



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

**Decision and Reasons**

**Referred application**

---

AFGHANISTAN

IAA reference: IAA22/10271

Date and time of decision: 20 May 2022 11:56:00

J McLeod, Reviewer

**Decision**

---

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

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

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

## Background to the review

---

### Visa application

1. The applicant is an Afghan national from Jaghori district, Afghanistan. He arrived in Australia [in] December 2012 and applied for a Temporary Protection Visa (TPV) on 25 November 2016. He claims that if he returns to Afghanistan, he will face harm from the Taliban because of his Hazara ethnicity and Shi'a Muslim faith and a personal dispute with his Pashtun neighbours who are part of the Taliban.
2. On 24 March 2017, a delegate of the Minister for Immigration (the delegate) refused to grant the visa. This decision was affirmed by the IAA on 22 March 2018. [In] January 2020, the Federal Court of Australia remitted the matter for the IAA's reconsideration. On 20 April 2020, the IAA again affirmed the delegate's decision not to grant the visa and, by consent, [in] February 2022, the Federal Circuit and Family Court of Australia remitted the matter to the IAA for reconsideration.

### Information before the IAA

3. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 28 December 2017 the IAA received an email and submission from the applicant's then representative. However, this was withdrawn by his current representative via email on 12 April 2020 and as such I have not had regard to the information provided by the former representative in 2017.
5. The IAA also received information including submissions from the applicant's current representative on 9 April 2020 (in response to an invitation sent by the IAA), 12 April 2020 and 28 April 2022. To an extent, these submissions reiterate some of the applicant's claims and country information already before me, and raise arguments against the delegate's and previous IAA decision. I do not consider these aspects of the submissions to be new information; I have had regard to those aspects.

### *Change in applicant's personal circumstances*

6. Following the delegate's decision, the applicant suffered a stroke and heart attack. On 16 March 2020, 12 April 2020 and 28 April 2022, the applicant, through his representative, provided new information relating to these changes in his personal circumstances:
  - The applicant provided two hospital discharge summaries dated 30 November 2018 and 12 November 2019 evidencing that he suffered a stroke in October 2018 and heart attack in November 2019.
  - In his statutory declaration (14 March 2020), the applicant provided new information about his symptoms and treatment. He stated he does not suffer ongoing symptoms from the heart attack but now takes medication for his heart condition. The stroke, however, has left him disabled. He states that since having the stroke, he has virtually no memory of prior events and therefore he is unable to clarify any previous statements in relation to his Protection Visa (PV) application. He says he suffers pain and weakness in his right arm and leg which have prevented him from working. He also has a speech defect which makes it very difficult for people to understand him, even in his native

Hazaragi. Accompanying the statutory declaration is also a note from the interpreter stating he comes from the applicant's area and knew him growing up. He attests to the applicant's speech difficulties and also his claims as to the village location and demography of the area.

- The submissions of 12 April 2020 and 28 April 2022 provide further comment on these matters, describing the applicant's disabilities as serious and permanent, with significant right-side weakness and pain and significant loss of memory. They state he is unable to communicate with strangers who have no understanding of his speech impairment and this may lead him to be treated with suspicion. They reiterate that he has been unable to work since his stroke and will have no realistic prospects of employment and no means to secure the basic necessities. They note the applicant cannot rely on his family for support as he has not been close to them or in personal contact since he left Afghanistan and his disability makes contact even more prohibitive, and because culturally, decisions would be made by his sisters' husbands who are unlikely to assist.
7. The applicant has also provided some other medical documentation which amounts to new information. He provided a letter from a doctor at [Medical Provider 1] which refers to his medical conditions including: sleep problems; social stresses, forgetfulness and dislipidemia. It states the applicant has high anxiety, gets very stressed and suffers from sleep and concentration problems significantly impairing his daily function. It suggests his symptoms are driven by social stresses with not having been able to visit his family in Pakistan and notes they have only slightly improved with anti-depressant medications. The letter is undated, but it refers to the applicant being separated from his family for five years and makes no reference to his stroke or heart attack. The representative submits it was probably written in 2018 (after the delegate's decision) and I consider this a reasonable assumption.
  8. The applicant has also provided an updated letter from another doctor from [Medical Provider 1], dated 3 March 2022. The letter refers to the applicant's symptoms of depression which he states is likely precipitated and perpetuated by lack of contact with his family, having been in Australia alone for 10 years, and notes in his history that he had a major depressive disorder in 2017. It also refers to the applicant having some visual changes and continuing subjective weakness in his limbs and lists five current medications the applicant takes. The doctor surmises that melancholic depression is the most likely diagnosis and has referred the applicant to a psychiatrist, but he also notes he would be investigating further given the applicant's medical history.
  9. I am satisfied that all this information regarding the applicant's medical conditions and related consequences relating to his speech, inability to work and diminished income arose after 24 March 2017 and so could not have been provided before the delegate made his decision. I also find it to be credible personal information which may have affected consideration of the applicant's claims. I accept the stroke and heart attack were serious events outside the applicant's control which have an ongoing impact on his health. While the matters raised in the doctor's letter appear to predate these events, they support claims the applicant raised at interview about suffering memory issues and stress and are relevant to the review. I am satisfied there are exceptional circumstances to justify considering all the new information discussed above.
  10. As for the information proffered by the interpreter regarding the location and demographics of the applicant's area, this information is not new; it was covered in the review material and I have had regard to it.

## Country information

11. The country situation in Afghanistan has changed dramatically since the applicant applied for protection, and since the delegate made his decision; the Taliban has regained control and is again the ruling regime. To account for this, I have obtained new country information post-dating the Taliban's takeover in August 2021.<sup>1</sup> It all post-dates the delegate's decision and provides the most accurate picture of current conditions in Afghanistan and the situation for persons with the applicant's profile. It assists in the determination of key issues under review. I am satisfied there are exceptional circumstances to justify considering this new information.
12. In their submission provided on 12 April 2020, the representative provided historical information relevant to the early Taliban movement in the 1990s, and in his email of 16 March 2020, the representative referred to attacks carried out by the Taliban in Jaghori and Malistan in 2018 and the United States' defeat and their agreement with the Taliban. No sources were provided in relation to any of this and while some of the historical information is covered by sources considered by the delegate, some of this and the references to the 2018 attacks, amounts to new information. Nonetheless, I have had regard to all these matters as they also arise in other materials before me, including some of the new information to which I am having regard.
13. When this case was previously reviewed by the IAA in 2018 and 2020, the IAA obtained new country information reports from the Australian Department of Foreign Affairs and Trade (DFAT), the European Asylum Support Office (EASO) and the United Kingdom Home Office (UKHO)<sup>2</sup> addressing relevant developments in what was an evolving security situation directly affecting Hazaras and Shi'as and returnees in Afghanistan. On 24 March 2020, the IAA wrote to the applicant inviting him to comment on the reports it obtained in 2020<sup>3</sup> and provide new information in relation to the information it had drawn from those reports ('the 2020 invitation'). The applicant's representative responded, addressing the information raised in the IAA's letter, critiquing its sources and referring to a number of new sources of country information including two more EASO reports published in June 2019<sup>4</sup> and two reports from

---

1 Department of Foreign Affairs and Trade (DFAT), "DFAT Thematic Report - Political and Security Developments in Afghanistan", 14 January 2022, 20220114091740; Afghan Analysts Network (AAN), "A Community Under Attack: How successive governments failed west Kabul and the Hazaras who live there", 17 January 2022, 20220117133414; EASO, "Afghanistan: Country focus (January 2022)", European Asylum Support Office (EASO), 7 January 2022, 20220110085950; UNHCR, "UNHCR Guidance Note on the International Protection Needs of People Fleeing Afghanistan", 9 February 2022, 20220210080933; ACCORD, "Ecoi.net featured topic on Afghanistan: Overview of recent developments and key players in Afghanistan (7 April 2022)", 7 April 2022, 20220411094729; United States Department of State (USDOS), 'Country Reports on Human Rights Practices for 2021 - Afghanistan', 12 April 2022, 20220413104428; European Union Agency for Asylum (EUAA; formerly 'EASO'), "Country Guidance: Afghanistan (April 2022)", 20 April 2022, 20220421101054; UKHO, "Country Policy and Information Note – Afghanistan: Fear of the Taliban (April 2022)", 29 April 2022, 20220502130414; Abubakar Siddique, Gandhara (Czech Republic), "Taliban faces rising armed resistance from former government factions", 27 April 2022, 20220428103411; The Diplomat, "As the World Looks Away, Violence Is on the Rise Again in Afghanistan", 11 May 2022; Reuters, "Taliban would take back Europe's Afghan deportees to face courts, says spokesman", 31 August 2021; Danish Immigration Service, "Country of Origin Information (COI) Brief Report: Afghanistan – Recent Events", December 2021

2 In 2018 the IAA obtained: Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Afghanistan", 18 September 2017, CISED50AD5680 DFAT, "DFAT Thematic Report Hazaras in Afghanistan", 18 September 2017, CISED50AD5681 and EASO, "Afghanistan: Security Situation December 2017", 1 December 2017, CISED50AD8102; and in 2020 the IAA obtained: DFAT, "Country Information Report: Afghanistan", June 2019; EASO, "Afghanistan: Key Socio Economic Indicators: Focus on Kabul City, Mazar-e-Sharif and Herat City", April 2019; and UKHO, "Country Policy and Information Note: Afghanistan: Hazaras", August 2018

3 DFAT, "Country Information Report: Afghanistan" 27 June 2019, 20190627113333; EASO, "Afghanistan: Key Socio-Economic Indicators: Focus on Kabul City, Mazar-e-Sharif and Herat City", April 2019; and UKHO, "Country Policy and Information Note: Afghanistan: Hazaras", August 2018

4 EASO, "Afghanistan Security Situation", June 2019; EASO, "Country Guidance: Afghanistan", June 2019

the Afghanistan Analysts Network (AAN) published in November 2018.<sup>5</sup> All of these reports obtained by the IAA in 2018 and 2020, and provided in response to the IAA's invitation post-date the delegate's decision, are from reliable sources and update the security situation relevant to persons with the applicant's profile. While there may be an argument as to their relevance given the situation has moved on even further since all these reports were published, I nonetheless consider they contain recent background relevant to the lead-up to the Taliban's takeover and the situation to which the applicant would return. I am satisfied that s.473DD(b)(i) and s.473DD(a) are met; I have had regard to these reports. For the same reasons, I am also satisfied that the bundle of new country information referred to in the 12 April 2020 submission published in late 2019 or 2020, and the country information provided with the email of 28 April 2022 also meets the requirements for s.473DD.<sup>6</sup> I have therefore had regard to all this new information.

14. However, in their response to the 2020 invitation, the representative also referred to information from an article by The Diplomat dated 3 November 2016 regarding the reshaping of schools to fit the Taliban agenda. The report itself was not provided as required by the IAA's "Practice Direction for Applicants, Representatives and Authorised Recipients" and no explanation has been provided as to the matters in s.473DD(b)(i) or (ii). The report predates the delegate's decision by several months and I am not satisfied it could not have been provided. Nor am I satisfied it contains credible personal information in the relevant sense. Further, no exceptional circumstances to justify considering this information have been pointed out and none are apparent to me. As such, I have not had regard to this report from The Diplomat.
15. In the response to the 2020 invitation, the representative also referred to the persecution of Hazaras under the previous Taliban regime and quoted information from Dr William Maley and the United States' Department of State (USDOS) in two decisions of the Refugee Review Tribunal made in 2001. These decisions and the information therein from Dr Maley and USDOS predate the delegate's decision by more than a decade and I am not satisfied they could not have been provided before the decision was made, or that they contain credible personal information pursuant to s.473DD(ii). Nor am I satisfied there are exceptional circumstances to justify considering this information. So, while I have considered the Taliban's historical treatment of Hazaras noted in other sources before me, I have not had regard to these decisions or the passages therein.
16. In their submission of 12 April 2020, the applicant's representative cites an SBS "Cultural Atlas: Afghan culture - Family" report on Afghanistan to support their argument that the applicant's sisters would not be in a position to support him upon return. I note it has been provided in addressing the applicant's changed vulnerabilities and circumstances since the decision was made but no submissions have been made going to s.473DD. The report provides only general information about the dynamics of family and gender roles in Afghan culture and I do not consider it reliably indicative of how his family would act towards him if he were to return. It is also undated, with the one external reference provided relating to statistics from 2010. I am not satisfied that the information could not have been provided before the delegate's decision was made and nor am I satisfied that it is credible personal information in the relevant sense. I am also not satisfied there are any exceptional circumstances to justify considering this new information. I have not had regard to it.

---

5 AAN, "Taleban Attacks on Khas Uruzgan, Jaghori and Malestan (I): A new and violent push into Hazara areas", 28 November 2018; and AAN, "Taleban Attacks on Khas Uruzgan, Jaghori and Malestan (II): A new and violent push into Hazara areas", 28 November 2018, 29 November 2018

6 For clarity, I include in this bundle the Long War Journal interactive map, noting the '2020 Mapbox' mark on the screenshot provided.

17. Also, to support their arguments regarding family support, the submission refers to a decision made by the Migration Review Tribunal in 2008, the applicant in which has been de-identified, but which the representative believes was Hazara. The decision predates the delegate's decision in this case by almost 10 years and while it may contain credible personal information relating to the applicant in that case, I am not persuaded it may have affected consideration of this applicant's case. Nor, given the decision relates to an entirely different applicant and their circumstances, am I satisfied there are exceptional circumstances to justify considering it.
18. In the same submission, the representative refers to a 2014 Country of Origin Research and Information (CORI) thematic report, "*Afghanistan; Blood Feuds*" which is also new information. It predates the delegate's decision and even the applicant's visa application and is general information, not credible personal information in the relevant sense. I am not satisfied that s.473DD(b)(i) or (ii) is satisfied. Nor do I consider there are exceptional circumstances to justify considering this report. I have not had regard to it.

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

---

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

- He is a citizen of Afghanistan and a Hazara, Shi'a Muslim who originates from Jaghori district in Ghazni Province.
- He never attended school. He and his family lived and worked on their ancestral farm, which shared a [natural feature] with their Pashtun neighbours and was close to [a] Taliban base. Their neighbours were Taliban members too and in 1997, the applicant's family fought with these neighbours over [natural resources]. When the Taliban came to power that year, his neighbour 'AK' became their leader for [the local Village 1] and he his family attacked the applicant's house with a bazooka, killing his parents. The applicant's other family members were at his uncle's house at the time, and he managed to escape and went straight to Pakistan with the help of his friend, a driver. He could not stay because he had been involved in the [disputes over natural resources] and he feared being targeted by the neighbours.
- Taliban across the country have his photograph. Over the following four years, his friend 'JA' (a transport driver between Jaghori and the Pakistan border) was stopped many times at different checkpoints by Taliban who were trying to match passengers against a photo of the applicant.
- He has never lived in Afghanistan again, instead residing in Pakistan and Iran.
- He fears that if he returns to Afghanistan he will be targeted and harmed by the Taliban because of his Shi'a faith, Hazara ethnicity, his previous disputes with Taliban leaders and his residence in Australia.

### **Refugee assessment**

---

20. 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

21. 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.
22. The applicant has provided a biographical narrative and documentary evidence to support his identity but there are some anomalies. For example: while he states he was born in [Village 2] in [Area 1] of Jaghori district, his Taskera refers to [Village 3]; and while his claimed family name is shown on his marriage deed, it does not appear on his Taskera. There are also variances in his accounts as to whether he was in Pakistan in 1996 (as he indicated in his Entry interview when he stated he was married in Pakistan that year), or only entered for the first time in around 1997 or 1998 (which is otherwise peppered throughout the review material). However, noting these matters relate to events which occurred over 25 years ago, that the applicant has consistently complained of memory difficulties and uncertainty around dates, and noting the applicant is also uneducated with low literacy, I am not concerned with these variances. I also consider the applicant has given a plausible explanation regarding his family name and that there is likely a plausible explanation regarding his birth village. The applicant has otherwise consistently claimed to be a Hazara, Shi’a Muslim who left his home in Jaghori, Afghanistan after the Taliban came to power. I accept this to be the case. Absent any evidence to the contrary and because I found his evidence on the matter to be convincing, I also accept he lived illegally in Pakistan, and Iran since that time and does not have a right to re-enter or reside in those countries.
23. I find that Afghanistan is the applicant’s country of nationality and his receiving country for the purpose of this review. And while his social media accounts suggest he may have friends in Kabul, given his other evidence, I accept he has no meaningful connections there and that his strongest ties are in Jaghori district, where at least one of his sisters still resides and his family still own land. I find Jaghori is the place to which he would return.
24. I accept the applicant’s claim that his village, [Village 2] (or ‘[alternative spelling]’) is close to [the] provincial border. Although there is no specific information before me about Jaghori in the 1990s, about who the appointed Taliban leaders were in the area, or about [Village 1] where the applicant claims a Taliban base was located, reporting from the EUAA (formerly EASO<sup>7</sup>) does indicate that [the area referred to] is located along the ‘conservative Pashtun belt’ and has a historical significance for the Taliban. The mujahideen movement mainly infiltrated Afghanistan from Pakistan through Zabul province in the 1980s, and the Taliban started their

---

<sup>7</sup> In January 2022, EASO was transformed into the now European Union Agency for Asylum or ‘EUAA’)

battle over the control of the country in the 1990s from Zabul.<sup>8</sup> On this basis I am prepared to accept there was a Taliban base in proximity to his area. I am prepared to accept too, that the applicant's family had a dispute with their Pashtun neighbours over the use of shared resources and that on occasion, the dispute became physical. The applicant has consistently referred to this dispute since his Entry interview in 2013 and it is plausible when considered with country.<sup>9</sup>

25. However, the applicant's evidence about the attack on his house, his immediate escape to Pakistan, estrangement from his sisters and about the Taliban showing his photo around in search of him has been problematic. There are some apparent discrepancies between his written application and the TPV interview regarding: the size of the neighbours' group that attacked his house (15, or seven or eight of the 15 neighbours), whether he was present or already running away when they fired on the house and whether or not the Taliban subsequently attacked and tortured his neighbours.
26. I have considered whether these issues could possibly be explained by misunderstandings or miscommunications during the applicant's interviews or in the preparation of his application - particularly having regard to his low literacy and education, and his documented concentration and memory issues. For instance, I find curious that the applicant made two separate but related references to there being 15 people. I have considered too whether it is possible that the applicant both heard the group coming and fled but was still close enough to see the house attacked (i.e., that both versions may in fact be true), and I am mindful that the applicant was non-specific about when his neighbours were tortured so his responses may not actually be inconsistent. It is also notable that he raised these claims - about the [dispute over natural resources] with Pashtun neighbours and fleeing the country with the help of a driver after the Taliban took power and attacked his house and killed his parents - early, in his Entry interview in 2013, and has maintained them ever since.
27. Nevertheless, the variations do give me pause. I am concerned that he would not, by the time he was interviewed in 2017, have had a clearer idea about whether other neighbours were attacked around the same time. The applicant's claim about his fleeing to Pakistan that day and not having contact with his sisters again is also difficult to accept - I have concerns about the plausibility of his escaping unharmed and finding his driver friend to immediately take him on the two day drive to Pakistan without even apparently checking in with his family, and I am also concerned that - as the delegate raised with the applicant- he appears to have made money transfers to his sisters and family since he has been in Australia, undermining his claim that he lost contact with them. I also have concerns with the plausibility that the Taliban were showing his photo around in search of him. I found his suggestions at interview that the Taliban must have killed his parents and taken his photo from the house (which, as the delegate pointed out he had claimed exploded and burned under their attack) or that they 'somehow' found it from somewhere else to be unconvincing. It is also difficult to accept they would put so much effort into searching for him in this way when there is no suggestion they placed any pressure on his family who remained in the area to provide his location, and they allowed his uncle to continue farming the family land. The applicant claims his uncle had made a deal with the Pashtuns and did not resist against or try to stand up to them like he had, but even so, I have difficulty accepting that in the circumstances of the dispute, that the family or the Taliban would not have claimed the land themselves, given the history of the dispute and the information before me about the Taliban's treatment of Hazaras in the subsequent few years. Overall, accepted the applicant's family fought with the neighbours from time to time,

---

8 EASO, "EASO Country of Origin Information Report: Afghanistan – Security Situation", June 2019

9 EUAA, "Country Guidance: Afghanistan (April 2022)", 20 April 2022, 20220421101054



on the information before me, his claims in respect of the attack and the circumstances of his parents' death and his departure from Afghanistan, his estrangement from his sisters and the Taliban's search for him are unpersuasive.

28. I accept the applicant is of Hazara ethnicity and is a Shi'a Muslim and that he is also, therefore, a member of a minority ethnic and religious group in Afghanistan. Country information indicates that most Hazaras are Shi'a Muslims and have distinct Asiatic features, which make them visually distinguishable from other ethnic groups in Afghanistan.<sup>10</sup> I am satisfied the applicant would be recognisable as a Hazara and that his religion would also be assumed. I accept he genuinely fears he will be harmed because of his ethnicity and religion, namely by the Taliban, although the threat of harm against Hazara Shi'as from other militant groups such as Islamic State of Khorasan Province (ISKP) also arises on the material before me and was considered by the delegate.
29. Since the applicant applied for protection, and since the delegate made their decision, there have been radical changes in country situation in Afghanistan. Having been ousted from power and fought a bitter insurgency for the last twenty years, the Taliban regained control of the applicant's province (Ghazni) in July 2021, and returned to power nationally in August, re-establishing the Islamic Emirate of Afghanistan.<sup>11</sup> While other militant groups remain active in the country, including the anti-Shi'a ISKP, there is only a weak organised resistance against the Taliban regime and it has now been in power around nine months.<sup>12</sup> It is widely regarded to have effective control over the entire country and there are no indications that this will change in the reasonably foreseeable future.
30. Upon assuming power last year, the Taliban sought to reassure Afghans that they would be inclusive towards the country's ethnic and religious minorities.<sup>13</sup> However, their return to power has been met with great fear by the Hazara community who view their promises of inclusivity and amnesty with scepticism, as propaganda or attempts at public relations.<sup>14</sup> Many Hazaras' memory of repression and hardship under the previous Taliban rule (1996-2001) is still raw. They were specifically targeted, including through several massacres, the worst in 1998 when at least 2000 were killed in Mazar-e-Sharif.<sup>15</sup> Many Hazaras fled the country to escape Taliban oppression.<sup>16</sup>
31. Since the Taliban's fall in 2001, Hazaras have made significant social, political, and economic gains in Afghanistan. They continued to be underrepresented in senior government positions,

---

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

11 DFAT, "DFAT Thematic Report - Political and Security Developments in Afghanistan", 14 January 2022, 20220114091740; EASO, "Afghanistan: Country focus (January 2022)", European Asylum Support Office (EASO), 7 January 2022, 20220110085950; ACCORD, "Ecoi.net featured topic on Afghanistan: Overview of recent developments and key players in Afghanistan (7 April 2022)", 7 April 2022, 20220411094729

12 Abubakar Siddique, Gandhara (Czech Republic), "Taliban faces rising armed resistance from former government factions", 27 April 2022, 20220428103411

13 Danish Immigration Service, "Country of Origin Information (COI) Brief Report: Afghanistan – Recent Events", December 2021

14 DFAT, "DFAT Thematic Report - Political and Security Developments in Afghanistan", 14 January 2022, 20220114091740; UKHO, "Country Policy and Information Note – Afghanistan: Fear of the Taliban (April 2022)", 29 April 2022, 20220502130414

15 DFAT, "DFAT Thematic Report - Political and Security Developments in Afghanistan", 14 January 2022, 20220114091740; European Union Agency for Asylum (EUAA), "Country Guidance: Afghanistan (April 2022)", 20 April 2022, 20220421101054; EASO, "Afghanistan: Country focus (January 2022)", European Asylum Support Office (EASO), 7 January 2022, 20220110085950

16 DFAT, "DFAT Thematic Report - Political and Security Developments in Afghanistan", 14 January 2022, 20220114091740; European Union Agency for Asylum (EUAA), "Country Guidance: Afghanistan (April 2022)", 20 April 2022, 20220421101054; EASO, "Afghanistan: Country focus (January 2022)", European Asylum Support Office (EASO), 7 January 2022, 20220110085950

but were otherwise active in the Afghan community, particularly in politics, education and civil society. However, DFAT speculated in 2019 that the sustainability of Hazaras' progress was in question due to insurgency operations of the Taliban and other groups<sup>17</sup> and the information before me covering the last five years contains isolated incidents of reported Taliban targeting against Hazaras, mostly in rural areas.<sup>18</sup>

32. Since 2015/16, many Hazara Shi'a families have also been devastated by an uptick in targeted complex mass-casualty attacks, mostly, it appears, at the hands of ISKP, who, since the Taliban's takeover, have conducted further attacks and vowed to continue their targeting of ordinary Shi'as.<sup>19</sup> Attacks of this kind have mostly occurred in Kabul and other major centres. DFAT assesses that Shi'a face a high risk of being targeted by ISKP and other militant groups on the basis of their religious affiliation when assembling in large and identifiable groups, such as during demonstrations or when attending mosques during major religious festivals, and that this risk increases for those living in Shi'a majority or ethnic Hazara neighbourhoods in major cities. Since early 2021 however, there have also been numerous attacks on public transport mini-vans or passenger vehicles which are largely favoured by young Hazaras in Kabul, with 9 occurring between January and June 2021, before the Taliban's takeover and at least six afterwards. Again, most were claimed by ISKP.
33. The Taliban is also sometimes among those accused of being responsible for attacks against Shi'as, but they have consistently denied any involvement. As noted above, since taking power nine months ago, they have promised to be inclusive, and they have not instigated any official adverse policies against Hazaras or Shi'as. They have allowed them to perform their Shi'a religious ceremonies and vowed to protect the Hazara community, providing security at some Shi'a mosques and returning previously confiscated weapons to Hazaras to resume their own guard, as was permitted under the former Afghan regime.<sup>20</sup> They also described the (largely Shi'a) victims of a recent ISKP attack in Kunduz as having been martyred, indicating possible support for Hazara they have otherwise ordinarily derided as 'infidels' incapable of martyrdom.<sup>21</sup>
34. DFAT's view is that while the Taliban may be attempting to disrupt ISKP and prevent its attacks on Hazaras, this, along with the Taliban's professed amnesty, does not indicate that it has put aside its historical antipathy towards Hazaras.<sup>22</sup> This comes alongside serious questions being raised about the Taliban's drive to protect Hazaras and Shi'as from ISKP. The Taliban is coming under criticism for what the Afghan Analysts Network has described as its 'tepid' response to the ISKP claimed attacks in Kabul, failing to acknowledge and take steps to address security concerns seriously, instead downplaying the strength of ISKP. It has been suggested that with attacks coming amid the Hazara community's diminishing representation in the government leadership and security institutions, the Hazara community has been left vulnerable and open to attacks. And whereas DFAT has warned of the risks being highest for those assembling in large groups for religious events or demonstrations, the increase on attacks on other community-based institutions (sports, voting and community centres in West Kabul) and the spate of passenger vehicle attacks over the past year is a worrying shifting development. The

---

17 EASO, "Afghanistan: Country focus (January 2022)", January 2022, 20220110085950; DFAT, "DFAT Thematic Report - Political and Security Developments in Afghanistan", 14 January 2022, 20220114091740; DFAT, "Country Information Report: Afghanistan" 27 June 2019, 20190627113333

18 EASO, "Afghanistan: Country focus (January 2022)", January 2022, 20220110085950; DFAT, "DFAT Thematic Report - Political and Security Developments in Afghanistan", 14 January 2022, 20220114091740; DFAT, "Country Information Report: Afghanistan" 27 June 2019, 20190627113333

19 EASO, "Afghanistan: Country focus (January 2022)", January 2022, 20220110085950

20 EASO, "Afghanistan: Country focus (January 2022)", January 2022, 20220110085950

21 DFAT, "DFAT Thematic Report - Political and Security Developments in Afghanistan", 14 January 2022, 20220114091740

22 DFAT, "DFAT Thematic Report - Political and Security Developments in Afghanistan", 14 January 2022, 20220114091740

Hazara community in Kabul feels abandoned (as, it is fair to say they also did by the former Afghan government) and is left to finding their own coping mechanisms and strategies to minimise the risks of going about their daily lives.<sup>23</sup>

35. The applicant's district of Jaghori is situated within the Hazarajat, a region previously considered safe while it was under the control of the Afghan government. However, following the takeover, the UN Secretary General's Special Representative to Afghanistan raised concerns about ISKP's expansion into nearly all provinces where they were described as "increasingly active". Several months on from this, there is little updated information available on Jaghori but nothing to indicate IKSP has carried out any attacks there.
36. There is some, albeit limited, evidence of Taliban targeting Hazaras after their takeover last year, including in Hazara districts and other places outside Kabul. A Shi'a cleric based in Kabul has described the situation in the applicant's district of Jaghori as disturbing, reporting that local Hazara Shi'as had been harassed and threatened by the "very extremist" local commander. The cleric voiced as has been echoed elsewhere, that even if the Taliban leadership had changed its vision with respect to Hazaras and Shi'as, there is concern about whether fighters and commanders on the ground would conform.<sup>24</sup> DFAT also noted the Taliban's command-control structure has been struggling to regulate the actions of tens of thousands of foot soldiers and their regional commanders.<sup>25</sup> Some incidents against Hazara individuals by Taliban on the ground were reported in 2021 in the Hazarajat and elsewhere, mostly in the lead-up to their takeover as they were mounting control over Hazara districts but also subsequently.<sup>26</sup> When the Taliban took control of the applicant's province in July 2021, they reportedly brutally killed at least nine Hazaras in Malistan district and since taking over in August, they summarily executed Hazaras in Daikundi who were former members of the security forces as well as two Hazara civilians. The Taliban also forcibly evicted thousands of Hazara families from their homes in central Afghanistan.<sup>27</sup>
37. There is some debate over the Taliban's motivations for the evictions. While the Taliban referred to them as 'property disputes' and claimed they were carried out in accordance with relevant court decisions, others have described them as ethnic-cleansing, score-settling, or easy grabs with little risk due to Hazaras being regarded as 'inferior'. Landowners were given little notice and no opportunity to present their legal claims to the land and some representatives who approached district officials requesting an investigation were arrested.<sup>28</sup> Mixed actions reportedly also followed – the Taliban retracted some eviction orders and promised to investigate some but otherwise claimed they were carried out in accordance with relevant court decisions.
38. DFAT assesses that while the level of mistreatment of Hazaras is currently less widespread than was predicted by some sources upon the fall of Kabul, Hazaras in Afghanistan face a high risk of

---

23 Afghan Analysts Network (AAN), "A Community Under Attack: How successive governments failed west Kabul and the Hazaras who live there", 17 January 2022, 20220117133414

24 UKHO, "Country Policy and Information Note – Afghanistan: Fear of the Taliban (April 2022)", 29 April 2022, 20220502130414

25 DFAT, "DFAT Thematic Report - Political and Security Developments in Afghanistan", 14 January 2022, 20220114091740

26 EUAA, "Country Guidance: Afghanistan (April 2022)", 20 April 2022, 20220421101054

27 DFAT, "DFAT Thematic Report - Political and Security Developments in Afghanistan", 14 January 2022, 20220114091740; USDOS, 'Country Reports on Human Rights Practices for 2021 - Afghanistan', 12 April 2022, 20220413104428; Afghan Analysts Network (AAN), "A Community Under Attack: How successive governments failed west Kabul and the Hazaras who live there", 17 January 2022, 20220117133414

28 EUAA, "Country Guidance: Afghanistan (April 2022)", 20 April 2022, 20220421101054; EASO, "Afghanistan: Country focus (January 2022)", January 2022, 20220110085950; DFAT 2022; ACCORD, "Ecoi.net featured topic on Afghanistan: Overview of recent developments and key players in Afghanistan (7 April 2022)", 7 April 2022, 20220411094729.

harassment and violence from both the Taliban and ISKP, on the basis of their ethnicity and sectarian affiliation.<sup>29</sup> It must be said that in the nine months the Taliban have been in power there is little evidence of their engaging in what might be characterised as systematic targeting against Hazaras and/or Shi'as and DFAT itself provides little evidence, only referring to the summary executions and evictions mentioned above, both of which, arguably had other motivations at play. Nevertheless, with the exodus of human rights agencies and other bodies which commonly reported on district level situations, there is a notable scarcity of publicly reported detail or alternative information - particularly about parts of the country outside the major centres, including the applicant's rural area – and noting that DFAT is a reliable, authoritative source declaring its own awareness of a strong pattern of relevant incidents, in the circumstances, I give their risk assessment considerable weight.

39. There is general uneasiness too, and I have my own concerns, about whether the Taliban will stand by their rhetoric against the targeting of Shi'as and of being an inclusive government. Scepticism about this is fuelled in part, by the Taliban's treatment of Hazaras under the previous regime and their historically anti-Shi'a rhetoric. It also arises from the incidents discussed above, and from the increasing number of examples in which the Taliban has incrementally broken promises of amnesty towards those associated with the former regime and to other minority groups, most notably women and girls.<sup>30</sup> It is difficult too, to accept the Taliban's statements of inclusivity given the lack of Hazara representation in their government, with only one Hazara appointed to the national ministry in what is a relatively minor position, and noting that any Hazara appointees at the central and provincial levels were reportedly part of the former Taliban insurgency.<sup>31</sup> There is also concern about the continued prominence of the Haqqani Network within the Taliban's new governance structure. The Haqqani Network has been one of most virulent anti-Shi'a factions within the wider Taliban movement. It has ties to Al Qaeda and has been linked to some of the recent ISKP bombings against Shi'as and now their factional leader, Sirajuddin Haqqani, has been appointed Minister of Interior, clearly signalling the powerful position that the faction maintains in the new Taliban regime.
40. As noted above, there are concerns about the attitudes of Taliban at the ground level. According to the EUAA, there is prejudice and negative attitudes against Hazaras on the part of the Taliban fighters, due the Hazara community's engagement in the former government and because they were perceived as more supportive of the West than other groups in Afghanistan. There is also the perception within conservative parts of Afghan society that the Hazara minority has embraced a culture out of step with the Taliban's definition of Islam, and there was some evidence of 'anti-Hazara' language among the general population even before the takeover.<sup>32</sup>
41. The UNHCR describes the Taliban's governance as being characterised by uncertainty, arbitrariness, and disregard for the rule of law. The formal justice system is not functioning. The Taliban has been ruling by decree and it is not yet clear whether the Taliban considers Afghanistan's legislative framework - including the Constitution within which Hazaras are a recognised ethnicity - to be in force.<sup>33</sup> The Taliban has confirmed that its governance would be

---

29 DFAT, "DFAT Thematic Report - Political and Security Developments in Afghanistan", 14 January 2022, 20220114091740

30 UNHCR, "UNHCR Guidance Note on the International Protection Needs of People Fleeing Afghanistan", 9 February 2022, 20220210080933

31 EUAA, "Country Guidance: Afghanistan (April 2022)", 20 April 2022, 20220421101054; DFAT, "DFAT Thematic Report - Political and Security Developments in Afghanistan", 14 January 2022, 20220114091740

32 EUAA, "Country Guidance: Afghanistan (April 2022)", 20 April 2022, 20220421101054; UKHO, "Country Policy and Information Note – Afghanistan: Fear of the Taliban (April 2022)", 29 April 2022, 20220502130414

33 UNHCR, "UNHCR Guidance Note on the International Protection Needs of People Fleeing Afghanistan", 9 February 2022, 20220210080933

based solely on Sunni Hanafi Shari'a jurisprudence, thereby indicating possible moves away from the 2009 Shia Personal Status Law which allowed Afghan courts to apply Shi'a jurisprudence in certain civil cases where all parties are Shia.<sup>34</sup> There are significant concerns about Hazaras facing discrimination regarding access to the legal system and resources, and some sources suggest this has already played out through some of the evictions discussed above.<sup>35</sup>

42. With the cessation of armed hostilities, there came a reduction in general violence and road travel – which previously carried risks for Hazara travellers – was made possible and relatively safe for the general population.<sup>36</sup> However, a countrywide trend analysis by Afghan Peace Watch (APW) and the Armed Conflict Location and Event Data Project (ACLED) suggests that the country situation may be starting to shift for the worse. APW and ACLED have tracked hundreds of incident reports that were in fact recorded between September 2021 and March 2022 and found that while violence overall has decreased from the height of armed clashes between former Afghan government forces and the Taliban between May and August 2021, there has been a marked shift in violence against women, journalists, and educators. There has also been a recent rise in violence against former Afghan government forces, at least six new opposition groups have emerged opposing Taliban rule and there has been intense infighting between various the Taliban factions themselves.<sup>37</sup> Experts from APW predict that *“...between Taliban infighting, the plethora of emerging armed opposition groups, and the ever-changing terrorist landscape, violence in Afghanistan is set to rise with the fast-approaching summer fighting season. As the Taliban fail to placate their rank and file, or deliver on basic governance, the façade of a strong and united Taliban that governed effectively from the shadows is likely to dissipate...”* As such, they predict the reduction in violence may be short lived. Relevantly, there are fears that with a rise in general insecurity, there may be more confrontations at the local level and armed checkpoints. DFAT has previously reported that Hazaras had faced greater risks than other travellers and that once stopped, Hazaras were more likely to be selected for kidnapping or violence than other ethnic groups.<sup>38</sup>
43. The applicant's representative has also made submissions about factors – additional to his ethno-religious profile - that may elevate the risks that might otherwise be faced by someone of this profile if they were to interact in with the Taliban in any capacity. Of note, the applicant would be returning after a long absence from the country in Pakistan and Australia (a western country) as a Hazara Shi'a with memory problems, mental health issues and apraxia or motor-speech disorder resulting from his stroke in 2018. Submissions have also been made about his ability to seek medical treatment for these, the other physical issues he continues suffer from his stroke and his heart condition.
44. Information before me indicates that while the former Afghan government was in power, returnee asylum seekers were generally not targeted merely for their absence or having spent time in the west. However, the EUAA has recently noted that men returning from western countries can be regarded with suspicion and may face stigmatisation or rejection.<sup>39</sup> Shortly after their takeover, on 31 August 2021, a Taliban spokesman also indicated they would accept failed Afghan asylum seekers but that they would be taken to court and the court would decide

---

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

35 Danish Immigration Service, “Country of Origin Information (COI) Brief Report: Afghanistan – Recent Events”, December 2021

36 DFAT, “DFAT Thematic Report - Political and Security Developments in Afghanistan”, 14 January 2022, 20220114091740

37 The Diplomat, “As the World Looks Away, Violence Is on the Rise Again in Afghanistan”, 11 May 2022

38 DFAT, “DFAT Country Information Report - Afghanistan September 2015”, 18 September 2015, CISEC96CF13366

39 EUAA, “Country Guidance: Afghanistan (April 2022)”, 20 April 2022, 20220421101054

what to do with them.<sup>40</sup> It is unclear what the charges may be or what sentence may be imposed but the Taliban have been clear about required adherence to Shari'a law. To date there is limited information concerning the situation of returnees or those perceived as 'Westernised' following the Taliban's takeover; there are no clear examples detailed in the material before me and nor is it clear whether this is due to a lack of returnees returning at all, a lack of incidents, or lack of reporting of any incidents. There are also no clear examples about how the new Taliban regime is treating persons with disabilities.

45. However, at a minimum, I accept that as the Taliban are now the ruling government and have control of the international airport, the applicant's status as a returnee may be known to them on his return. I accept applicant may have difficulty communicating with strangers including Taliban officials at the entry point on return, or checkpoints on his return journey to Jaghori, and that this, coupled with his ethno-religious identity, his long-term absence and not being accustomed to the norms and expectations of the Taliban, or modern-day Afghanistan, may lead him to be regarded suspiciously. Further, given the concerns raised by the representative and international community about the reduced access to healthcare and mental healthcare in regional areas and the under-staffed, under-equipped health facilities across the country, and the possible closure of some centres<sup>41</sup>, I accept the applicant may from time to time be required to travel outside his local area for treatment and medication including to places like Kabul, resulting in an elevated risk than he might otherwise face in the confines of Jaghori.
46. The UNHCR advises that conditions in Afghanistan remain highly unpredictable, with widespread concerns about targeted violence and human rights violations, and that no Afghans should be returned at this point in time.<sup>42</sup> Clearly, the situation in Afghanistan under the new Taliban regime is complex and still unfolding. I give weight to the mounting concerns among international observers, which I also share, about the Taliban winding back rights and freedoms and renegeing on their promises of protections and inclusivity for minority groups. I give weight to UNHCR's advice about the volatility of the situation and the arbitrariness undermining the rule of law, to DFAT's advice about the risks facing Hazaras and Shi'as from the Taliban and ISKP, and my own concerns about ongoing ISKP targeting and the Taliban's ongoing ability and willingness to protect against ISKP attacks - particularly given their background of fragmented factions and the rising insurgency against them. I also weigh here my concerns about the applicant's time abroad and personal challenges leading him to be regarded suspiciously and that the little information on returnees following the Taliban's takeover indicates they may be treated adversely.
47. Weighing all the above together, I consider that if the applicant were to be returned to Afghanistan in the reasonably foreseeable future, the chance that he would come to the adverse attention of the Taliban or be in an area with an ISKP is not remote. And in these circumstances, I am satisfied he would face a real chance of suffering serious harm in the form of significant physical harassment or ill-treatment and/or a threat to his life or liberty. I am satisfied this harm would amount to systematic and discriminatory conduct carried out by the Taliban or ISKP for the essential and significant reasons of his Hazara ethnicity and Shi'a religion and an imputed political opinion arising from his return from the west. As I am satisfied the applicant would face harm arising from his ethnicity and religion and return from the west, I am satisfied there are no reasonable steps the applicant could take so as to modify his behaviour so as to avoid the real chance of persecution. Given the harm would be inflicted by

---

40 Reuters, "Taliban would take back Europe's Afghan deportees to face courts, says spokesman", 31 August 2021

41 UK Home Office, "Country Policy and Information Note – Afghanistan – Medical treatment and healthcare", October 2021, 20211103090000

42 UNHCR, "UNHCR Guidance Note on the International Protection Needs of People Fleeing Afghanistan", 9 February 2022, 20220210080933

the Taliban who are now the ruling authorities in effective control of all of Afghanistan including the Kabul international airport where he would be initially returned, his district of Jaghori and the country-wide road networks, I find that effective protection measures are not available to the applicant and that the real chance of harm relates to all areas of Afghanistan.

48. For the above reasons I am satisfied that the applicant has a well-founded fear of persecution.

#### **Refugee: conclusion**

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

#### **Decision**

---

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

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

## Applicable law

---

### **Migration Act 1958**

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

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

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

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

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

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



...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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