghanistan's National Directorate of Security (NDS) announced in late November 2016 and in December 2016 that it had arrested a number of the persons suspected of having planned and perpetrated these attacks against Kabul's Shia Muslim community.¹² Although a further attack of this kind occurred near a Shia Muslim mosque in Herat city in January 2017, no further attacks of this kind were reported from Kabul until 15 June 2017 when ISKP perpetrated an attack upon Kabul's Shia Muslim Al Zahra mosque in Dasht-e Barchi during Lailat-UI-Qadir commemorations, which killed some five civilians and injured seven others.¹³ The attackers were reportedly repelled by Afghan security forces and forced to retreat to a kitchen, where they detonated a bomb, with casualties much fewer than they would have been had the attackers gained access to the mosque. It was reported that security forces at Kabul's Shia Muslim mosques had been stepped up because of the 2016 Islamic State attacks.¹⁴ The Taliban have consistently condemned attacks of this kind and have

⁶ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 2.28-2.33; Sroush, Q. "Hazaras in the Crosshairs? A scrutiny of recent incidents ", Afghanistan Analysts Network, 24 April 2015, CXBD6A0DE5323.

⁷ UNAMA, "UNAMA Protection of Civilians Annual Report 2015", 14 February 2016, CIS38A8012245, pp.49-50

⁸ UNAMA, "Afghanistan: Protection of Civilians in Armed Conflict – Annual Report 2016", 6 February 2017, CISED50AD201, pp.68, 81; UNAMA, "Afghanistan: Protection of Civilians in Armed Conflict – Midyear Report 2017", 1 July 2017, CISED50AD4852, p.46.

⁹ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 2.33.

¹⁰ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 3.6.

¹¹ UNAMA, "Afghanistan: Protection of Civilians in Armed Conflict – Annual Report 2016", 6 February 2017, CISED50AD201, pp.34-35; "Afghanistan mosque attack: 30 dead, ISIS claims responsibility", CNN News, 21 November 2016.

¹² "Key ISIS figures involved in recent Kabul attacks arrested ", Khaama Press, 15 December 2016, CX6A26A6E15727; "2 ISIS suicide bombers arrested in Kabul city", Khaama Press, 28 November 2016, CX6A26A6E14124.

¹³ UNAMA, "Afghanistan: Protection of Civilians in Armed Conflict – Midyear Report 2017", 1 July 2017, CISED50AD4852, p.45.

¹⁴ Joscelyn, T. "Islamic State continues to target Shiite civilians in Kabul", The Long War Journal, 15 June 2017, CXC9040669201.

sought to present themselves as a national movement for all Afghans regardless of sect or ethnicity.¹⁵

24. Given the emergence in Afghanistan of groups pledging allegiance to Islamic State, and the mass casualty attacks perpetrated by ISKP against Shia Hazaras in Kabul since July 2016, I accept that the overall level of risk faced by Shia Hazaras in Kabul has risen. However, the Afghan government has stepped up security for Shia Muslim mosques in the aftermath of the 2016 attacks and thus far 2017 has seen only one attack of this kind, with the attackers beaten off and prevented from causing more than a few casualties. The applicant does not claim to have ever been involved in organised political activities of the kind that was bombed in July 2016. The applicant does not claim to be a frequent attendee of communal Shia Muslim worship and/or commemoration and at his SHEV interview he stated that he was not currently attending mosque here in Australia and that he said his prayers at home. However, and even if like most Afghan Shia Muslims the applicant did choose to attend commemorations such as Ashura upon return to Kabul, he would be one of a Kabul Shia Hazara Muslim population of some two million persons attending any one of the many Shia Muslim mosque's scattered across his own suburb of [Town 1] and Kabul more generally. Given this, and given the manner in which the occurrence of such attacks, and their impact, has been limited by the response of Afghanistan's security forces, and given that the Taliban is not perpetrating attacks of this kind in Kabul, I am not satisfied on the evidence that the applicant would face a real chance of harm from a mass casualty attack perpetrated against the Shia Muslim and/or Hazara community in Kabul by a group pledging allegiance to Islamic State or the Taliban any other insurgent group.
25. Notwithstanding the Islamic State and LeJ attacks noted above, outbreaks of inter-faith violence between members of Kabul's Shia Muslim and Sunni Muslim communities have proven rare in Kabul over recent years. In November 2012 a group of Sunni students at Kabul University attempted to prevent (predominantly Hazara) Shia students from observing Ashura, and the clash resulted in one death and some eight injured.¹⁶ More generally, however, Shia-Sunni relations in Kabul are still characterized by mutual respect and tacit acknowledgement of each other's ceremonial specificities.¹⁷ Inter-communal violence along ethnic lines has also proven rare in Kabul over recent years, and the events of 8 September 2012, in which Hazaras clashed with Tajiks, represents one of the few instances when violence of this kind has occurred in the capital in the recent decade. The other major episode of this kind occurred in August 2010 when clashes broke out between Hazaras and Kuchis on the western outskirts of Kabul over a land dispute. While the exact circumstances are unclear, reports indicate that some Hazaras, and perhaps some Pashtuns, were shot by police when a riot broke out and mobs of young men began attacking local shopkeepers. Credible sources reported that as many as four persons may have died. The tensions between the Kabul Hazara and Kuchi communities may have been added to by the clashes which had also been occurring over the preceding years between Hazaras and Kuchis in Wardak Province.¹⁸ An Afghan asylum seeker now writing as a journalist in Australia has claimed that during the August 2010 clashes some 15 to 20 Hazaras were killed by Afghan security forces firing at protesters, with many more wounded, and that most of the protesters were refugees from Behsud District,¹⁹ but such claims are not confirmed by broader reporting. Although at the entry interview the applicant

¹⁵ Suroush, Q. "Hazaras in the Crosshairs? A scrutiny of recent incidents", Afghanistan Analysts Network, 24 April 2015, CXBD6A0DE5323.

¹⁶ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 3.6.

¹⁷ Foschini, F. "Kabul And The Challenge Of Dwindling Foreign Aid", US Institute of Peace, 1 April 2017, CISED50AD4472, p.61.

¹⁸ DIBP COIS, "Afghanistan: Hazaras Issues Paper", 2 April 2015, CRF90949638, pp.9, 52.

¹⁹ Hekmat, A.K. "Unsafe Haven: Hazaras in Afghanistan and Pakistan", Cosmopolitan Civil Societies Research Centre, University of Technology Sydney, 1 October 2011, CIS22129, p.7.

stated that police had killed a Hazara just because he was a Hazara, broader credible reporting indicates that the Kabul police deal with all violent public disturbances in a similar fashion irrespective of the ethnicity of the rioters, and there is no evidence of the police harassment of Hazaras in Kabul.²⁰ In any event, Kabul has not seen a repeat of these clashes and credible sources, including UNHCR, assess that Hazaras from Wardak's Behsud region are not being targeted in Kabul by members of the Kuchi community or any other actors on the basis of their originating from Behsud or more broadly.²¹

26. UNHCR has observed that while some sources report that overt discrimination by Sunnis against the Shia community has decreased, other sources report that such discrimination continues.²² There is no evidence of Shia Muslims being prevented from practicing their faith in Kabul. DFAT has observed that while conditions for Hazaras have improved greatly since 2001, they still face societal discrimination, partly as a result of earlier practices of official discrimination. For example, until 2001 there were few Hazaras employed in senior government positions. Due to the important role that ethnic, tribal and familial connections play in day to day life for all Afghans, Hazaras are still underrepresented in senior levels of government bureaucracy. The historical enmity between Afghanistan's Pashtun and Hazara communities contributes to the Hazara community's perceptions of ongoing discrimination and targeting for violence.²³ DFAT assesses that any discrimination faced by Shias in Afghanistan, including the Hazara community, is more likely to be societal in nature, primarily as a result of the important role played by ethnic, tribal and familial networks in Afghan society and the dominance in many areas of the Sunni majority, and that discrimination generally occurs as a result of a positive preference for members of one's own family/tribal/ethnic/religious group, rather than negative discrimination against others.²⁴ The applicant does not claim to have suffered any instances of discrimination of this kind during the eight years of his life during which he lived in Kabul following 2004, and during which he was able to earn a livelihood while living in western Kabul with his large family, most of whom continue to live in [Town 1]. Further, Kabul's ethnic communities conduct much of their day-to-day dealings with other members of their own ethnic community.²⁵

27. On the evidence, I am not satisfied that the applicant would face a real chance of violent harm of any kind in Kabul for reason of his being a Shia Hazara, whether from insurgent groups like Islamic State or the Taliban or LeJ, or from members of other ethnic communities such as Kuchis, or Pashtuns or Tajiks, or from members of Kabul's Sunni Muslim community more broadly, or from the police or any other actor. I am willing to accept that there is a real chance that the applicant may experience some very low level discrimination on the basis of his being a Shia Hazara but, that Kabul's ethnic communities conduct much of their day-to-day dealings with other members of their own ethnic community,²⁶ I am not satisfied that there is a real chance of the applicant experiencing anything more than some very low level societal

²⁰ Foschini, F. "Kabul And The Challenge Of Dwindling Foreign Aid", US Institute of Peace, 1 April 2017, CISEDB50AD4472; DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367.

²¹ Danish Immigration Service (DIS), "COI for Use in the Asylum Determination Process: Report from the DIS's Fact Finding Mission to Kabul, Afghanistan", 1 May 2012, CIS23406, p.46.

²² UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, pp.51-52

²³ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 3.2.

²⁴ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 3.5.

²⁵ DIS, "COI for Use in the Asylum Determination Process: Report from the DIS's Fact Finding Mission to Kabul, Afghanistan", 1 May 2012, CIS23406, pp.9-10; Foschini, F. "Kabul And The Challenge Of Dwindling Foreign Aid", US Institute of Peace, 1 April 2017, CISEDB50AD4472, p.6.

²⁶ DIS, "COI for Use in the Asylum Determination Process: Report from the DIS's Fact Finding Mission to Kabul, Afghanistan", 1 May 2012, CIS23406, pp.9-10; Foschini, F. "Kabul And The Challenge Of Dwindling Foreign Aid", US Institute of Peace, 1 April 2017, CISEDB50AD4472, p.6.

discrimination on the basis of his being a Shia Hazara, and I am not satisfied that there is a real chance that such discrimination would threaten the applicant's capacity to subsist or that it would otherwise amount to serious harm.

28. The applicant also claims to fear the Taliban, Islamic State and their supporters because he is a Shia Hazara and who has lived in Australia for the last four years, and people in Kabul would know this. He also claims to fear harm in Kabul because people in Kabul, including the Taliban and members of other terrorist organisations, assume that returnees from western world are rich, therefore they kidnap returnees from the western world. The Edmund Rice Centre (an advocacy group supporting the claims of Afghan and other asylum seekers in Australia) has claimed that several Hazaras have been killed following their return to Afghanistan having attempted to find asylum in Australia.²⁷ In September 2014 it was reported that a Shia Hazara Afghan-Australian man had, while travelling between Ghazni province and Kabul, been killed by the Taliban who reportedly singled the man out on a bus and accused him of being a foreigner. In October 2014 a Shia Hazara Afghan asylum seeker who had been deported from Australia alleged that while travelling from Kabul to Jaghori he had been halted at a Taliban checkpoint where it was discovered he had pictures from Australia on his phone, following which he was accused of being a spy and tortured, following which he escaped back to Jaghori then returned to Kabul.²⁸ In 2015 it was reported that a Hazara asylum seeker who had returned from Denmark had been killed after returning to his home area in Wardak Province to obtain an identity card.²⁹ UNHCR noted the reporting of the two 2014 incidents in its April 2016 protection eligibility guidelines for Afghanistan, while also noting that in recent years groups like the Refugee Support Network (RSN), the Bureau of Investigative Journalism (BIN) and the Peace Research Institute Oslo (PRIO) had claimed that young people with Western connections and mannerisms are reportedly at risk of being mistaken for collaborators with the government and the international community, and that just being identified as returnee has put such persons at risk of violence, and that returnees from Europe are generally assumed to have become "westernized" or "anti-Islamic".³⁰
29. Notwithstanding the appearance of occasional reports that returnees have been targeted in insecure areas, and claims that young Afghans are at risk even in Kabul of being targeted on the basis of their being returnees, recent years have seen thousands³¹ of Afghan asylum seekers returned to Afghanistan but without there being any evidence of these persons having been targeted in Kabul by insurgent groups, or of their being kidnapped or robbed in the capital, as a consequence of their being persons who have returned from, or sought asylum in, western countries. For its own part, UNHCR has assessed that individuals perceived as "westernized" may be in need of protection depending on the individual circumstances of the case.³² In September 2015 DFAT reported that it was aware of occasional reports of returnees

²⁷ "Stop deporting Afghans to be killed", The Australian, 30 March 2011, CX261708.

²⁸ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p.41, n.256; "Hazaras face death on return to Afghanistan", The Saturday Paper, 8 November 2014, CX1B9ECAB6982; DIBP COIS, "Afghanistan: Hazaras Issues Paper", 2 April 2015, CRF90949638, p.25.

²⁹ Afghanistan Analysts Network, "Afghan Exodus - Afghan asylum seekers in Europe (1) – the changing situation", 13 February 2017, CXC9040661658.

³⁰ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p.41, n.255; see also: Gladwell, C. & Elwyn, H. "Broken futures: young Afghan asylum seekers in the UK and on return to their country of origin", UNHCR Policy and Evaluation Service Research Paper No. 246, 1 October 2012, CIS24488;

³¹ Afghanistan Analysts Network, "Voluntary and Forced Returns to Afghanistan in 2016/17: Trends, statistics and experiences", 19 May 2017, CXC9040667688.

³² UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p.42.

from western countries alleging they have been kidnapped or otherwise targeted on the basis of having spent time in a western country. While DFAT did not make a judgement on the veracity of individual cases, DFAT assessed that in general returnees from western countries were not specifically targeted on the basis of their being failed asylum-seekers. Further, in February 2016 DFAT observed that that, although Hazaras are widely perceived to be affiliated with both the government and the international community, this does not mean that all Hazaras face the same level of risk as those working for the government or the international community³³ and that, with the exception of those travelling by road through insecure areas like those between Kabul and the Hazarajat, low-profile Hazaras who have spent time in western countries face a low risk of violence as a result of those international links.³⁴ DFAT's findings are based on extensive consultations with informed stakeholders in Afghanistan and given this, and given that thousands of asylum seekers who have returned from western countries to cities like Kabul in recent years without there being any evidence of their being targeted in these cities, I give this assessment significant weight.

30. On the evidence, I am not satisfied that the applicant would face a real chance of being harmed in any way in Kabul by the Taliban, Islamic State, or any other terrorist or insurgent groups, or by kidnappers or criminals more broadly, or by any other actors, for reason of his being a returnee who has lived, and sought asylum in, Australia, a western country or because he would be considered anti-Taliban or pro-Western, or because he would be perceived to be rich for reason of being a returnee from the western world.
31. The applicant also claims to fear that he will be socially ostracised as a failed Afghan asylum seeker. For Afghans returning to ethnic communities like the Pashtun community whose members may well be supportive of the Taliban led insurgency, and opposed to the Afghan government and its western backers, the possibility of being ostracised in this way or of experiencing some discrimination on the basis of having lived, and sought asylum, in a western country like Australia, may be real depending on the person's particular circumstances. However, the applicant does not claim that any of his own family members are opposed to the west in this way, and the Shia Hazara community is known for engaging in extensive migration to western countries and for having a broadly favourable view of the west.³⁵ The possibility that he would suffer any discrimination, let alone ostracism, on the basis of having lived, and sought, asylum in western country like Australia from his own family and Shia Hazara community in Kabul seems remote, and the possibility that the applicant's history would become known to members of other ethnic communities, or that he would suffer any discrimination when dealing with such communities, likewise seems remote, and I am not satisfied that he would face a real chance of harm on this basis. Alternatively, the possibility that he would be ostracised for having failed to obtain asylum in Australia, that is for failing to have obtained asylum, likewise seems remote. For while there is some evidence to indicate that some families may see such returnees as failures,³⁶ and that such returnees may see themselves as failures,³⁷ the applicant has provided no evidence to indicate that his family would ostracise him upon return to Afghanistan for having failed to obtain asylum and I am not satisfied that there is a real chance of his suffering harm of this kind either. I am not satisfied that there is a real chance of the applicant suffering harm of any kind for reason of his being a failed Afghan asylum seeker.

³³ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 3.30.

³⁴ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 3.31.

³⁵ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 2.2, 3.30.

³⁶ Gladwell, C. & Elwyn, H. "Broken futures: young Afghan asylum seekers in the UK and on return to their country of origin", UNHCR Policy and Evaluation Service Research Paper No. 246, 1 October 2012, CIS24488.

³⁷ Afghan Analysts Network, "Voluntary and Forced Returns to Afghanistan in 2016/17: Trends, statistics and experiences", 19 May 2017, CXC9040667688.

32. Of the thousands of Afghan asylum seekers who have been returned to Afghanistan in the recent year, the only returnee to have reportedly suffered any harm in Kabul was a man who was unfortunate enough to be wounded as a bystander to an insurgent attack which occurred in the vicinity of Supreme Court in February 2017.³⁸ While UNAMA has reported that the emergence of ISKP and sectarian attacks in Kabul is extremely concerning, and while as noted above several mosques in Kabul's Hazara populated western suburbs were targeted by these attacks over the recent year, it nonetheless continues to be the case that the overwhelming number of insurgent attacks perpetrated in Kabul are high profile complex attacks which occur in central Kabul, and which are perpetrated by the Taliban led insurgency and which primarily target Afghan government institutions and leading figures, along with Afghan and foreign security forces, and the facilities and personnel of foreign government and non-government and international organisations. Attacks of this kind have, over recent years, killed several hundred civilians and wounded over a thousand others each year. Even so, it is also the case that such attacks overwhelmingly occur in central Kabul rather than in the [Hazara] suburbs of Kabul like the applicant's own home neighbourhood of [Town 1], and the suburb where he worked, [Town 3].³⁹ Even allowing for the fact that there have sometimes been attacks of this kind in the vicinity of Kabul airport which the applicant would use in order to return to Kabul, and even given the possibility that the applicant may need to conduct business in the city centre from time-to-time, given that he has previously lived and worked in in the [suburbs] of [Town 1] and [Town 3] and like most Hazaras in Kabul would likely do so again in the future, and given that Kabul is a city of some four million persons, I am not satisfied that there is real chance of the applicant's being harmed in any way in Kabul as a consequence of the kind of generalised violence arising from such insurgent attacks.

33. I accept that the applicant may experience some very low level societal discrimination on the basis of his being a Shia Hazara in Kabul, I am not satisfied that there is a real chance that such discrimination would threaten the applicant's capacity to subsist or that it would otherwise amount to serious harm. However, given the steps taken by the Afghan government to prevent future attacks upon the Shia Hazara community in Kabul and the manner in which such attacks have been limited, given the low risk posed to the Shia Hazara community in Kabul by inter-communal ethno-sectarian violence and/or the police, and the low risk of harm posed to the applicant in Kabul as a return from a western country who has lived, and sought asylum, in Australia, including on the basis of his being perceived as rich, and given the absence of any evidence that he would be ostracised by his family or his own Hazara community for having failed to obtain asylum, I am not, when considering all of the circumstances cumulatively, satisfied that the applicant would for the foreseeable future face a real chance of harm of any kind, other than that of some low level discrimination which would not amount to serious harm, in his home area of Kabul. I am therefore not satisfied that the applicant would face a real chance of serious harm in Kabul.

Refugee: conclusion

34. 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).

³⁸ Afghan Analysts Network, "Voluntary and Forced Returns to Afghanistan in 2016/17: Trends, statistics and experiences ", 19 May 2017, CXC9040667688.

³⁹ DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 2.29-2.31; EASO, "EASO COI Report: Afghanistan Security Situation", 20 January 2016, CIS38A8012395, pp.20, 34-38; UNAMA, "Afghanistan: Protection of Civilians in Armed Conflict – Annual Report 2016", 6 February 2017, CISED50AD201; UNAMA, "Afghanistan: Protection of Civilians in Armed Conflict – Midyear Report 2017", 1 July 2017, CISED50AD4852.

Complementary protection assessment

35. 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

36. 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.

37. For the reasons already given above I accept that the applicant may face a real chance, and therefore a real risk of suffering some very low level societal discrimination on the basis of his being a Shia Hazara in Kabul. However, I am not satisfied that the applicant would face a real risk of suffering discrimination of a level that would deprive him of the capacity to subsist or that would otherwise arbitrarily deprive him of his life. Nor am I satisfied that there is a real risk that he would suffer discrimination of a kind that would result in pain or suffering or severe pain or suffering that would amount to cruel or inhuman treatment or punishment, or treatment that would amount to extreme humiliation, or that it would amount to torture or result in his being subject to the death penalty. I am therefore not satisfied that such harm would amount to significant harm. Other than this, and for the reasons already given above, I am not satisfied that the applicant would face a real risk of suffering harm of any other kind in Kabul. I am therefore not satisfied that the applicant would face a real risk of significant harm in Kabul.

Complementary protection: conclusion

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

Decision

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

Applicable law

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.

...

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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