



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA22/10284

Date and time of decision: 7 June 2022 14:50:00

M Currie, Reviewer

Decision

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

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be an Afghan citizen of Sayed Hazara ethnicity and an adherent of the Shia faith. He arrived in Australia in May 2013 and lodged an application for a Temporary Protection Visa (TPV) in December 2016. In May 2017, 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 25 May 2017, the applicant's matter was referred to the Immigration Assessment Authority (IAA).
2. An IAA reviewer affirmed the delegate's decision on 6 February 2018. However, in July 2020, this decision was quashed by the Federal Circuit Court of Australia (FCCA), which determined the IAA had fallen into jurisdictional error and the matter was referred back to the IAA for reconsideration.
3. In September 2020, a second IAA reviewer considered the applicant's case, and again, affirmed the delegate's decision. In February 2022, this decision was quashed by the Federal Circuit & Family Court of Australia (FCFCOA) which found that the second IAA reviewer had also fallen into jurisdictional error. The FCFCOA remitted the matter back to the IAA for reconsideration of the applicant's claims for protection.
4. This is a *de novo* decision; 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

5. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
6. Due to the circumstances outlined above, this applicant's claims for protection have been under consideration over a period of more than six years. This extended time frame, combined with the IAA's multiple reviews of this case, have led to a large volume of correspondence between the applicant and the IAA. Much of that correspondence was of an administrative nature and does not concern my consideration of her claims for protection; however, in the years since the delegate first decided her case, this applicant has also submitted a large volume of case related material to the IAA. This includes various submissions, written statements, personal documents and a large volume of country information said to be relevant to the consideration of his claims for protection. Naturally, some of this material related to claims and issues that the applicant had advanced before the delegate. To the extent that this material is not new information, I have had regard to it. However, most of the case related materials provided to the IAA over the years relates to issues and claims which were not before the delegate. As a consequence, much of this material is new information under s.473DD of the act.
7. Broadly speaking, the materials which have been provided to the IAA were provided in three separate tranches. The first tranche was provided to the IAA in 2017, after the date of the s.65 Decision, but before the IAA made its first decision in relation to this applicant's case. The second tranche was provided to the IAA in 2020, after the first IAA decision had been quashed by the FCCA, and prior to the date the second IAA decision was made. Finally, the third tranche was provided to the IAA in 2022, after the FCFCOA quashed the second IAA decision.

Summary of what has been provided to the IAA.

8. The first tranche of material sent to the IAA was sent on 16 June 2017. The first tranche contained: (a) a Submission to the IAA (the 2017 Submission); (b) a New York Times article published on 1 March 2017; (c) a Pajhwok Afghan News article published on 16 March 2017; (d) a report published by the United Nations Assistance Mission in Afghanistan (UNAMA) relating to civilian casualties in Afghanistan which was published on 25 April 2017; (e) a 2017 report by the Afghanistan Independent Human Rights Commission; (f) an article published by the Afghan Analysts Network (AAN) on 4 June 2017; (g) an online biography relating to an Afghan man was published at an unknown time; (h) an article published by The Independent newspaper in 2017; (i) an article published by Tolo News on 1 June 2017; (j) a second article published by the New York Times on 31 March 2017; (k) an article published by The Guardian newspaper on 21 May 2017; (l) an article published by Bloomberg on 6 June 2017; (m) an article published by Radio Free Europe on 6 June 2017; (n) a second article published by Tolo News on 5 March 2017; (o) a report published by the Jamestown Foundation on 15 December 2016; (p) an article published by Deutsche Welle on 2 June 2017; (q) a second article published by the AAN on 19 May 2017; (r) a third article published by Tolo News on 1 June 2017; (s) a third article published by the New York Times on 2 June 2017; (t) a second casualty report published by UNAMA on 27 April 2017; (u) a refugee decision, published by the Refugee Review Tribunal (RRT) in 2013; (v) a fourth article published by Tolo News on 3 June 2017; (w) a Smart Traveller Report relating to Afghanistan, published by the Department of Foreign Affairs and Trade (DFAT) on 13 June 2017; (x) a third article published by the AAN on 15 August 2016; (y) an article published by Al Jazeera on 22 April 2017; and, (z) a report published by the US State Department relating to human rights practices in Afghanistan published on 3 March 2017.
9. On 18 July 2017, two further documents were provided to the IAA. These were: (aa) a 157-page Housing Profile of Afghanistan, published by the Afghan Ministry of Urban Development and Housing in May 2017; and (bb) a two-page extract from the same housing report.
10. Except for the 2017 Submission, all of the documents provided to the IAA in 2017 were country information reports¹. None of these documents was before the delegate and so all of these country information reports are new information under s.473DD of the Act.
11. The applicant's 2017 Submission to the IAA argues that the delegates findings in relation to this applicant are wrong; that the delegate's conclusions relied upon out-of-date information; that the Taliban is growing stronger in Afghanistan; that persons of Hazara ethnicity continue to be targeted based upon their ethnicity and their faith; that no part of Afghanistan is safe for persons of his profile and that the applicant would not be safe in Afghanistan. I have considered the arguments in the 2017 Submission. Throughout the submission, a large volume of new information was cited, from the many country information reports provided in the first tranche.
12. The second tranche of material was sent to the IAA on 15 July 2020, after the first IAA decision had been quashed by the FCCA. The second tranche contained: (cc) another submission to the IAA (the 2020 Submission); (dd) a document titled '*Table of Documents*' which outlined what documents were provided to the IAA in the second tranche; (ee) a submission about the relevance of new information (the new information Submission); (ff) a document in the Portable Document Format (PDF) titled '*Country information – Part 1*' which when examined was found to contain 370 pages of new country information reports, which had been compiled into single PDF; (gg) a PDF Document titled '*Country Information – Part 2*', which was found to contain 269 pages of new country information reports; (hh) a PDF Document titled '*Country Information –*

¹ Documents (b) to (bb)

Part 3, which was found to contain 136 pages of new country information; (ii) a PDF Document titled '*Country Information – Part 4*', which was found to contain 151 pages of new country information; (jj) a PDF Document titled '*Country Information – Part 5*', which was found to contain 41 pages of new country information; (kk) a PDF Document titled '*Country Information – Part 6*', which was found to contain 18 pages of new country information; and, (ll) a PDF Document titled '*Country Information – Part 7*', which was found to contain 3 pages of new country information.

13. As in the first tranche, the second tranche consisted of submissions, and large amount of country information. None of the country information provided in the second tranche was before the delegate, it is all new information under s.473DD of the Act. The country information reports identified as parts 1-7, actually contained copies 17 separate country information reports which had been compiled into these PDF documents. Each of these reports was identified in the 'Table of Documents', and reasons for their submission had been provided in the 'New Information Submission'.
14. The applicant's 2020 Submission summarised the salient aspects of the applicant's profile as being his age, his separation from his wife, his status as a practicing Shia Muslim of mixed Hazara-Sayed ethnicity, and his lack of education. It argues that he fled Afghanistan in 203 in order to avoid persecution (from groups including the Taliban and Kuchi nomads) and that his work history is varied though predominantly manual, low skilled informal and that his time in Australia would lead to him being perceived as westernised upon return to Afghanistan. It was further argued that the applicant's home province of Maidan Wardak is unsafe, that road travel is unsafe, and that relocation to other parts of Afghanistan is unreasonable for this applicant. I have considered the arguments in the 2020 Submission.
15. The third tranche was provided to the IAA on 9 May 2022, after the second IAA decision had been quashed by the FCFCOA. It consisted of: (mm) another written submission (the 2022 Submission); (nn) a 91- page PDF document titled '*Bundle of Documents – Part 1*'; and (oo), a 371-page PDF document titled '*Bundle of Documents – Part 2*'. As with the PDF documents provided in the second tranche, both the PDFs titled '*Bundle of Documents*' contained multiple country information reports.
16. The 2022 Submission cites various country information to argue that the circumstances faced by this applicant have changed significantly since August 2021 when the Taliban defeated the Afghan national Government and took control of all of Afghanistan. The submission asserts that even though the war in Afghanistan has concluded, the country is still unsafe. Furthermore, persons of his profile (Shia Hazara) have a history of conflict with the Taliban, and that the risks faced by Shia Hazara preclude him returning safely to that country. I have considered the arguments in the 2022 Submission to the IAA. The 2022 Submission also extensively cites the new country information which was provided in both Part 1 and Part 2 of the 'Bundle of Documents'.
17. As is apparent from the foregoing summary, a large volume of new information and claims have been provided to the IAA within the three tranches. This material amounts to more than 1800 pages, the vast majority of this new information is country information. While assessing whether any of this material meets s.473DD, I have looked at all this new information as a whole. However, for the sake of convenience, when considering this material, I have started with the information that has been provided to the IAA in the third tranche as this is the most recently published information and is likely to be of most value in assessing the present conditions in Afghanistan.

The third tranche

18. I have summarised the applicant's 2022 written submission above. In support of these arguments, the applicant has provided two PDF documents, each of which consists of a number of separate reports which have been compiled into a single document². These documents are cited extensively in the 2022 Submission to the IAA. According to the 2022 written submission all of the new country information provided to the IAA in the third tranche postdates the delegate's decision, furthermore, it should be considered as it sheds light on the substantial and significant changes which have occurred in Afghanistan since the final departure of US troops in early 2021. I have considered these arguments. All of the new country information provided in the third tranche was published in 2021 or 2022, and so I am satisfied that it could not have been provided to the delegate prior to the date of the s.65 Decision and s.473DD(b)(i) is met for this information. The new country information provided in the third tranche is published by a range of reputable sources including DFAT, UNAMA, the UK Home Office, the United Nations Security Council, the Special Inspector General for Afghanistan Reconstruction, Reuters, the New York Times, the BBC and others. It relates to the change conditions in Afghanistan since the Taliban took control of the country. The information in these the documents is general country information about Afghanistan, not credible personal information and so I am not satisfied that s.473DD(b)(ii) is met for either of the two PDF documents. However, as argued in the applicant's 2022 Submission, conditions in Afghanistan have shifted dramatically in the last twelve months. The Taliban, long the main militant opposition group in Afghanistan defeated the Afghan Government in 2021, and since August 2021, took control of the entire country. While small pockets of resistance to the Taliban persisted for a short period following the takeover, this resistance has ended, and the Taliban are now considered to have full control of Afghanistan. As a consequence of these developments, the situation in Afghanistan is now substantially different from the situation which was considered by the delegate in the s.65 decision. The documents provided to the IAA in the third tranche were published after the Taliban takeover. They represent credible recent information about the changing conditions in that country. The material cited by the delegate in the s.65 decision is now at least five years old, and does not contain any information about the present conditions in Afghanistan. As a consequence of these factors, the third tranche of information is much more reliable and useful for assessing whether this applicant would face harm in Afghanistan now. I am satisfied that there are exceptional circumstances to justify considering the new country information provided in the third tranche, and so s.473DD(a) is met. As both limbs of s.473DD are met for the country information provided in the third tranche, I have considered both PDF documents³.

The first & Second Tranches

19. As noted in my summary above, the first and second tranches contained a large volume of country information which was not before the delegate. As it was not before the delegate, this country information is new information under s.473DD of the Act. This information was provided to the IAA in 2017, and in 2020 respectively, and is now, somewhat dated (especially the material from 2017). At the time these first and second tranches were provided to the IAA they represented, what was then, recent information about conditions in Afghanistan, and in submissions the applicant had argued that this material should be considered on that basis. However, as I have already summarised, conditions in Afghanistan have changed substantially since that time. As a consequence of these changes, the country information provided to the IAA in the first and second tranches no longer reflects an accurate picture of conditions in that country or the circumstances to which the applicant would return. Furthermore, I have already

² Documents: (nn) titled 'Bundle of Documents Part 1' and (oo) titled 'Bundle of Documents Part 2'.

³ Documents: (nn) titled 'Bundle of Documents Part 1' and (oo) titled 'Bundle of Documents Part 2'.

accepted a large volume of much more recent information which was provided in the third tranche. In these circumstances, I am not satisfied that any of the country information provided to the IAA by the applicant in the first⁴ (2017) or the second⁵ (2020) tranches is of any further relevance to my consideration of his claims. Having found that this information is not relevant, I will not consider any of this country information in this decision.

20. Given the passage of time since the date of the delegate's decision, I have also decided to obtain country information about Afghanistan published by the United Nations High Commissioner for Refugees (UNHCR)⁶. This report contains relevant, credible and authoritative country information from a reliable source about conditions in that country. This report is not about the applicant specifically, rather it relates to a class of persons of which the applicant claims to be a member. The report was published more recently than the information cited by the delegate, and so this information is more up to date and provides a more accurate picture of conditions in Afghanistan. I am satisfied that there are exceptional circumstances to justify considering this information.

Applicant's claims for protection

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

- He is an Afghan citizen of Sayed (Hazara) ethnicity and an adherent of the Shia faith. He was born in [year] in the Behsud District, of Maidan Wardak Province, Afghanistan. As a child he lived in Behsud with his family.
- When he was a small child, his family home was attacked by Kuchi nomads. During the attack one of his brothers was killed. Following the attack, he and his family departed Afghanistan and went to live in Iran. He departed Afghanistan around the age of [age range].
- In Iran, the applicant completed some informal schooling, and afterwards, worked in several jobs including as a labourer and as [an occupation 1]. He married and has children.
- Around 2008 or 2009, the applicant travelled to [other countries]. He lived in [Country 1] for around two years, before travelling onwards to [Country 2]. He was granted temporary residency in [Country 2], and he lived there until early 2012. While in [Country 2], he obtained an Afghan Passport from the Embassy of Afghanistan. In early 2012, he returned to Iran on the Afghan Passport in order to find his wife and children with whom he had lost contact. He could not find his family.
- Upon his return to Iran, he was detained by the Iranian authorities, and subsequently deported to Afghanistan. This was the first time he had returned to Afghanistan since his departure as a small child. While in Afghanistan he lived in Kabul. He worked as [vendor], purchasing [product 1] in Maidan Wardak, and selling in Kabul. While he lived in Afghanistan, he never returned to his home village in Behsud district.
- On one occasion, while he was out of Kabul obtaining [product 1] with a friend. They were stopped by the Taliban. They stole his [product 1] and beat him and his friend severely. The Taliban told him that he (a Shia) was not allowed to work in that occupation. Afterwards he was very frightened.

⁴ Documents: (b) – (bb).

⁵ Documents: (ff) – (ll).

⁶ United Nations High Commissioner for Refugees (UNHCR), 'UNHCR Guidance Note on the International Protection Needs of People Fleeing Afghanistan', 9 February 2022, 20220210080933

- Kabul was not safe for Hazara Shia. One day in Kabul, the applicant witnessed the Taliban kill a small child. He participated in the burial of six Hazara who had been tortured and killed by the Taliban. He has nightmares about this. He has step brothers who returned to Afghanistan and faced many problems, though he does not know the details.
- The Taliban are against Hazara Shia. He fears that he would not be safe in Afghanistan due to his Hazara ethnicity and his Shia faith.
- He fears further conflict with Kuchi's in Afghanistan, who have historical conflicts with his family and with Shia.
- The applicant does not have any relatives in Afghanistan, and no support network. He does not know anybody in that country and would not be able to rely on anybody for support.
- He believes his time spent in western countries would lead to him being perceived as westernised in Afghanistan.

Factual findings

22. In his Protection Visa Application, this applicant asserts that he is a citizen of Afghanistan. However, he has not provided any original Afghan documentation to support his claimed citizenship. He says he has never had an Afghan Taskira (primary form of identity documentation used in Afghanistan⁷). The applicant says he was able to obtain an Afghan Passport in [Country 2] despite not having lived in Afghanistan for around 30 years because he was interviewed by an embassy official who accepted he was an Afghan. Though he has asserted that he previously had an Afghan Passport, he no longer has this document and has not provided a copy. Since being in Australia, the applicant has obtained a letter from the Afghan Embassy in Canberra, dated [in] October 2016 which indicates he is an Afghan citizen from Maidan Wardak Province and that he was born in [year].
23. I have some concerns about the applicant's claimed history. I note his Protection Visa Application indicate he was born in [year], and that he departed Afghanistan when he was around [age range]. That would mean he departed Afghanistan around 1981 or 1982. However, a written document provided to the delegate during his Protection Visa Interview, the applicant indicated he departed Afghanistan in 1986, while in another document provided at the same time, he indicated he was living in Behsud until around 1995. A departure in 1986 would mean he was around [older] and was still a young child. However, a departure in 1995, would mean he was [an adult].
24. These issues are of concern, since on his own evidence, this applicant provided false evidence to the Department throughout his primary visa assessment process. Specifically, he provided a range of false information about himself, his circumstances, and his family's history and whereabouts. In his Protection Visa Interview, he had claimed to have lost contact with his wife and children around 2009, when he departed Iran for [other countries]. However, during his Protection Visa Interview the delegate confronted the applicant with information about his family, specifically that his wife and children were living in Australia and that he had largely maintained contact with them throughout his life and knew they were in Australia. After he was confronted by the delegate, the applicant admitted that large portions of his account were untrue. However, he did not 'come clean' about these issues voluntarily, rather he only provided true and correct information about these issues after he was confronted by the delegate with

⁷ Document: (nn)

contrary information. To my mind, these circumstances suggest that the applicant would not have provided true information about these issues if he had not been confronted by the delegate.

25. During his interview, when asked why he had not provided true information to the Department the applicant merely stated that he *“could not talk about these things”* and largely blamed his wife for his decision to provide false information. He says that due to the long period he and his wife had lived apart, she had come to view their marriage as over, and wished to separate. He says that she threatened to divorce him and prevent him from seeing his children if he mentioned any of these issues during his primary visa assessment process. He says that though he wanted to tell the truth to the Department, he was prevented from doing so by the threat from his wife. I do not find this explanation to be convincing. As the delegate pointed out during the applicant’s Protection Visa Interview, he had provided false information about his family upon his arrival in Australia and consistently until the delegate confronted him.
26. These issues first coming to light during his 2017 Protection Visa Interview, over five years ago. Despite his case being considered by the IAA twice since that time (in 2018 and again 2020), his submissions have not provided any further explanations to the IAA about why he had provided false information to the Department.
27. These issues lead me to doubt that the applicant has been entirely forthcoming about his claims. In my view, there are other factors which cast doubt on the applicant and his reliability. I note for example that during his Entry Interview with the Department, which was conducted in June 2013, soon after his arrival in this country, the applicant claimed that the reason he left Afghanistan was because he had been attacked by unidentified Kuchi persons about one year earlier (i.e. 2012), he said that during this attack, he had been beaten. However, in the applicant’s 2016 Statement of Claims which accompanied his Protection Visa Application, he did not even mention this 2012 attack by Kuchi’s, nor did he provide any other details about this event, such as where this had occurred, or why it happened, or who was involved, and only made a general claim to have been *“beaten”* in the past. While the applicant’s Statement of Claims asserts that any differences between his Protection Visa Application and information he provided earlier may be attributed to errors of interpretation, or the limited time he had to answer questions in the past, in my view, his failure to provide further specific information about an incident that he had earlier identified as his principal reason for leaving Afghanistan is concerning. His failure to discuss this issue in his 2016 Statement of Claims has the effect of shifting his principal reason for departing Afghanistan.
28. The issues the applicant provided false information about were all issues about which the applicant had direct knowledge. They relate to him personally, or to his family. The applicant did not merely conceal true information from the delegate, he provided false information which he had invented. To my mind, all these factors indicate that the applicant provided false information deliberately. I conclude he did so to improve his chances of obtaining a Protection Visa. Overall, the applicant has not satisfied me that he has been forthcoming about his life and experiences. Given all of these factors, in my view, the applicant is not a witness of credit.
29. Notwithstanding my concerns about this applicant and his truthfulness. I am willing to accept that he was born in Afghanistan in [year] and that he is an Afghan national. Notwithstanding his long-term residence in Iran, [Country 1] and [Country 2], For the purposes of this decision, I find that Afghanistan is his receiving country.
30. When he first arrived in Australia, and in his Protection Visa Application, this applicant claimed he was of Hazara ethnicity. However, in his Protection Visa Interview the applicant described

himself as being a Shia Muslim of Sayed ethnicity. He said Sayed's were decedents of Mohammad. He said that Sayed Shia, and Hazara Shia were often conflated in Afghanistan, because the Sayed's were Shia, and often lived in Hazara communities. Country information before me indicates that indicates that the Hazara community of Afghanistan speaks the Hazaragi language, and I note that interviews in this country have always been conducted with this applicant in that language. He says he does not speak Pashtun. Though I have some residual concerns about this applicant and his identity, I accept he is a Muslim of the Shia faith, and that he is, a Sayed Hazara.

Kuchi Attack, death of applicant's brother

31. In the Statement of Claims which accompanied the applicant's Protection Visa Application, he claimed that when he was a child, his village in Afghanistan was attacked. He says that from conversations he has had with other, unspecified persons, he "*believes*" his brother was killed during this attack. He says that he personally does not recall details of this attack. During his Protection Visa Assessment, he did not provide any further information about this event, such as when it occurred, or who perpetrated the attack, or why the attack occurred. He has not provided any independent evidence supporting evidence for his claims about his brother's death. When he first arrived in Australia, he said that his brother had been killed when 'Kuchi' people had attacked his village. The applicant has not provided any further details about this attack, such as when it occurred, or why it happened or who specifically was involved. His claim about these events lacks detail. According to his Protection Visa Application, the applicant was born in [year] and he and his family left Afghanistan for Iran when he was around the age of [age range]. If the applicant's account is to be believed, these events must have occurred before his family left Afghanistan, over 40 years ago.
32. Even taking into account the applicant's claims that he has now become estranged from his father and wider family, the applicant's apparent lack of knowledge about what actually happened to his brother is surprising. While he says he has no contact with his family now, this is a relatively recent development in his life, having only arisen in the last decade. He is almost [age] years of age, and notwithstanding his current estrangement, he previously had a relationship with his family for well over 30 years. While he says he was a young child when this event happened, his account indicates that other members of the family know what had really happened to his brother. It seems doubtful that the applicant would not have learned to true circumstances of his brother's death from family during the roughly three decades he remained in contact with them. Overall, the applicant's account is unconvincing.
33. I have already discussed the applicant's revised claims and my assessment of his credibility. I am willing to accept that the applicant had a brother who died while he was young. However, he has not satisfied me that his account about the death of his brother is accurate or that Kuchi people are responsible for the death of his brother, or that they attacked his village when he was a child.

Taliban Incident

34. The applicant's central claim for protection is that he had a confrontation with the Taliban during the roughly nine-month period which he lived in Afghanistan in 2012. He says that this incident resulted in his being severely beaten by the Taliban, having his [product 1] stolen, and being warned that his occupation was not suitable for a Shia. In addition to the harm from the beating, he cites this incident as a reason why he could not return to Afghanistan or obtain safe work

there in future. He says that this event occurred around three months prior to his departure from Afghanistan

35. Given my earlier findings about this applicant, I have genuine concerns about this claim. He did not mention this issue when he first arrived in Australia, and his failure to mention, what is now his most significant claim, is troubling. The applicant has not provided any independent supporting evidence for this event. As noted above, the applicant claims that differences in his account are due to errors of translation, but I do not find that explanation to be persuasive. I consider his failure to mention this event when he arrived to be particularly telling.
36. Overall, the applicant has not satisfied me that his account of this event is truthful or that this event, or anything similar occurred in Afghanistan.

Refugee assessment

37. 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

38. 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.
39. I have found that Afghanistan is this applicant's receiving country. The applicant was born in Behsud Province of Maidan Wardak Province and lived there as a child. In his Protection Visa Interview the applicant indicated his family still owns land in Behsud. However, I note that when this applicant returned to Afghanistan in 2012, after being deported from Iran, he chose to live in Kabul, a location where he had no historic ties. I accept that if returned to Afghanistan now, he would return and reside in Kabul, as he did previously.

40. The applicant has argued that it is not safe for him to return to Afghanistan. He fears that he would face harm in that country due to his ethnicity and his religion. He says that the agents of harm would be Taliban militants, or nomadic Kuchi's. He also states that he would be unable to secure employment in Afghanistan, and that road travel is unsafe. He says the long period of time spent living in Western countries such as [Country 1], [Country 2] and Australia would lead to him being of interest to the Taliban in Afghanistan, and that he would be perceived to have pro-western views.
41. As I have indicated earlier, the situation in Afghanistan has altered significantly since the applicant's case was assessed by the delegate⁸. In early 2021 the United States announced it would withdraw all of its remaining forces from Afghanistan, and in response to the US withdrawal, the Taliban launched an offensive in May 2021. In the face of the offensive, the security forces of the then Government of Afghanistan collapsed or surrendered to the Taliban. By the end of August 2021, all remaining US forces had departed Afghanistan, and the Taliban had entered Kabul, overthrown the Afghan Government and assumed control of the country⁹. The Taliban has had effective control over all of Afghanistan since that time¹⁰. There is no organised national resistance to Taliban control by elements of the former regime and all major cities and regions in Afghanistan are under Taliban authority¹¹. To date, the Taliban have been in control of Afghanistan for around ten months, and it appears that the group will have largely uncontested rule over the country for the foreseeable future.
42. Persons of Hazara ethnicity have resided in Afghanistan for centuries. Traditionally the Hazara population lived in the central highlands of Afghanistan in a region known as the Hazarajat. Historically the Hazarajat was independent, but in the 19th century, the Pashtun ruler of Afghanistan sought to bring the region under his authority and launched a war against the Hazara, resulting in the death of large numbers of Hazara, and lasting enmity between the Hazara and the Pashtun communities. Tension between the groups was exacerbated by the rise of the predominately Pashtun Taliban in the 1990s, which led to further conflict with the Hazara population since ethnic Hazara, including the applicant, are mostly adherents of the Shia faith while the Taliban are strict adherents of the Sunni branch of Islam¹². The Hazara and Shia populations are strongly correlated and are often conflated in Afghanistan¹³. This religious divide leads to conflict with Sunni groups such as the Taliban, which tend to view the Hazara unfavourably¹⁴.
43. Population estimates for Afghanistan are said to be unreliable though a DFAT report provided by the applicant estimates a population of around 36 million¹⁵. Most sources indicate that Hazara constitute around 10% of the total Afghan population and are the third largest ethnic group in the country¹⁶. By this count, there are at least three and half million Hazara in Afghanistan. While the Hazarajat is the historic home of the Hazara, many Hazara have emigrated from that area. Kabul, the Capital city, is assessed to have a population of around 5 million persons, of whom

⁸ Documents: (nn) & (oo)

⁹ Documents: (nn) & (oo)

¹⁰ Documents: (nn) & (oo)

¹¹ Documents: (nn) & (oo)

¹² Documents: (oo)

¹³ Documents: (nn) & (oo)

¹⁴ Documents: (nn) & (oo)

¹⁵ Documents: (nn)

¹⁶ Documents: (nn)

around 40-50% are estimated to be Hazara (i.e. there are up to 2 million Hazara in Kabul). Hazara are said to be the most populous ethnic group in the city¹⁷.

44. Before the Taliban takeover, Hazaras had full political rights in Afghanistan, and there were numerous Hazara political parties¹⁸. Hazara were a recognised ethnicity in the Constitution of Afghanistan¹⁹. A 2009 Shia Personal Status Law recognised different practices on issues such as marriage, divorce and inheritance among the Shia community and special laws had been written to incorporate Shia Islamic practice in Afghanistan including Article 131 of the Constitution which provides that Afghanistan's courts shall apply Shi'a jurisprudence in certain civil cases where all parties are Shia²⁰. Country information provided by the applicant indicates that at present the Taliban is ruling Afghanistan by decree and it is unclear exactly what form the Taliban Government will assume in future. Publicly, the Taliban have promised to have an 'inclusive' Government, but to date, it is not clear what this means. Thus far, only a single Hazara has been appointed to any official position under the Taliban, and this was to a relatively minor post²¹. According to DFAT, most Taliban appointees are Pashtuns' who were formerly long-serving Taliban commanders with little relevant government experience²².
45. Hazaras are said to face marginalisation and ethnic discrimination is widespread at the community level in Afghanistan²³. The applicant has provided credible reports about the mistreatment and marginalisation of Hazara²⁴, although there is said to have been an improvement in the living standards for Hazara over the last two decades and Hazara are said to have made significant social and economic gains in Afghanistan during the two decades when the Taliban was out of power²⁵, such reporting preceded the Taliban takeover.
46. The applicant is a practising Shia Muslim. Shia Afghans are also said to face difficulties in Afghanistan. I have already noted the tensions that exist between the Shia minority and the Sunni militant groups. This tension has been manifested by attacks against Shia in Afghanistan including attacks which targeted religious and political gatherings; Shia religious buildings and celebrations; Shia schools and other buildings connected with the Shia faith; and, demonstrations conducted by Shia²⁶. Many Hazara Shia were killed during these attacks. Post-attack claims of responsibility indicate that the Islamic State is principally responsible for these attacks and identified Shia as specific targets²⁷. Islamic State takes a stronger anti-Shia view than the Taliban. Attacks on Shia in recent years has largely been confined to large cities, including Kabul, Mazar-e-Sharif and Herat²⁸. DFAT and others have suggested that Shia face a high risk of being targeted by Islamic State due to their religion, especially when gathering large cities in groups that are identifiably Shia, such as at religious gatherings, festivals or political demonstrations²⁹.
47. At present, there is still an Islamic State presence in the country, and the group maintains the capacity to conduct offensive operations. The Taliban is in conflict with Islamic State and have

¹⁷ Documents: (nn) & (oo)

¹⁸ Documents: (nn)

¹⁹ Documents: (nn) & (oo)

²⁰ Documents: (nn)

²¹ Documents: (nn)

²² Documents: (nn)

²³ Documents: (nn) & (oo)

²⁴ Documents: (nn) & (oo)

²⁵ Documents: (nn) & (oo)

²⁶ Documents: (nn) & (oo)

²⁷ Documents: (nn) & (oo)

²⁸ Documents: (nn) & (oo)

²⁹ Documents: (nn) & (oo)

vowed to expel the group from the country. Despite this, Islamic State have carried out several high-profile attacks in Afghanistan since August 2021. These attacks directly targeted members of the Shia faith³⁰. The group's operations have occurred in major cities such as Herat and Kabul³¹.

48. Since August 2021 when the Taliban secured control of Afghanistan, fighting has largely stopped across the country, there have been far fewer security incidents, and civilian casualties in Afghanistan have fallen significantly. The chances of a person being harmed as a result of conflict related violence have fallen substantially. Nevertheless, though the Taliban, has publicly granted an amnesty to former Government forces, and vowed that they would not seek reprisals on former enemies, there are credible reports that that some (usually senior) persons who were associated with the former regime have been rounded up, especially those with a background in security, intelligence or investigations³². Others at risk are also said to included journalists, human rights activists and those with links to foreign organisations. The applicant is not a journalist or a human rights activist, and does not have links to foreign organisations, or the former regime, or its security services, and so I am satisfied that he would not be of any present interest to the Taliban regime. Furthermore, before the Taliban returned to power and announced the amnesty for former opponents, they are credibly reported to have engaged in a wave of targeted assassinations against influential and prominent Afghans, including journalists, human rights activists, judicial workers, doctors and clerics³³.
49. However, over the period since they acquired power, the Taliban has backtracked on commitments they made about other issues, such as women rights and in relation to girl's education. These incremental changes have had the effect of winding back earlier promises; slowly, but steadily, making conditions for women and girls worse in Afghanistan. The Taliban's earlier commitments on these issues do not appear to have been genuine. In this context, it is notable that the Taliban has a history of difficult and confrontational relations with the Hazara community and there is a documented history of conducting mass attacks against the Hazara community in the past. Over 2000 Hazara were killed by the Taliban in a well-documented massacre in 1998³⁴ and the country information provided by the applicant documents that in the last 18 months, in areas where the Taliban has gained control there have been multiple incidents where persons of Hazara ethnicity have been killed extrajudicially³⁵.
50. In light of these issues, and the well documented past history of antagonism between Hazara and the Taliban, the Hazara community in Afghanistan are said to view the Taliban's promises of inclusive Government with scepticism³⁶. The country information provided by the applicant outlines what I consider to be numerous, legitimate concerns that have been voiced by Hazara. The Taliban steady imposition of stricter restrictions on other groups, such as women, and their clear willingness to breach their earlier commitments does not bode well for minority groups, especially those, like the Hazara Shia, that have faced decades of antagonism from the Taliban movement. Furthermore, the country information indicates that Taliban movement is divided between sometimes competing factions³⁷. At present one faction, the hardcore Haqqani Network, has a powerful position within the Taliban movement and its leader, Sirajuddin

³⁰ Documents: (nn) & (oo)

³¹ Documents: (nn) & (oo)

³² Documents: (nn) & (oo)

³³ Documents: (nn) & (oo)

³⁴ Documents: (nn) & (oo)

³⁵ Documents: (nn) & (oo)

³⁶ Documents: (nn) & (oo)

³⁷ Documents: (nn) & (oo)

Haqqani, has been appointed to the Interior Ministry³⁸. Historically, the Haqqani Network has been amongst the most virulent anti-Shia factions within the wider Taliban movement. The Haqqani Network has been designated as Terrorist organisation (unlike the remainder of the Taliban)³⁹ and the faction's apparent strength and influence within the wider movement at present is alarming.

51. Part of the country information has provided to the IAA is a report written by an Australian academic. In this report, the author opines that Hazara are not safe in Afghanistan and that the return of any Hazara asylum seeker to Afghanistan should be avoided, on the basis that events in Afghanistan are "extraordinarily fluid". Since the Taliban takeover, the UNHCR has recommended that, in the present circumstances, asylum seekers should not be returned to Afghanistan⁴⁰.
52. Overall, taking all the factors I have mentioned into account, I consider that there is substantial evidence before me about the mistreatment of persons with a Shia Hazara profile in Afghanistan by the Taliban and the Islamic State. I find that this applicant would face a real chance of serious harm in that country. This harm would involve systematic and discriminatory conduct amounting to persecution. I am also satisfied that the essential and significant reasons he would face this harm are his religious (Shia) and ethnic (Hazara) profile.
53. I am satisfied that these aspects of his profile are innate or immutable characteristics which he could not conceal, and that he could not take reasonable steps to modify his behaviour in order to avoid a real chance of harm for these reasons. Consequently, s.5J3 does not apply in this case. As the Taliban are now in control of all of Afghanistan, I am satisfied he would face a real chance of persecution in all areas of the country. For the same reasons, I am not satisfied that he could obtain effective protection from any party in Afghanistan.
54. As I have found the applicant has a well-founded fear of persecution, it is not necessary to consider his remaining claims for protection.

Refugee: conclusion

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

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*.

³⁸ Documents: (nn) & (oo)

³⁹ Documents: (nn) & (oo)

⁴⁰ United Nations High Commissioner for Refugees (UNHCR), 'UNHCR Guidance Note on the International Protection Needs of People Fleeing Afghanistan', 9 February 2022, 20220210080933

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.