



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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AFGHANISTAN

IAA reference: IAA19/06758

Date and time of decision: 15 August 2019 12:24:00

M Tubridy, Reviewer

**Decision**

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

*Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an 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 national of Afghanistan. On 3 October 2013 the applicant lodged an application for a subclass 866 (permanent) Protection visa (PV) which was found to be invalid. On 28 November 2015 he was invited to apply for either a subclass 785 Temporary Protection visa (TPV) or a subclass 790 Safe Haven Enterprise visa (SHEV). On 13 September 2016 he lodged his SHEV application. The applicant attached his 2013 PV application to his SHEV application and sought to rely upon the claims and evidence it contained with the exception of what had been claimed in 2013 with regard to the applicant's having been born in [date]. A delegate of the Minister (the delegate) refused to grant the visa on 25 January 2018, and the matter was referred to the IAA on 7 February 2018. On 29 November 2018 the IAA affirmed the decision not to grant the applicant a protection visa. On 12 June 2019 the Federal Circuit Court of Australia remitted the matter to the IAA for reconsideration.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) including the submission of 29 November 2018 which was sent to the delegate some four days after the delegate had refused to grant the visa (this post-decision submission advocates for the merit of the applicant's claims but without introducing any new information as all of the information it refers to was before the delegate when he made his decision).
3. A number of submissions have been made to the IAA on the applicant's behalf by his former and his current representative. To the extent that these present arguments in favour of the merit of the applicant's claims including by way of disagreement with some aspects of the delegate's decision and without introducing any new information I have had regard to these submissions. Additionally, these submissions have also provided some new information. In some instances the new information in question has been country information. The IAA's practice direction requires that if applicants provide new country information they must provide a copy of the new country information or extract part(s) of the information on which they rely. Where this has not been complied with I have not accepted the new information in question. With regard to the new country information which I have accepted I note that all of this country information was published after the date of the delegate's decision and thus could not have been provided to the delegate before he made his decision. I am thus satisfied that s.473DD(b)(i) is met with regard to this new information and, given the value of current information for assessing the applicant's claims with regard to Afghanistan, I am also satisfied that there are exceptional circumstances to justify considering this new information.
4. The submissions have also provided new information in the form of extracts from Administrative Appeals Tribunal (AAT) decisions and wherein the decision maker found that the applicant had a well-founded fear of persecution in all areas of Afghanistan for reason of being a Shia Hazara (and in one case cumulatively with his political opinion). New information has also been provided in the form of a IAA decision wherein the decision maker accepted that the applicant had been living outside Afghanistan since the age of [age], and had no family in Afghanistan, and wherein these matters featured among the reasons why the decision maker was not satisfied that it was reasonable for this particular applicant to relocate to Mazar-e Sharif in order to avoid a real risk of significant harm which he might face

in Kabul as a consequence of his being a practising Shia Muslim. It has been submitted that the provided IAA decision is new information which could not have been provided to the delegate as it post-dated the delegate's decision. It has also been submitted that this, along with the similarities between this case and that of the applicant's, made for exceptional circumstances. It is true that the provided IAA decision (unlike the provided AAT decisions) post-dates the delegate's decision and so could not have been provided to the delegate. This satisfies s.473DD(b) but I am not satisfied that this makes for exceptional circumstances either in itself or in combination with the fact that there are some similarities between the matters considered in the provided IAA case and claims of the applicant in the present matter. I am required to consider the applicant's own claims, and his own particular circumstances, and not what another decision maker decided about another applicant whose claims were in some ways similar. I am not satisfied that there are exceptional circumstances for considering the provided IAA decision, or the provided AAT decisions.

5. I have also obtained new information<sup>1</sup> in the form of country about the situation in Afghanistan for persons like the applicant published by a range of credible observers, and which were not available when the delegate made his decision because they have only been recently published. Given the need for the most current information about such matters I am satisfied that there are exceptional circumstances to justify considering this new information.

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

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6. The applicant's claims can be summarised as follows:
  - He is a national of Afghanistan, and ethnic Hazara and a Shia Muslim. He fears persecution at the hands of armed anti-government elements (AGEs) that continue to operate throughout Afghanistan. He will be targeted for the for the following reasons: his race as a Hazara; his religion as a Shia Muslim; his imputed political opinion as someone perceived a supportive of the west or the international community within Afghanistan, or as a potential spy, or as an opponent to antigovernment elements (AGEs), including the Taliban; his actual or imputed membership of a particular social group, namely: western returnees; and: landowner involved in a land dispute (because people have taken the land his father inherited and so will target the applicant as his father's son). He also fears being targeted by Kuchis or by other Pashtun groups who continue to target Hazaras. He also fears harm in Afghanistan because he does not know anyone in Afghanistan, and because he will not find work because does not know anyone to give him work and has no documents (either as proof of his identity or of his education), and he has lived all his life in Pakistan and he speaks a different dialect of the language and has a Pakistani accent, and his parents are living in Pakistan as refugees, and they (he and his family) do not own any land in Afghanistan and would have nowhere to live and he cannot survive there. He also fears harm in Afghanistan because since he has been in Australia the way in which he thinks has become completely different and has been changed, and he is wearing clothes and approaching people differently, and he will be seen as a non-believer and an infidel who has

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<sup>1</sup> DFAT, "DFAT Country Information Report: Afghanistan", 27 June 2019, 20190627113333; EASO, "Afghanistan: Security situation", 12 June 2019, 20190613124844; UNAMA, "Midyear Update on the Protection of Civilians in Armed Conflict: 1 January to 30 June 2019", 30 July 2019, 20190808111453; UNAMA, "Afghanistan, Protection of Civilians in Armed Conflict – Annual Report 2018", 24 February 2019, 20190226143710; UNAMA, "Afghanistan, Protection of Civilians in Armed Conflict – Annual Report 2017, 15 February 2018", CIS7B83941276; CEDOCA, "Afghanistan Security Situation in Kabul City", 15 May 2019, 20190530091858; Afghan Analysts Network, "Taleban Attacks on Khas Uruzgan, Jaghori and Malestan (I): A new and violent push into Hazara areas", 28 November 2018, CXBB8A1DA39578.

returned from a foreign country and has maybe changed his religion and converted to Christianity. He also fears that there is no security and that there are suicide bombings and abductions.

## Refugee assessment

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

## Well-founded fear of persecution

8. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
  - the person fears persecution and there is a real chance that the person would be persecuted
  - the real chance of persecution relates to all areas of the receiving country
  - the persecution involves serious harm and systematic and discriminatory conduct
  - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
  - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
  - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
9. The applicant claims to be a national of Afghanistan, and an ethnic Hazara who was born into a Shia Muslim family in Kabul. For reasons that will be explained below I accept that this is the case and I therefore find that Afghanistan is the applicant's receiving country for the purpose of this review. For reasons to be explained below I do not, however, accept the applicant's claim he was [age] years of age when he arrived in Australia [in] October 2012. As will be discussed below it is apparent from the evidence that the applicant was around [age] years of age when he arrived in Australia and that he was born in around [year]. For reasons to be explained below I accept that when the applicant was around [age] (that is, in around [year]) he and his family moved from Kabul to Maidan Wardak's Behsood region to [Village 1], [which] both his father and mother had originated. In 2005 he and his family returned to Kabul. However, for reasons to be explained below I am not satisfied and I do not accept that while in [Village 1] his family owned and worked a family farm, or that his family was affected by a land dispute, or that they were directly affected by problems with Kuchi nomads. The applicant claims that in 2006 he and his family departed Afghanistan for Pakistan and that his family thereafter remained outside of Afghanistan such that the applicant has no family, and knows no one, in Afghanistan. The applicant has sought to put this at the heart of his claims by submitting that because he has no support network in Afghanistan he would be particularly vulnerable if he were returned to his country. For reasons that will be explained below, I am not satisfied and I do not accept that the applicant's family members have been outside Afghanistan since 2006. From the evidence before me it is not apparent that the

applicant's family (following their return to the capital in 2005) ever left Kabul; and on the evidence before me it seems most probable that the applicant's family remain in Kabul and that the applicant himself was residing with his family in Kabul (and not in Pakistan) in 2012 when he began his journey to Australia.

10. In his SHEV application the applicant stated he believed himself to be about [age] years of age (such that he would have been born in around [year]) and that when he had first arrived in Australia he told the Department he was [age] years of age but that the Department told him this was not correct and that the Department also told him he was born on [date]. The applicant submitted that it was because of this (the Department's finding about his date of birth) that he presented himself in his 2013 PV application as having been born on [date]. I note that the Department's [October] 2012 arrival interview record indicates that the applicant stated upon arrival that his parents had told him he was [age] years of age. At the SHEV interview the delegate noted that in 2012 the applicant had had a Departmental age determination which had found him to be over [age] years of age and had assigned him the nominal date of birth of [date]. The delegate asked the applicant if he had any objections or comments regarding this finding. The applicant answered that he did not.
11. On the evidence before me it would appear that the Department was correct to determine that the applicant was over [age] years of age when he arrived in Australia. This is apparent from the fact that the applicant has indicated that he was nearing the completion of his [number] year of school education at the time he departed for Australia (meaning he must have been around [age] years of age before he began his journey to Australia) and the applicant's indication that he spent five-to-six months in [Country 1] before he arrived in Australia meaning he must have been closer to [age] years of age or older by the time he arrived (for reasons that will be explained below it seems probable that he began his journey to Australia around five months before his [October] 2012 arrival). Moreover, at his SHEV interview the applicant indicated that his sister had been [age] years of age at the time he left for Australia. This is significant because in his 2013 PV application family table the applicant indicated that his sister (who is his half-sister; born to a now estranged second wife to the applicant's father) was born just two months before the applicant. Thus, the applicant must himself have been around [age] years of age when he began his journey and so by the time he arrived in Australia he must have himself been at least [age] years of age. All this being so, he must have been born at some time before mid-[year].
12. The applicant claims that at that time of his birth and up until 1999 when he was around [age] years of age he and his family were residing in Kabul in an area he has referred to as "[name deleted]". By this, it would seem that the applicant is referring to the Hazara populated West Kabul suburb of [Neighbourhood 1]. The applicant claims that during this time the Taliban took control of Kabul and that while in Kabul his father had been abducted from his work and was held overnight where he was subjected to beatings and then released the next day. His father does not know who was responsible for abducting him other than that the man responsible was a Pashtun and that abductions of Hazaras were happening regularly in Kabul at the time. As a result of this incident and growing problems for Hazaras in Kabul his family moved to [a town] (to the village from which both of his parents originated) in around 1999. I note that following the 1992 defeat of the communist government in Kabul the various victorious mujahedeen guerrilla factions had a brief period of cooperation and power sharing but this had quickly turned into a struggle for power, and for control of Kabul in particular, and that the conflict often played out along ethnic lines and that numerous abductions occurred during this period. This period of conflict in Kabul was brought to an end in 1996 when the Taliban captured the capital. The Taliban thereafter established order by enforcing their strict version of Islamic law until 2001 (when Taliban rule was overthrown by

the Northern Alliance with the backing and support of the United States and its allies). I accept that the applicant's father was abducted by a Pashtun in Kabul during the 1990s. I accept that the applicant's family found Taliban rule in Kabul oppressive. I note that the applicant has provided the taskeras (that is the Afghan national identity documents) of both of his parents (along with English translations for these) and that these indicate that both parents were born in [Village 1] in Markaz Behsood District, in Maidan Wardak Province. I accept that the applicant and his family moved to this location in 1999 when the applicant was around [age] years of age.

13. The applicant claims that in [District 1] his father returned back to the land he (the father) had inherited from the applicant's grandfather, and farmed this land. The applicant claims that this resulted in a land dispute. In his 2013 written claims he submitted that his family have told him that his father at that time had a land dispute with another Hazara family, and that the person who was in dispute with the applicant's father had been working on the land during the time the applicant's grandfather had been alive, and that when his grandfather passed away this person's family had claimed parts of the land belonged to them, and that the Hazara family threatened the applicant's family. The applicant claims that because of this, and also because of problems his family were facing from the Kuchis, his family fled back to Kabul in around 2005 (at which time he would have been around [age] years of age). The applicant claims that his family settled in an area he has referred to as "[name deleted]", which would appear to be a rendering of [Location 1] which neighbours [in Neighbourhood 1] in Hazara populated West Kabul. I accept that the applicant and his family settled in this area in 2005. Other matters seem much more doubtful. The applicant has provided very little evidence in support of his claim that his family was ever involved in a land dispute and at the SHEV interview when the applicant was asked about the identity of the other family involved in the dispute he said he did not know. I accept that in 2005 the applicant would have been a child and that it is plausible he would have no direct knowledge of such a matter but, nonetheless, he is now an adult and he is in contact with his father who would have had direct knowledge of this matter if it had in fact occurred. The applicant has claimed that his life would be at risk if he returned to Afghanistan because of this matter (because the family asserting ownership over the land would kill him because they would assume he had returned to Afghanistan to try and reclaim the land as his father's son). Even so, provided nothing more of substance to the delegate about this matter to establish that such a dispute had ever occurred. Indeed, he even proved unable to provide convincing information about the existence of any such land in itself (asked if he knew how much land was involved in terms of its size the applicant said that in his opinion it would be a large portion of land but that he did not know the actual size of the land in question). I am not satisfied that there was any such dispute or even that the applicant's family ever owned any such land or that his family was ever farming any such land during the period in which they resided in Markaz Behsood District.
14. The applicant claims that his family's decision to move to Kabul in 2005 was also motivated by problems they were facing from Kuchi nomads; with the applicant claiming that he never saw the Kuchis because they came at night but that his father told him that they had destroyed the family's crops after coming through the family's land. During certain years the sedentary farming communities of the Hazara populated [District 1] region have had confrontations with the Kuchi nomadic pastoralist tribes who (during certain years) have followed (or have attempted to follow) their once traditional migration route through the [District 1] region and into the central highlands of Afghanistan. Following the 2001 overthrow of the Taliban it would not appear that there were any significant outbreaks of

violence in this regard until the well-documented clashes of 2008<sup>2</sup> but one report provided by the applicant (which was published in August 2012)<sup>3</sup> asserts that seasonal violence had been occurring in the Behsud region's Kajab Valley from 2005. Given that I do not accept that the applicant's family were farming any land in [District 1] I do not accept that the applicant's family's crops were destroyed by Kuchi Nomads or that Kuchi nomads had come through the applicant's family land. Nevertheless, it is plausible enough that a Hazara family living [in a village in District 1] might (for fear of an outbreak of violence) have decided to migrate to Kabul because of concerns over rising tensions between local Hazara farmers and the Kuchi nomad community. I accept that the applicant's family moved to Kabul in 2005 (at least in part) because of concerns about the developing situation in [District 1] with regard Kuchi nomads.

15. The applicant claims that in 2006 his family decided to depart Kabul for Pakistan and that since 2006 neither he nor any members of his family have ever been in Afghanistan such that he now knows no one in Afghanistan and he now speaks with a Pakistan accent, and he has no taskera (Afghan national identity document) because he lost this document while travelling to Pakistan in 2006 (and to collect a new such document would require his return to Afghanistan), and that he decided to travel to Australia after he was assaulted by a group of Baloch men in Quetta (Balochistan), and he has never been issued an Afghan passport, and that he was only able to undertake his air travel during his journey to Australia because he was provided a fraudulently obtained Pakistan passport but that he is unable to provide this document as evidence of this because he no longer possesses it. I have serious doubts about these various claims for a number of interrelated reasons. I note as follows with regard to the evidence before me:

- The applicant has never provided any documentary evidence of his schooling in Quetta (undertaken between [year] and [year]) and he claims he received no qualifications from any of the institutions he attended. I do not find such a situation plausible. Even allowing for the applicant's claim that he did not complete his twelfth year of schooling in Quetta he nonetheless would have completed other years of schooling and I am not persuaded that he would be without documents evidencing this (particularly given the importance which Hazaras place on obtaining, not just an education, but qualifications). With regard to the applicant's claim (to have no documents to prove he has been educated) the delegate noted in his decision that the applicant did not state that he had taken any steps to try and obtain such documentation. The applicant has said nothing further in this regard to the IAA. I note that in his education tables the applicant has submitted that he cannot remember the name of the Iranian school for refugees (which he claims he attended between [year] and [year]) but such a claim (that he cannot remember the name of the Iranian funded school in question) is far from being a convincing explanation for why he is unable to provide any such documents. Further, the fact that he is unable to provide the name of the school which he claims his parents (with whom he is in contact) sent him to for three years (when he would have been between the ages of [age] and [age] years) only serves to raise further doubts about whether the applicant really was in Pakistan during these years.
- In his 2016 Supplementary Statement the applicant has submitted that he is unable to provide a taskera (as evidence of his identity, nationality or citizenship) because he lost

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<sup>2</sup> UK Home Office, "Country of Origin Information Report, Afghanistan", 16 November 2009; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 6 August 2013; DIBP, "Protection Assessment Guidance Note No.5 – Afghanistan – Hazara ethnicity and/or affiliation with government or international organisations", 14 December 2015

<sup>3</sup> "Afghan nomad clashes raise fears of ethnic strife", Agence France Presse, 6 August 2012.

this document in 2006, and because he has been outside Afghanistan since 2006, and since to obtain a taskera he would need to go to the office in Afghanistan to get one he is thus not in a position to provide such a document. It is true that Afghanistan is yet to implement a system which would allow a person outside the country to nominate a representative to collect a new or replacement taskera on his/her behalf. It is currently also the case that in order to obtain a new or replacement taskera it must be collected in person (or in person by a male relative) from the person's province of origin within Afghanistan.<sup>4</sup> The applicant claims his family is not in contact with any relatives in Afghanistan. As already noted the applicant claims that his own immediate family have (like himself) been continuously outside Afghanistan since 2006. The problem with this claim is that the applicant's parents' taskeras were both registered on [2012] and both show that they originate from Maiden Wardak Province which suggests that in 2012 the applicant's parents visited the Maiden Wardak Province office of the Population Registration Department to collect these documents. That is to say, that his parents were in Afghanistan. I note, moreover, that these taskeras were issued around five months before the applicant arrived in Australia; that is, at around the time the applicant was himself preparing to travel to Australia. This seems more than a coincidence. I find it hard to believe that the applicant would himself be without a taskera if other members of his family had taskeras issued to them at around the time he was preparing to travel to Australia, and at a time when possession of a valid taskera would have enabled him to apply for an Afghan passport to facilitate his air travel. I am not satisfied that the applicant is without a taskera.

- The applicant claims that he has never held an Afghan passport and that undertook his air travel on a fraudulently obtained Pakistan passport. At his 2012 arrival interview and at his 2012 entry interview he indicated that he did not know whether this passport carried his own name because he was told not to look in this document. However, in his 2013 PV application he indicated (without any ambiguity) that this document carried his own name (at Question 31 of Part C), and he likewise indicated that this document carried his name in his 2016 SHEV application (at Question 58 in Part C). But his 2016 "Supplementary Statement" the applicant appeared to revert to his earlier claim by submitting that the smuggler: "gave me a passport and said don't open it but take it with you [and] I did what he instructed me to do and I didn't look at the passport". The applicant claims to be unable to provide this Pakistan passport as he no longer possesses it. At some times he has claimed that this document was "taken" from him by a smuggler; this was the case at his 2012 arrival interview, and at his 2012 entry interview, and in response to Question 31 of Part C of his 2013 PV application, and in response to Question 58 in Part C of his 2016 SHEV application. But elsewhere in his PV and SHEV application forms, and at his SHEV interview, the applicant submitted that he threw this document into the sea at the direction of the smuggler. He also provided conflicting information about where he was when he did this. In his 2013 PV application he submitted that he had done this "in [Country 1]" (at Question 15 of Part C) and his 2016 "Supplementary Statement" did not depart from this altogether in submitting that he had done this when he "was on the boat coming to Australia" (since this could entail the event occurring in the vicinity of [Country 1] on the boat coming to Australia). But at the SHEV interview the applicant said the smuggler told him to tear the passport up and throw it into the sea when he was on the boat "from [Country 2]" (that is, when he was on the boat taking him from [Country 2] to [Country 1]; and thus well before the boat journey from [Country 1] to Australia which occurred five months later). I am not

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<sup>4</sup> DFAT, "DFAT Country Information Report – Afghanistan", 18 September 2017, CISED50AD5680; EASO, "EASO publishes a COI report on key socio-economic indicators, state protection, and mobility", 23 August 2017, CXC90406612861.



satisfied that the applicant employed a Pakistan passport for his air travel, or that he is unable to provide the travel document which he did employ.

- At the SHEV interview the delegate put it to the applicant that there was evidence to indicate that he (the applicant) had transferred large sums of money from Australia for the benefit of persons in Afghanistan and that the most recent of these had been sent in July of 2017 (thus indicating that the applicant did in fact know people in Afghanistan). The applicant initially denied this. The delegate put it to the applicant that there was evidence he had sent money to [Mr A]. The applicant then submitted that he had sent money to this person, but that he had forgotten this, and that [Mr A] was the brother of a friend of the applicant's here in Australia, and that that this friend in Australia had not had any money and had asked the applicant to send this money to his brother in Kabul. I note that at the outset of the interview the applicant indicated that while in Australia he has lived and found employment through other Hazaras and I have no reason to doubt this or that many of these Hazaras originate from Afghanistan and that they have family in Afghanistan. But the manner of the applicant's claiming to suddenly remember that he had sent money to someone in Kabul, and his explanation that this person was the brother of a friend in Australia who he otherwise had no knowledge of, and that in such circumstances the applicant would have sent this money directly to [Mr A] rather than simply giving to his friend in Australia (enabling the friend to send the money to himself directly) was not at all convincing. I am not satisfied that the applicant does not himself know [Mr A] of Kabul, and this raises real doubts about the applicant's claim that he has no connections in Kabul.
  - At the SHEV interview the delegate also put it to the applicant that there was information before the Department to indicate that in late 2016 he had sent money to Afghanistan for the benefit of persons whose names matched those of his parents. The applicant denied having done this and suggested that perhaps someone had stolen his identity to make money transfers of this kind. The delegate queried the plausibility of this by putting it to the applicant that the names of the beneficiaries were a match with those of his parents. The applicant said that he had only sent money to his parents in Pakistan. The delegate then presented the applicant with a photograph (said to have been sourced from a publicly available [social media] page) and the applicant identified this as a photograph of his brother, [Mr B]. The delegate then put it to the applicant that this photograph placed [Mr B] in Afghanistan. The applicant then said that perhaps the person in the photograph was someone other than his brother. Thus, unlike the matter of the [Mr A] transfers, the applicant sought to dispute the matters which the delegate had put to him regarding there being evidence of his transferring money to Afghanistan in 2016 for his parents, and of his brother's being in Afghanistan. I have no reason to doubt that the evidence which was before the delegate was summarised by him accurately. Nevertheless, with the applicant disputing these matters and without the evidence itself before me I am wary of giving any weight to these matters as evidence that the applicant has made money transfers to Afghanistan for the benefit of his parents and/or that a recent photograph of [Mr B] shows him in Afghanistan. I therefore give these matters no weight as evidence in these regards.
16. Although the applicant has had ample opportunity to make his case he has not done so convincingly. The applicant claims to have sent money to Pakistan (for the benefit of his parents) but he has never provided any evidence of this. He has transferred money to [Mr A] in Kabul and I am not satisfied that the applicant does not know this person. I am also not satisfied that the applicant employed a Pakistan passport for his air travel or that he is unable to provide the travel document which he did use. Given that the applicant's parents' taskeras were issued in [2012] I am not satisfied that the applicant's family were outside of

Afghanistan at that time, or indeed that the applicant was outside Afghanistan at that time, and I am not satisfied that he is without a taskera. Given the absence of any documentary evidence of his having attended school in Pakistan I am not satisfied and I do not accept that he was living in Pakistan between [year] and [year]. I therefore do not accept that when he speaks Hazaragi he does so with a Pakistan accent and in a Pakistan dialect of the language. Altogether, I am not satisfied that the applicant's family ever departed Kabul after they settled in the West Kabul neighbourhood of [Location 1] in 2005; and I am not satisfied that the applicant departed Afghanistan any earlier than May 2012. I do not accept that the applicant was in Quetta (Balochistan) when he decided to travel to Australia or that this decision to travel to Australia was prompted by his being beaten in Quetta by a group of Baloch men who demanded that the applicant pay them money.

17. The applicant also claims that certain aspects of his behaviour have changed since his arrival in Australia. Relevantly, in his 2013 PV application it was submitted on behalf of the applicant that as a result of the period he had spent in Australia at that time (which then amounted to less than 12 months) in combination with his six years in Pakistan (which I do not accept) he might already have forgotten how to conduct himself socially in Afghanistan to the point where he might inadvertently offend someone who would (consequently) inflict serious harm upon him. It was submitted that the applicant now lived a "different lifestyle" which would mark him out as a supporter of the West. The 2013 PV application provided no express indication of what had actually changed in the applicant's behaviour. His 2016 SHEV application sought to rely on these claims also, and in this regard it was submitted in his 2016 Supplementary Statement that: I dress differently now compared to when I was in Afghanistan. This statement was made in the course of the applicant's explaining why he feared being identified and targeted for having been in Australia and he thus appeared to be implying that he now dressed more in the manner of an Australian than in the manner of an Afghan. But he provided nothing more specific than this. He did not specify how it was that he dressed when he was in Afghanistan and before he arrived in Australia. He did not specify how it is that he has dressed in Australia or why, if in fact he has dressed differently, he would want to continue to dress in this way if he returned to Afghanistan. I note that on 9 August 2017 the applicant did provide the delegate with a current passport style photograph of himself but it is not apparent from this how the applicant is dressed but it is apparent that he presents with a full beard. The photograph attached to his November 2012 entry interview shows him unbearded but other than this it was not apparent that the applicant's appearance has changed since his arrival in Australia (and that he subsequently grew a full beard is not a matter likely to set the applicant apart in an overwhelmingly Muslim country like Afghanistan).
18. At the SHEV interview the applicant provided more persuasive evidence about a change in his behaviour when he stated that although he called himself a Muslim he had not practised his faith since being in Australia and that this had occurred because he had seen all the killing that occurs because of religion. This at least offered some indication of why a particular behaviour in his life had changed and a somewhat clearer sense of what had changed; this being that because he saw religion as playing a role in violence he had ceased to practise his faith although he retained his faith still. Even so, it was not clear from this precisely what it meant for the applicant to still see himself as a Muslim and yet not to practise his faith, and when the delegate questioned the applicant about this he said no more than that he had not practised Islamic practises in Australia. The applicant thus seemed to suggest that having arrived in Australia he immediately ceased all Islamic practises while still thinking of himself as a Muslim such that he has consistently presented himself as a Shia Muslim when asked about his religion by the Department. I am not persuaded that the applicant really did cease all Islamic practises upon arrival in Australia given that his 2013 PV application

(notwithstanding the claim that he had changed in some unspecified way while in Australia) gave no specific indication that he had ceased to practise Islam. At the SHEV interview he went on to say that his thinking had changed but when asked how this was he spoke only about the effect of seeing people with different religions living side-by-side in multi-cultural Australia. I accept that the applicant has seen this but it is not apparent how this has changed his thinking or his mode of behaviour. He also said, as per his 2016 Supplementary Statement, that the way he was wearing clothes was different, and he added to this that the way he was approaching people was different, but again all of this was so vague that at the most all I can accept is that at some time after 2013 the applicant has ceased to participate in communal worship, and that he has no further interest in this, but on the evidence I am otherwise not satisfied that the applicant has changed in any way since his departure from Afghanistan in terms of his religion or in terms of how he wishes to dress and conduct himself, or that (aside from not attending communal worship) he would otherwise want to behave any differently upon return to Afghanistan to how he had previously behaved. Further, the suggestion that the applicant might have forgotten how to behave socially in Afghanistan seems doubtful given the extent to which (as became apparent at the SHEV interview) the applicant has (while in Australia) lived and socialised with other Hazaras (at least some of whom are from Afghanistan and have family in Afghanistan).

19. Following the SHEV interview a 23 January 2018 submission was provided which tendered that the applicant feared harm because of his status as a non-observant Shia Muslim and his rejection of Islam. As has been noted above, I can accept that the applicant no longer participates in communal worship but the applicant had certainly never previously claimed that he had rejected Islam, and as noted above he had otherwise always presented himself to the Department as a Shia Muslim and at the SHEV interview he had said that he saw himself as a Muslim. I do not accept that the applicant has rejected Islam. It was then submitted that the applicant had "adopted Western culture and mannerisms which are now inherent to his character". Given the absence of any substantive indication of this at the SHEV interview, and given that the January 2018 submission offered no specific indication of how the applicant had "adopted Western culture and mannerisms" I do not accept that this has occurred either. Following the delegate's refusal of this matter a submission was made to the IAA on 28 February 2018 which argued (while significantly not arguing that he applicant had rejected Islam as on 23 January 2018) that the applicant's being a non-observant Muslim might contribute to a real chance of persecution and significant harm. The submission referred to the applicant's statements at the SHEV interview –to the effect that that he had not practised Islam since being in Australia – but it offered nothing more than this by way of detail. On 20 June 2019 a submission was provided to the IAA which noted that the applicant's case had been remitted to the IAA for reconsideration because there had been a failure by the previous IAA to consider the applicant's claim that his appearance, or dress or any other factor, would point to his return from the West would otherwise distinguish him. Even so, nothing further was said in the 20 June 2019 submission to specify how it was that the applicant's dress and/or appearance had changed while in Australia, or to substantiate that this was the case, or that would explain why (if this was the case) he would want to continue in such a change in his behaviour (if such a change had occurred) upon return to Afghanistan. Given that the applicant has had the assistance of a migration agent, and given that he has had ample opportunity to make his case in this regard if there is a case to be made, I have not exercised my discretion to invite the applicant to provide further information in this regard. On the evidence I accept that the applicant is a Shia Muslim who no longer participates in communal worship and that he would continue to behave in this way upon return to Afghanistan, but other than this I do not accept that upon return to Afghanistan he has any interest in living his life differently to how he lived his life before he departed Afghanistan.

20. Given the applicant's history I consider that if he were to return to Afghanistan he would return to Kabul (as noted above I am not satisfied that the applicant's family ever departed Kabul after settling there in 2005, and I am not satisfied that the applicant is without a support network in Kabul). With regard to what the situation in Kabul would be for the applicant I have had regard to the wide array of country information which is before me by way of the decision of the delegate, the submissions made on behalf of the applicant (including those which have satisfied s.473DD), and by way of myself having obtained recently published reports from a range of credible observers.
21. The security situation in Kabul has been broadly similar over recent years. Under a transition strategy beginning in 2011, Afghan National Defence and Security Forces (ANDSF) have gradually taken over full responsibility for security in the country. Although most foreign troops had withdrawn from Afghanistan by the end of 2014, around 16,000 troops from 39 countries remain in Afghanistan in an advisory and training capacity under the North Atlantic Treaty Organization (NATO) led Resolute Support Mission, while the United States also deploys a smaller number of troops separately under a complementary mission, Operation Freedom's Sentinel. Since the transition a situation has emerged characterised by a shift in the operations of the Taliban-led insurgency (now placing greater emphasis on the holding and controlling of territory) and by the emergence in Afghanistan of the Islamic State movement (also known as Daesh).
22. From the time of the transition the Taliban-led insurgency has placed more emphasis on taking and holding ground and it has sought to challenge the Afghan government's control over certain parts of Afghanistan. It is a matter of debate as to exactly how much of Afghanistan is under Taliban control, how much is contested or threatened, and how much is under Afghan government control, but it would seem that the Afghan government exerts its strongest dominance over urban areas many rural parts of the country are contested or threatened and some are under the control of the Taliban's various shadow governments. The Taliban have staged attacks upon urban areas and in 2015 they briefly overran Kunduz city, and in 2018 they briefly overran Ghazni city in 2018, but threats to Kabul (which is far and away Afghanistan's biggest city with an estimated population of more than five million) have been restricted to asymmetric attacks perpetrated by small groups employing explosive devices and/or firearms. Insofar as the Taliban-led insurgency is concerned such attacks (typically carried out by the Taliban affiliated Haqqani Network) have targeted the institutions and personnel of the Afghan government and its military, and also the institutions and personnel of foreign governments, while some other targets (such as media outlets and NGOs and hotels hosting foreign workers) have also been targeted. However, (and even though it is Kabul which has hosted the vast majority of the large numbers of failed asylum seekers who have returned to Afghanistan from western countries in recent years) there is little evidence to indicate that the Taliban (or for that matter any other AGE) have in recent years targeted Afghans in Kabul for reason of their having returned from having lived and/or sought asylum in a western country. Outside of Kabul, in more remote areas, there have been some reported episodes of an AGE having targeted an Afghan for having lived and/or sought asylum in a western country (and some of these instances have involved Shia Hazaras) and it would seem the perception of these persons as possible spies. Given the nature of the events reported it would seem that in certain places in Afghanistan, and in certain circumstances, such a person can face a similar level of risk to a person associated with Afghan government or the international community. However, the evidence does not indicate that this is the case in Kabul.
23. Nor is there any evidence of the Taliban having targeted Shia Hazaras in Kabul in recent years. There has been some debate about whether Taliban has, or has not, been responsible for

various attacks upon Shia Hazaras in other parts of the country at certain times (notably in relation to a spate of road abductions which affected Shia Hazara travellers around 2015) and also about whether these incidents had ethno-sectarian motivations or whether they were instead motivated by matters more particular to the actors involved. Some members of the Shia Hazara community have alleged that the atrocities which were committed by the Taliban during the 1990s (during the civil conflict which was being fought at that time) are evidence of an ongoing ethno-sectarian antipathy toward Hazaras on the part of the Taliban. The Taliban has denied this and has denounced such ethno-sectarian attacks such as the 2011 bombing of the Shia festival of Ashura in Kabul (which was perpetrated by the Pakistan based sectarian group Lashkar-e-Jhangvi) and similar attacks which have been perpetrated in more recent years by Islamic State. In the later part of 2018, the Taliban undertook offensive operations in the Hazara dominated districts of Khas Uruzgan, Malestan and Jaghori, and the applicant provided the IAA with reports by several commentators who have opined that this operation is evidence of the antipathy of the Taliban toward Hazaras; with one such commentator submitting that this was a symbolic strike designed to highlight the inability of the Afghan state effectively to protect members of a vulnerable ethnic and sectarian minority, and as punishment for the relatively tolerant and liberal lifestyle of these communities, far removed from the puritanical extremism of the Taliban. Although this attack may, at least in part, have been intended to embarrass the Afghan government and to provide leverage to the Taliban in the lead up to peace talks, broader reporting suggests that this Taliban offensive was not an attack on Hazaras per se but rather a specific response to a very specific dispute which had erupted in Khas Uruzgan between the Taliban and Abdul Hakim Shujai (the Hazara former Afghan Local Police commander).

24. That Hazaras are seen as being generally opposed to the Taliban (and to AGEs more broadly), and that they are supportive of and sympathetic to western countries and a more liberal lifestyle is accepted. But there is little firm evidence of Shia Hazaras being attacked by the Taliban on this basis alone in recent years (that is, for reason of their being supportive of the west or the international community within Afghanistan, or as potential spies, or as opponents to AGEs). In any event, in the area of Kabul the Taliban-led insurgency has not perpetrated any attacks against Shia Hazaras in recent years nor does the evidence suggest that there is a real chance of the applicant coming to harm of such a basis within the capital for the foreseeable future, even allowing for the fact that he would be returning from having lived and sought asylum in a western country.
25. Attacks upon Shia Hazaras in Kabul have, however, been perpetrated by certain avowedly sectarian groups including, as noted, a single attack by Lashkar-e-Jhangvi in 2011 and more recently by Islamic State. Since 2016 the Islamic State movement has staged three to five attacks each year in Kabul upon Shia Muslims and/or Hazaras in circumstances where Shia Hazaras have assembled in large and identifiable groups. In one instance a Shia Hazara educational institution hosting an exam was targeted, and in another the target was a Shia Hazara wrestling club, and in another it was a voter registration office, but otherwise the events targeted have been either political or religious events with the latter being the most common target. Certain places and certain events would appear to be particularly at risk of attack. For instance, worshippers have been attacked at the Kart-e Sakhi Shrine on several occasions, while the persons commemorating the anniversary of the death of Abdul Ali Mazari (the Hazara leader of Hezb-e Wahdat until his death) have been attacked twice over consecutive years. Over 2016 to 2018 attacks of this kind have resulted in the deaths of some 150 persons with as many again injured. Recent years have seen reports of success on the part of Afghan security agencies in arresting and disrupting Islamic State cells attempting to operate in Kabul, and 2019 has seen fewer attacks upon Shia Hazaras in Kabul and far fewer casualties as a result, but even so the evidence suggests that for the foreseeable future there

remains a real chance that Kabul will see further attacks against Shia Hazaras of a similar nature and level to those experienced over 2016 to 2018. Such attacks have caused considerable concern within Kabul's Shia Hazara community (which is substantial in size and thought to amount to more than two million persons). Afghan security forces have been deployed to provide security at such events, and the Afghan authorities have also facilitated the arming of members of the Shia Hazara community to aid in providing security at such events, but even so some Shia Hazaras have accused the Afghan government of not doing enough to protect its Kabul community.

26. Like the Taliban, the Islamic State movement has also perpetrated attacks in Kabul which have targeted the institutions and personnel of the Afghan government and its military, and against the institutions and personnel of foreign governments, and against some media outlets and NGOs, but as with the Taliban the evidence does not indicate that the Islamic State movement has undertaken any attacks in Kabul against persons who have lived and/or sought asylum in a western country.
27. Since 2016 AGE attacks in Kabul have resulted in around 500 civilian deaths each year, and more than double this number injured. Although Kabul has thus far in 2019 seen a considerable decrease in the number of civilian casualties caused by such violence it seems reasonable, on the evidence, to expect that for the foreseeable future (and notwithstanding intermittent peace talks with the Taliban) there is a real chance that Kabul will continue to experience civilian casualties from attacks by AGEs that will be both of a level and of a kind as those which have been experienced over recent years. It has been submitted that the applicant would be at risk of harm from such attacks and that the shortage of ambulances in Kabul for responding to such attacks is also a relevant consideration. That the applicant finds this situation concerning is understandable. Nevertheless, for the foreseeable future the possibility of his experiencing any harm in Kabul from an AGE attack (either by way of his being specifically targeted or as a bystander to an attack) seems remote given the matters discussed above. Given the size of Kabul's population and of its Shia Hazara population in particular, and given that the applicant would not be attending any Shia Muslim places of worship, and given that on the evidence he has no interest in attending political events, and given that in recent years attacks in the Hazara neighbourhoods of west Kabul remain limited (and are typically limited to attacks on places of worship and political events), and given that on the evidence it is not apparent that the applicant has any interest in seeking out future employment with the Afghan government or its security forces, or with a foreign employer, or an NGO or a media company (in the past he has worked in private employment, including most recently as an air conditioning technician, which he sought out through friends in the Hazara community), and given that attacks in the vicinity of the airport (at which he would have to arrive) have been rare, the possibility of his experiencing harm of any kind from an AGE is remote.
28. It has also been submitted that the applicant would be at risk of harm not just from AGEs like the Taliban and Islamic State but also from broader Afghan society. There have been reports from some sources, and from refugee advocates in particular, that some returnees to Afghanistan have experienced reintegration problems involving ostracism, or of their being treated with suspicion of a kind leading to discrimination and isolation, as a result of their being viewed as westernised and/or as lapsed in their practise of Islam. Such a situation is plausible where returnee's family and its social group are religiously conservative but the applicant, being a Shia Hazara, would be returning to a community known for its sympathy for western countries, and a more liberal lifestyle, and the applicant has never given any indication that he fears harm from his own family in this regard, or that they would ostracise him. It is true that in Afghanistan persons found to have converted from Islam to another

religion can face difficulties but reporting on such matters does not indicate that a person, who continues to identify as Muslim like the applicant does, would face a real chance of being perceived by broader society (or by Hazara society specifically) as having converted from Islam to Christianity or another faith (or as having ceased to be a Muslim such that he is a non-believer or an infidel) on the basis of his no longer practising his faith by attending communal worship, and/or because he has returned from living in a western country. For a person returning to a Shia Hazara community in Kabul such an adverse outcome is remote.

29. For similar reasons, and given in particular that I do not accept that the applicant is without family and/or a support network in Kabul, and given the manner in which (from his evidence at the SHEV interview) it was apparent that the applicant had found employment in Australia by way of his Hazara friend network here, and given that this is generally the means by which employment is sought out in Afghanistan, and given that the evidence suggests that he would likely return to live in a Shia Hazara dominated neighbourhood in west Kabul, there seems little chance of the applicant experiencing harm by way of discrimination such as in the employment market or in some other regard as a Shia Hazara from some other ethnic community. The applicant also claims to fear physical harm from the Kuchi community. In the past tensions between the Hazara and Kuchi communities have occasionally manifested in Kabul but there has been no significant evidence of this in recent years and, more broadly, relations between Kabul's various ethnic groups have been generally harmonious. The possibility of the applicant's experiencing any harm on such basis thus also is remote. It has also been submitted that some returnees from western countries have been abducted or robbed due to perceived wealth but, again, and although the Hazara neighbourhoods western Kabul are affected by a level of crime (as is Kabul more broadly) the evidence before me does not indicate that there has been a trend of returnees from western countries being targeted in Kabul in this manner, and the applicant would not be without the security that comes from having a family and support network in the city. I have accepted that the applicant's father was abducted in Kabul in the 1990s by a Pashtun man but on the evidence it is not apparent that this matter has any implications in terms of posing any future risk of harm to the applicant.
30. Given the extent to which the harm feared by the applicant is remote given his own particular circumstances and the evidence before me regarding the situation in Kabul, I am not satisfied that the applicant would for the foreseeable future face a real chance of harm of any kind if he were to return to Afghanistan. I am therefore not satisfied that the applicant would face a real chance of serious harm if he were to return to Afghanistan.

#### **Refugee: conclusion**

31. 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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32. 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**

33. 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.
34. For the reasons given above I am not satisfied that the applicant would face a real risk of experiencing harm of any kind if he were to return to Afghanistan. I am therefore not satisfied that he would face a real risk of significant harm if he returned to Afghanistan.

### **Complementary protection: conclusion**

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

### **Decision**

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



## Applicable law

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

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

In this Act, unless the contrary intention appears:

...

***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

***cruel or inhuman treatment or punishment*** means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
  - (c) that is not inconsistent with Article 7 of the Covenant; or
  - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***degrading treatment or punishment*** means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***receiving country***, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

***torture*** means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

### 5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
  - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
  - (b) conceal an innate or immutable characteristic of the person; or
  - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
    - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
    - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
    - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
    - (iv) conceal a physical, psychological or intellectual disability;
    - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
    - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
  - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
  - (b) the persecution must involve serious harm to the person; and
  - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
  - (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

### 5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
  - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

#### **5L Membership of a particular social group other than family**

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
  - (i) the characteristic is an innate or immutable characteristic;
  - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
  - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

#### **5LA Effective protection measures**

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
  - (a) protection against persecution could be provided to the person by:
    - (i) the relevant State; or
    - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
  - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
  - (a) the person can access the protection; and
  - (b) the protection is durable; and
  - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

#### **36 Protection visas – criteria provided for by this Act**

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
  - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
  - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
  - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (a); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant; or
  - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (aa); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
  - (a) the non-citizen will be arbitrarily deprived of his or her life; or
  - (b) the death penalty will be carried out on the non-citizen; or
  - (c) the non-citizen will be subjected to torture; or
  - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
  - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
  - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
  - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

*Protection obligations*

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
  - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

*Determining nationality*

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.