



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN
IAA reference: IAA20/08028

Date and time of decision: 21 April 2020 09:05:00
M Currie, Reviewer

Decision

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

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be an Afghan citizen of Pashtun ethnicity and an adherent of the Sunni faith. He arrived in Australia in September 2012 and lodged an application for a Temporary Protection Visa (TPV) in November 2015. In October 2016, a delegate of the Minister for Immigration found that Australia did not owe protection obligations to the Applicant. On 7 November 2016, the applicant's matter was referred to the Immigration Assessment Authority (IAA).
2. An IAA reviewer affirmed the delegate's decision on 9 December 2016. However, [in] February 2020, this decision was quashed by the Federal Circuit Court of Australia which found that the initial IAA review of this case failed in its review function under section 473CC of the Act by failing to properly consider the reasonableness of relocation to Kabul, and that this error was material and jurisdictional. The Court remitted the matter back to the IAA for reconsideration of the applicant's claims for protection.
3. My task is to consider the applicant's claims for protection afresh. As this is a *de novo* decision, I am not bound by any earlier findings by the delegate, or the IAA.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. On 29 November 2016, migration agent sent an email to the IAA on behalf of the applicant. Email contained a submission to the IAA regarding the applicant's case (the 2016 Submission). The 2016 submission argued against the findings of the delegate. To the extent that this admission argued against the delegates findings, I have considered it.
6. I observe that the 2016 submission to the IAA contained a range of references to country information which had previously been submitted to the delegate in the applicant's post-interview submission. These references are not new information And I have considered them. Two references cited in the submission were not previously given to the delegate in the applicants post interview submission. These are a 2016 report by the European Asylum Seeker Office (EASO) and a 2015 report by the United Nations Assistance Mission Afghanistan (UNAMA). These reports were provided in order to assist with the assessment of the prevailing security conditions in Afghanistan at the time of the original IAA assessment. However, as a number of years have passed since these reports were published they no longer represent an accurate picture of conditions in Afghanistan. Consequently, they are not up to date and are not relevant to my forward-looking consideration of the applicant's claims. In the circumstances I am not satisfied that there are exceptional circumstances to consider these reports. As s.473DD(a) is not met for these reports I have not considered them.
7. At the time of the IAA's initial review of this case, the original IAA review obtained new country information in order to assist with the consideration of the applicant's claims¹. I have reviewed

¹ Tribal Analysis Centre, "Khost Province District Studies", 1 May 2013, CIS28649; IDS International, "Khost Provincial Handbook: A Guide to the People and the Province", 1 May 2010, CIS28176; The Guardian (UK), "Kabul street style", 8 August 2011, CXCB3E63420923; Stars and Stripes, "West's cultural influence explodes on streets of Afghanistan", 20 December 2014, CX1B9ECAB9054.

this material, and I am satisfied that it is of ongoing relevance to my consideration of the applicant's case, and that there are exceptional circumstances to justify consideration of this material. I have considered it.

8. [In] March 2020, After the Federal Circuit court had remitted the applicants case back to the IAA, this applicant migration agent sent an email to the IAA. The email contained another Submission to the IAA, sent on the applicant's behalf (the 2020 Submission). The 2020 Submission sought to provide a range of recent country information relating to the present conditions in Afghanistan to the IAA, including information from the Department of Foreign Affairs and Trade (DFAT), the United Nations High Commissioner for Refugees (UNHCR), Radio Free Europe/Radio Liberty, Al Jazeera, and the Khaama Press News Agency, which it argued was relevant to the consideration of the applicant's protection claims.
9. Given the passage of time since the Department had considered this applicant's claims, much of the country information which is before me is out of date. As a consequence, I have decided to obtain a range of credible country information reports about present conditions in Afghanistan. These reports are a 2019 country information report about Afghanistan from the DFAT², two reports by EASO published in 2019³, a 2019 report by the UNAMA⁴, a 2018 report by the UNHCR⁵ and a 2018 report by the UK Home Office⁶. Given the lack of relevant country information before me, I am satisfied that there are exceptional circumstances to justify considering this information. On 27 March 2020 I wrote to the applicant and provided him with copies of these reports and indicated to him what I considered would be of pertinent information to the consideration of his claims. I invited him to comment on the relevance of this information to his case.
10. Turning back to the applicant's 2020 submission, I observe that it contained citations to several documents which were not before the delegate⁷. Ordinarily, all of these citations would be considered new information, and would have to pass the threshold of s.473DD. However, in this instance, two of citations provided in the 2020 submission, are citations to the new information which I obtained in the previous paragraph⁸, and as such these references are already before me. I have considered them.
11. The three remaining citations in the 2020 Submission are extracts from news articles published by Radio Free Europe/Radio Liberty, Al Jazeera, and the Khaama Press News Agency. These citations were not before the delegate and have not been obtained by me. They are new information. Each of the three articles is said to relate to the present security situation in the

² Department of Foreign Affairs and Trade (DFAT), "Country Information Report: Afghanistan 27 June 2019", 20190627113333

³ EASO, 'Country Guidance: Afghanistan' European Asylum Support Office (EASO), June 2019, 20191125104658 & EASO, 'Afghanistan: Security situation', EASO, 12 June 2019, 20190613124844

⁴ United Nations Assistance Mission in Afghanistan (UNAMA), 'Afghanistan: Protection of civilians in armed conflict 2019 (February 2020)', 22 February 2020, 20200224115345

⁵ UN High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 30 August 2018, CIS7B839419284

⁶ UK Home Office, "Country Policy and Information Note - Afghanistan: Afghans perceived as Westernised", 1 January 2018, OG9EF76792

⁷ DFAT, "Country Information Report: Afghanistan 27 June 2019", 20190627113333; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 30 August 2018, CIS7B839419284; Radio Free Europe/Radio Liberty, 'IS claims suicide attack on mosque at Afghan army base', 24 November 2018; Al Jazeera, 'Blast hits football ground in Eastern Afghanistan', 3 March 2020; Khaama Press News Agency, 'Children among 10 killed as Taliban IED goes off in Khost Province', 17 December 2019

⁸ DFAT, "Country Information Report: Afghanistan 27 June 2019", 20190627113333; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 30 August 2018, CIS7B839419284

Khost Province of Afghanistan, the location the applicant previously lived. Each of these articles was published some years after the delegate's decision and so I am satisfied that the extracts could not have been provided to the Minister prior to the date of the s.65 decision. S.473DD(b)(i) is met for these extracts. Given the extracts provided recent security information about prevailing conditions in the applicant's former home province, I am satisfied that there are exceptional circumstances to justify considering the extracts, and so s.473DD(a) is met for these citations. As both limbs of s.473DD are met for the new information from Radio Free Europe/Radio Liberty, Al Jazeera, and the Khaama Press News Agency, I have considered it.

12. On 14 April 2020 the applicant responded to my invitation to comment, and provided a further submission to the IAA (the second 2020 Submission). The second 2020 Submission continued to argue that the applicant could not safely return to Khost Province, or to Kabul or other places in Afghanistan. It further argued that the roads between Kabul and Khost were unsafe, and that as the applicant is a Sunni Pashtun it is expected that he would support the Taliban, and since he does not, he would face harm.
13. I note that the applicant's second 2020 Submission contains many references to sources which were not before the delegate. Most of these references were to materials which I had provided to the applicant, and upon which I had invited him to comment. However, the 2020 Submission also contained references from Mindat.org, Al Jazeera, Tolo News, the New York Times, Pajhwok Afghan News and Human Rights Watch. These sources were not before the delegate, nor did I provide them to the applicant. They are new information. These sources relate to recent security issues in the applicant's home province of Khost, and to the recent outbreak of COVID-19. All of these materials were published well after the date of the delegate's decision, and I am satisfied that they could not be provided earlier. Given they relate to the prevailing conditions in Afghanistan, and noting the passage of time since the delegate's decision, I am satisfied that there are exceptional circumstances to justify consideration of this material. As both limbs of s.473DD are met for this new information, I have considered all it.
14. Finally, I note that in the materials referred to the IAA by the Secretary, there is a copy of an invalid Class XA Protection Visa Application that was submitted by the applicant in 2013. Also, provided in the review materials is a post interview submission which the applicants migration agent sent to the Department following his April 2016 protection visa interview. For the avoidance of any doubt, I have considered the invalid Class XA Protection Visa Application and the post-interview submission which was sent to the Department.

Applicant's claims for protection

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

- He is an Afghan citizen of passion ethnicity who adheres to the Sunni faith. He was born in [year] and lived in the [District 1] of Khost Province, Afghanistan. He lived with his parents and his siblings. His family owned [property] in [District 1] and he worked as a [Occupation 1]. He was married in 2002 and has [number of] children. His wife and children lived with him in his parents' home.
- Around April 2012 the applicant noticed two men in placing an explosive device on the main road which pass through his village. The applicant approached the men and asked them what they were doing; he tried to explain that to place an explosive device in that location may lead to villagers being harmed. The two men told him to mind his own business and one of them struck him with a rifle the applicant believes that the two men

were from the Taliban. The applicant told other villages in the area to be careful about the bomb and told the Taliban men that they should remove it.

- After the bomb was in placed the two men departed the village and the applicant rode his bicycle to the nearest the district centre and reported the bomb to the local authorities. He returned to his village and afterwards members of the Afghani National Police returned to the village and safely removed the bomb.
- After the bomb had been removed members of the Taliban visited his family home and knocked on the door asking to speak with him. Somehow, they had become aware that he had reported the bomb. The applicant declined to speak with them but his father went outside and talked to them. The Taliban asked the applicant's father where he was. They came inside the family home looking for him however the applicant jumped the rear fence of the property and escaped. He fled to his cousins/uncles house, which was located nearby, in the same village.
- From his uncles house the applicant made his way to Pakistan with the assistance of an agent. From Pakistan the applicant travelled onwards via [one country] and [then another] to Australia.
- After his departure he became aware that the Taliban regularly visited his family in order to find him. He surmises that they were still interested in him.
- The applicant believes that the Taliban is still seeking him. He fears that if he returns to Afghanistan the Taliban would impute him with anti-Taliban political opinion. He believes that if he returned to Afghanistan he would not be safe and the Taliban would seek him out. He believes they would harm him or kill him.
- The applicant also believes that his long absence from Afghanistan in a western country would compound his difficulties, as the Taliban would impute him to be a supporter of the West or of the Afghani government. These factors would lead to further problems with the Taliban who opposed the government and western intervention in that country.

Factual findings

16. As part of his SHEV application, this applicant has provided a copy of his Afghan Driver's License and his Afghan Taskira, the principle form of identity documentation used in that country⁹. He is also provided an accredited translation of the Taskira. These documents provide consistent identity information about the applicant and that information is consistent with his verbal claims to identity since arriving in this country. The applicant has established his identity to my satisfaction. I accepted he is an Afghan citizen who is of Pashtun ethnicity and who adheres to the Sunni faith. I accept that he was born in [year] and that he lived in [Village 1] in the [District 1] of Khost Province, in Afghanistan. For the purposes of this decision I find that Afghanistan is his receiving country.

Brother Missing

17. The applicant says that his brother is missing. According to the applicant, his brother went missing around the time he travelled to Australia. According to the applicant his brother has not been seen since that time and is presumed to have suffered harm or to be deceased. The

⁹ DFAT, "Country Information Report: Afghanistan 27 June 2019", 20190627113333

applicant's claims about his brother's disappearance have been vague and contain no further information. He does not know when, or why or how his brother disappeared.

18. It is not clear what happened to his brother and though the applicant fears a sinister outcome, in the absence of any further information about his brother, and the circumstances of his brother's claimed disappearance, I am not satisfied that his brother's disappearance is linked in any way to the remainder of the applicant's claims or is otherwise linked to the applicant. I will not consider this issue further.

Incident with Taliban, Ongoing interest in him

19. This applicants' central claims all revolve around a single incident he says occurred around April 2012. At the time of the incident, the applicant was in his village of [Village 1], in the [District 1] of Khost Province. He observed that two men on motorcycles were emplacing an explosive device on the main road which passed through the village. The explosive device was located near the houses of himself, and other families. He feared that if the device detonated local villagers, including children, may be harmed. The applicant recognised that the two men who were emplacing the device were members of the Taliban because of the clothes that they were wearing and the fact that they were emplacing an explosive device. He speculated that the men were in placing the device on the road because it was frequently used by the International military Forces who were deployed within Khost province at that time.
20. The applicant approached the men in and advised them that it was not safe to emplace the device on the main road in the village, because local villagers would be harmed when it detonated. The two Taliban men told him to mind his own business and one of the men struck him with a rifle knocking him to the ground. The applicant was fearful that he would be killed. After the men had finished in emplacing the device, they departed the village on motorcycles. When they had departed, the applicant warned local villagers about the device, and then he rode his bicycle to the nearby district centre and reported the device to the authorities. Then he returned to his village. Sometime later members of the Afghan National Police attended his village and removed the device safely. The applicant says that thereafter he spoke out against the Taliban.
21. According to the applicant, that same evening members of the Taliban visited his family home and knocked on the door; they asked to speak with him. The applicant was afraid and locked the door. The Taliban advised the family that if they do not open the door The Taliban would come over the walls into the family home. The applicant hid inside the house but his father went out and spoke to the Taliban. The Taliban men said they wanted to speak to the applicant, but his father denied he was he was present. After the applicant had realised the Taliban was looking for him, he fled the house, by jumping over the rear wall of the property and went to his uncle's house which is in the located in the same village. After his departure the Taliban searched his family home and his father was beaten. The Taliban were looking for the applicant.
22. Fearful that he could no longer live in his village the applicant made arrangements to travel to Pakistan with the assistance of an agent. From Pakistan the applicant travelled to Australia. He says that from time to time, the Taliban would visit his family home in [Village 1] and ask for him. He says that due to his confrontation with the Taliban, and his subsequent reporting of the bomb to the authorities he is of ongoing interest to the Taliban. His wife and children have left the family home to live with her father in another village.

23. Like the delegate, I have some concerns about the applicant's account of this event. I have doubts that the applicant would confront two armed Taliban men in the way he claims. I thought that the applicants account of the confrontation was vague.
24. I note that though the applicant says that after this event, he '*spoke out*' against the Taliban I consider that his claims in this regard are not credible. I note that he says that his roadside confrontation with the Taliban occurred at around 2pm in the afternoon. After the confrontation, he says that he travelled to the district centre, and then returned home. He says the Taliban visited his home on the same night, and he made his escape, and has not returned to his home since. In my view, this would leave very little time for the applicant to develop a reputation for '*speaking out*' against the Taliban as he claims that he did. I do not accept that he ever had such a reputation, or that he was known for speaking out. I consider that he has fabricated this aspect of his narrative in order to add weight to his claims for protection.
25. I note that the applicant says that after he arrived at his uncle's house he never returned to his home, and quickly decided it was not safe for him to continue living in Afghanistan. He says that with the assistance of his father, he sold a plot of land so that he would have enough money, and made arrangements to depart Afghanistan using the money from the land. He says that he was able to depart in two to three days. However, he has also stated that he did not speak to his father for two or three days after the incident which contradicts his earlier claims and implies that the applicant had arranged with his father to sell the land, prior to the incident which he says is the reason he left his home.
26. I also observe that the applicant had initially indicated that after he fled his home, his wife and children said to have gone to live in a nearby village to reside with her father. However, at his Protection Visa Interview the applicant disclosed that in fact, at the same time the applicant was departing Afghanistan for Pakistan, his wife, children and Father-in-Law also departed Pakistan. He conceded that they were in fact in Pakistan at the same time, and though the applicant says that they did not travel together, or reside together, or meet, while they were in Pakistan, this seems, to me, to be unconvincing. At interview, the applicant went on to say that his wife and children lived in Pakistan for several years, in a home owned by the applicant's Father-in-Law. Furthermore, he said that that his Father-in-Law had actually been living in Pakistan at the time of the incident. He says that his wife, children and Father-in-Law all returned to Khost and now reside there. Despite his earlier claim not to have spoken to his wife, at interview, he conceded that in fact, he did speak to his wife while he was in Pakistan, but when he did get to speak to her, she was still in Afghanistan. He says that she departed the family home, two to three days after the incident, but this would mean that they departed at the same time, at interview he conceded they could have travelled at the same time.
27. Overall, I have serious concerns about the totality of the applicant's claims. I am not satisfied that he has told the truth about events in Afghanistan. It seems clear that initially, the applicant gave a misleading account about what happened to his wife and children after his departure from Khost. I conclude he attempted to disguise the fact that his wife and children were safe in Pakistan. I also note that though the applicant has claimed that Khost is not safe for his family, on his own evidence, his family returned to Khost more than five years ago, and continue to reside there. He has indicated that he maintains regular contact with his family, and though he says that Khost is not safe for them, he has not indicated that they have had any problems since their return to Khost.
28. I think that all of the issues I have canvassed about the applicant's claims cast real doubt on the applicant's central claim to have intervened in a Taliban plot to emplace and detonate a bomb in 2012. I note the delegate found that the applicant's claims were implausible, that he would

not have intervened in the way he claims, and did not accept that any such event occurred. However, I note that, though I have some concerns, the applicant has provided a generally consistent account of these events since he first arrived in Australia and I have formed a different view. I am willing to accept that the applicant was involved in an incident similar to what he describes. I accept that he reported the emplacement of an explosive device to the authorities and that this led to suspicion from the Taliban. I accept that after this event the applicant fled Afghanistan in fear of the Taliban. I accept that at the time of his departure the applicant was of interest to the Taliban. Though I do not accept he had a reputation for '*speaking out*' against the Taliban, I do accept that he opposes the Taliban and that his actions identified him as a person who opposes the Taliban.

Refugee assessment

29. 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

30. 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.

31. Country information before me indicates that Afghanistan is a violent society with frequent conflict related violence occurring for more than 30 years¹⁰. Many thousands of civilian deaths have occurred throughout this period¹¹. The Taliban remains engaged in a violent insurgency against the government of Afghanistan and its western allies. The general security situation in

¹⁰ DFAT, "Country Information Report: Afghanistan 27 June 2019", 20190627113333; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 30 August 2018, CIS7B839419284; EASO, 'Country Guidance: Afghanistan' European Asylum Support Office (EASO), June 2019, 20191125104658 & EASO, 'Afghanistan: Security situation', EASO, 12 June 2019, 20190613124844

¹¹ United Nations Assistance Mission in Afghanistan (UNAMA), 'Afghanistan: Protection of civilians in armed conflict 2019 (February 2020)', 22 February 2020, 20200224115345

Afghanistan is said to have declined in recent years. Broadly, the Government is said to retain control of the large urban conurbations, while the Taliban is said to be stronger in rural areas¹².

32. Khost Province is located in Southeast Afghanistan. There are no current reliable estimates of population by district however, in 2006, the Khost Directorate of Census and Population estimated a population of around 1.3 million. Khost is home to a large number of tribes¹³, though 99% of Khost Province is said to be of Pashtun ethnicity and society is structured around the Pashtunwali, the “*way of the Pashtuns*”¹⁴. The extended family unit is the primary unit of social organisation¹⁵. Khost borders the Afghan provinces of Paktya to the north and west, and Paktika to the southwest and Pakistan to the East¹⁶. The physical terrain of Khost is characterized by rugged mountains in the west, south, north, and east, and extended centralized arid and semi-arid plains (the Khost “*bowl*”). Khost also shares important borders with the Pakistan tribal areas including North Waziristan and Kurram Agencies which makes it an area of strategic importance. Khost is a majority Pashtun province with many cultural, commercial and political ties with Pakistan¹⁷. Khost City is the seat of the provincial Government. Tribal groups and families from Khost are said to place little significance in the international border between Afghanistan and Pakistan¹⁸. Agriculture and animal husbandry are the primary forms of livelihood¹⁹. Trade with Pakistan dominates economic life in Khost²⁰.
33. [District 1], where the applicant is from is located in [a specified part] of the Province. It is dominated by the Khostwali tribe. [District 1] was formerly under the influence of powerful tribal elders, however these ties have weakened due to the long period of conflict and [District 1] is described as fragmented; security is weak in the district²¹. Historically, Khost was known as a centre of power for the Communist regime in Afghanistan, though the district also provided thousands of recruits to fight soviet forces²². A number of mujahidin militia groups operated in the [District 1]²³. After the withdrawal of the soviet forces from Afghanistan, Khost was one of the first districts to fall out of government control, with the mujahidin commander Jalaludin Haqqani taking control of the province. Haqqani later joined forces with the Taliban, and is the founder of the Haqqani network, a powerful militia group in Khost, and throughout the entire south east of Afghanistan’s border region. The group dominates the anti-Government activities in Khost²⁴. Though Jalaludin Haqqani died in 2015, his son now controls the network and it is effectively considered to be part of the Taliban²⁵. The Taliban has an open presence in [District 1] and control of the district is contested with the government²⁶. Khost province is the site of ongoing conflict. The Khost Protection Force (KPF), a violent pro-Government armed group also operates throughout the Province in conflict with the Taliban. Both the Taliban, and the KPF have

¹² EASO, ‘Afghanistan: Security situation’, EASO, 12 June 2019, 20190613124844

¹³ Tribal Analysis Centre, “Khost Province District Studies”, 01 May 2013, CIS28649

¹⁴ European Asylum Support Office (EASO), “Afghanistan: Security situation”, 12 June 2019, 20190613124844

& IDS International, “Khost Provincial Handbook: A Guide to the People and the Province”, 1 May 2010, CIS28176

¹⁵ IDS International, “Khost Provincial Handbook: A Guide to the People and the Province”, 1 May 2010, CIS28176

¹⁶ European Asylum Support Office (EASO), “Afghanistan: Security situation”, 12 June 2019, 20190613124844

& IDS International, “Khost Provincial Handbook: A Guide to the People and the Province”, 1 May 2010, CIS28176

¹⁷ Tribal Analysis Centre, “Khost Province District Studies”, 01 May 2013, CIS28649

¹⁸ IDS International, “Khost Provincial Handbook: A Guide to the People and the Province”, 1 May 2010, CIS28176

¹⁹ Tribal Analysis Centre, “Khost Province District Studies”, 01 May 2013, CIS28649

²⁰ IDS International, “Khost Provincial Handbook: A Guide to the People and the Province”, 1 May 2010, CIS28176

²¹ [Source deleted]

²² IDS International, “Khost Provincial Handbook: A Guide to the People and the Province”, 1 May 2010, CIS28176

²³ [Source deleted]

²⁴ IDS International, “Khost Provincial Handbook: A Guide to the People and the Province”, 1 May 2010, CIS28176

²⁵ European Asylum Support Office (EASO), “Afghanistan: Security situation”, 12 June 2019, 20190613124844

²⁶ [Source deleted]

been identified as being responsible for the indiscriminate and unaccountable deaths of civilians throughout Khost Province.²⁷

34. Having found that the applicant was of interest to the Taliban in Khost at the time of his departure, and given the ongoing and open presence of the Taliban in Khost, I conclude that the applicant would face a real chance of harm in Khost if he returned there. However, in order for the fear to be well-founded under s.5J of the Act, the real chance of persecution must relate to all areas of the receiving country.
35. During his Protection Visa Interview, the delegate asked the applicant why he could not return to Kabul. In my correspondence with the applicant, I noted that there are over five million people living in Kabul, more than a million of whom are estimated to be Pashtun Sunni's like the applicant. Furthermore, though Kabul Province faces high levels of violence, Kabul, and other cities, are still reported as being the places which contain the best economic opportunities in Afghanistan. Wages and public services are better in Kabul than in other parts of the country.
36. The applicant has put forward a variety of arguments as to why he could not return and reside safely in Kabul or other parts of Afghanistan. These fall into two principal categories, concerns about the security situation, and other problems which are best described as economic concerns.
- His security concerns argue along the following lines: (a) even though the Government maintains control of Kabul, the city is not secure, (b) the Taliban (and the Haqqani network) have long demonstrated a clear capacity to operate in Kabul, (c) he is still of interest to the Taliban, and so he cannot live in Kabul.
 - His principal economic concerns are that: (a) economic conditions in Kabul (and other major cities) are dire, accommodation, services and employment are scarce (b) as he has only worked as a [Occupation 1] he would be unable to find employment in Kabul, (c) he could not support himself or his family, and so he cannot live in Kabul.
37. Turning first to the applicant's security concerns, all sources before me do indicate that the Taliban is able to operate in Kabul and other major cities, even though these places remain under the control of the Government²⁸. In areas it does not control, the Taliban is said to maintain a shadow government, where shadow governors and officials have responsibility for Taliban activities in their areas²⁹. The Haqqani Network continues to control much of the south-eastern border regions of Afghanistan, and is active in Kabul, having conducted a number of high profile attacks in the city³⁰.
38. Over the last decade, the Taliban has shown that it has the capability to select and target individuals throughout Afghanistan for harm. A variety of sources indicate that the principal targets for Taliban activity (and from other insurgent groups) are Government Officials, Security personnel, humanitarian and human rights workers, civilians deemed to be supporters of the Government, or of international military forces, tribal and religious leaders, women and

²⁷ United Nations Assistance Mission in Afghanistan (UNAMA), 'Afghanistan: Protection of civilians in armed conflict 2019 (February 2020)', 22 February 2020, 20200224115345

²⁸ DFAT, "Country Information Report: Afghanistan 27 June 2019", 20190627113333; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 30 August 2018, CIS7B839419284; UNAMA, 'Afghanistan: Protection of civilians in armed conflict 2019 (February 2020)', 22 February 2020, 20200224115345; EASO, 'Country Guidance: Afghanistan' European Asylum Support Office (EASO), June 2019, 20191125104658 & EASO, 'Afghanistan: Security situation', EASO, 12 June 2019, 20190613124844

²⁹ DFAT, "Country Information Report: Afghanistan 27 June 2019", 20190627113333; & EASO, 'Afghanistan: Security situation', EASO, 12 June 2019, 20190613124844

³⁰ DFAT, "Country Information Report: Afghanistan 27 June 2019", 20190627113333;

individuals perceived as westernised³¹. The applicant argues that as he has lived in Australia for around 8 years, he would be perceived as westernised, but he does not claim to be a member of any other at risk profile.

39. I have accepted that the applicant was of interest to the Taliban at the time he departed Afghanistan. The Taliban has demonstrated the capacity to target individuals anywhere in Afghanistan, if they are of ongoing interest over the last decade. Though he is not a government official or security officer or an aid worker, religious leader, the applicant argues he would still be of interest due to his intervention against the Taliban in 2012. Given the passage of time, I have some doubts about whether the applicant would be of ongoing interest to the Taliban. Especially in an area where he was not known, as he was in Khost.
40. However, the weight of evidence before me does indicate that the Taliban do have the capacity to identify and target persons throughout Afghanistan. According to UNAMA, the Taliban was responsible for 47% of civilian deaths in Afghanistan in 2019. Interactions with the Taliban can be unpredictable and violent. I consider that there is some risk that the applicant would be considered to be an opponent of the Taliban. I consider that the applicant would face a small, but nevertheless real chance of harm in other parts of the country from the Taliban if returned to that country.
41. The evidence before me shows that despite government control of the major urban areas, including Kabul, the applicant would not be able to rely on the Government of Afghanistan to provide him with effective protection and so s.5J(2) is met for the applicant.
42. I have found that the applicant would face a risk derived from his past actions. In the circumstances, I am not satisfied that he could take any reasonable steps to modify his behaviour would alleviate the risk he faces and so s.5J(3) is met for the applicant.
43. I conclude that the essential reason the applicant would face harm is due to his political opinion, which would involve a threat to his life and liberty, and systematic and discriminatory conduct. And so that s.5J(4) and s.5J(5) are both met for the applicant. I am satisfied that s.5J(6) exclusions do not apply.
44. I conclude the applicant has a well-founded fear of persecution in Afghanistan.

Refugee: conclusion

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

Decision

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

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

³¹ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 30 August 2018, CIS7B839419284

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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