



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

**Decision and Reasons**

**Referred application**

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AFGHANISTAN

IAA reference: IAA19/07482

Date and time of decision: 18 December 2019 13:48:00

J McLeod, Reviewer

**Decision**

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

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be an Afghan national who fears being harmed by the Taliban for refusing to join them, and by the Taliban, other Anti-Government Elements (AGEs), his own extended family, and the wider community on account of his westernised views and behaviour, his Australian citizen partner and child, and their particular religious practices and circumstances.
2. He arrived in Australia in November 2012 and applied for a Safe Haven Enterprise visa (SHEV) on 25 May 2017. A delegate of the Minister for Immigration (the delegate) accepted the applicant's claims and found that he would face a real chance of persecution in his home province of Paktiya but that it would be reasonable for him to relocate to Kabul where he would not face a real chance of persecution or real risk of significant harm. She refused the grant of visa on 31 October 2019.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material).
4. On 28 November 2019 the IAA received a bundle of information from the applicant's representative including inter alia, a submission, letters relating to the applicant's son, country information and tribunal and judicial decisions.
5. The submission reiterates information which was claimed to, or which I am satisfied arose on the material before, the delegate, and contains references to case law and arguments addressing the delegate's findings. This is not new information; I have had regard to it.
6. However, the letters relating to the applicant's son are new information for the purposes of s.473DC of the Act. The applicant has provided a letter from his son's doctor outlining his son's multiple health and behavioural issues, and an associated letter from the National Disability Insurance Agency (NDIA) approving the son's access the National Disability Insurance Scheme (NDIS). Both letters post-date the decision and I find they both therefore meet s.473DD(b)(i). They also meet s.473DD(b)(ii). This information provides a current picture of the applicant's familial circumstances and is pertinent to one of the key issues under review; I am satisfied there are exceptional circumstances to justify considering this new information.
7. The applicant's representative has also submitted new country information which was not before the delegate when the decision was made. It all post-dates the decision so I accept s.473DD(b)(i) is met. While the recent nature of the information does not of itself make the circumstances exceptional, I accept the information is highly relevant and I take into account that in the abundance of resources considered by the delegate, there are only two reports published in 2019. The reports specifically cover events and developments which have occurred since the decision was made. I am satisfied there are exceptional circumstances to justify their consideration.

### Applicant's claims for protection

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

- He is a Pashtun, Sunni Muslim, born [on date] in [his home] village, Zurmat District, Paktia<sup>1</sup> Province, Afghanistan.
- He is uneducated and worked on his family farm in Zurmat district from about 2002 – 2012.
- About seven years ago, his brother ‘HR’ was dragged out of the mosque while praying and forcibly taken to fight for the Taliban. A couple of weeks later, the family heard HR had been killed.
- About six months before he arrived in Australia in November 2012, the Taliban came to the applicant’s home. They said they had come to take the applicant to fight. His mother lied and said he was not home and they said they would return tomorrow.
- His [uncle], ‘RM’ helped him escape that same evening, by taking him to Quetta, Pakistan, where he remained for about two months before travelling to Australia on a fake passport organised by a smuggler.
- After he left Afghanistan the Taliban frequently visited his family home asking after his whereabouts from his family and neighbours. They also searched the family home and threatened to take his brothers away to fight. The family relocated to Quetta to protect them.
- He fears that if he returns the Taliban will force him to fight with them, or harm him in punishment for his refusal.
- He also fears harm from the Taliban, local villagers (all of whom are part of, or associated with, the Taliban) and his uncles and cousins because he has broken cultural and religious laws and adopted western views and behaviours. His fiancé and son are Australians from an extended Christian family and his son was born outside of marriage. He will be perceived as being Christian and westernised, having abandoned his cultural and Islamic traditions.
- His family in Afghanistan have heard and told others in the village. His uncle is very angry from the shame and possibly also because he wanted the applicant to marry his daughter. The uncles have threatened him, his mother and siblings over this.
- He has posted photos of him and his son on [social media] so he thinks people would also know through his [social media contacts] from his village.
- These issues will exacerbate the risks for him on return, and if he returns with his fiancé and son, they will kill her and take his son.
- He would not be safe anywhere in Afghanistan and would also face great troubles relocating too, due to his lack of education, inability to speak other languages, lack of employment experience and limited skillset. Farms are only run as family businesses in Afghanistan so he would struggle to find employment elsewhere, and this would make it very hard to subsist.

## **Factual findings**

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9. The applicant claims to be a Sunni Pashtun Afghan citizen from Zurmat district in Paktiya Province, Afghanistan.<sup>2</sup>

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<sup>1</sup> Alternative transliterations: Paktya; Paktia

10. He has provided certified copies of his and his father's taskeras and a translation of his own, and evidence of his application to have his taskera verified by the Afghan Embassy in Australia. He has also provided a statement regretfully admitting to altering his original taskera after receiving it in Australia by placing his fingerprint on it, on the ill-advice of someone else.
11. I share some of the delegate's concerns as to the authenticity of the taskeras but there is no conclusive evidence that the documents the applicant has submitted are fraudulent copies or are based on fraudulent originals and I draw no adverse inference of the absence of verification by Embassy as while the Embassy had advised the verification process could take four to six weeks, I accept these processes, which are carried out in liaison with an authority in Afghanistan, can take considerable time. I am also prepared to accept the applicant's explanation as to the fingerprint.
12. Besides the documentary evidence, the applicant speaks Pashto and he has been consistent and convincing in recounting his biographical narrative of his life in Paktiya. I accept the applicant's claimed identity, nationality and background. I accept he is a Sunni Pashtun citizen of Afghanistan and that his identified alias name used in his email address derives from a Pashtun tribal name, and that he has given a plausible explanation for the alternative year of birth recorded by the department. I accept he lived in Zurmat, Paktiya, farming his family's land until he was around [age] years old and went to Pakistan and then on to Australia.
13. The applicant claims his brother 'HR' was forcibly recruited by the Taliban. He claims the family heard that he had died soon after, and a few years later, the Taliban visited his house and advised his mother that they were now coming to take him.
14. The applicant has consistently claimed that he left Afghanistan due to the risk of being forcibly recruited like his brother, however he has provided scant details as to the Taliban's attempt to take him. At the SHEV interview he stated he was at home in early 2012 when his mother answered the door to the Taliban. They said they were looking for the applicant, to take him with them. His mother lied that he was not home, and they left. Fearing their return, the applicant fled the next morning to Pakistan, where he stayed for two months and then came to Australia. After this, the Taliban visited the house looking for him. I have some concerns about the plausibility of the Taliban coming to take the applicant away and leaving simply on the basis of his mother's claim that he was not home, and not returning again for the applicant until the applicant was in Australia, particularly when they had warned that they would return the next day. I also have concerns about a key discrepancy in the applicant's claims regarding his brother's forced recruitment: while his written SHEV application indicates his brother was dragged away by the Taliban while praying at the mosque, in the SHEV interview the applicant indicated that his brother's Taliban abduction had occurred in the same circumstances in which they came for him (ie. at home).
15. However, I note the applicant was not asked to clarify this issue during the SHEV process, nor to provide any more details on the Taliban's attempt to recruit him. There may be plausible explanations and details for this and I am reticent to place any adverse weight on the applicant's evidence in these regards. Significantly, country information that was before the delegate from the European Asylum Support Office's (EASO's) 2016 report 'Afghanistan Recruitment by armed groups' report supports that the Taliban were active in the applicant's province at the time, and were engaging in forced recruitment, including of children. EASO reported that the United Nations High Commissioner for Human Rights reported that along with Kandahar, Helmand and

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<sup>2</sup> I am satisfied the references to Pakkia in RACs' post-interview submissions have been made erroneously, and that the applicant's claim is that he originates from Paktiya.

Farah provinces, Paktiya province was a centre for child recruitment in 2013. According to Child Soldiers International, child recruitment by Anti-Government Elements (AGEs) mostly occurred in the southern (Kandahar and Helmand) and eastern (Paktiya, Khost and Paktika) provinces, because of the stronger presence of AGEs in these parts of the country, and UNHCR's Monthly Internally Displaced Person (IDP) updates on 2014 noted reports of forced recruitment by insurgents in, among other places, Paktiya. While some of this information relates to child soldiers, I consider it also relevant and applicable to the applicant and his brother, who were at the time of their respective Taliban incidents, [age] and [age] years old, being young men of fighting age.

16. In consideration of the above, I accept the Taliban forcibly recruited the applicant's brother, who died, and that they subsequently wanted to recruit the applicant. I accept the applicant's explanations that he is a peaceful person and does not align with their ideology or violent methods. I accept the applicant fears that if he returns to Afghanistan he will be forcibly recruited by the Taliban and/or will face harm from the Taliban for refusing to join and fight with them (as punishment for his previous refusal, and/or in the event that they attempt to recruit him again).
17. The applicant has provided written and oral evidence of his relationship with his Australian citizen fiancé and the baby that they have had together, outside of wedlock, and his representative has provided extensive submission on the matter. It is submitted that if the applicant were returned to Afghanistan his fiancé would also travel there with their baby. I have some reservations about the likelihood of this, noting their child's special needs outlined in the new information, and that the applicant's fiancé also has [other] children in Australia. Nevertheless, I accept on the evidence provided that they are a genuine and committed family unit who intend to reunite, should the applicant be removed to Afghanistan.
18. I accept the applicant fears being harmed by the Taliban, his extended family on his paternal side and the wider community on account of his Australian fiancé and baby and other adopted western views and behaviours.

### **Refugee assessment**

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19. 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**

20. 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.
21. I have accepted that the applicant originates from Zurmat district in Paktiya Province, Afghanistan. I accept he has never lived or worked in any other area of Afghanistan and I find that and absent a fear of harm, Zurmat is the place in Afghanistan (which I accept is his 'receiving country') to which the applicant would return.
22. Information in the review material indicates that the applicant's home province, Paktiya is predominantly Pashtun, and is a volatile province. EASO's 2018 Country Guidance report indicates a strong presence of insurgent groups, especially the Taliban, in some parts of Paktiya, with military operations occurring and conflict severity varying, but particularly affecting six areas including the applicant's district of Zurmat. EASO has assessed indiscriminate violence in the province to be at such a high level that it has advised its European decision makers that minimal individual elements would be required to meet the relevant European test for protection.
23. In the post-interview submission, the applicant's representative referenced numerous other incidents and sources which support the assessment of volatility in Paktiya. The representative also referred to an informative article from the credible Afghan Analysts Network (AAN) published in September 2019, regarding the extent and nature of the Taliban's control in the applicant's district, Zurmat.<sup>3</sup> According to AAN, Zurmat is one of the Taliban's regional strongholds, as it also was during the Emirate. For historical reasons, Zurmat is sometimes called Little Kandahar as a number of prominent Taliban leaders came from the area. Zurmat was as important for the insurgents, as Kandahar was for southern Afghanistan. Two different networks of the Taliban have been active in the area: the Haqqani network and the Mansur network.
24. AAN suggests that currently, the Taliban have a *"very strong presence in Zurmat, with the government only in control of the district centres and some areas close to it"*. In other areas of the province, the tribal systems operate in such a way that tribal leaders simply observe the ideological conflict and maintain their networks with influential actors on all sides, and this operates to obstruct or constrain the emergency of both warlordism and the influence of the Afghan state. However Zurmat's tribal system offers no such protection. Zurmat's myriad of tribes and clans is fragmented and tribal codes are weakened, such that the insurgents have been able to secure more support. The extent of Taliban control and the relative weakness of the Afghanistan government was especially noticeable during the 2018 elections when voting was only possible in the district centre; 19 of the 22 intended polling stations in Zurmat remained closed at the Taliban's behest. The Taliban also operate their own parallel judicial system in Zurmat, with most cases coming before the Taliban courts being either land disputes or family conflicts.
25. Given the country information about Zurmat, the applicant's claims that everyone are part of the Taliban in his area, while difficult to assess with any certainty, are not unfounded. AAN's reporting indicates that the Taliban are powerful and active everywhere except the district centre and places close to it, that it is the Taliban who attend to people's problems in the

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<sup>3</sup> Afghan Analysts Network, "One Land, Two Rules (8): Delivering public services in insurgency-affected insurgent-controlled Zurmat district", 4 September 2019

remaining areas, have an active district governor and are active in every sphere, while great distrust is held in the government and international forces, in part due to longstanding corruption at all various levels of government and repeated recent incidents of abuse by Afghan and US forces against civilians in the district. Locals have described Taliban fighters and officials as being mostly local, with one person also remarking that the Taliban have been able to recruit even well-educated young locals men.

26. Given that seven years has passed since the Taliban tried to recruit the applicant, and taking into account the substantial control and support the Taliban appears to enjoy in Zurmat now, I have some doubts as to whether the Taliban would notice, or care about, the applicant's return, and I also have doubts about whether they would now be needing to be engaging in forced recruitment.
27. However, I am mindful of the extent of local membership in Zurmat's Taliban and that they have visited and issued threats against him and his family since he has been in Australia. I am also mindful of the feud the applicant now faces with his extended family there. Notably too, UNHCR's 2016 and 2018 guidance before the delegate is that in areas where AGEs exercise effective control over territory and the population, they are reported to use a variety of mechanisms including coercive strategies to recruit fighters, and persons who resist recruitment, and their family members, are reportedly at risk of being killed or punished.
28. I also take into account that there are other issues which would affect the applicant's return to Zurmat. The applicant would be returning to Afghanistan having spent seven years in a western country, and as the fiancé and father of Australian citizens, something I accept is known to his extended family there. While the applicant's fiancé converted to Islam several years ago for a previous partner, she does not wear a burkah or hijab of any kind, does not attend mosque and comes from a Christian family, maintains some Christian traditions (which the applicant, while still a practising Sunni Muslim joins in) and considers her faith to be 'hybrid'.
29. I accept the applicant's uncles and cousins are angry about his relationship and have threatened the applicant and accused him of becoming Christian. I also note the applicant's comment regarding his intended betrothal to his cousin, this uncle's daughter. I accept the applicant's return (even without his fiancé and son) would be noticed by his family and/or other locals who may inform them, or inform the Taliban.
30. The country information before me indicates that AGEs systematically target civilians associated with, or who are perceived to be supportive of, the Afghan government and international community and according to UNHCR, individuals who are perceived to have adopted values and/or appearance associated with western countries are so affiliated and have been targeted. Reports also indicate that returnees who have lived in western countries could face difficulties in traditional rural areas. EASO's report on 'Individuals targeted under societal and legal norms' and UNAMA's annual reports before the delegate also provides numerous examples of individuals (mostly women, but also men) targeted by extended family or community members (including several years after an event) in areas lacking government control on account of reasons including inter alia, refusing an arranged marriage or defying family's choice of spouse, and alleged acts of 'immorality' resulting in parallel justice punishments including executions, lashings, beatings and 'degrading' treatment.
31. I place weight on this country information and given the combination of issues the applicant carries upon return, with his refusal to join the Taliban (his political opinion) and his adopted western behaviours and Australian 'hybrid' Muslim fiancé and child (imputed pro-western opinion among other reasons), and that he would be returning to a Taliban stronghold and

conservative rural area outside of government control where he has been threatened by both the Taliban and his extended family, I accept he faces a real chance of coming to the adverse attention of his feared persecutors and facing persecution as defined in the Act.

32. Section 5J(1)(c) of the Act requires that the real chance of persecution relates to all areas of the receiving country. Submissions were provided on behalf of the applicant in October 2019 to the delegate, and November 2019 to the IAA, both addressing inter alia, reasons why relocation to Kabul would not be viable in the applicant's circumstances.
33. Information before the delegate indicates that many Afghans, even those who have never lived in Kabul before, return or relocate there, to the country's largest and fastest growing urban centre. The government maintains effective, but not absolute control in Kabul. As the representative's submission and new country information provided to the IAA demonstrates, attacks are still carried out with some frequency, mostly against high-profile targets. These include government institutions, political figures, Afghan and international security forces, other security services, international organisations and diplomatic representatives of some countries. While such high-profile attacks are common in Kabul, this is relative to the high concentration of government, international and security related targets in Kabul, and to the overall size of the city's population which varies in estimates but is said to be at least around five million people.
34. I have accepted the Taliban attempted to recruit the applicant and subsequently harassed and threatened his family in Zurmat. However my finding that he would face a real chance of persecution on return there was influenced by inter alia, the extent of control and support by the Taliban in the area, the history of forced recruitment there, the presence of local community members in the Taliban and of the applicant's extended family of whom he is in dispute and are aware of his Australian residence, fiancé and child, and the notion of his return to this place in rural Afghanistan where I accepted his return, after a long absence abroad and with his personal circumstances, would be noticed and come to adverse attention.
35. In contrast, there are no reports of forced Taliban recruitment from Kabul where the government has effective control, and due to the size and diversity of the city, the chance of the applicant's return being noticed by anyone of concern in Kabul is much smaller. I consider the chance that any Taliban in and around Kabul who would be aware of, or care about the applicant is remote, as are the chances that the local Taliban from Zurmat would track the applicant to Kabul and seek to harm him. I am not satisfied that in Kabul, the applicant faces a real chance of being harmed by the Taliban over his previous refusal to join them. Nor am I satisfied that he faces a real chance of forced recruitment again, now or in the reasonably foreseeable future in Kabul.
36. As for the applicant's adopted western views/culture, and his Australian fiancé and child, I take into account the DFAT (2017, 2019) and UNHCR (2016, 2018) reporting before the delegate indicates that some individuals perceived as having adopted values and/or appearances associated with western countries have been targeted due to their imputed support for the Government and the international community. DFAT acknowledges that people who have been identified as having international associations face a high risk of being targeted by anti-government elements (AGEs) and that this may possibly include returnees from western countries. DFAT notes there are occasional reports of returnees from western countries (including two from Australia in 2014) allegedly being targeted for having spent time in a western country.
37. However there have been no reports of individual returnees from Australia being targeted since the two incidents in 2014 (both on roads in Ghazni, removed from Kabul) and unlike the



applicant who is Pashtun, these incidents involved persons of Hazara ethnicity, a factor which the United Kingdom Home Office (UKHO) - in its *"Afghanistan: Afghans perceived as Westernised"* Country Policy and Information Note of January 2018 - considers relevant. The UKHO described the reports of harmed returnees as isolated reports about a small number of returnees. It also noted the motivations for such attacks have often been unclear and factors such as the person's ethnicity appear to have been significant. There have been no reports of individual returnees from Australia being targeted since the two incidents in 2014, and no such incidents recorded as occurring in Kabul city.

38. EASO's 'Individuals targeted under societal and legal norms' report of December 2017 also contains information from reliable and authoritative sources relevant to this matter. In August 2017, the International Organisation for Migration's (IOM's) national programme manager on return, reintegration and resettlement told EASO that based on his work with other 20 000 Afghan returnees from Europe and Australia, IOM has not documented state or non-state targeting of Afghan returnees due to 'Westernisation' or time spent abroad. He also stated there have been no ethnically-based killings or returnees coming back from Western countries, unless someone becomes caught in a cross-fire between government forces and insurgents. IOM has indicated that contrary to recent reporting about the killing of a deportee from Germany in April-May 2017, the incident 'has not been confirmed by any reliable sources'. Similarly, in December 2017 EASO noted it was unable to locate any corroborating information regarding a claimed targeted killing of a returnee from Norway and nor was there any corroborating information in any other sources before me. EASO also referred to some other incidents reported by the UNHCR, the Refugee Support Network and the Guardian however I am satisfied those incidents involved mostly younger returnees with and in particular circumstances which I do not accept are reflective of the applicant's.
39. The Finnish Immigration Service's October 2019 report on its fact finding mission to Kabul conducted in April 2019 suggests that newcomers are easily recognised and are questioned about their life history. It suggests the Taliban's information networks are strong, even in Kabul and a number of Afghans deported from Germany have reported experiencing incidents of violence from the Taliban and community because they were considered to be westernised. However while I consider the Finnish Immigration Service to be a credible source, the reporting on this issue is vague, and I note their comments on the violence the deportees claim to have experienced includes conflict-related violence, criminality so it is difficult to determine a clear link to the motivation being that the deportee was westernised.
40. Overall, the country information does not indicate there is systematic targeting of returnees in Afghanistan, including those who return from Australia, those with western clothing or mannerisms or who are failed asylum seekers.
41. I take into account that the applicant's situation is nuanced and complex and that in the applicant's case, these issues relevant to westernised returnees interact with his familial circumstances, with his fiancé and child, his fiancé's hybrid faith and non-adherence to Islamic and cultural traditions such as modesty of dress, mosque attendance, and the couple's observance of Christian holidays. I also note the applicant's claims of what is posted on [social media]. It has been submitted that as a Pashtun man who has transgressed cultural, religious and sexual ethics and adopted western culture, he will face harm throughout Afghanistan from his family and wider community and the Taliban and other AGEs. They also submit that the western ideals adopted by the applicant and his family would be incongruent with residing in any part of Afghanistan and that his partner's presence would place him at risk of harm given her failure to observe modest dress, her western background and her Christian faith.

42. I have considered the submissions on these issues, and I note the UNHCR has reported that persons accused of committing crimes against Sharia law, such as apostasy, blasphemy, having consensual same-sex relations, or adultery (zina), are at risk not only of prosecution, but also of social rejection and violence at the hands of their families, other community members and the Taliban and other AGEs. The 2019 Finnish report before the delegate suggests the potential for honour killings (from family members as opposed to the Taliban or other AGEs) is very high, especially where couples have married without the families' agreement. It reports that hiding from families is challenging and that young couples who try to escape by Kabul are not hard to find.
43. According to EASO (2017), there are also social ramifications as Afghans who adopted a 'European lifestyle' regarding marriage, sexuality and gender norms were reportedly not able to continue to do so openly upon return as this was not socially acceptable. In one example, a man who left Afghanistan and married a white American woman encountered problems with his family because this was not something anyone in the family had done before.
44. However EASO does not describe the type of nature of the problems this man faced, and the despite suggesting a high risk the Finnish information contains no data or examples of such incidents, nor any contextual information such as the extent of other networks in Kabul, or the proximity in time to the couple's escape. Overall the country information contains only anecdotal examples of this kind; the information does not suggest that they occur with such frequency in the large and diverse city of Kabul which receives increasing numbers of returnees from western countries, so as to suggest the applicant will face a real chance of harm in relation to these matters.
45. I consider too that the chance that the applicant's family in Zurmat hearing of his return and finding and harming him in Kabul is remote. I also find the chance that the applicant would face harm for these matters from the Taliban or wider community in Kabul to be remote. I am not satisfied the applicant faces a real chance of harm now or in the reasonably foreseeable future in relation to these matters in Kabul.
46. I accept that civilian casualties in Kabul have risen in recent years. The country information before me indicates that civilians have been killed in places of worship, bazaars and other ordinary places they need to access. The representative has provided information about inter alia, civilian casualties in Kabul, Islamic State and Taliban attacks in Kabul. It has been suggested that even with the security personnel and military presence in Kabul attacks in Kabul indicate Kabul is not safe. However while insurgent attacks have occurred in and around Kabul, the evidence does not indicate that Afghan government or security forces are losing control of the city. Insurgents' primary targets and targeted locations have been persons and locations associated with the government and international community. While Islamic State has carried out attacks along sectarian lines in Kabul, its sectarian targets have not been Sunnis or Pashtuns and these attacks have been sporadic. Taking into account these factors and the size and diversity of the city I find the chance the applicant would be harmed as a bystander, inadvertently getting caught up in attacks, or otherwise through generalised violence is remote. That is, I am not satisfied that he faces a real chance of suffering serious harm through generalised violence in Kabul.
47. Having regard to criminal risks, I accept the police capacity to maintain law and order is constrained by a lack of resources, and equipment, poor training, low education levels and corruption. Nevertheless, the information does not suggest criminality is so frequent and severe as to indicate a real chance of harm to the applicant in his circumstances, now or in the reasonably foreseeable future. I am satisfied that the applicant will quickly adjust and exercise

an ability to take reasonable precautions consistent with those taken by other ordinary civilians in Kabul which would not amount to precluded modifications of behaviour. Considering all of this, I am not, on the evidence, satisfied that the applicant would face a real chance of harm in Kabul as a consequence of criminality.

48. I am satisfied the applicant would be able to access Kabul by air. I note there have been attacks in and around Kabul airport and on the road to Kabul city. Having regard to the country information which was before the delegate I am satisfied that there is a strong military presence in Kabul and there is likely to be so in the reasonably foreseeable future. Country information indicates the government and security forces have put in place a range of effective-counter measures to prevent and respond to insurgent attacks in Kabul and I am satisfied they maintain effective control over the city, including the airport and roads. The applicant does not have a high profile and I am satisfied he will not be of personal interest to any AGEs/insurgents/extremists in Kabul. When having regard to this, to the significant security and armed presence and government control, I do not accept that past attacks preclude the possibility of the applicant being able to safely use the Kabul airport, nor the roads to the city. I find the chance of the applicant being seriously harmed while in transit to Kabul city is remote. Accordingly, I am satisfied there is not a real chance of him facing serious harm before accessing Kabul city.

#### **Refugee: conclusion**

49. 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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50. 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**

51. 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.

52. I have found above that the applicant would face a real chance of being seriously harmed if he returned and lived in Zurmat, Paktiya. For the same reasons, and applying the authority in *MIAC v SZQRB (2013) 210 FCR 505*, I am also satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's removal to Afghanistan, the applicant will face a real risk of significant harm if he returns and lives in Paktiya.

### Qualifications to the real risk threshold

53. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:
- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm
  - the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or
  - the real risk is one faced by the population of the country generally and is not faced by the person personally.
54. Dealing with the second and third limbs first, I am satisfied that in Zurmat, Paktiya which apart from the district centre and places close to it is under the control of the Taliban, and where it is the Taliban who tend to locals' problems and operate their own parallel judicial system, the applicant could not obtain protection from an authority of Afghanistan such that there would not be a real risk that he would suffer significant harm. I am also satisfied that the risk to the applicant would be due to his particular profile as a person returning having previously escaped from the Taliban in that area, and a person returning from a significant period in the west where he adopted western views and behaviours and has become fiancé and father to Australian citizens of hybrid Muslim-Christian faith.
55. However of relevance to the first limb is that I found above the applicant would not face a real chance of persecution in Kabul. For the same reasons, I do not accept the applicant faces a real risk of significant harm in (or in accessing) Kabul.
56. As for whether it is reasonable to expect the applicant to relocate to Kabul, I take into account that consistent with its previous version (2016), UNHCR's most recent guidelines (2018) considers that relocation within Afghanistan is reasonable only where the individual has access to shelter, essential services (sanitation, health care, education) and livelihood opportunities, and a traditional support network of extended family members or members of his or her larger ethnic community. DFAT has also consistently noted (2017, 2019) that in Afghanistan, ethnic, tribal and family affiliations are important factors. Kinship is central to identity and acceptance in the community, including for finding shelter and employment, and therefore Afghans tend to reside in places their ethnic group constitutes the local majority. Traditional extended family and tribal community structures of Afghan society are the main protection and coping mechanisms for people in Afghanistan, who rely on these networks for their safety and economic survival, including access to accommodation and an adequate level of subsistence.
57. UNHCR advises that the only exception to the requirement of external support are in circumstances involving single able bodied men and married couples of working age without identified specific vulnerabilities. UNHCR considers that such persons may, in certain circumstances, be able to subsist without family and community support in urban and semi-urban areas that have the necessary infrastructure and livelihood opportunities to meet the basic necessities of life and that are under effective Government control (as Kabul is). DFAT also assesses internal relocation is generally more successful for single men of working age - provided they are able to make use of family or tribal networks.
58. However the applicant is engaged to be married to an Australian citizen and he has an Australian citizen son. Rather than returning as a single adult male he would effectively be returning to Afghanistan as a fiancé and parent of a young child of mixed race and hybrid religion and who has special needs. While I have not accepted that the applicant would face serious or significant

harm in relation to this, I consider it is a highly relevant factor when considering whether his relocation to Kabul would be reasonable. Also relevant is that since the applicant's father passed away from natural causes several years ago, and his older brother died soon after being taken by the Taliban, the applicant is the oldest male in his pre-existing family unit, and while they have been living with his [uncle] in Pakistan, he has also been contributing money to help support his mother and siblings from Australia. I accept the submissions that whether his fiancé and child are with him in the reasonably foreseeable future or not, he would not be returning as a single unencumbered male.

59. DFAT has stated that a lack of financial resources and lack of employment opportunities are the greatest constraints on successful internal relocation and that unemployment and underemployment are high across Afghanistan. While large urban areas offer greater opportunities for employment and access to services and DFAT 2019 confirms that this is the case with Kabul due to its centrality and status as the national capital, with wages and the quality and availability of public services tending to be higher in Kabul. In addition to trade and other service industries, a small number of larger private businesses have established themselves in Kabul, including in food processing, textile production, and light manufacturing. However, the drawdown of the international presence and associated reduced aid and other financial flows since 2011 has had a major impact on Kabul's economy, as has the pressure on Kabul's labour market from recent large-scale influx of internally displaced persons and returnees from abroad and there is widespread unemployment and underemployment. There is high competition for jobs, both skilled and unskilled. EASO's 2017 report 'Key Socio-economic indicators, state protection, and mobility in Kabul City, Mazar-e-Sharif, and Herat City' notes local press reporting on (day) labourers complaining that there are hardly any jobs for them in Kabul, with the number of job seekers outnumbering the available jobs by far and most days of the month, labourers remain without job.
60. The Finnish Immigration Service's October 2019 report notes that returnees who left from the provinces but who return to Kabul have a more difficult time adjusting to life and conditions in Kabul. This and the information discussed above leads me to the view that economic and employment prospects in Kabul have deteriorated and that persons who are obviously strangers to the area, with no networks or connections, and no education or specific labour skills suitable to an urban environment, would face significant difficulties in obtaining employment. The applicant is an able bodied man of around [age] years (working age), however he has never been to Kabul and has no known networks there. He is uneducated and has limited work experience in Afghanistan - only farming, which I do not consider will be conducive to his finding work in the competitive work market and urban environment of Kabul. He has worked [in a certain role] in Australia but I accept the representative's submission that if he works [in that area] in Kabul he faces a higher probability of being harmed in generalised violence compared to the general population.
61. I recall too, the EASO (2017) information regarding the social ramifications for Afghans who have adopted a 'European lifestyle', and that EASO sources have also reported that living alone is not the norm in Afghanistan, and is assumed and perceived by Afghan society to mean the person must be involved in illicit behaviour such as drugs, drinking and sexual activities. Property owners will ask many questions about a tenant's background before they agree to rent a person accommodation. Finland's 2019 Fact Finding report also acknowledges the convention of newcomers being questioned by other community members for their life story and familial circumstances. I accept the applicant's familial circumstances, although not eliciting harm, would further challenge the applicant's ability to settle in a new location, and to ready his circumstances for a possible reunion with his fiancé and child.

62. I am satisfied that the applicant would face substantial difficulties trying to establish himself and find work and accommodation in Kabul. I have accepted too that there is a genuine intention for the applicant and his fiancé (and their young child) to reunite, but whether or not this occurs, I accept that he is still contributing to his family's needs in Quetta, and would maintain responsibility to provide for his fiancé and son who has multiple health and behavioural issues and requires additional support, in Australia. All of these factors add additional challenges to the prospect of relocation.
63. If they were to join him, the prospect of the applicant supporting the integration of his fiancé and son into the Kabuli environment, a completely unfamiliar place and country with specific religious and cultural traditions they do not adhere to, which has ongoing security issues and DFAT considers particularly risky for Australian citizens, presents additional challenges for the applicant and his family. Adding to this would be the challenges he would face in Kabul caring for his son who has recognised additional needs.
64. In the event that his family members did not join him, I also have concerns about the applicant's ability to adjust in an unfamiliar place without family networks or other support in the region. While separation from family does not necessarily of itself render relocation unreasonable, noting that the applicant's family has settled in Pakistan for protection reasons, I accept there is no real prospect of them joining him in Kabul. These, and the circumstances of Australian family, his limited education and work experience and particular domestic arrangements are all critical factors which would cumulatively affect the applicant's ability to successfully relocate. I am not satisfied he will be in a position to establish himself in Kabul in the reasonably foreseeable future and I am not satisfied in his particular circumstances that it is reasonable for him to remain in Kabul with little prospect of supporting his families.
65. In addition to Kabul, I have considered whether it would be reasonable for the applicant to relocate to another area under government control such as Herat or Mazar-e-Sharif or somewhere else. However, the applicant's personal circumstances would remain the same and while much of the above focusses on economics, employment and living conditions in Kabul, comparable situations exist in the other urban centres, and difficulties rise further in rural parts. I am therefore also not satisfied that relocation elsewhere in Afghanistan would be reasonable for the applicant in all the circumstances. Taking into account the same reasons discussed above in relation to Kabul, I am also not satisfied that it is reasonable for the applicant to relocate to another part of Afghanistan.

#### **Complementary protection: conclusion**

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

#### **Decision**

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

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

## Applicable law

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

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

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.