



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA20/08713

Date and time of decision: 16 November 2020 13:36:00

S Ryan, 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 national of Afghanistan and arrived in Australia [in] June 2013. On 8 September 2016 he lodged an application for a Safe Haven Enterprise visa (SHEV) and participated in an interview conducted by a delegate of the Minister for Immigration (the delegate) held on 16 September 2020. The delegate refused to grant the visa on 8 October 2020 and referred the matter to the Immigration Assessment Authority (IAA) on 9 October 2020.

Information before the IAA

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

Applicant's claims for protection

3. The applicant's claims can be summarised as follows:
 - He was born between [Year 1] and [Year 2] in a village in [a District] of the Kandahar province of Afghanistan. He is of Pashtun ethnicity, from the [Tribe] tribe, and follows the Sunni sect of Islam.
 - His father [did a job task] for the American forces in Kandahar and was threatened by the Taliban on account of this work. The applicant's family fled to Pakistan, however his father later returned to Kandahar to continue [doing a job task] and shortly afterwards was killed by the Taliban.
 - He and his family remained in Quetta, living as undocumented refugees, and in 2013 he travelled to Australia on account of the poor security situation and his insecure status in Pakistan.
 - He will be targeted in Afghanistan due to his actual and imputed political opinion against the Taliban and in support of the West on account of his links to the Americans and international community through his father's work for American forces, and on account of his time in Australia.

Factual findings

Identity and background

4. The applicant has consistently claimed to have been born in a village in [a District] of Kandahar Province of Afghanistan. He has also claimed that he and his family fled Afghanistan to live in Pakistan after the arrival of American forces, when he was approximately [Age 1] or [Age 2] years old. Considering the consistency of his evidence concerning his biography, his evident familiarity with his former home area and ease with the Pashtun language, I accept these events occurred and also accept his claims concerning his ethnic, tribal and religious identity.
5. The applicant has stated he does not know his exact date of birth and has provided to the Department conflicting information with respect to his age and the dates of key biographical

events. When asked for his birthdate during his Arrival interview in September 2013 he stated he was approximately [Age] years old, had lived in Pakistan for a period of [Number] years and that he had left Afghanistan to live in Pakistan when he was [Age 1] years old. These timeframes do not accord with his estimated age, but was not a matter pursued by the interviewer. It is apparent that the interviewer used this response to record his year of birth as [Year 1], and to then calculate that the applicant had left Afghanistan in [Year].

6. The applicant provided the same birthdate and timeline in the 2017 SHEV application, but also provided an Afghan ID card (taskira) that estimated his age to be [slightly younger] at the time the document was issued in 2013, which would suggest he was born in [Year 2]. The information in the taskira also appears to give an approximate age that is based on the issuing officer's observation of the applicant's face in 2013, and it is not apparent that the Afghan authority issuing the taskira has had any other basis such as birth records from which to determine his age.
7. During the SHEV interview the delegate questioned this timeline, pointing out that the applicant had claimed his father left after having worked for American forces in Afghanistan. He observed that the American forces only began arriving in Afghanistan in late 2001 and that this is not consistent with his claim to have been born in [Year 1] and to have left Afghanistan when he was [Age 1] or [Age 2] years old. The applicant responded that he was sure his family left after the American forces arrived in Kandahar, that he can only estimate these dates and that his family had not been paying attention to counting or recording the years in which these events occurred.
8. I note that the birth year attributed to the applicant by the Department upon his arrival in Australia appears to be based solely on the applicant's evidence during the Arrival Interview, which he had specified was only an estimate. As noted by the delegate, the applicant's claim to be unaware of his exact date of birth or age is plausible, these are not matters commonly significant to Afghan people. There is no apparent advantage the applicant has sought or gained from estimating that he was [Age] year old upon arrival to Australia, and I do not draw any adverse inference from this.
9. I share the delegate's concerns with the implausibility of the applicant's account of how he obtained a taskira in Afghanistan in early 2013. A contemporaneous report from the Immigration and Refugee Board of Canada in 2012 indicates an Afghan taskira is generally only issued to those holding documentation such as their father's taskira, and with the support of a family member or senior member of their tribe, and take will commonly take three or four days to be issued.
10. The applicant claims he drove more than 500km on roads in rural Pakistan and Afghanistan in Winter, and despite also claiming to have had no documentation and no contacts or social networks remaining in Afghanistan, to have applied for and been issued a taskira on the same day. The applicant claims he was accompanied to the government office in [Village] by the malik of his village who vouched for his identity, but also stated that he did not visit his family's village out of fear for his safety and did not indicate how he had been able to make arrangements for the malik of his village to travel to [Village] to support his application.
11. There is no evidence before me that positively confirms that the taskiras provided by the applicant; his and his father's; have been formally examined and found to be non-genuine documents. Nevertheless I do not find his evidence concerning the manner in which he obtained his own taskira is persuasive or plausible and I have concerns the applicant has not given a full and accurate account of his time and activities in Afghanistan in 2013, nor the extent to which he and his family have maintained social and familial networks in Afghanistan.

12. The applicant has been consistent in claiming to have left Afghanistan at the age of [Age 1] or [Age 2], that this was after the arrival of American forces to Afghanistan. While I give the taskira only limited evidentiary weight in determining his age, I also note that the [Year 2] birth year estimated in the taskira fits with this timeline. On balance I am satisfied the applicant was born in Afghanistan in approximately [Year 2] and that he and his family left for Pakistan in either 2002 or 2003.
13. I accept the applicant's claims that he resided with his family in Pashtunabad in the city of Quetta from approximately 2003 and up until leaving for Australia in June 2013. He was married in late 2012 and his wife, who he claims is also an undocumented Afghan refugee living in Pakistan, and lives with his mother and [siblings] in Quetta. His father died in around 2003 and he confirmed during the SHEV interview that his mother and all of his siblings currently live in Quetta. Whilst living in Quetta he worked in [businesses] for eight years, leading to him establishing his own [business] in Pashtunabad in 2013. He claims to have closed this business when departing Quetta in 2013
14. The applicant has spent more than ten years living in Pakistan before travelling to Australia and he confirmed he departed Pakistan in June 2013 through formal immigration channels using a Pakistan passport containing his image. I have some concerns with the plausibility of the applicant's claim to have no other knowledge of the identity in which this document was issued, noting that he used this Pakistan passport to travel by air from Karachi to [Country 1] and onwards to [Country 2] passing through formal checkpoints in each country. Regardless, these circumstances suggest he has close and substantial links to Pakistan and also raise the possibility that may either be a citizen of that country and/or have an existing right to enter and reside in Pakistan.
15. Nevertheless, I also consider that country information confirms that the applicant's claim that he has never been registered as a refugee and has been unable to obtain Pakistani citizenship is plausible. The 2019 Country Information Report Afghanistan published by the Australian Department of Foreign Affairs and Trade (DFAT) describes a formal agreement in 2007 between the United Nations High Commissioner for Refugees and the Pakistan government giving displaced Afghans the right to register as refugees. Nevertheless it is also apparent from the same report, and from the European Asylum Support Office (EASO) 2020 report on Afghanistan, that very large numbers of Afghan refugees in similar circumstances to the applicant have resided in Pakistan undocumented, some for decades, and that many continue to live in Pakistan without registration or identity documents.
16. While there are some aspects of the applicant's circumstances that point to the possibility of him either being a national of Pakistan, or having an existing right to enter and reside in Pakistan, on balance I do not consider there is any sufficiently substantial evidence supporting such findings.
17. I am satisfied that the applicant is a national of Afghanistan only, and I have assessed him against Afghanistan as the receiving country. In light of my findings on the applicant's claims under s5J of the Act, I have found it unnecessary to further consider whether he has any existing right to enter and reside in Pakistan.

Place to which he would return

18. I accept the applicant's evidence, given during the September 2020 SHEV interview, that his mother and siblings live in Quetta. He travelled to Kandahar in early 2013, and while I have some concerns the applicant has not given a full and accurate account of his time and activities in

Afghanistan in 2013 and the lack of any family or other social networks in Afghanistan, I am willing to accept his claim that he and that he has no close family members living in Kandahar and did not return to his family's village in 2013. I accept his claim that his family have no property, family or friends living in [District]. The applicant did not indicate he has any social networks in [District] or in Kandahar more broadly, nor has he indicated any intention to return to Kandahar. He has not lived in Kandahar since leaving as a young child in 2002 or 2003. From the evidence he has provided I find that the applicant's ties to [District] are historic and not ongoing, and are no longer substantial.

19. DFAT advise that Afghan returnees from Western countries almost exclusively return to Kabul and observe that most choose to remain in Kabul for economic reasons rather than travel onward to former home provinces. For these reasons I find that find that Kabul is the area of Afghanistan to which he would most likely return.

Father's work

20. The applicant has claimed that his father was [an Occupation] in Kandahar who became known to the Taliban as a person assisting the American forces based in the region and that he was killed by the Taliban in around 2002 or 2003 for this reason. He claims that, if he returned to Afghanistan he would become known to the Taliban as the son of someone who previously assisted the Americans and that he would be targeted and harmed.
21. The evidence given by the applicant during the SHEV interview concerning his father's employment was very limited. He seemed unclear as to whether his father worked for the Afghan government or the American military, stating his father [did a job task] for the government, and that he was [doing a job task] from the American base to the airport but did not enter the base. In the written claims provided with the 2017 SHEV application he claimed his father was carrying out work for the American forces and for the government and that he was not sure how long he had been doing this work.
22. The applicant has consistently claimed that his father was killed by the Taliban as a result of working as [an Occupation] for American forces. He has not provided any evidence of his father's employment, although I accept that obtaining evidence of his father's employment from nearly 20 years prior may be difficult, noting also that these claimed events occurred during a period of substantial unrest and violent conflict in Afghanistan. I also take into account the applicant claims concerning his father's employment and the circumstances of his death relates to a period when the applicant was a young child, and that the facts of which have been presumably described to him at a later time and may not be matters that he would be able to recall from his own memory
23. The 2011 UK Home Office Afghanistan country information report describes American involvement in the early stages of the military campaign having commenced in late 2001, was limited to air strikes targeting terrorist facilities and various Taliban military and political assets within Afghanistan. While fighting was largely concentrated in Kabul and Afghanistan's Northern provinces, the UK Home Office note the presence of a small number of American Marine units in Kandahar from late 2001. By December 2001 the Taliban regime had been removed from power and its forces had been largely driven into Pakistan and an 'Afghan Interim Authority' had been established.
24. EASO describes Kandahar as the 'birthplace' of the Taliban and notes the province is also of some significance to the Taliban in connecting Afghanistan with Taliban safe havens in Pakistan. The evidence before me suggests that the American ground forces were present in Kandahar from

the early stages of the conflict and maintained a military presence in Kandahar in the 2002/2003 period.

25. Country information before me indicates that the Taliban and its fighting forces had been largely driven out of Afghanistan by the end of 2001 and that it took them a number of years after this to reorganise and return to Afghanistan as a significant insurgent force. I nevertheless note Kandahar's significance to the Taliban and its proximity to its safe havens in Pakistan. On the information before me, I cannot rule out the possibility that the Taliban may have had some limited presence in Kandahar during this period, particularly towards the end of 2002 and into 2003.
26. I have some concerns with this claim, as I consider the country information before me suggests that the applicant's claim that his father [did a job task] for American forces in Kandahar in 2002 or 2003 and was killed by Taliban forces is somewhat unlikely and his claims are not supported by any corroborative evidence. However, I cannot rule it out as an impossibility, and I accept that the applicant's scant and imprecise evidence and the absence of any corroborative evidence can be reasonably explained. On balance, I put weight on the consistency with which the applicant has put forward this claim and am willing to accept that these events occurred as he has claimed.
27. I accept the applicant's claim that his father that his father worked in Kandahar for a brief and unspecified period in around 2002 and 2003 as [an Occupation] to American forces at an airfield in Kandahar. I am also willing to accept that his father was killed by the Taliban around this time.
28. I accept his father's work for American forces, if known to the Taliban, would have led to his father being an imputed or actual opponent, and this may have been the reason, or part of the reason he was killed. However on the evidence before me it is also apparent that the applicant's father's involvement in the conflict was brief and limited to [doing a job task] to the airfield in Kandahar. The applicant stated during the SHEV interview that his father did not oppose the Taliban or experience any problems with them during the period in which they controlled Kandahar (1996 and 2001), stating the problems began after the arrival of American forces. The applicant's evidence does not suggest that his father ever held any higher or prominent profile as an anti-Taliban leader; either as a combatant in a militia fighting the Taliban, or in some other way, such as a religious, tribal or political leader.

Health

29. Applicant provided a medical certificate from his General Practitioner in February 2020 which indicates he was being treated for anxiety and depression on account of unspecified family issues. He has elsewhere claimed that his wife in Pakistan has been treated for mental health issues and he is concerned for her wellbeing and I accept this is the case.
30. I note this information has been provided solely in context of requesting that the assessment of his SHEV application is expedited. The evidence provided by the applicant concerning his mental health is very limited, and could not be considered to be a detailed report describing the nature and severity of his condition, or evidence suggesting his condition is ongoing, or describing his schedule of treatment for this condition.
31. During the September 2020 SHEV interview the applicant was asked about his health and indicated he was feeling well, and did not indicate he was receiving treatment or taking medication. There is no suggestion from the applicant or his representative that the applicant was affected by a medical condition affecting his capacity to put forward his claims or give

evidence during that SHEV interview. Significantly, neither the applicant or his legal representative have put forward any claim that he fears harm in Afghanistan on account of any health condition, or that he would need to seek medical treatment in Afghanistan if returned there. I accept this is the case.

Refugee assessment

32. 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

33. 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.

34. The applicant fears being harmed by the Taliban on the basis his father previously worked for American forces in Kandahar, and further that his adverse profile as an imputed opponent of the Taliban and other insurgent groups would have increased because he will be returning from Australia. However, for the following reasons I am not satisfied that his fear is well founded.

35. The applicant claimed in the 2017 SHEV application that he is '*well known in [District]*' and it is therefore likely his return, and family's link to American forces will become known to the Taliban. I regard this claim to be highly speculative and improbable considering he has elsewhere claimed to have '*negligible social connections in Afghanistan*'. Regardless, for reasons given earlier I am satisfied he would be returning to Kabul and he has not indicated he would have any reason to travel to his former area of residence in [District].

36. I also note that the applicant indicated that his sister and her husband lived in [District] for an unspecified period in recent years, returning to Pakistan whilst the applicant has been living in Australia. He indicated that his sister and husband moved to [District] to run their business and their departure was on account of the general security situation. His evidence did not suggest that his sister, who shares the same close familial association with the father, was personally targeted by the Taliban or its supporters for any reason whilst she lived in [District]. His evidence

did not suggest that his family are involved in historic or ongoing disputes, or that certain persons in [District] hold personal enmity towards his family, such that people would monitor his return to Afghanistan and/or be motivated to inform on him to the Taliban.

37. While I have accepted that the family left Afghanistan for the reasons he has given, there is no credible evidence before me that the applicant or any member of his family were known to the Taliban as the family member of a person working for American forces at that time or targeted for this reason. Considering the brief, low profile and historic nature of his father's association with American forces, and the fact that nearly two decades have since elapsed, I am not persuaded that his family's association with American forces is widely known in [District] or in any part of Afghanistan, or that the applicant's return to Afghanistan and father's historic connection to American forces would be known to the Taliban or reported to them.
38. I consider the chances of the applicant being known to the Taliban as the son of a person who previously worked for the Americans, or that he would become a person of interest to the Taliban on account of his father's association with American forces to be no more than remote.
39. The country information submission provided by the applicant's representative in September 2020 claims that the applicant faces a risk of harm from the Afghan government on the basis that he is a returning failed asylum seeker. The submission cites a 2017 report in the Independent describing Danish officials observing Afghan police mistreating Afghan two men who refused to disembark the plane. The submission also cites a 2017 report from the United Nations Assistance Mission in Afghanistan (UNAMA) which reports the mistreatment and torture by Afghan authorities of significant numbers of persons detained by Afghan police.
40. While I have had regard to these reports, I also consider more recent reporting before me; particularly from DFAT and EASO does not suggest that returnees from Western countries attract negative attention from Afghan government authorities on account of having lived abroad or for having sought and failed to gain asylum. The information before me indicates it is highly unlikely that the applicant would be stopped and questioned about these matters by Afghan authorities if he returned to Afghanistan. The applicant has not given any indication that he would be a person of interest to Afghan authorities for any other reason and, considering his circumstances, there is no reason apparent to me. I consider the chances of the applicant coming to the adverse attention of Afghan authorities for any reason is remote.
41. I am willing to assume that, upon return to Afghanistan, his circumstance as a returnee from Australia and as a person who previously lived in Quetta, may become known within his community in Kabul. The applicant also claims to fear harm from the Taliban and other anti-government insurgent groups in Afghanistan on account of being having lived in Australia. He claimed he will be assumed to hold pro-Western views and to be opposed to the Taliban and other insurgent forces fighting the Afghan government. I consider the country information is mixed as to the degree to which returnees from Western countries face a heightened risk of harm from nongovernment actors.
42. DFAT and EASO describe how the targeting by insurgent groups of people associated with the government or international community is not confined to any specific ethnic group, and that the targeting of such people is typically based on more direct links to security or military forces, or to Afghan government and international agencies. DFAT provide the following as examples of the sorts of civilians who have been victims of targeted violence on the basis of their support for the Afghan government or association with such persons: election workers; senior public servants, personnel working at educational and health institutions; journalists; the brother of a

police commander; a district prosecutor a parliamentary candidate; religious and tribal leaders; and Afghan civilians working for the international military forces.

43. DFAT acknowledges that people who have been identified as having international associations face a high risk of being targeted by anti-government elements. DFAT assess that this may in some instances include returnees from Western countries. DFAT notes anecdotal reports of returnees from Western countries (including two from Australia in 2014) allegedly targeted for having spent time in a Western country. However there have been no reports of individual returnees from Australia being targeted by insurgents since the two incidents reported in 2014 (which I note occurred in Ghazni province).
44. I do not consider that the small number of anecdotal reports of individual targeting of returning Afghans on the basis of having lived in the West suggests there is a widespread pattern or systematic targeting of such returnees in Afghanistan, including those who return from Australia. I particularly note the very large numbers of returnees to Kabul and the lack of any reports of any such incidents of systematic and/or targeted harm against returnees having occurred in Kabul.
45. I accept the contention put forward in the post interview submission that it is important for Afghans who return to the country to adjust, adapt, respect and follow societal and cultural norms and expectations within their communities. Although I consider this and other observations made with regard to the treatment of returnees from Western country in the reporting before me emphasises the variability in experiences, particularly with regard to the differences between ethnicities, or between people who are returning to rural, more traditional communities and those, like the applicant, who would be returning to Kabul, a large urban centre characterised by a substantial demographic heterogeneity, fuelled in part by massive populations of returnees, internally displaced people and economic migrants.
46. In the September 2020 written submission the applicant has argued that, on account of having spent the majority of his life in Pakistan and only [Age 2] years in Afghanistan, he has negligible '*lived experience*' in Afghanistan and has no meaningful understanding of various (unspecified) Afghan mannerisms and social mores. I have difficulty believing this claim, noting that the applicant's formative experiences in Pakistan took place within the Pashtunabad area of Quetta, a Pashtun area of a large city hosting very large numbers of Afghan refugees and which is located close to the porous border between Afghanistan and Pakistan.
47. The applicant stated he married in late 2012 a woman whose family originate from the [District] area and who are also Pashtun [Tribe] tribe, and that whilst in Australia he continues to be in regular contact with his family. His first language is Pashtun and he continues to practice his Sunni Islam faith. I consider these circumstances are further evidence that he has maintained ongoing contact with Afghan Pashtuns and has retained a far greater familiarity with Afghan customs and social mores than the post interview submissions to the delegate suggest.
48. I also consider this claim is expressed in very general terms and the applicant does not specify how his upbringing in Quetta, or his time in Australia have led him to lose his Pashtun language, or adopt any accent, mannerism, mode of dress or any other behaviour or characteristic that might lead to him being identified in Afghanistan as being 'Westernised'. Considering his particular circumstances, including his time in Australia and Pakistan, I am satisfied the applicant has retained his familiarity with Afghan social, cultural and religious norms and expectations and that he would be capable of making the necessary adjustment and adaptations between life in Australia and life in Kabul.

49. While I take into account DFAT's general observation that most returnees from Western countries take measures to conceal their association with the country from which they have returned, I am not satisfied that the evidence points to the applicant facing a real chance of harm on this basis. Regardless, even if I were to accept that this was the case, I am also satisfied the applicant would adjust his approach and behaviour in line with the context and environment to which he returns. I am satisfied this would involve taking reasonable steps to modify his conduct to avoid any future chance or risk of harm, for example through dressing and acting in a manner that is not discordant with other Afghans, not openly discussing his religious views, or his previous residence in Australia, and by taking steps to protect and keep discrete any documents or objects that may link him to Australia.
50. As noted above, I am satisfied the applicant would have retained his cultural identity and that he would be capable of sufficiently understanding and adapting to relevant cultural, religious, tribal and linguistic practises upon return to Afghanistan. I consider that, for the applicant, taking such steps would be reasonable and relatively minor inconveniences. I am satisfied there is nothing in his evidence that suggests he would be unable to, or could not or would not want to take such steps.
51. I have considered whether the applicant faces a real chance of harm as a result of the security environment in Kabul City. Country information describes the city as having been under the control of the Afghan government forces for some time, and the most recent DFAT and EASO reports do not suggest this is likely to change in the foreseeable future. Nevertheless I take into account all of the recent reporting before me confirms Kabul continues to be the target for suicide and complex attacks against both civilian and non-civilian targets carried out by insurgent groups, most notably the Taliban and Islamic State.
52. EASO's September 2020 report describes how, while security incidents attributed to Islamic State have decreased in Kabul, the group maintains an operational capacity in the city and were able to undertake a small number of attacks in 2020. Similarly the Taliban and other anti-government insurgent groups continued to undertake complex attacks on government and international targets in heavily populated areas of the city.
53. This country information before me, including the material provided by the applicant, indicates that nearly all attacks made by insurgent forces in Kabul are directly targeted against persons and institutions that are directly associated with the government or international community. These include attacks targeting of Afghan security forces and their infrastructure, judges, lawyers, health care workers, aid workers, journalists, human rights activists and political figures. I particularly note that the largest numbers of attacks causing civilian casualties have been sectarian attacks targeting the Shia community undertaken by Islamic State.
54. Considering the personal circumstances of the applicant, I am not satisfied that he fits any of these profiles, although I note this does not exclude the possibility of civilians being targeted for another reason. For reasons given earlier I consider it is no more than a remote chance the applicant's association with American forces via his father's work would be known to the Taliban or would become known to them upon his return to Afghanistan. For reasons given earlier I am not satisfied that the applicant's residence in Australia, even if known in his community, would lead to him facing a heightened risk of harm on account of being seen to have direct links with the government or international community.
55. The Afghan government have intensified counter-measures against insurgent groups seeking to attack Kabul, and while they have had an impact, these appear to vary considerably in their effectiveness in protecting Kabul. I accept that violent insurgent attacks within the city continue

to be a common occurrence and while these attacks have diminished in frequency and ferocity over the past few years, it is evident from EASO's report that attacks undertaken by the Taliban and Islamic State will continue at the same or similar tempo for the foreseeable future. I also accept there will continue to be large numbers of civilian casualties in Kabul as a result of direct attacks on particular groups, or having been caught by indirect fire, or from the use of IEDs in densely populated urban centres.

56. In assessing the risk of harm faced by the applicant personally, I also take into account the comparatively small number of insurgent attacks and the lack of direct ground engagement between combatants in Kabul City and its surrounds, and the fact that the most damaging attacks in terms of civilian casualties have come from those attacks targeting the Hazara Shia community. For reasons given elsewhere in this decision I do not accept the applicant is likely to have an elevated profile with a direct association with the Afghan government or international community or be personally targeted by insurgent groups for this reason. While I accept that the applicant does face some chance of being killed or seriously injured on account of generalised violence, I am not satisfied that, in his particular circumstances, this rises to a real chance.
57. EASO describe how many Afghans from other regions who are returned to Kabul remain there because of relatively higher security and because of expectations of more job opportunities, better support services and prospects of social acceptance. EASO have indicated in September 2020 that few communal tensions are reported from Kabul, and this assessment is supported by Oxfam's report which reported that Afghan returnees to large urban centres like Kabul are mostly perceived as part of society and do not suffer structural discrimination from host communities. I accept nonetheless that the applicant would be returning to a large urban city which is facing increased pressures on resources, jobs, services, and facilities and that most returnees in Kabul City depend on relatives for accommodation and other forms of support. EASO and Oxfam describe the importance of social networks as being vital for returnees.
58. EASO also observe that while Kabul has a very heterogenous population and hosts very large numbers of returnees and internally displaced people in Afghanistan. EASO observes that many districts have formed in different parts of Kabul which are based around larger groups with the same ethnicity, and that different city neighbourhoods form a sort of 'village society' in which communities have more direct connections with their province of origin than with central Kabul.
59. I have concerns that the applicant has given a less than full account of the extent to which he may be able to rely on social networks in Afghanistan (drawing on family and tribal links), and note the above country information suggests the applicant would be likely to find a neighbourhood in Kabul in which Pashtun Sunnis from Kandahar and/or members of the [Tribe] tribe have formed existing social networks from he might derive support.
60. Nevertheless I accept that, as a person who is not from Kabul and who has never lived as an adult in Afghanistan, there is some chance he may need to establish himself with limited or no such social supports in Kabul. I accept that he may face real challenges establishing himself in Kabul, particularly when finding work and renting accommodation. In this respect I consider his experiences and demonstrated experience in establishing social networks and finding employment in Quetta and Australia, while not directly comparable, are relevant considerations. He has successfully lived apart from his family and settled in an unfamiliar place, having lived in Australia for more than six years in to date. He has had many years of varied employment experiences in the [specified] industries in Quetta and Australia and I consider his skills are well suited to finding work in a developing urban environment like Kabul.

61. For all of these reasons I am not satisfied that the applicant faces a real chance of being denied in Kabul a capacity to earn a livelihood of any kind, such that he would face significant economic hardship such that it would threaten his basic capacity to subsist.
62. I am not satisfied that the applicant faces a real chance of harm on account of being a Sunni Pashtun who previously lived in Pakistan, whose father was killed by the Taliban after having worked for American forces, and who is returning from Australia.

Refugee: conclusion

63. 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

64. 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

65. 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.

66. I have concluded above that the applicant does not face a real chance of any harm on any of the bases claimed. As 'real risk' and 'real chance' involve the application of the same standard, I am also not satisfied that the applicant would face a real risk of significant harm for the purposes of s.36(2)(aa) on these grounds.

Complementary protection: conclusion

67. 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.

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.