



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

**Decision and Reasons**

**Referred application**

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AFGHANISTAN

IAA reference: IAA21/10091

Date and time of decision: 15 December 2021 12:10:00

M Currie, Reviewer

**Decision**

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

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be an Afghan citizen of Hazara ethnicity and an adherent of the Shia faith. He arrived in Australia in August 2012 and lodged an application for a Safe Haven Enterprise Visa (SHEV) in November 2015. In September 2016, a delegate of the Minister for Immigration decided under s.65 of the *Migration Act 1958* (the Act) to refuse the visa, finding that Australia did not owe protection obligations to the Applicant. On 7 September 2016, the applicant's matter was referred to the Immigration Assessment Authority (IAA).
2. An IAA reviewer affirmed the delegate's decision on 27 January 2017. However, in September 2021 that decision was quashed by the Federal Circuit and Family Court of Australia (FCFCOA), which determined that the IAA had fallen into jurisdictional error. The Court remitted the matter back to the IAA for reconsideration of the applicant's claims for protection.
3. This is a *de novo* decision, not a review of the delegate's decision or reasoning. My task is to consider the applicants claims for protection and the materials before me afresh. I am not bound by any earlier findings by the delegate, or the IAA.

### Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the Act.
5. As I have summarised above, it has been more than six years since this applicant first lodged his Protection Visa Application, and his claims were assessed by the delegate over five years ago. As a consequence, I consider much of the country information which was cited by the delegate to be out of date. The IAA reviewer who assessed the applicant's case in 2017 obtained a range of further information at that time<sup>1</sup>, but these reports are themselves at least four years old. In the intervening period, conditions in Afghanistan have changed significantly; in early 2021, the last remaining US combat forces withdrew from Afghanistan and, as of August 2021, the Taliban assumed control of the whole country.
6. In the circumstances, I have decided to obtain recent country information about the conditions in Afghanistan from the UK Home Office, the European Asylum Seeker Office (EASO), the Danish Immigration Service, Reuters and the United Nations High Commissioner

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<sup>1</sup> Canadian Immigration and Refugee Board (IRB), Afghanistan: Night letters [Shab Nameha, Shabnamah, Shabnameh], including appearance (2010-2015), 10 February 2015, AFG105047.E, OGFDFC61A3; Danish Immigration Service (DIS), "Country of Origin Information for Use in the Asylum Determination Process: Report from the DIS's Fact Finding Mission to Kabul, Afghanistan", 1 May 2012, CIS23406; European Asylum Support Office (EASO), "EASO Country of Origin report Afghanistan: Insurgent strategies - intimidation and targeted violence against Afghans", 1 December 2012, CIS24804; DFAT, "DFAT Thematic Report on Afghanistan Security Conditions 1 January to 31 August", 5 September 2016, CIS38A80121778; "Wilayat Khorasan unleashes new wave of violence but loses leader", Jane's Intelligence Review, 6 September 2016, CX6A26A6E11053; "Assault on Shia shrine in Kabul likely to have been conducted by Islamic State, indicating resilient attack capability", Jane's Intelligence Review, 12 October 2016, CX6A26A6E11042; Landinfo, "Hazaras and Afghan insurgent groups", 3 October 2016, CIS38A80122778; HRW, "Afghanistan's Shia Hazara Suffer Latest Atrocity. Insurgents' Increasing Threat to Embattled Minority", 13 October 2016, CX6A26A6E11758; "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", Afghanistan Analysts Network, 19 October 2016, CX6A26A6E11358; "Death Toll Rises To 30 In Kabul Mosque Bombing", Tolo News, 21 November 2016, CX6A26A6E13647; "Afghanistan Kabul mosque suicide attack kills dozens", BBC News, 22 November 2016, CX6A26A6E13651

for Refugees (UNHCR)<sup>2</sup>. I have also obtained a report about conditions in Afghanistan, most recently published by the Department of Foreign Affairs and Trade (DFAT)<sup>3</sup>. All of these documents were prepared specifically to advise decision makers who are assessing cases from Afghanistan. Given the factors I have outlined, I am satisfied that there are exceptional circumstances to consider doing so.

7. In the five years since the s.65 decision was made, the applicant has provided a large volume of materials to the IAA in the form of various submissions, written statements, personal documents and country information reports and articles. These documents were provided by email, in two separate tranches. The first tranche of materials was provided to the IAA in 2016, after the s.65 decision was made, but prior to the initial IAA review of this case. The second tranche was provided to the IAA in October 2021, after the FCFCOA had quashed the initial IAA decision.

#### *The First Tranche*

8. The first tranche of documents was provided in seven emails to the IAA sent between September and November 2016.
  - The first email contained: a five page Submission to the IAA dated 26 September 2016; a single page submission on what were said to be the exceptional circumstances to justify considering information then being provided to the IAA, also dated 26 September 2016; several articles and documents relating to [contracts] in Afghanistan; three country information reports about events in Afghanistan and three maps, provided by the applicant, which are said to show the location of his family home in Kabul in relation to the site of various bomb detonations.
  - The second email contained 20 country information reports. These reports were all published between March and September 2016, except for one, which was published in February 2012.
  - The third email contained a further four news articles, all published in October 2016 and a further submission to the IAA which reported that two of the applicant's female relatives were killed in recent attacks against Shia in Kabul and argued that the articles showed it was not safe for Hazara Shia to live in Afghanistan. This was a new claim.
  - The fourth email contained another Submission to the IAA. This submission contained photos of a bombing which was said to have occurred recently in Kabul, in which it was claimed that two of the applicant's relatives had been killed.
  - The fifth email another submission, which contained what was said to be the death notice of one of the applicant's relatives who had been killed in the Kabul bombing.

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<sup>2</sup> European Asylum Support Office (EASO), 'Country Guidance: Afghanistan (November 2021)', 11 November 2021, 20211112104234; European Asylum Support Office (EASO), 'EASO Country of Origin Information Report: Afghanistan Security situation (September 2021)', 9 September 2021, 20210910075607; United Nations High Commission for Refugees (UNHCR), 'UNHCR Position on Returns to Afghanistan', 17 August 2021, 20210818083956; UK Home Office, 'Country policy and information note Afghanistan: fear of the Taliban', 6 October 2021, 20211007090314; UK Home Office, 'Country policy and information note Afghanistan: security and humanitarian situation', 6 October 2021, 20211007085815; UK Home Office, 'Country policy and information note: Afghans perceived as "Westernised", Afghanistan, June 2021', 17 June 2021, 20210621090637; Danish Immigration Service, 'Afghanistan: Recent events', 13 December 2021, 20211214082224; Danish Immigration Service, 'Afghanistan – Recent Developments in the Security Situation, Impact on Civilians', 10 September 2021, 20210913115425; Reuters, 'Talban would take back Europe's Afghan deportees to face courts says spokesman', 31 August 2021

<sup>3</sup> Department of Foreign Affairs and Trade (DFAT), "Country Information Report: Afghanistan 27 June 2019", 20190627113333

- The sixth email contained a translation of the death notice.
9. None of the documents provided to the IAA in the first tranche was before the delegate. They are all new information. The new claim about the applicant's relatives being killed in a bombing in Kabul is also new information. I have considered the submissions sent to the IAA in 2016.
  10. Turning first to the recent bombing in Kabul, which is said to have killed two of the applicant's relatives, and the supporting photos and documents which have been provided to support this claim. These events are said to have occurred after the date of the delegate's decision. This information could not have been provided to the Minister prior to the date of the decision and so s.473DD(b)(i) is met for the new claim, the photographs and the death notice (and translation). On its face, this new claim is also credible personal information which may have affected the consideration of the applicant's claim for protection and so s.473DD(b)(ii) is also met for the new claims and the supporting materials. According to the applicant, his principal claims arise from his status as a Hazara Shia in Kabul. On its face, the claim and materials provided relate to a bombing which targeted Hazara Shia in Kabul. In circumstances where the new claim and supporting information relates directly to the risks faced by this applicant in Afghanistan, I am satisfied that there are exceptional circumstances to justify considering the new claim, and the supporting materials for this claim which have been provided and so s.473DD(a) is also met. As both limbs of s.473DD are met for the new claim and the supporting materials, I have considered this claim and the supporting materials.
  11. The three maps provided by the applicant are said to show the location of his family home in Kabul and the location of various bombings which have occurred in the city. The maps were not before the delegate and they are new information. They have been provided by the applicant in order to show that Kabul is unsafe, and that his home is located in an area which has been attacked many times. The applicant could have provided information about the location of his home earlier. I am not satisfied that this information could not have been provided before the date of the s.65 Decision and so s.473DD(b)(i) is not met for these maps. However, I am satisfied that the maps contain credible personal information about the applicant which may have affected the consideration of his claims for protection and so s.473DD(b)(ii) is met for the maps. I have considered the reason that these maps were provided, but, like other information before me, the bomb data locations cited in these maps is now considerably out of date and it is worth noting that though he says he could not safely return to his home in Kabul, his family has lived there throughout the period he has been in Australia. In the circumstances, even taking into account the s.473DD(b)(ii) factors, given the historic nature of the bomb data information, I am not satisfied that there are any exceptional circumstances to justify considering this new information now and so s.473DD(a) is not met and I must not consider it.
  12. The applicant has also provided a large volume of new country information within the first tranche. In Submissions sent to the IAA in 2021, the applicant asserts that he continues to rely on all information given to the IAA previously which includes the country information provided in 2016. His 2016 submission about why new information should be considered argues that these reports provided (what was then) up to date information about conditions in Afghanistan. Nevertheless, I observe that, as with the remainder of the materials provided in the first tranche, this country information was provided in late 2016 and is at a minimum, at least five years old. Consequently, this material does not provide evidence about the situation in Afghanistan now, and taking into account that my assessment of the applicant and his claims is forward looking, the current relevance of this material is, in my view, very doubtful. The relevance of this material is even more contentious in light of the significant

changes that have occurred Afghanistan over recent months. Given these factors, I am of the view that the large volume of country information provided to the IAA in 2016 is not of any relevance to my consideration of the applicant's claims now. In the circumstances I have not considered any of this material.

### *The Second Tranche*

13. The second tranche of documents was provided in two emails to the IAA sent in September 2021.
  - The first 2021 email was sent to the IAA on 9 September 2021. It contained a five-page submission to the IAA, dated 8 September 2021; a copy of the September 2021 FCFCOA decision which quashed the initial IAA review of this case. Finally, the email contained 11 separate numbered country information reports. These country information reports were published between January and September 2021.
  - The second 2021 email was sent to the IAA on 21 September 2021. It contained a two-page written statement from the applicant dated 15 September 2021.
14. The 2021 Submission to the IAA argues that the applicant's profile is that of a Hazara Shia who lived in Kabul for most of his life. It is further argued that as the Taliban had taken control of Kabul in August 2021, Kabul was no longer safe for him. The submission goes on to discuss the current security situation in Kabul with extracts and references to the 11 numbered country information reports.
15. The applicant's 2021 written statement the applicant restated his claims and his profile. He provided some further clarification about the status of family in Kabul, but this merely elaborated on information already before me, rather than being new information. I note that the 2021 written statement contains a claim that as a returnee from the West, this applicant would be considered to be a 'spy' on behalf of the West. Though he had earlier identified his time in the West as a reason to fear returning to that country, he had not made any claim previously that he would be considered by the Taliban to be a spy. This is a new claim. It is new information.
16. The applicant already made claims to the delegate about his time in the west. He said that his time in the West would lead him to be imputed with pro-Western political opinion, and that he would face harm for that reason. He did not mention that he would be considered as a spy. He did not mention this issue in his Protection Visa Application, in the Statement of Claims which accompanied his application, or in a supplementary Statement of Claims provided to the Department with his Protection Visa Application. He did not mention fearing he would be considered a Western spy due to his time in Australia in any of the three Submissions he provided to the Department in 2016. The applicant has not explained why he did not make this claim earlier, or why he is making it now. Given the similarity of these claims it is not clear why; he has not pointed to any particular country information or anything else, which would indicate that returnees are considered to be spies by the Taliban. I am not satisfied he could not have made this claim prior to the date of the s.65 decision and so s.473DD(b)(i) is not met. Nevertheless, this new claim is credible personal information which may have affected his claim for protection so s.473DD(b)(ii) is met. The applicant has not identified this an explanation for why he is making this new claim now, or why he now fears he would be considered a spy. He has not identified any exceptional circumstances which justify the consideration of this new claim and none is apparent to me. In the circumstances, even taking into account the factors that led to my positive s.473DD(b)(ii)

finding, I am not satisfied that there are any exceptional circumstances to justify considering this new claim and so s.473DD(a) is not met, and I must not consider it.

17. None of the 11 numbered country information reports which were cited as extracts in the 2021 Submission and provided separately to the IAA were before the delegate. The extracts (and the documents themselves) are all new information. Each of the articles was published well after the date of the s.65 Decision and so I am satisfied that they could not have been provided before that decision was made and s.473DD(b)(i) is met for these documents or the extracts. Of the 11 documents, only those numbered 3 – 7 contain credible personal information, which may have affected the applicant's claims for protection, and I am satisfied that these five documents meet s.473DD(b)(ii). The remaining documents (those numbered 1, 2 & 8- 11) do not contain any credible personal information, rather they are just general country information about Afghanistan and so s.473DD(b)(ii) is not met for those documents. Nevertheless, given the long passage of time since the date of the s.65 Decision the information provided in all the documents is relevant, and provides up to date information about conditions in Afghanistan. In the circumstances I am satisfied there are exceptional circumstances to justify considering all of the 11 numbered documents and so s.473DD(a) is met. As both limbs of s.473DD are met for each of the 11 numbered documents, I have considered all of them.
18. Finally, I observe that the applicant's 2021 Submission to the IAA asserts that the IAA "*must exercise its power to get new information reasonably*" and that the circumstances of this case "*oblige the Authority to conduct a hearing with the applicant*" in order to discuss the conditions he would face upon return. I consider this to be a request for the IAA to interview the applicant. I have considered the applicant's request to be invited for an interview, however, I have taken into account the provisions of s.473BA which indicate that the IAA is required to pursue the objective of providing a mechanism of limited review that is efficient, quick, free of bias and that in general, the IAA does not hold hearings and is required to review decisions on the papers, except where there are exceptional circumstances. In this instance I note that this applicant has been engaged in the Protection Visa Application process for more than five years, and has had multiple opportunities to advance his claims, and to provide evidence in support of those claims including his SHEV Application, his Protection Visa Interview, his three 2016 Submissions, his 2021 Submission to the IAA and his 2021 written Statement. I further note that this applicant has been represented throughout the years his case has been under review by the Department and the IAA. It is not clear to me that I require further information from him. Considering all of the information before me, including his desire for a hearing, and the other factors I have identified, I am not satisfied that any further interview is warranted by the circumstances of this case.

### **Applicant's claims for protection**

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19. The applicant's claims can be summarised as follows:
  - He is a person of Hazara ethnicity who adheres to the Shia faith. He was born in [year], in Maidan Wardak Province. Around the age of [age], he and his family moved from Maidan Wardak to Kabul, where he lived thereafter. His father operated a [business] in Kabul.
  - Between 1989 and 1992, the applicant was conscripted into the Afghan Army. His role was in [an] area and he was not a combat soldier.

- The applicant married in 1995. He has [number of] children. At the time of his wedding in Kabul, he was captured and identified by the Taliban. He was held for around a week and mistreated. His father paid a ransom to secure his release. Thereafter, The Taliban would regularly attend the family [business] and extort funds from him and his family.
- Around 1997, his parents moved from Kabul to Mazar-e-Sharif. Around 1998, his parents disappeared. He believes his parents were killed by the Taliban in Mazar-e-Sharif.
- During his life in Kabul, he worked in a variety of roles, including as a [Occupation 1], at the family [business], and as a [Occupation 2]. In 2010, he commenced working as a [Occupation 3] at a US Military [base]. At the same time, he continued to work as a [Occupation 2]. After working on the base each day, he would resume his [Occupation 2] activities of an evening. During this period, he continued to reside in Kabul.
- One afternoon in 2011, after he completed his day of work at the camp, he returned to Kabul in his [car], with several [people]. After [they] exited his car, he found a letter in the car. It was addressed to him, and he presumes the letter was left by the [people] in his car.
- The letter was a threat letter from the Taliban. It warned him that he should cease working at the US Army Base.
- After receiving the letter, the applicant and his wife became very frightened. He ceased to work at the army base. In early 2012, the applicant fled Afghanistan and travelled to Australia. His wife and children remained in Kabul.
- In 2016, a bomb was detonated in Kabul which targeted the Hazara Shia community. Two Hazara Shia members of his extended family were killed in the bombing.
- The applicant fears to return to Afghanistan because of his Hazara ethnicity and his Shia faith. He says these factors would lead to him being targeted by the Taliban, or other Sunni extremist groups such as Islamic State.
- He says that road travel is unsafe for Hazara Shia like him, and that he would be unable to travel in Afghanistan.
- He says his historic links to the US military would lead to him facing harm. He says these links would lead to him being imputed with pro-United States political opinion.
- He says his past links to the Afghan Army would lead to him being imputed as a supporter of the Afghan Government and that this would lead to him facing harm in Afghanistan.
- He says that as a returnee from the West, he would be imputed with pro-Western political opinion.
- He says that Afghanistan is so unsafe and insecure that he would not be safe in Kabul, or in any other part of the country.
- He fears that if he returns to Afghanistan there is a real possibility that his mental health will deteriorate.

### **Factual findings**

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20. As part of his SHEV Application, the applicant has provided copies of several documents in order to establish his identity. This includes a copy of his Afghan Taskira (the principal

personal identity used document in Afghanistan<sup>4</sup>) and an Afghan Bank Card. He has provided an accredited translation for the Taskira.

21. Broadly, these documents provide consistent information about the applicant's identity. However, there are some differences between the applicant's verbal identity claims, and the documentation he has provided. The translation of his Taskira indicates that he was born in Kabul, while the applicant says he was born in [Maidan] Wardak Province. The applicant has argued that this was the second Taskira he had been issued; that his original Taskira identified his place of birth as Maidan Wardak; that when the second Taskira was issued, in [1980], his father had his birth recorded in Kabul, so that the applicant could attend school. Submissions to the Department and the IAA further argue that travel back to Maidan Wardak to obtain a Taskira was unsafe due to fighting and so the applicant was forced to obtain his second Taskira in Kabul.
22. However, the applicant's Protection Visa Application indicates asserts he moved to Kabul (from Maidan Wardak) in 1970, and that he had attended school in Kabul from [year] until [year], and that by 1980, the applicant was working full time as a [Occupation 1]. I found the applicant's explanations of why the Taskira he has presented records Kabul as his place of birth as unpersuasive. In the circumstances, I am not satisfied that the applicant was born in Maidan Wardak as he claims, and, in any case, the applicant's own evidence is that he lived in Kabul for the majority of his life, from around 1970 until 2012, when he came to Australia. Taking all of these factors into account, and in light of the Taskira he has presented identifying Kabul as his place of birth, I conclude he was born in Kabul.
23. The applicant has established his identity to my satisfaction. I accept that he is an Afghan citizen, of Hazara ethnicity who adheres to the Shia faith as he claims. I accept that he was born in [year] in Kabul. For the purposes of this decision, I find that Afghanistan is his receiving country.

### **1995 Marriage/Abduction**

24. According to the applicant's SHEV Application he was married in Kabul in 1995. He says that on the evening of his marriage, he, and the wedding guests were celebrating with music. Some of his relatives were playing the drums. The noise drew attention from the Taliban, who he says had recently gained control of Kabul. The Taliban entered the wedding celebration and demanded to know the identity of the Groom. When the applicant identified himself to them, he was attacked, then taken away by the Taliban. He was held by the Taliban for around one week. During this period, he was severely mistreated, including have a hot iron placed against his back, and having his leg broken. He says his father paid a ransom to secure his release. He says that from the time of his wedding, he was known to the Taliban.
25. There are some reasons to doubt the applicant's claims about this incident. Most obviously, because in his SHEV Application (answer to question 36) and in the Statement of Claims which accompanied the visa application, the applicant said he was married in 1995. He had also indicated he was married in 1995 in an interview conducted in 2012, soon after his arrival in Australia and in an invalid 2013 Protection Visa Application. However, at his 2016 Protection Visa Interview the delegate put it to the applicant that country information indicates that the Taliban did not secure control of Kabul until 1996, a year after he said he was married. Furthermore, this applicant had failed to mention this abduction by the Taliban

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<sup>4</sup> Department of Foreign Affairs and Trade (DFAT), "Country Information Report: Afghanistan 27 June 2019", 20190627113333



in two interviews conducted with him in 2012, after his arrival in this country. These factors would seem to cast doubt upon the applicant's claim that he was abducted by the Taliban at his wedding.

26. In submissions, it has been argued that this applicant is illiterate, and that his grasp of dates is poor, and that he had merely made an error by asserting his marriage was in 1995. Instead, the marriage actually occurred in 1996, after the Taliban had occupied the city of Kabul. It is further argued that the interviews held with the applicant in 2012 were both hurried, and the applicant was advised to provide only brief comments about his reasons for coming to Australia and this explains his failure to mention this incident in 2012.
27. Country information does indicate the Taliban has been known to crackdown on music in areas they control, and broadly, the applicant's claims about this issue are believable<sup>5</sup>. I also concede that in 2012, he was advised to provide his reasons for coming to Australia quickly. While I have some doubts, given his repeated assertions over at least four years that he was married in 1995, I am willing to accept the applicant's claims that he was abducted from his wedding in 1995, held for about one week, severely mistreated, and only released after his father paid a ransom. I accept that after his release, he was periodically mistreated by the Taliban when they visited the family [business] and extorted money and other goods.

#### **Death of Parents**

28. The applicant asserts that around 1997, his parents departed Kabul for Mazar-e-Sharif. He says that around 1998, his parents disappeared, and he believes that they were killed during a notorious Taliban massacre of Hazara in that city.
29. The applicant has not provided any independent evidence in support of these claims about his parents, and in my view, his claims lack detail. The applicant has claimed his parents were killed in Mazar-e-Sharif since his arrival in Australia, however, there are other reasons to be concerned about this claim. He has variously stated his parents were killed in 1997 and 1998, though he also says he does not know what happened to them. In his invalid 2013 Protection Visa Application, (answer to question 41 – Employment?) the applicant indicated that he worked in Kabul at the family [business] with his father until 2007, around a decade after he says his father was killed in Mazar-e-Sharif. His SHEV Application (answer to question 85 – Employment?) indicates he assisted his father at the family [business] until 2009.
30. There was a Taliban massacre of Hazara's in Mazar-e-Sharif in August 1998, following the Taliban capture of that city<sup>6</sup>. This fact is not in dispute. However, the applicant's claims about his family and employment, specifically his statements that he assisted his father at the [business] in Kabul until 2007 (invalid 2013 Protection Visa Application) and 2009 (SHEV Application) cast real doubt on whether the applicant's parents had ever travelled to Mazar-e-Sharif or been killed in that city. In this context, I note that during his Protection Visa Interview the applicant stated that his family, including his parents had moved to a new house in Kabul, around 2003.
31. Overall, I am not persuaded the applicant has been forthcoming about his parents in Afghanistan. Considering his conflicting evidence, he has not persuaded me he is telling the truth. In light of his statements in his Protection Visa Interview, and in his SHEV Application

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<sup>5</sup> Katzman, K. "Afghanistan: Post-Taliban Governance, Security and US Policy", US Congressional Research Service", 6 June 2016, CIS38A80121169,

<sup>6</sup> Human Rights Watch, "Afghanistan - Massacres of Hazaras in Afghanistan", Vol. 13, No. 1 (C), 1 February 2001, CIS13003.

and the earlier invalid application, I am not satisfied that his parents were killed by the Taliban in Mazar-e-Sharif as he claims

### **US Army Camp**

32. The applicant says that in 2010, around a month prior to Christmas, he commenced working as a [Occupation 3] at a US Army [Base]. He says the Taliban learned of his work on the base, and in a letter addressed to him personally, threatened to kill him if he did not stop.
33. As evidence of his work on the base, the applicant has provided certificate which he says he was issued at the US Army Base and a copy of the threat letter from the Taliban, and a translation of the letter.
  - On its face, the certificate is supportive of his claims. The certificate is issued in his name and indicates that he had participated in [training] and had qualified as a [Occupation 4] on [date] July 2010. The Certificate indicates that it was issued under the [authority].
  - The letter is also supportive of the applicant's claims. Taliban letter accuses the applicant of working at "American and English" Camps and accuses of spying against the Taliban. In the letter he is threatened with death.
34. There are some reasons to doubt the applicant's claims about this issue. Firstly, because during his Protection Visa Interview he clearly said that he commenced working at the base around one month prior to Christmas 2010. However, the certificate was issued in July 2010. Secondly, on his own admission, the applicant had previously worked as [Occupation 1], at a [business], and as a [Occupation 2], so it is not entirely clear how he obtained work as a '[Occupation 3]' at the base. Thirdly, though he says he received a letter from the Taliban the letter seems to indicate he worked at an English base also and this is a claim the applicant himself has never made.
35. While I have some concerns about these issues, in light of the documents, notably the [Occupation 4] certificate, I am satisfied that the applicant did in fact work at a US Army Base in Afghanistan. I accept that he did so for longer than six months but less than a year as he asserts. I accept that the Taliban learned of his work, and threatened him by letter leading him to cease his employment at the base, and later, to travel to Australia.

### **Refugee assessment**

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36. 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**

37. 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.

38. I have found that this applicant's receiving country is Afghanistan. I have found he was born in Kabul, and there is no dispute that he lived in Kabul for more than forty years, prior to his travel to Australia. He asserts his wife and children still reside in the same family home in Kabul that he lived in prior to his departure. In the circumstances, I conclude that if returned to Afghanistan, he would return and reside in Kabul with his family.

*Hazara Shia in Kabul, links to the West, US Army base*

39. This applicant has cited his ethnicity, his religion, his time in the West, and his previous work on a US Army Base as reasons to fear harm if returned to Afghanistan. He says these elements of his profile, individually and cumulatively would lead to his being of interest to the Taliban, who now rule Afghanistan.
40. I have accepted that the applicant is a Hazara Shia, who formerly worked for a brief period at US Army Base in Afghanistan. I have accepted he was known to the Taliban in the past, having first come to their attention in 1995, when he was detained and mistreated by them for one week. In the years which followed he and his family faced occasional visits from the Taliban, who extorted money and other goods from them. I have also accepted that he received a personalised threat letter from the Taliban in 2011, leading to his decision to stop working at the US Army Base, and ultimately to deciding to leave Afghanistan for Australia.
41. Country information indicates that in 2021, conditions in Afghanistan changed substantially<sup>7</sup>. In early 2021 the last remnant of NATO military forces which had occupied Afghanistan since 2001 departed the country. At the time it was asserted that the forces of Afghanistan Government would be able to prevail against the Taliban, with continued US intelligence and logistics support, but within a few months the Taliban had quickly obtained military superiority and the Afghan State, such as it was, collapsed. Except for small pockets of

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<sup>7</sup> European Asylum Support Office (EASO), 'Country Guidance: Afghanistan (November 2021)', 11 November 2021, 20211112104234; European Asylum Support Office (EASO), 'EASO Country of Origin Information Report: Afghanistan Security situation (September 2021)', 9 September 2021, 20210910075607; United Nations High Commission for Refugees (UNHCR), 'UNHCR Position on Returns to Afghanistan', 17 August 2021, 20210818083956; UK Home Office, 'Country policy and information note Afghanistan: fear of the Taliban', 6 October 2021, 20211007090314; UK Home Office, 'Country policy and information note Afghanistan: security and humanitarian situation', 6 October 2021, 20211007085815; UK Home Office, 'Country policy and information note: Afghans perceived as "Westernised", Afghanistan, June 2021', 17 June 2021, 20210621090637; Danish Immigration Service, 'Afghanistan: Recent events', 13 December 2021, 20211214082224; Danish Immigration Service, 'Afghanistan – Recent Developments in the Security Situation, Impact on Civilians', 10 September 2021, 20210913115425

resistance, by the end of August 2021, the Taliban had assumed control of all of Afghanistan<sup>8</sup>. On 7 September 2021, the Taliban announced the formation of an interim government in Afghanistan<sup>9</sup> and since then, the Taliban has governed Afghanistan. The Taliban has implemented a range of changes in Afghanistan, typical of those the group has enforced in other areas under their control<sup>10</sup>.

42. Though overt conflict has reduced, and security is said to have improved in Afghanistan in the months since the Taliban assumed power<sup>11</sup>, Afghanistan now is described as volatile and unstable, and county information about conditions in the country may quickly become outdated as circumstances change<sup>12</sup>. The Taliban's rule of Afghanistan faces many challenges, there are widespread economic problems in Afghanistan due to the withdrawal of Western personnel and aid programs, and the freezing of Afghani Government funds held internationally. Afghanistan also faces a range of security problems, as there are other armed groups which continue to operate in Afghanistan, outside of the Taliban's control. Most notably, the Islamic State of Khorasan Province (Islamic State) which musters between 1500 – 2200 fighters. Islamic State opposes the Taliban, and they have increased their recruiting and the number of their attacks since the Taliban has gained power<sup>13</sup>. Islamic State is known to target the Shia community, and information provided by the applicant in his Submissions indicates the group has conducted recent attacks in Kabul.
43. The Taliban sees itself as the genuine and legitimate Government of Afghanistan, though they have not been recognised as such by any Western country. In the months since the Taliban assumed power in Afghanistan, they have made a number of public statements. In general, the aim and tenor of these statements has been to calm the situation in that country, and to promote stability. In August, the Taliban has publicly announced a 'general amnesty' for former Government employees<sup>14</sup>. The Taliban promised they would not govern Afghanistan in a spirit of revenge and would not seek to punish former enemies.

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<sup>8</sup> EASO, 'Country Guidance: Afghanistan (November 2021)', 11 November 2021, 20211112104234; European Asylum Support Office (EASO), 'EASO Country of Origin Information Report: Afghanistan Security situation (September 2021)', 9 September 2021, 20210910075607; United Nations High Commission for Refugees (UNHCR), 'UNHCR Position on Returns to Afghanistan', 17 August 2021, 20210818083956; UK Home Office, 'Country policy and information note Afghanistan: fear of the Taliban', 6 October 2021, 20211007090314; UK Home Office, 'Country policy and information note Afghanistan: security and humanitarian situation', 6 October 2021, 20211007085815; UK Home Office, 'Country policy and information note: Afghans perceived as "Westernised", Afghanistan, June 2021', 17 June 2021, 20210621090637; Danish Immigration Service, 'Afghanistan: Recent events', 13 December 2021, 20211214082224; Danish Immigration Service, 'Afghanistan – Recent Developments in the Security Situation, Impact on Civilians', 10 September 2021, 20210913115425

<sup>9</sup> Danish Immigration Service, 'Afghanistan: Recent events', 13 December 2021, 20211214082224

<sup>10</sup> European Asylum Support Office (EASO), 'Country Guidance: Afghanistan (November 2021)', 11 November 2021, 20211112104234; European Asylum Support Office (EASO), 'EASO Country of Origin Information Report: Afghanistan Security situation (September 2021)', 9 September 2021, 20210910075607; United Nations High Commission for Refugees (UNHCR), 'UNHCR Position on Returns to Afghanistan', 17 August 2021, 20210818083956; UK Home Office, 'Country policy and information note Afghanistan: fear of the Taliban', 6 October 2021, 20211007090314; UK Home Office, 'Country policy and information note Afghanistan: security and humanitarian situation', 6 October 2021, 20211007085815; UK Home Office, 'Country policy and information note: Afghans perceived as "Westernised", Afghanistan, June 2021', 17 June 2021, 20210621090637; Danish Immigration Service, 'Afghanistan: Recent events', 13 December 2021, 20211214082224; Danish Immigration Service, 'Afghanistan – Recent Developments in the Security Situation, Impact on Civilians', 10 September 2021, 20210913115425

<sup>11</sup> Danish Immigration Service, 'Afghanistan: Recent events', 13 December 2021, 20211214082224

<sup>12</sup> Danish Immigration Service, 'Afghanistan: Recent Developments in the Security Situation, Impact on Civilians', 10 September 2021, 20210913115425

<sup>13</sup> Danish Immigration Service, 'Afghanistan: Recent events', 13 December 2021, 20211214082224; Danish Immigration Service, 'Afghanistan: Recent Developments in the Security Situation, Impact on Civilians', 10 September 2021, 20210913115425

<sup>14</sup> UK Home Office, 'Country policy and information note Afghanistan: fear of the Taliban', 6 October 2021, 20211007090314

44. Recent studies, conducted before the Taliban gained full control in Afghanistan, indicated that Taliban rule in Afghanistan is unaccountable<sup>15</sup>. The Taliban is fragmented, local Taliban commanders have full control in their areas, and protest against Taliban decisions is impossible<sup>16</sup>. Despite Taliban statements, there have been many documented cases where the Taliban has broken commitments not to target former enemies, especially former members of the Government security forces, who have been targeted by the Taliban in the months since they assumed control.
45. In light of the changes in Afghanistan, the European Asylum Seeker Office (EASO) has recently published updated country guidance for decision makers considering asylum claims related to Afghanistan. EASO reported that individuals in Afghanistan who have worked for foreign military troops or who are perceived as supporting them would be highly likely to face persecution in Afghanistan; that persons perceived as 'westernised' could be exposed to harassment which might amount to persecution; that persons from the Hazara Shia minority which could be exposed to acts of such severe nature, such as killing, abduction and sectarian attacks, that they would amount to persecution<sup>17</sup>. The applicant's profile includes all of these categories. The UK Home office has also published recent guidance for asylum seeker decision makers about the situation in Afghanistan which identifies minorities and persons associated with foreigners as being at risk of harm<sup>18</sup>.
46. Although DFAT and other sources have previously assessed returnees from the West were, generally not targeted merely for having spent time in the west<sup>19</sup>, since the takeover by the Taliban, the UNHCR has advised that given the volatility and uncertainty in the country at present, no Afghan nationals should be forcibly returned to Afghanistan, including failed asylum seekers<sup>20</sup>. Whilst there have been very few reports of western returnees being targeted for this reason in recent years, it is unclear what may happen in future, under the new Taliban Government. In this context I note that the Taliban issued a statement on 31 August 2021 saying they would accept failed Afghan asylum seekers from Europe but that upon return, failed asylum seekers would be taken before an Afghan court, and that the court would decide their fate<sup>21</sup>.
47. The country information I have summarised indicates that credible international commentators agree the present situation in Afghanistan is unclear, and the future is uncertain. Though the Taliban have secured control of the country, the future security situation is unclear as the Taliban still have substantial rivals, notably Islamic State.
48. The Taliban has made promises to govern Afghanistan for all afghans, but the groups past history, and credible accounts of their more recent experience of governing provides a glimpse into the style of Government the Taliban will likely implement throughout Afghanistan. Taliban Government is arbitrary and highly localised, with local Taliban commanders having almost total control of all aspects of life in their areas. These factors suggests that persons with an adverse history with the Taliban may face further interest from

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<sup>15</sup> UK Home Office, 'Country policy and information note Afghanistan: fear of the Taliban', 6 October 2021, 20211007090314

<sup>16</sup> UK Home Office, 'Country policy and information note Afghanistan: fear of the Taliban', 6 October 2021, 20211007090314

<sup>17</sup> European Asylum Support Office (EASO), 'Country Guidance: Afghanistan (November 2021)', 11 November 2021, 20211112104234

<sup>18</sup> UK Home Office, 'Country policy and information note Afghanistan: fear of the Taliban', 6 October 2021, 20211007090314

<sup>19</sup> DFAT, "Country Information Report: Afghanistan 27 June 2019", 20190627113333

<sup>20</sup> UNHCR, 'UNHCR Position on Returns to Afghanistan', 17 August 2021, 20210818083956

<sup>21</sup> Reuters, Taliban would take back Europe's Afghan deportees to face courts says spokesman, 31 August 2021

Taliban officials, and some, unspecified risks in future. Some former opponents of the Taliban have already been taken into custody by the Taliban, despite earlier promises.

49. The available evidence to date seems to indicate that the Taliban is really not interested in the activities of ordinary people. Rather their focus has been on high level commanders of the security forces, and other persons of influence. This applicant was not such a person. During his life he worked as a [Occupation 1], in a [business], as a [Occupation 2], and for a short period as a [Occupation 3] on a US Army Base. Nevertheless, I have accepted that the applicant was known to the Taliban from 1995, that he and his family had suffered years of occasional harassment from Taliban members at the family [business], that the Taliban learned of the applicant's work at the US Army base in 2010/11 and that they had directly threatened his life in 2011. I accept that in the past, he has been a person of interest to the Taliban. In addition to the Taliban's knowledge of him personally, the applicant's profile is that of a Hazara Shia; a person with ties to the West; a person with ties, albeit limited, to the US occupation of Afghanistan. Country information indicates that each of these separate profiles can, in some circumstances, lead to harm in Afghanistan. Given the profile factors I have mentioned, the present uncertainty in Afghanistan, the arbitrary nature of life under the Taliban, and the power of local commanders, I am satisfied that a person of this applicant's specific profile may face a real chance of being imputed with pro-Western or pro-American political opinions.
50. The Taliban have control of the country and necessarily, of the international airport in Kabul, where he would most likely be returned. In the circumstances, the Taliban would know about his return to Afghanistan. The Taliban have stated intention to detain and try western returnees. Given the volatility and uncertainty in Afghanistan at this time I am not satisfied that this applicant, as a person with a profile of a Hazara Shia returning from the West, would not face serious harm from the Taliban.
51. Having taken all these factors into account, I consider that if the applicant returns to Afghanistan now, or in the reasonably foreseeable future that he would face a real chance of arbitrary detention and physical mistreatment amounting to serious harm and persecution, for reasons relating to his cumulative profile, including his status as a member of the Hazara Shia minority, his past contact with the Taliban, his work at the US Army Base, his residence in the West, and his imputed political opinion. These factors are immutable parts of the applicant's life, and he could not take reasonable steps to modify his behaviour so that that he was not affected by these issues. I am satisfied that this persecution would involve systematic and discriminatory conduct by the Taliban. As the Taliban now governs all of Afghanistan, they would be the agent of persecution and so I conclude that he could not obtain durable protection from the Afghan Government. For the same reasons, I also find the real chance of persecution relates to all areas of Afghanistan.
52. Given these factors, the applicant has a well-founded fear of persecution in Afghanistan, and I have not found it necessary to consider the remainder of his claims.

#### **Refugee: conclusion**

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

## Decision

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

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

## Applicable law

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

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

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

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

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

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



...

### 5J Meaning of well-founded fear of persecution

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

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

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

### 5K Membership of a particular social group consisting of family

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

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

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

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

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

#### **5L Membership of a particular social group other than family**

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

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

#### **5LA Effective protection measures**

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

...

#### **36 Protection visas – criteria provided for by this Act**

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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