



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN
IAA reference: IAA20/08582

Date and time of decision: 6 August 2020 14:03:00
S MacKenzie, 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 a citizen of Afghanistan. He arrived in Australia [in] June 2013 as an unauthorised maritime arrival. On 23 January 2017 the applicant lodged a valid application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV).
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 24 May 2018, on the basis that the applicant did not face a real chance of serious harm or a real risk of significant harm upon return to Afghanistan.
3. On 4 October 2018 the IAA affirmed the decision not to grant the referred applicant a protection visa. [In] July 2020, the Federal Circuit Court of Australia remitted the matter to the IAA for reconsideration.

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).

July 2018 submissions and new information

5. On 4 July 2018, in connection with the first review, the IAA received a written submission from the applicant's representative (IAA submission), a statutory declaration from the applicant (July 2018 statement), and a number of annexures. The information is primarily new claims and evidence not before the delegate ('new information') and is accompanied by a further submission from the representative arguing why it should be considered under s.473DD of the Act (second IAA submission).
6. The new information can be summarised as follows:
 - Since around May 2015 the applicant has been in a long-term de facto relationship with "DJ" who is a male-to-female (MtF) transgender and identifies as a woman. They first met through a gay/bisexual/queer-friendly social networking mobile phone application called '[App 1]' in October 2014 and were engaged in December 2017;
 - The applicant identifies as trans-amorous (sexually and romantically attracted to transgender persons, specifically male-to-female transgender persons). He also identifies as queer, a term used to denote a non-heteronormative sexual identity that may not easily be classified under other known terminology such as gay or lesbian, etc) and as a member of the LGBTIQ (lesbian, gay, bisexual, transgender/transsexual, intersex and queer/questioning persons) community;
 - The applicant fears harm in Afghanistan due to:
 - his membership of the particular social group of queer persons in Afghanistan
 - his membership of the particular social group of members of the LGBTIQ community in Afghanistan
 - his membership of the particular social group of men in a relationship with pre-operative MtF transgender persons

- his actual or perceived non-conformity with socially defined and traditional gender roles in Afghanistan (as a result of his trans-amorous sexuality)
 - his relationship being illegal in Afghanistan
 - his perceived or actual un-Islamic behaviour
 - his perceived or actual westernised behaviour.
7. As evidence of DJ's status as a MtF transgender person, the applicant provides a copy of DJ's Australian passport (issued in her former male name), a copy of her name change certificate (issued by the Government of Western Australia), a copy of DJ's application to have her gender changed in her Australian passport, and a letter from [Dr A], dated 11 June 2018, confirming that DJ is a transgender female (MtF) currently awaiting gender altering surgery.
 8. As evidence of his de facto and continuing relationship with DJ, the applicant provides copies of joint tenancy agreements, their bank statements evidencing regular transfers to each other, statutory declarations (Form 888) from DJ's brother and their mutual friend attesting to the relationship, and numerous photographs together. [Dr A]' letter also confirms that DJ has been in a relationship with the applicant since mid-2015.
 9. In his July 2018 statement, the applicant provides a number of reasons as to why he did not raise this information during the interview with the delegate on 21 June 2017 (SHEV interview). In summary, he was afraid that his relationship would become known to the small and religiously conservative Afghan community in [Australian City 1] and that he would become the subject of gossip and judgement. The applicant stated that DJ accompanied him to the SHEV interview in case the delegate required further insight into their relationship. However, it was evident from his interactions with the interpreter prior to the commencement of the interview that the interpreter was religiously conservative. The interview was at the time of Ramadan and the interpreter had asked him if he was fasting.
 10. The applicant also states that he did not have the funds to engage a lawyer or migration agent to assist with his SHEV application. He states it was only when he engaged a lawyer to assist with his IAA review that he understood it was important to provide details of all the reasons he feared returning to Afghanistan. He states he regrets not raising this information at the SHEV interview and not asking the delegate to speak with DJ to learn more about their relationship.
 11. In the second IAA submission, the applicant's representative acknowledges that the applicant did not raise the claims relating to his sexual orientation or his relationship with the delegate but draws attention to his SHEV application form where he declared DJ as his partner and that she assisted him to complete the application. The representative also draws attention to the difficulties applicants may have in raising sensitive claims and argues that the new information meets s.473DD of the Act and therefore should be considered.

July 2020 submissions and new information

12. On 27 July 2020, the applicant provided a further statutory declaration (July 2020 statement). The applicant in part reiterates claims and evidence before the delegate and the new information provided in July 2018. However, he also provides new claims and evidence not previously advanced (new information). The statement is accompanied by a submission from

the representative arguing why the new information should be considered under s.473DD of the Act (third IAA submission).

13. The new information in the July 2020 statement can be summarised as follows:
 - The applicant had sexual relationships with men in Afghanistan. In around 2014, prior to meeting DJ, he went to gay nightclubs in Australia;
 - The applicant does not believe in God, Islam, or religion. He is an atheist and fears harm in Afghanistan on this basis.
14. In his July 2020 statement, the applicant states that he did not mention his sexual relationships earlier because it was an intensely personal experience that he did not feel comfortable discussing with anyone. While he had told DJ and very close friends that he had sex with men, he did not feel comfortable telling strangers, including to the IAA at the first review. Over the past two years he has become more confident talking about his sexuality as long as it is with persons outside of the Afghan and Muslim community.
15. The applicant also states that he declared in his SHEV application that he did not follow Islam but was unable to explain this further in the SHEV interview for the same reason he was not able to talk about his sexuality. He was scared to say anything about his sexuality or beliefs in front of the interpreter. He did not want to disrespect the interpreter's beliefs by saying that he did not share them. He knows that Muslims find the idea of apostasy extremely offensive. The Afghan community in [City 1] is small.
16. The applicant also provides to the IAA a copy of the medical visa (and [Country 1] immigration border control stamps) he used to travel to [Country 1] prior to him coming to Australia. While the applicant's evidence that he travelled to [Country 1] on a medical visa was before the delegate, a copy of the visa and stamps was not and is therefore new information. It is provided in part to address apparent concerns raised by the delegate in her decision about the applicant's nationality and country of origin. While the delegate ultimately accepted he was a national of Afghanistan and that Afghanistan was the receiving country, it was evident from her decision that she had some concerns that he may have been an [Country 1] national. She was also not satisfied that he had only resided in [Country 1] for around six months prior to coming to Australia, as initially claimed. I note these concerns were not put to the applicant prior to the decision.
17. In the third IAA submission, the applicant's representative also refers to a number of sources of country information¹ not before the delegate. It is also new information provided primarily to evidence that the applicant faces harm in Afghanistan for reason of his sexuality and religious beliefs. The representative also provides numerous reasons as to why the IAA should find there are exceptional circumstances for considering the new claims and country information.

¹ Department of Foreign Affairs and Trade (DFAT), "Country Information Report Afghanistan", 27 June 2019, 20190627113333; United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 30 August 2018, UN3079B839; UK Home Office, "Country Policy and Information Note - Afghanistan: Sexual orientation and gender identity or expression", 26 February 2020, 20200309152622; United States Department of State, "2019 Country Reports on Human Rights Practices: Afghanistan", 10 March 2020, 20200312144847; United States Department of State, "Afghanistan 2019 International Religious Freedom Report", 10 June 2020, 20200612121624

18. In the IAA submission, the representative states that both the applicant and DJ would like to attend an interview with the IAA in relation to the new claims. In my view this is an unusual case. A number of out of the ordinary claims have been raised that in some respect bear little resemblance to the claims before the delegate. If I were to conduct an interview its purpose would be to establish the genuineness of the new claims, in particular, about the applicant's sexuality. However, having had regard to the new information, I consider it compelling and credible and do not consider an interview is necessary.
19. Having considered the new information about the applicant's sexuality and religious beliefs in its entirety, I am satisfied it represents credible personal information that was not previously known and had it been known may have affected the consideration of his claims. I am also satisfied that exceptional circumstances exist to justify considering the new information. As noted above, I consider this to be an unusual case with out of the ordinary claims. I am also persuaded by some of the reasons advanced to the IAA as to why the information was not previously mentioned.
20. In respect of the new country information from DFAT, UNHCR, UK Home Office and the United States Department of State, I accept that as it all post-dates the delegate's decision it could not have been provided to the Minister. The new information is from credible sources and is material to the issues under consideration. I am satisfied that there are exceptional circumstances to justify considering it.
21. As noted above, the applicant was not made aware, prior to the Minister's decision, that the delegate had concerns with his claimed nationality or his time spent in [Country 1] and for this reason I accept he did not provide a copy of the medical visa (and the immigration border control stamps) earlier. I am also satisfied it represents credible personal information that was not previously known and had it been known may have affected the consideration of his claims. The applicant's time in [Country 1] is material to his claims for protection and for this reason I am satisfied that there are exceptional circumstances to justify considering it.

Applicant's claims for protection

22. The applicant's claims can be summarised as follows:
 - He is a Pashtun male from Kandahar city;
 - He does not believe in God or religion and identifies as an atheist;
 - In Afghanistan, he had sexual relationships with men;
 - In around 2012, he and his brother were threatened by the Taliban in connection with their employment with American/western forces. Later, his brother was killed by the Taliban;
 - The applicant moved to [Country 1] but continued to receive threats by telephone. He decided to come to Australia;
 - Since 2015 he has been in a de facto relationship with DJ, a MtF transgender. He identifies as queer and as a member of the LGBTIQ community;
 - If returned to Afghanistan, he fears he will be harmed due to:
 - his previous employment/connection to American/western forces
 - his membership of the particular social group of queer persons in Afghanistan

- his membership of the particular social group of members of the LGBTIQ community in Afghanistan
- his membership of the particular social group of men in a relationship with pre-operative MtF transgender persons
- his actual or perceived non-conformity with socially defined and traditional gender roles in Afghanistan (as a result of his trans-amorous sexuality)
- his relationship being illegal in Afghanistan
- his perceived or actual un-Islamic behaviour
- his perceived or actual westernised behaviour
- his atheist views.

Refugee assessment

23. 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

24. 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.
25. Since his arrival in Australia, the applicant has consistently claimed to be an Afghan citizen of Pashtun ethnicity from Kandahar city. In support of his identity he provided a copy of his Taskera (Afghan identity document) and Afghan passport.
26. The applicant has also consistently claimed since his arrival that prior to coming to Australia he spent time in [Country 1] having travelled there on a medical treatment visa. He has also consistently claimed that while in [Country 1] he married a nurse “TK” [in] March 2013. However, like the delegate, I also have concerns with his evidence as to how long he was living in [Country 1] prior to coming to Australia.

27. The applicant initially claimed in his interview with the then Department of Immigration and Citizenship on 17 July 2013 (arrival interview) that he travelled to [Country 1] after the death of his brother and that he remained there for six months prior to departing for Australia in late March 2013. However, later in the arrival interview, he variously indicated that his brother died in August 2012 and December 2012.
28. In his written SHEV application, the applicant recorded that left Afghanistan for [Country 1] in November 2012 and remained there until his departure in March 2013. However, in the SHEV interview, he reverted to his earlier evidence that he was there for six months. He also advised the delegate that his brother died in May 2012.
29. In his July 2020 statement, the applicant states that he and his mother were granted [Country 1] medical treatment visas [in] January 2013 because his mother needed treatment for [Medical Condition 1]. In order to accompany his mother, the applicant applied for and was granted a medical treatment visa in his own right. He had [Medical Condition 2] in the past so was able to obtain the visa on that basis. They arrived in [Country 1] [in] January 2013. As evidence of this the applicant provides to the IAA a copy of the medical treatment visa and the [Country 1] immigration border control stamps in his Afghan passport.
30. The difficulty with the applicant's evidence to the IAA is that it significantly contradicts his earlier evidence as to how long he was in [Country 1], without explanation. I also note he was specifically asked in the SHEV interview when his mother passed away and he responded that it was in January or February 2012, prior to him travelling to [Country 1]. He also advised the delegate that his mother has passed away in Kandahar and that she had never travelled with him to [Country 1]. I note this differed from his evidence in the arrival interview that his mother passed away in [Country 1] in 2012.
31. I also note the applicant's evidence in the SHEV interview that he speaks [Language 1], which seems unusual for a Pashto speaking Afghan from Kandahar. According to the immigration stamps in his passport that have been provided to the IAA, he only lived in [Country 1] [from] January 2013 [until] March 2013. In his July 2020 statement, the applicant states that it is 'common' in Afghanistan to learn [Language 1] from watching [Country 1] films and that because he watched such films he was able to quickly pick up the language when he arrived in [Country 1]. He also claims that he can speak Urdu because Pakistan is only 100 kilometres from Kandahar and he states that Urdu and [Language 1] are similar languages. I note his evidence in his arrival interview was that he could only speak "a little bit" of Urdu.
32. On the evidence, I accept the applicant spent time in [Country 1] prior to coming to Australia. I also accept he arrived in [Country 1] in January 2013. However, I am not satisfied this was his first trip to [Country 1] and suspect he travelled to and possibly resided [Country 1] prior to this time. In particular, I find it difficult to reconcile his evidence in the SHEV interview that his mother passed away in early 2012 with his evidence to the IAA about her travelling with him to [Country 1] in early 2013. Even accepting he was confused with dates, I am not persuaded with his evidence to the IAA that he met and married his now ex-wife within two months of landing in [Country 1]. Overall, I am not satisfied the applicant has been truthful about his time in [Country 1] or about how his relationship with his ex-wife developed. His reasons for providing conflicting evidence about whether his mother travelled to [Country 1], whether she passed away in that country, and when this happened remains unexplained. However, in the context of this particular case, I consider not much turns on this and nor do I consider it necessary to reach a concluded view on the matter. I suspect there are other reasons as to why there are difficulties with the applicant's evidence about his time in [Country 1], which I have discussed later in this decision.

33. Although the applicant spent time in [Country 1] prior to coming to Australia, on the evidence, I am satisfied he does not have the right to reside there. I am satisfied he has divorced TK. Like the delegate, I find that he is an ethnic Pashtun, a national of Afghanistan, and that Afghanistan is the receiving country for the purpose of this decision.
34. I accept the applicant's evidence to the IAA that he is an atheist. I note he indicated in his written SHEV application that he did not want to be forced to follow a particular religion and that he feared the government and community in Afghanistan due to his religious views. I also note where he was asked to record his religion in his SHEV application he wrote 'from a Sunni Muslim family'.
35. The applicant was asked in the SHEV interview about his religion. He identified as Sunni and when asked if he practiced he said he did "in his heart". Overall, I considered his oral evidence about his religious practice unconvincing. He variously indicated that he attended mosque and didn't attend mosque, and that he prayed and did not pray. He said it was "hard to explain". He also indicated that he had been invited to Afghan festivals (which I inferred to mean religious festivals) but did not want to go.
36. Having considered the applicant's written and oral evidence, I am not satisfied it supports the delegate's finding that he is a Sunni Muslim who does not attend mosque. It is clear from the applicant's written evidence that he advanced claims consistent with a person who holds atheist views. Further, he was clearly uncomfortable talking about his religion in the SHEV interview. I note that despite this apparent conflicting evidence, the delegate did not raise any concern with the applicant during the SHEV interview about why his written claims differed from his oral evidence (which I also considered in itself unconvincing). Nor did she raise any concern following the interview, including when she wrote to him under s.57 of the Act inviting him to comment on information. I also give some weight to the fact the applicant was not represented throughout the SHEV process and therefore may not have been fully cognisant of the importance of providing the information about his views on religion earlier or more clearly. In all the circumstances, I am persuaded by his submissions to the IAA that he did not feel comfortable expressing his religious views in front of the interpreter. I accept his interaction with the interpreter prior to the interview led him to form the view that he was religiously conservative and that he genuinely feared repercussions should his religious beliefs be exposed to the small Afghan community in [City 1].
37. I further accept the applicant's compelling evidence to the IAA that he has been in a long-term de facto relationship with DJ who is a MtF transgender. I accept the applicant identifies as queer and as a member of the LGBTIQ community. I note the applicant declared his relationship with DJ in his written SHEV application and spoke of his relationship with her during the SHEV interview. I am also prepared to accept the applicant's evidence to the IAA that prior to coming to Australia he had sexual relationships with men in Afghanistan. The UK Home office reports that same-sex sexual relations amongst men is not uncommon in Afghanistan and occurs in a range of divergent cultural circumstances. The UK Home office also reports that it is prevalent in Pashtun culture, and may be regarded as a legitimate satisfaction of carnal desire and preferable to pre-marital sex with a woman.²
38. I am keenly aware of the difficulties faced by persons with claims relating to sexual orientation and other gender based claims and I note the submissions to the IAA in this regard. The representative draws attention to the Department's policy for decision makers that recognises

² UK Home Office, "Country Policy and Information Note - Afghanistan: Sexual orientation and gender identity or expression", 26 February 2020, 20200309152622

applicants may have claims related to sexual orientation or gender identity but choose to make alternative claims rather than discuss something so sensitive and personal and that they may feel increased anxiety about disclosing private information in front of a person from their own community or ethnic or religious background as they may fear judgement or that this information will be passed on to others in their community. I am persuaded by his submissions to the IAA as to why he did not mention his sexual orientation during the SHEV interview. I also accept the submission to the IAA that the applicant's circumstances were exacerbated by his lack of legal representation throughout the SHEV process. I also take into account his relatively young age when he first came to Australia ([age] years) and when he lodged his SHEV application ([age] years). I also give weight to his evidence in the SHEV interview that he makes a deliberate effort not to mix with the Afghan community in Australia, which I accept is likely due to his efforts to conceal his sexuality and religious beliefs.

39. In coming to my conclusion in respect of the applicant's sexual orientation, I have also had regard to his evidence about events in [Country 1] where he claimed to marry TK, an [Country 1] national. He initially claimed before the delegate that he met his now ex-wife five and a half months before their marriage and that they lived together during this period. As above, his evidence to the IAA is that it was a much shorter period. For reasons outlined above and further below, I consider the applicant's evidence about his time and events in [Country 1] problematic and I am not satisfied he has provided a truthful account to the delegate or the IAA. However, irrespective of this, I accept his broadly consistent evidence that he married in [Country 1] in March 2013, that the relationship ended in early 2015, and that the marriage finally dissolved in July 2017. I am also prepared to accept his evidence to the IAA that that he formed a romantic bond with TK at a time she was caring for his mother and that he decided to marry TK due to societal pressures faced by unmarried men in Afghanistan. The applicant's actions are not inconsistent with reporting from the UK Home Office that LGBTI persons face societal and family discrimination and pressure to follow cultural and religious norms, including marriage.³
40. The applicant's evidence as to the events that transpired in the months leading up to his departure from Afghanistan was also problematic. In summary, he claimed that he and his brother worked for NATO (North Atlantic Treaty Organisation) and that they received threats from the Taliban for doing so. He claimed that his brother was killed by the Taliban, and that he then fled to [Country 1] after obtaining a medical visa through a smuggler. He claimed that once in [Country 1], he continued receive telephone threats from the Taliban and it was for this reason he decided to come to Australia.
41. As noted earlier in this decision, there were apparent inconsistencies in the applicant's evidence as to when his brother was killed, when he first went to [Country 1], and how long he remained there. I also note his evidence in the arrival interview that he worked for NATO for "four and a half to five years" significantly differed from his evidence in the SHEV interview that it was for "two to three years". Further, his evidence in the SHEV interview was that he did not know who was responsible for the threats or the death of his brother was different from his earlier claim that it was the Taliban. As also noted earlier, the applicant's evidence as to events in [Country 1] was also unconvincing and this, along with his other problematic evidence, leads me to conclude he was not recalling a genuine personal experience.
42. I also note the delegate did not accept the applicant's claimed interactions with the Taliban. While I acknowledge the representative's general submission to the IAA that the initial claims raised by the applicant before the Delegate should not be discredited but understood as

³ Ibid

‘alternative claims’, I also note that the various statements and submissions to the IAA are silent on this aspect of his evidence and the delegate’s findings. On all the evidence, I am not satisfied the applicant or his brother came to the adverse attention of the Taliban, or any other person or group, prior to the applicant’s departure from Afghanistan or at any other time. I reject these claims in their entirety.

43. In 2019 DFAT reported that homosexual sex is illegal in Afghanistan and the Afghan Penal Code provides for the use of the death penalty in accordance with sharia law. DFAT understands that there have been no instances of the death penalty been carried out on this issue since the overthrow of the Taliban regime. However, there have been frequent credible reports that individuals perceived to be homosexual (almost exclusively males) have continuing difficulties with the police, including harassment and/or arrest (usually on spurious charges).⁴
44. DFAT also reported that in addition to the legal constraints there are strict social and cultural taboos that severely constrain an individual’s freedom to identify publicly as homosexual. Further, there is no societal understanding or acceptance towards consenting adults who consciously embrace same-sex attraction as a key part of their personal identity. DFAT also cited credible reports of individuals being dismissed from their jobs, disowned by their families, restricted from accessing health services, being robbed, pressed for sexual favours, or raped because of suspicions that they are homosexual.⁵
45. Overall, DFAT assessed that LGBTI (lesbian, gay, bisexual, transgender, or intersex) individuals faced a high risk of official discrimination, including by entrapment, arrest, harassment and mistreatment by police. DFAT also assessed that such individuals face a high risk of societal discrimination, which may include violence. Continuing traditional views about sexuality and gender considerably restricted a LGBTI person’s ability to live openly, and to participate in the community and workforce.⁶
46. In a recent report about sexual orientation in Afghanistan, the UK Home Office assesses that same-sex relations remain hidden and stigmatised, and that persons who openly identify as LGBTI could be liable to prosecution by the state, and likely to face discrimination and violence by the state. The report also states that LGBTI persons fearing harm from non-state actors cannot seek effective protection because the authorities are unwilling to provide it.⁷ In 2018, UNHCR was of the view that, due to the criminalisation of same-sex relations, as well as the strong social taboos, individuals of diverse sexual orientations are likely to be in need of international refugee protection.⁸ Consistent with other information before me, the United States Department of State reports in 2020 that Afghan law criminalises consensual same-sex sexual conduct. Under the penal code, conviction of sex between men is a criminal offence punishable by up to two years’ imprisonment. Under Islamic sharia law, conviction of same-sex sexual activity is punishable by death, flogging, or imprisonment.⁹ The United States Department of State also reports that in 2019 there were reports of harassment and violence of individuals perceived to be involved in same-sex sexual activity by society and police. The report also states that Afghan law does not prohibit discrimination or harassment based on sexual orientation, and that homosexuality is widely seen as taboo and indecent. LGBTI

⁴ DFAT, “Country Information Report Afghanistan”, 27 June 2019, 20190627113333

⁵ Ibid

⁶ Ibid

⁷ UK Home Office, “Country Policy and Information Note - Afghanistan: Sexual orientation and gender identity or expression”, 26 February 2020, 20200309152622

⁸ UNHCR, “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan”, 30 August 2018, UN3079B839

⁹ United States Department of State, “2019 Country Reports on Human Rights Practices: Afghanistan”, 10 March 2020, 20200312144847

individuals did not have access to certain health-care services and could be fired from their jobs because of their sexual orientation. LGBTBI persons also reported that they continued to face arrest by security forces and discrimination, assault, and rape by society at large.¹⁰

47. I am satisfied that queer, or LGBTIQ, men in Afghanistan are a particular social group as the characteristic of engaging in sexual activity with other men (or with MtF transgender persons) is shared by each member of the group. I am satisfied that the applicant shares the characteristic and that the characteristic is one that is innate or immutable. I am also satisfied that the characteristic is not a fear of persecution.
48. I am also satisfied that if returned to Afghanistan there is a real chance the applicant would continue to have sexual relationships with men or transgender persons. The type of harm he faces in doing so, as described by the information before me, includes imprisonment, significant violence and significant harassment. I am satisfied that there is a real chance of serious harm, including significant physical harassment and physical ill-treatment of the applicant as contemplated by s.5J(5). I am also satisfied that such conduct would be systematic and discriminatory and for the essential and significant reason of his sexual orientation should he return to Afghanistan.
49. On the applicant's own evidence he has been reasonably discrete in respect of his sexuality while in Australia for fear that it may become known within the Afghan community. I find that were he to return to Afghanistan it is very likely he would take steps to conceal his sexuality for fear of harm, as he did in the past. Section 5J(3) of the Act provides that a person will not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour so as to avoid a real chance of persecution. However, this is qualified by certain types of modifications which a person cannot be expected to make, including altering his or her sexual orientation or concealing his or her true sexual orientation. As I am satisfied the applicant will face harm because of his sexual orientation, there are no reasonable steps he could take to modify his behaviour so as to avoid the real chance of persecution.
50. Section 5J(2) of the Act provides that a person will not have a well-founded fear of persecution if effective protection measures are available to them in a receiving country. I have noted above that homosexuality is illegal in Afghanistan and the Afghan authorities have themselves been accused of violence and other forms of mistreatment against the LGBTBI community and individuals perceived to be involved in same-sex sexual activity. There is no information in the material before me that indicates that the police or other authorities take any steps to protect citizens who are members of the LGBTIQ community from violence inflicted by other groups or individuals. Because the feared harm is present throughout Afghanistan and in part emanates from the Afghan authorities operating under laws applying throughout the country, I find that the real chance of persecution relates to all areas of Afghanistan and that effective protection measures are not available to the applicant.
51. I am satisfied that if the applicant returns to Afghanistan, he will face a real chance of persecution for reasons of his membership of a particular social group, being queer, or LGBTIQ, men in Afghanistan. In light of this, I have not found it necessary to consider his other claims for protection.

¹⁰ Ibid

Refugee: conclusion

52. The applicant meets the requirements of the definition of refugee in s.5H(1). The applicant meets s.36(2)(a).

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*.

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.