



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN
IAA reference: IAA20/08708

Date and time of decision: 30 October 2020 15:26:00
M Brereton, Reviewer

Decision

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of 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 Pashtun and Sunni Muslim from Paktia¹ province, Afghanistan. He departed Afghanistan lawfully [in] January 2013 and arrived on Christmas Island [in] July 2013. On 18 July 2017, he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 2 October 2020, a delegate of the Minister for Immigration (the delegate) refused to grant the visa.
2. The applicant's claims and evidence changed over time and the delegate ultimately did not accept that the applicant was a witness of truth in relation to many aspects of his claims. The delegate accepted the applicant's claims as to identity and origin, medical issues and that he would be failed asylum-seeker from the West if he returned to Afghanistan. The delegate was not satisfied that the applicant faced a real chance or real risk of relevant harm for any of or all of these reasons.

Information before the IAA

3. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. No further information has been obtained or received.

Applicant's claims for protection

5. At the arrival interview [in] July 2013 (the arrival interview), the applicant claimed:

I was studying in college, [a profession]. I received a threat letter that I should leave because my father was affiliating with Mujahideen (resistance against operation). The letter said to leave [his profession] and work with Taliban. One day in 2010 when I was going to college we entered the college door and the security personnel ran towards a person who wasn't a student, the person had a pot and when the security touched him they exploded. Two days later the college was destroyed. Principal was killed.

In 2010 while teaching English I received threats from Taliban again, they had a problem with me interpreting for Americans. They wanted me to join them. I went to the [named] district to make an ID card, suddenly firing happened upon me at the door. Five minutes later a bomb blasted close by. My father took our family to Pakistan.
6. The applicant also said that he had been kidnapped and held for ransom while he was living in Pakistan, and that the police 'would catch you and you had to pay money to be released'. He said that he was coming to Australia for protection and to complete his studies.
7. The applicant's Statement of Claims (SOC) in his SHEV application of 18 July 2017 stated:

¹ Also spelt Paktya.

I am of Pashton ethnicity and Sunny Muslim faith who originate from a village in the vicinity of [location]. I and my family fled Afghanistan due to the extremely unsafe situation in our country of origin.

I fear that if I am forced to return to Afghanistan, I would be seriously harmed for the reason of my religion and ethnicity. In case of deportation I will have to live either in Pashton dominant areas, where I will be forced to join militia and take part in anti-government armed operations, or in Hezara dominant areas where I will be facing mistreatments, harassments and racism due to my ethnicity and religion.

If I refuse to join anti-government active groups (e.g. Taliban or ISIS) I will be perceived as supportive of the West, a spy, a hostile and infidel person and would be considered for unfair punitive measures. There are many reports that forced recruited persons have been used to carry out suicide attacks, as human shields, to participate in active combat, to plant road side bombs or to smuggle weapons.

As such, I have a well-founded fear of persecution, mistreatment and exposing myself to a real risk of harm if I return to Afghanistan. I fear this harm, ill treatment and serious human rights abuses from extremist Taliban organisation in Afghanistan and or other illegal anti-government affiliates.

There will be no safe place in Afghanistan and there will be no chance of safe relocation to a different area of the country to escape this threat. I will not be able to seek help or protection of the Government of Afghanistan who are already struggling to curb the violence and return the peace/security to Afghanistan.

8. At the first SHEV interview on 19 February 2020, the applicant made claims generally consistent with his SHEV application. Following that interview he provided further identity documents.
9. In June 2020, the applicant retained a new migration agent. He was invited to attend a further SHEV interview and on 22 July 2002, he provided a pre-interview declaration and medical evidence raising additional claims. He claimed to fear harm as a person suffering severe mental health issues, and as a person suffering a physical disability. He also feared harm as a person who has adopted a Western lifestyle and strayed from the religious teachings and culture of Afghanistan, and as a failed asylum-seeker who has been in the West.
10. At the second SHEV interview on 23 July 2020, the applicant gave evidence largely consistent with his SHEV application and first interview. The delegate raised some concerns pursuant to s.57 of the Act and invited the applicant to respond in writing. The applicant responded on 11 August 2020, stating that he had provided incorrect information about witnessing firing and an explosion at a college. He stated that he had also provided incorrect information about his education and had only studied to [grade] in Pakistan. The applicant's response, which contained additional claims not previously raised, went on:

I was born during Afghan Civil War. There was never a quiet day and normal life was always witnessing gunfire, rocket fire, regular funerals and sounds of tanks. Then came the Taleban. They imposed strict sharia law in Afghanistan. My father was in [Country 1] often for work at the time so the childhood was empty and we never went anywhere as there was no male guardian at home to accompany my mother as was required by Taleban rules at the time.

There was no entertainment, no television or music and all men and women had to adhere strict Sharia laws and men were required to have long beards and women were always forced to wear Chadari's (a form of Burka). At the age of just [age], I witnessed the American invasion. This was even more violent period as day and night you could hear the roars of American fighter jets in the sky and constant bombardments and fighting. My father had returned just prior to the invasion from [Country 1] and was bedridden because of serious injury that he suffered in [Country 1].

We moved to Pakistan for our safety in 2002 and once we had some what settled into a semi-normal life, there was a war between Sunnis and Shia's in Parachinar starting in 2007. In 2008 I was forced to stop my schooling and stay home because both sides were targeting innocent civilians. From the Sunni's point of you we were expected to be supporting the Sunni side and just by being Sunni, you were under threat of being killed by the Shia's. Both sides were also recruiting fighting age to join their ranks.

I ran away to Afghanistan in 2009, but the trouble soon followed and received death threats from Taleban for teaching at [a] School and not joining them when I was asked twice to do so. Some weeks later after receiving the second letter from Taleban to join them, I went to the Tazkera office in Paktia. The Tazkera office was attacked by the extremists and there was a massive explosion soon after. I really thought that I would be killed that day and felt that the attack was targeting me because I did not agree to join the Taleban after they had sent me two letters.

In August 2012, I was kidnapped in [a town in] Peshawar. I was kept in a dark room for around 6 days. It was an extremely traumatic incident and if my parents had not paid the ransom to my kidnappers, I would have been killed. Until this day I hate the dark and I have significant fear that I would be kidnapped and harmed in Afghanistan or Pakistan. In 2013, I was forced to flee Pakistan as it was no longer safe for me to remain there or Afghanistan. I took an extremely dangerous journey and came to Australia to protect my life.

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

- He is a Sunni and a Pashtun who was born and lived in the Paktia Province. His family went to Pakistan in around 2002. He was forced to stop attending school in Pakistan because of Taliban threats and returned to Afghanistan in around 2009. His family returned to Afghanistan at about this time or shortly after.
- His father owned property in the province and was seen as 'well-off'.
- He began teaching English at a school but was threatened by the Taliban and the Taliban also demanded he join them. He went to a *taskera* office in Paktia and soon after it was attacked by extremists. He believes that the extremists were targeting him in that attack.
- His father sold the family property and also took out loans to pay for their escape. The family fled to Pakistan and remained there.
- In 2012, the applicant was kidnapped in Pakistan. He was released after a ransom was paid. He decided it was no longer safe in Pakistan and in 2013 he fled to Afghanistan.
- He was only in Afghanistan briefly and then fled to Australia. His family remained in Pakistan until recently, when his parents and one brother went to [Country 2]. His younger siblings now live in Afghanistan with his [relative].

- He faces harm from the Taliban and other extremist groups who operate throughout Afghanistan. His father has not repaid the loans and the applicant will be targeted by those who are owed money. He has adopted a Western lifestyle in Australia including smoking cigarettes, drinking alcohol and going to clubs and adult entertainment venues. He will be identified as a returnee from the West and will be kidnapped for ransom, or will be considered as a spy and an infidel and harmed for that reason.
 - He suffers from mental health issues. He also has physical injuries caused by a car accident in Australia. He is unable to work and will face harm in Afghanistan as a person with a mental health condition, and a person with a disability.
12. I also note from the review material that in 2014, there was an inadvertent release of some of the applicant's personal information from the Department (the data-breach). While the applicant did not raise this as a claim, the delegate considered whether the applicant faced a real chance or real risk of relevant harm arising from the data-breach.

Refugee assessment

13. 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

14. 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.
15. The applicant claims to be a Sunni Pashtun who was born in the Paktia Province. He claims to have lived in Paktia, as well as in Pakistan. He provided a copy and translation of a *taskera*² with his SHEV application. He subsequently provided a copy of the biodata and cover pages of an Afghan passport, as well as copies of documents said to be his parents' identity and other documents. The delegate had concerns with the timing of provision of some documents, as well as the copy of the passport (the applicant had claimed that his passport was taken by the

² Afghan identity document.

people smugglers before he arrived in Australia) and the use of a name ('Z') on some documents but not on others. The delegate explored the applicant's identity and personal documents at length during the second SHEV interview. The applicant explained that he had found a copy of part of his passport in some old emails but did not have any other pages. He said, as I understand his evidence, that he had not been aware that he had this copy at the time of his arrival interview. The applicant explained that Z is a tribal name and appears on some documents but not others.

16. The delegate noted some apparent inconsistencies in copies of the applicant's parent's documents. Some of these were said (by the applicant) to have arisen because his parents are illiterate and did not know exactly what was written on their documents. He had referred to his parents being illiterate before these concerns were raised and I accept his claim in this regard. He also explained that an inconsistency in a translation of his father's *taskera* arose because the first translation had been done in [Country 2], where his parents now have residency. The applicant had arranged for a NAATI-accredited translation in Australia and had submitted that to the Department as well. He said that the NAATI translation was the correct translation. I accept his evidence on this point. I also consider that his explanations for the timing of producing the documents and the variations in family name are plausible. The delegate remained concerned about the documents but was not able to find conclusively that any of the documents were false. I am likewise not satisfied that the documents are false or fraudulently obtained.
17. The applicant claims that he has lived in Pakistan with his family, but that his family did not have legal residency status there. He claims that his family left Pakistan after he did and returned to Afghanistan, but his parents and one brother are now living in [Country 2]. He has not claimed, and there is no evidence before me suggesting, that he has any right of return to, or residence in, Pakistan, [Country 2] or any other country.
18. I accept the applicant's claims about his identity documents, and I find that he is a Sunni and Pashtun from Afghanistan and that Afghanistan is the receiving country for the purposes of this review.
19. The applicant claims that his family originated from Paktia Province. On the two occasions he returned to Afghanistan from Pakistan, he returned to this province. However, during his SHEV interviews he said that his father had sold the family land in Paktia and that he (the applicant) did not have contact with any family there. He said that he has [specified family members] who live in Afghanistan with their [relative], but that they travel between Afghanistan and Pakistan seasonally. He said that he has a friend who lives in Kabul and who was looking after his documents for him, although he had not spoken to this friend for a long time.
20. The Australian Department of Foreign Affairs and Trade (DFAT)³ reports that returnees from western countries to Afghanistan almost exclusively return to Kabul. Most returnees have been single men rather than family groups. In-country sources report that many returnees choose to remain in Kabul for economic reasons rather than return to their home provinces. The applicant does not claim to have property, a home or employment waiting in Paktia, but he did say that he has a [relative] and siblings who live in Afghanistan on a seasonal basis. He said that they travel between Afghanistan and Pakistan because the border is close. He did not specify the exact location the family lives in when in Afghanistan, but the reference to the

³ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Afghanistan', 27 June 2019, 20190627113333.

proximity of the border suggests it is not Kabul. While he claims to have a friend in Kabul, he has not claimed to have had any recent contact with this person.

21. The applicant's residence before coming to Australia alternated between Paktia and Pakistan. He has not claimed to have lived in Kabul for any period, other than briefly while arranging his travel to Australia. He does not claim to have any contacts, accommodation or employment prospects in Kabul. Although he claims that his remaining Afghan relatives spend part of the year in Pakistan, he said that they return to Afghanistan and I am satisfied that they are not based in Kabul when they do so. I also note that the applicant did not claim he would return to and remain in Kabul or any other area of Afghanistan. Having regard to all of these factors, I am satisfied that the applicant will return to and remain in Paktia, should he return to Afghanistan.
22. As noted above, the applicant made and maintained some claims which he later conceded were incorrect information. In his August declaration he apologised and explained that this was due to absolute desperation for his life, the significant consequences he would face if returned to Pakistan or Afghanistan, and the lack of proper legal advice. He said that that he had a mistrust of authorities in his mind which did not change when he arrived in Australia in 2013. He said that he was young and extremely fearful that the information he provided may be shared with Pakistani or Afghan authorities or intelligence services and he did not feel comfortable being open and honest. He also met many detainees who told him what he should and should not say and he provided incorrect information. Later he was advised by other asylum-seekers in the community that if he provided incorrect information to the Department, he may be refused a visa and be detained and deported. This fear forced him to rely on the incorrect information that he had provided previously. He said that his current agent has explained the repercussions of providing incorrect information and so he has taken this opportunity to correct the incorrect information and, going forward, wants to be upfront and honest with the Department.
23. The delegate found that the applicant was not a credible witness of truth. I also have some concerns with the applicant's explanation. While he claims that he did not understand the repercussions until advised by his current agent, I note that the importance of telling the truth and possible repercussions were clearly explained to him at the start of the first SHEV interview, where he was assisted by an interpreter. I do not accept that he did not understand this or that he was not able to correct his information at that time. Furthermore, he was assisted by his former representative (not the representative who assisted him at the second SHEV interview) who was also a registered migration agent, and I do not accept that the former agent would not have explained the importance of telling the truth. I am satisfied that the applicant maintained the incorrect information until it became clear to him that the delegate may not accept it, and only then did he seek to correct it. His explanation for why he gave the incorrect information initially is plausible, but I do not accept his explanation for why he did not correct it until after the second SHEV interview. I share the delegate's concerns as to the applicant's credibility and the truth of aspects of his evidence but have, nevertheless, considered the claims as amended by the s.57 response.
24. The applicant claimed initially that he attended a high school in Afghanistan but in his s.57 response and Notification of Incorrect Information he said that he attended school in Pakistan. He said that later he was invited to work as a teacher in Afghanistan, and he had to obtain his *taskera* for that purpose. When he went to the local *taskera* office there was an extremist attack and a bomb blast. He thought that he was being targeted personally, because the Taliban had demanded he join them, but he had refused to do so. He also said that he had

received threats because he was working as a teacher and eventually his father took the family back to Pakistan for safety.

25. The applicant has not provided copies of the threat letters or any other evidence in support of these claims. Information in the review material does indicate that the Taliban has targeted educational institutions in the past and it is plausible, and I accept, that there may have been warnings issued to students to stop attending schools. It is plausible that if the applicant was studying at this time, he may have been affected by such warnings. However, although the applicant referred at the SHEV interviews to studying in a 'neighbouring village' in Afghanistan and receiving the threat letter, the applicant later said that he had in fact studied in Pakistan. I do not accept that the applicant was studying in Afghanistan or that he was threatened by the Afghani Taliban for that reason. I am not satisfied that he will be of any ongoing adverse interest to the Taliban in Afghanistan for having attended school in Pakistan more than ten years ago.
26. The applicant claims that he began teaching English in his local area after he returned to Afghanistan. In his August declaration he said that he worked in a school being operated by [an agency]. He said that he had to obtain his taskera in order to take this job and so he went to the local office to get it. He also claims that the Taliban was demanding he join them, but he refused to do so. He believes that for these reasons he was targeted by the Taliban in an attack at the taskera office. The applicant was born in [year] so would have been aged around [age range] at the time he claims he was employed as a teacher. The applicant has not provided any evidence of his teaching position or the threats he claimed to have received. I do not accept that a young person who was only educated to [grade], and with no other qualifications or experience, would be employed as a teacher in [a] school. I do not accept that the applicant was employed as a teacher.
27. Even if I did accept that the applicant worked at a school in Afghanistan, he did so only briefly, and he has not claimed that any other teachers or administrative staff were targeted or harmed. I do not accept that the applicant's profile at the school, if he did work there as a teacher or in some other capacity, would lead to him being individually targeted. Further, even if I accept that the Taliban had asked the applicant to join and he had refused, I do not accept that the Taliban would attack the taskera office in order to harm the applicant, given he could have been targeted at his home, while travelling to or from his work, or in any other public place. I accept that there may have been an attack on the taskera office, but I am not satisfied that the applicant's presence there was anything more than coincidence. I am not satisfied that the applicant was being, or would now be, personally targeted by the Taliban because of any involvement with a school, or for refusing to join with the Taliban. I am not satisfied that any profile he may have had in Paktia [when much younger] ten years ago would attract adverse attention from the Taliban in Paktia or anywhere else in Afghanistan. I am not satisfied that the applicant faces a real chance of harm from the Taliban or any other extremist groups for any reason arising from his education or employment, or any refusal to join such groups at that time.
28. The applicant claims that while he was in Pakistan, he was kidnapped and held until his family paid a ransom. The applicant's evidence indicates that the family was not known in Pakistan and it is plausible that he may have come to the attention of local criminal groups, as a stranger in the area. However, the applicant has not claimed that the kidnappers were linked to Afghanistan or that there was any reason behind his kidnapping other than a perception of wealth in Pakistan. I am not satisfied that there is a real chance that the applicant will suffer any harm arising from, or otherwise linked to, this incident should he return to Afghanistan.

29. At his arrival interview the applicant said that 'the police would catch you and you had to pay money to be released'. He did not specify whether this occurred in Pakistan or Afghanistan. None of his statements or declarations, nor any of his oral evidence at the SHEV interviews, refers to being arrested or having to pay bribes to Afghan officials. I am not satisfied that these incidents, if they occurred, took place in Afghanistan or involved Afghan officials. I am not satisfied that the applicant faces a real chance of harm in Afghanistan for this reason.
30. The applicant claims to suffer from anxiety, depression and post-traumatic stress disorder (PTSD). He has provided a letter from a psychologist dated 22 July 2020 that states that he was referred by his general practitioner and is undergoing treatment and management for these conditions. The psychologist will be continuing to see him. The applicant has also provided a copy of his discharge assessment from immigration detention, dated [in] January 2014. This states that he was seen on several occasions by the mental health team while in detention. He presented with 'detention fatigue' as well as symptoms of PTSD caused by previous (unspecified) torture and trauma in his 'home country'. He is said to have utilised torture and trauma counselling in detention.
31. The applicant has also provided medical evidence which notes that he was injured in a car accident in Australia in 2017. A report dated 19 July 2019 from [a named] occupational physician, diagnoses soft-tissue musculoskeletal sprains of the cervical and lumbar spine and the right shoulder. The applicant is said to suffer cervical pain and to be on high dosages of pain relief. The practitioner opines that the applicant remains restricted from frequent and constant heavy lifting, pushing, pulling or carrying and from frequent bending. He is restricted from constant static sustained spine positions without the ability to stretch and exercise the areas of the spine. He has reduced capacity, reduced work capacity, ongoing pain and restriction and reduced productivity. He was incapacitated from his current employment ([specified]) and from jobs involving heavy lifting, manual labour and standing periods. The practitioner opines that 'if the applicant had to compete in the open market place with 'able-bodied' persons for jobs he has training and experience in, his reduced capacity, reduced work capacity, ongoing pain and restriction and associated reduced productivity would currently, in reality, mean he will have difficulty getting work and not be able to as successfully compete with 'able bodied' persons for jobs.'
32. A certificate dated 19 July 2020 from the applicant's general practitioner states that the applicant continues to suffer from severe pain and has been prescribed pain relief medication. He has also been referred for physiotherapy and to see a neurosurgeon.
33. I accept that the applicant suffers from the noted health issues and that this has resulted in a reduced work capacity. The 2020 letter from his psychologist indicates that the applicant has recently been referred for treatment but does not indicate that the applicant has been assessed as requiring crisis intervention, hospitalisation or other high-level treatment.
34. DFAT reports that article 52 of the Afghan Constitution commits the state to providing free preventative healthcare and treatment of diseases as well as providing medical facilities to all citizens, and to encouraging and protecting the establishment and expansion of private medical services and health centres. While basic healthcare services are free, medicines can be expensive and/or out of date, excluding the poor from treatment for common illnesses. The Afghan healthcare sector remains heavily dependent on foreign funding. Afghanistan is a state party to international treaties including the Convention on the Rights of Persons with Disabilities. DFAT does not indicate that persons with disabilities are subjected to persecution in Afghanistan. While accurate data on mental health issues is unavailable, the World Health Organisation (WHO) estimates that more than a million Afghans suffer from depressive

disorders while over 1.2 million suffer from anxiety disorders (the WHO acknowledges that actual figures for both are likely to be much higher). The Ministry of Public Health reported in April 2017 that it had given specialised training in mental health issues to over 700 professional psychological counsellors and 100 specialised mental health doctors. Of this number, the government had employed 300 mental health professionals in government-run health centres and the remainder in different health non-governmental organisations (NGOs). For the vast majority of the population, however, there are significant barriers to accessing treatment for mental health issues, including a considerable cultural stigma surrounding mental illness and a lack of outpatient mental health services. Afghanistan has only one high-security psychiatric facility, in Herat.

35. DFAT reports that continuing armed conflict frequently inhibits access to health services in conflict-affected areas and health centres, health-care workers and vaccination programmes have been the target of attacks by the Taliban and other extremists in the past. The United Nations Assistance Mission in Afghanistan (UNAMA)⁴ reports that the Taliban and other groups have continued to attack health care targets into 2020. These have included attacks against facilities, the killing or abduction of protected personnel, threats against healthcare personnel and facilities, and damage to healthcare facilities caused by fighting in the area. A number of facilities have been forced to close. Other information notes that approximately one third of the Afghan population, mostly those living in remote areas, do not have a functional health facility within two hours of their homes.⁵ It has also been reported⁶ that in early 2020, the Taliban were preventing Paktia's health centres receiving medical supplies, reportedly because of their discontent towards the quality of services provided. In mid-February 2020, it was reported that 45 health care facilities had been closed by anti-government groups in Paktia, depriving up to one million people of basic health services.
36. Information provided to the delegate by the applicant⁷ also reports difficulties accessing medical and mental health treatment in Afghanistan. Human Rights Watch reports that whether people seek help is influenced by an array of individual, cultural, and structural factors, ranging from poor health literacy to poverty, social exclusion, stigma, gender discrimination, and the ongoing conflict. The 2019 WHO update also reports a lack of practitioners, lack of experience, weak community knowledge, remoteness and a lack of funding. The media reports mirror these concerns.
37. The applicant does not have any profile as a health worker and I have found above that he is not now, and will not in the future be, of any interest to the Taliban arising from his past schooling, employment or claimed refusal to join them. While some facilities in Paktia have reportedly been closed down, there are no recent reports before me of ongoing or systematic attacks against clinics or other health facilities there. I am not satisfied that the applicant faces

⁴ United Nations Assistance Mission in Afghanistan (UNAMA), 'Afghanistan: Protection of civilians in armed conflict 2019 (February 2020)', 22 February 2020, 20200224115345; 'Afghanistan Protection of civilians in armed conflict first quarter report - 1 JANUARY - 31 MARCH 2020', 27 April 2020, 20200507100951; 'Afghanistan Protection of Civilians in Armed Conflict Midyear Report: 1 January - 30 June 2020', 27 July 2020, 20200728131433.

⁵ Humanitarian Response, 'Humanitarian Response Plan: Afghanistan 2018 - 2021 2020 Mid-Year Revision', 8 June 2020, 20200622125449.

⁶ European Asylum Support Office (EASO), 'EASO COI report Afghanistan: Security Situation (2020 update)', 28 September 2020, 20200929084838.

⁷ Human Rights Watch, 'Afghanistan: Little Help for Conflict-Linked Trauma', 7 October 2019; 'Afghanistan's Lone Psychiatric Hospital Reveals Mental Health Crisis Fuelled by War', NPR News, 14 February 2018; World Health Organisation, 'Mental and Disability Health Situation Update', 3 April 2019; 'After years of war, Afghans wary to talk of mental health', AP News, 18 August 2016; 'Afghanistan's mentally ill left to superstition', Chicago Tribune, 26 December 2008.

a real chance of harm arising from attacks on healthcare facilities or workers should he return to Afghanistan and need to access healthcare there.

38. I accept that the applicant may face difficulties accessing treatment and medication in Afghanistan. However, I am satisfied on the information before me that such difficulties would be the result of the security situation, funding, capacity constraints and other factors which affect the Afghan medical system as a whole. I am not satisfied that the applicant will be denied, or otherwise unable to access, any medication or treatment for any reason contemplated by s.5J(1)(a).
39. I accept that the applicant may be restricted in the type of work he can do, although any such restriction will be because of his medical condition. The medical evidence does not diagnose him as totally and permanently incapacitated, nor does it indicate that he is, or will be, unable to undertake any type of work at all. His condition may however limit his options or affect his competitiveness for work. The information before me does not indicate that persons with disabilities are subjected to systematic discrimination or discriminatory conduct and while I have sympathy for the applicant and the difficulties he may face obtaining work because of his condition, I am not satisfied that any such difficulties will be inflicted because of his disabilities, or for any of the other reasons contemplated by s.5J(1)(a).
40. The applicant claims that his father is in significant debt and has gone to [Country 2] without repaying the loans. The applicant claims that as the eldest son, he will be targeted by his father's creditors. He has not provided any evidence in support of this. I also note that he has younger siblings and a [relative] who live in Afghanistan (at least periodically) and he has not indicated that anyone has approached them trying to locate his father, himself, or to try and collect on any debts. Even if I accept the assertion that the debtors would only target the eldest son, I do not accept that they would not at least make inquiries with his family to try and locate him, ask him to send money to Afghanistan, or ascertain if he intends to return to Afghanistan. I am not satisfied that this claim is any more than speculative. I am not satisfied that the applicant faces a real chance of harm from any person arising from any debts his father may have.
41. The applicant submitted to the delegate that he will be unable to work in Afghanistan and will be faced with the choice of being homeless and starving, or else having to join an extremist group. The information before me relating to Paktia does not report homelessness or starvation as issues there and while there has been some population displacement, this has been attributed in the main to issues of security.⁸ Further, I note that the medical evidence before me does not indicate that the applicant is unable to work at all. Although his physical capacity is limited, he has not been diagnosed as totally and permanently incapacitated for any kind of work. I consider the assertion that he will be unable to work, and the implied assertion that this relates to any and all work, to be speculative. I am not satisfied that he faces a real chance of being homeless and starving.
42. The applicant has also claimed to have refused overtures by the Taliban to join. Several sources report on the risk of extremist recruitment of returnees and the possible radicalisation of returnees and people deported from Europe.⁹ Nevertheless, given the applicant's claimed refusal to join the Taliban in the past, and my finding that , I consider this submission to be speculative and I am not satisfied that the applicant faces a real chance of harm for this reason.

⁸ EASO, 'EASO COI report Afghanistan: Security Situation (2020 update)', 28 September 2020, 20200929084838.

⁹ EASO, 'EASO COI report Afghanistan: Security Situation (2020 update)', 28 September 2020, 20200929084838.

43. The applicant has not claimed to fear harm as a Sunni Pashtun in Afghanistan, unless he is returned to a Hazara area, where he says he may face discrimination. He has not provided any reason why he might return to a Hazara area and I am not satisfied that he will return to such an area. I am not satisfied that he faces a real chance of harm as a Sunni Pashtun in a Hazara area.
44. I have considered whether the applicant may face harm from generalised violence in Paktia. DFAT and other reporting before me indicates that Paktia is a Pashtun majority province. It also indicates, and I accept, that civilians have been killed and injured as bystanders or as innocent victims during attacks on government buildings, defence and security personnel, foreign troops and organisations, hospitals and other targets throughout Afghanistan. UNAMA¹⁰ reported that the period 1 January – 27 July 2020 saw a 13% decrease in civilian casualties from the same period in 2019 and was the lowest figure since 2012. UNAMA attributed the decrease to a decrease in the number of casualties caused by the security forces and groups other than the Taliban but noted a ‘worrying increase’ in the number of civilian casualties caused by improvised explosive devices (IED) and remote detonated devices, particularly near military or security installations. According to UNAMA, the most affected provinces for civilian casualties were Balkh, Kabul, Nangarhar, Faryab and Kunduz.
45. Other information¹¹ indicates that in 2019, UNAMA documented 218 civilian casualties (78 deaths and 140 injured) in Paktia province. This represents a decrease of 49% compared to 2018. The leading causes of casualties were ground engagements, followed by targeted/deliberate killings and search operations. The first half of 2020 saw a marked increase in civilian casualties during the second quarter compared to the first, but in April 2020, a resident observed that violence had remained ‘somewhat reduced’, due to weather conditions and the Taliban’s longing for peace. A Paktia elder said that the Taliban had stopped pressuring people for food or questioning them about their travels. Data on 651 violent events in Paktia province attributed 450 as ‘battles’ (69%), 176 as ‘explosions/remote violence’ (27%) and 25 as ‘violence against civilians’ (4%). Out of the 25 recorded events of violence against civilians, 14 were attributed to Afghan security forces and NATO allies, primarily in Gardez, Jaji and Zurmat districts. This included the killing of five civilians from a single family during a search operation against the Taliban in Zurmat district, and 11 civilians killed during a special forces’ operation (although the authorities claim these were Taliban fighters). The Taliban were held responsible for six incidents of violence against civilians, including the murder of tribal elders. Gardez city and the capital district has also been the scene of increasing criminality. In June 2019, residents expressed concerns about the growing pattern of targeted killings by unidentified gunmen and robberies. This prompted the local police chief to announce increased efforts to tackle violence.
46. The information above indicates that while there are violent incidents in Paktia, these have in the main affected those believed to be involved with the Taliban, or to have some type of profile in the community. I am not satisfied that the applicant has, or will have, any such profile should he return to Paktia. Although criminal violence is said to have been a problem in the main city, Gardez, the applicant is not from that city and in any event, the local police have announced increased efforts to tackle such violence. The information does not indicate that generalise or other violence in Paktia is so common or widespread that civilians with no other profile (such as the applicant) face more than a remote chance of harm. Having regard to all

¹⁰ UNAMA, 'Afghanistan Protection of Civilians in Armed Conflict Midyear Report: 1 January - 30 June 2020', 27 July 2020, 20200728131433.

¹¹ EASO, 'EASO COI report Afghanistan: Security Situation (2020 update)', 28 September 2020, 20200929084838.

of the above, I am not satisfied that there is a real chance that the applicant will be harmed in generalised violence or as a bystander in Paktia.

47. I accept that the applicant will return to Kabul and may have to remain there briefly before travelling on to Paktia. DFAT reports that Kabul remains a particularly significant target for suicide and complex attacks against both civilian and non-civilian targets carried out by anti-government extremists (AGEs). Afghan and international forces have put in place a range of countermeasures to prevent and respond to insurgent attacks in Kabul. These include numerous checkpoints along highways leading into Kabul, at major intersections, and outside government and international institutions. These checkpoints provide a deterrent to insurgent attacks by increasing the probability of detection before AGEs are able to carry out their attacks. Nevertheless, the checkpoints vary in their effectiveness, and violent attacks within the city are common.
48. I note from the information before me that the preponderance of events reported in Kabul in recent years that have involved attacks on, or generalised violence against, civilians, have been sectarian-based and have occurred in Shi'a and Hazara majority areas of that city. While some attacks have harmed civilians from other religious or ethnic groups, these have in the main been attacks on public or government buildings, security forces or the international community. The applicant is a Sunni Pashtun and he has not claimed that he has any need to attend Shi'a or Hazara majority areas in Kabul for any reason.
49. There have been some attacks in and around Kabul airport that have seen civilians harmed as bystanders. These attacks have included attacks against foreign representatives visiting Kabul, security checkpoints and official convoys. There is no information before me indicating that civilian passengers, including those transiting through Kabul airport to other destinations, or those transiting to bus stations for onwards travel, have been targeted for harm. Although there are some reports noting that Shi'as and Hazaras have been targeted while travelling, I take into account that the applicant is a Sunni and a Pashtun and will be travelling to a Pashtun majority area. I am not satisfied on the evidence before me that the risk of being caught up in generalised violence in Kabul during the brief period he may have to transit there is more than remote. I am not satisfied that he faces a real chance of harm from generalised violence in Paktia, or while transiting Kabul and travelling to Paktia.
50. I accept that the applicant was kidnapped for ransom in Pakistan and that the reason for this may have been a perception that he came from a wealthy family. He claims that his father has now sold all of the family property and is in fact in significant debt. His parents live in [Country 2]. The applicant has been unable to work in Australia for some time. However, he does claim that he may be perceived as being wealthy because he has been in the West.
51. On 28 March 2014, the Department advised the applicant:

The information that it was possible to access was your name, date of birth, nationality, gender, details about your detention (when you were detained, reason and where) and if you have other family members in detention.

The information did not include your address (or any former address), phone numbers or any other contact information. It also did not include any information about protection claims that you or any other person may have made, and did not include any other information such as health information.
52. There is no information before me indicating that the Afghan authorities, or any group or organisation in Afghanistan, was aware of the data-breach and/or accessed the information. I

am not satisfied that there is more than a remote chance that extremist groups are, or will become, aware of the information in the data-breach and the applicant's presence in Australia.

53. The applicant's agent submitted that the applicant has adopted a Western style of dress, smokes cigarettes, drinks alcohol, and attends nightclubs, bars and adult entertainment venues. His agent also submits that the applicant's accent has been affected by his time in the West but there is no evidence beyond this assertion of any change in the applicant's accent. I note his medical reports refer to him smoking and drinking alcohol and I accept that he does so. I also accept that he may attend clubs and other venues in Australia.
54. DFAT reports that it has no information to suggest that returnees from western countries attract negative attention from state authorities for having sought and failed to gain asylum. Amnesty International has reported that there have been cases in which returnees from Europe have been killed after returning to Afghanistan but DFAT assesses that reports of returnees being harmed are more likely to have related to the highly dangerous general security situation which affects all Afghans. The information does not identify when such incidents are said to have occurred, or indicate that there have been recent incidents, nor is there any other information before me to indicate that returnees have been targeted and harmed recently. I consider that DFAT's reference to the general security situation in this context is referring to the situation in the past (when such incidents were reported) rather than a general assessment of the situation now.
55. In forming this view, I have also taken into account DFAT's assessments of the general security situation, as noted above, as well as other information in the review material, including current assessments.¹² DFAT understands that most returnees take measures to conceal their association with the country from which they have returned and keep a low profile on return. DFAT assesses that people in this situation do not face a significantly higher risk of violence or discrimination than other Afghans with a similar profile. I note that the relevant question is not whether the applicant faces a "significantly higher risk" but rather, whether he faces a real chance or a real risk of relevant harm.
56. The applicant has not provided any evidence to support the claim that his accent has changed or that it will mark him out as a returnee from the West. He has not claimed that he will need or want, or intends, to disclose his asylum claims or time in Australia to any person, or that he will need or want, or intends, to carry any document or other item which would identify him as having claimed asylum or spent time in the West and I find that he will not do so. The applicant has not claimed that he will want to continue smoking cigarettes and drinking alcohol in Afghanistan. DFAT does not assess that users of tobacco are suspected or accused of having been in the West, or are otherwise targeted for harm, for that reason. The information before me does indicate that alcohol is prohibited under Islamic law but as noted earlier, the applicant has not claimed that he has abandoned his faith or that his drinking of alcohol is related to any belief, characteristic or ideal. I agree with the delegate that his drinking and attendance at venues appears to reflect the opportunities he has to do so in Australia and does not indicate that he will need, want, or intend to continue such activity should he return to Afghanistan, or that such opportunities would arise. I find that he will not do so. The applicant has not identified any other aspects of his dress, appearance, mannerisms or other presentment which

¹² UNAMA, 'Afghanistan Protection of Civilians in Armed Conflict Midyear Report: 1 January - 30 June 2020', 27 July 2020, 20200728131433; EASO, 'EASO COI report Afghanistan: Security Situation (2020 update)', 28 September 2020, 20200929084838; 'Govt Data Shows Rise in Taliban Attacks Since Peace Deal', Tamim Hamid, Tolo News, 13 July 2020, 20200714143500; 'Taliban suicide bomber kills three as violence rises despite peace push', Reuters, 8 July 2020, 20200709092601.

would identify him as having been in the West, or lead to any imputation that he has strayed from Islamic teaching or is supportive of the West, foreign forces or the Afghan government.

57. I accept that the applicant will need to travel by road from Kabul to Paktia should he return to Afghanistan. There have been reports of returnees travelling on the roads in Afghanistan being targeted kidnapping or extortion in the past. DFAT notes that when abductions of travellers do take place it is difficult to establish motivation as criminals and insurgents on the roads tend to target people of all ethnicities, who appear wealthy, in attacks that can include kidnapping for ransom. DFAT also concurs with the assessment of UNAMA and other international sources that the primary motivations for kidnapping/abductions include taking hostages for ransom or prisoner exchange, or to target those with connections to the government or international community. About two years ago, the Taliban abducted 22 civilian men, who were *en route* from Paktia Province to Kabul. When Afghan national security forces arrived to rescue the abductees, a fire fight broke out and six civilians managed to escape. The Taliban took the remaining 16 to an unknown location. According to sources, the Taliban wanted to exchange the civilians for the release of some of their members from Government detention facilities. The Taliban released all of the abductees 10 days later, following mediation by elders.
58. In 2017, the European Asylum Support Office (EASO)¹³ opined that Afghans returning from the West were frequently perceived by others to be a source of funds, or wealthy after having spent time abroad and returnees fear being kidnapped for ransom for this reason. It also noted that in 2015, the Australian government referred to 'occasional reports' of alleged kidnapping after return. Another 2015 report referred to by EASO found that a 'small minority [of Afghan returnees from Europe who were examined in the study] faced specific threats' after coming back to Afghanistan, usually from violent demands for money. More recently, EASO¹⁴ noted that in July 2018, Taliban militants were reported to search vehicles and look for government employees on the Gardez-Kabul Highway, abduct civilians and attack official convoys. The Ghazni-Paktia Highway was closed by Taliban militants after fighting with the Afghan security forces in Ghazni province, in May 2018. In March 2019, the Afghan authorities announced that they were now in full control of the road linking Paktia to Khost; the highway had been previously under the influence of the Taliban and the Haqqani Network.
59. The above suggests that kidnapping and extortion remains a concern in Afghanistan. While some incidents have related to the victims' personal or family profiles (such as in politics, communities, religion or business) some have been attributed to perceptions of wealth, or from an imputation of being supportive of the West or the Afghan government. I accept that journeys by road in Afghanistan in general present some risks for all travellers and that in 2018 an incident occurred involving civilians travelling from the applicant's home province of Paktia to Kabul. However, on the evidence before me regarding the frequency of such incidents overall, I am not satisfied that the chance of an attack or abduction occurring on the roads in Afghanistan is any more than remote. Nor do I accept that the applicant is known to the Taliban or any other group, and there are no reports before me to indicate that persons who have been resident in a Western country are being targeted on the roads between Kabul and Paktia Province (or anywhere else).
60. The information I have noted above qualifies the (earlier) reporting as a 'small minority' and 'occasional reports', drawn from across Afghanistan as a whole. This indicates that any risk the applicant may face of being harmed as a returnee from the West in Paktia, is remote. Given the scope and range of information before me, if returnees from the West faced more than a

¹³ EASO, 'Afghanistan: Individuals targeted under societal and legal norms', 12 December 2017, CISED B50AD7870.

¹⁴ EASO, 'EASO COI report Afghanistan: Security Situation (2020 update)', 28 September 2020, 20200929084838.

remote chance of being targeted for abduction throughout Afghanistan for that reason only, I would expect there to be some reporting along these lines. In making my assessment regarding the applicant's overall profile I also give weight to the fact that he is not from an ethnic or religious minority (which in some circumstances may plausibly contribute to a profile of risk) and will be a Pashtun returning to a Pashtun majority area.

61. I accept that there have been incidents where civilians have been harmed by IED or explosive remnants of war, both in Paktia and on the roads in Afghanistan. Although such devices may be deployed along the roads, the information before me indicates that these devices are generally random weapons (apart from suicide bombers who have utilised vehicle borne IED to target check points, government vehicles and military convoys). The information does not indicate that there have been recent incidents of this nature on the roads to or within Paktia, or that there is any more than a remote chance that a traveller to or within Paktia may be harmed in such incidents. I am not satisfied that the applicant faces a real chance of harm from IED or similar devices, or while travelling on the roads to or within Paktia.
62. Having regard to all of the above, I am not satisfied that the applicant faces a real chance of being identified as a returned asylum-seeker who has been in the West. Even if he were, I am not satisfied that the applicant faces a real chance of harm as a returned asylum-seeker who has been in the West, including from any perception of wealth, any imputation as being a spy or an infidel, or any other adverse imputation. I am not satisfied that he faces a real chance of harm during any travel he may undertake to or from, or within, Paktia.
63. I am not satisfied that the applicant has a well-founded fear of persecution should he return to Afghanistan.

Refugee: conclusion

64. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

65. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

66. Under s.36(2A), a person will suffer 'significant harm' if:
 - the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.

67. The expressions ‘torture’, ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’ are in turn defined in s.5(1) of the Act.
68. I accept that the applicant may face difficulties accessing medical and mental health treatment in Afghanistan. Having regard to the information cited earlier, I am not satisfied that any difficulties he may face accessing medical treatment in Afghanistan would include or amount to the arbitrary deprivation of life, or the infliction of the death penalty or torture. Nor does it reflect an intention to inflict severe pain or suffering, or pain or suffering that is cruel or inhuman, or degrading treatment or punishment. I am not satisfied that any such difficulties would constitute or lead to significant harm as that term is understood in the context of s.36(2A). I accept that his medical and mental health conditions may make it more difficult for him to obtain work and establish himself in Afghanistan. He told the delegate that his parents do not have any means of providing him with support from [Country 2]. His medical diagnosis indicates that he will be unable to do certain types of work, but not that he is precluded from any or all types of work. Nevertheless, I accept that his reduced capacity may impact on his competitiveness for employment and exacerbate his difficulties. Should this occur, it will be as a result of his existing medical condition. I am not satisfied on the information and evidence before me that they would arise from any intention, by act or omission, to inflict severe pain or suffering, pain or suffering that could be reasonably regarded as cruel or inhuman in nature, or an intention to cause extreme humiliation. I am also not satisfied there is a real risk that the death penalty will be carried out, that the applicant will be arbitrarily deprived of his life as that term is properly understood, or that he will be subjected to torture.
69. Having regard to all of the above, I am not satisfied that the applicant faces a real risk of significant harm arising from his mental health or health issues generally in Afghanistan.
70. I have found above that the applicant does not face a real chance of harm for any other reason or reasons in Afghanistan. As ‘real chance’ and ‘real risk’ equate to the same threshold,¹⁵ and for the same reasons as I have given above, I am not satisfied that the applicant faces a real risk of significant harm for any other reason or reasons in Afghanistan.

Complementary protection: conclusion

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

Decision

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

¹⁵ *MIAC v SZQRB* (2013) 210 FCR 505

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.