



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA22/10363

Date and time of decision: 17 October 2022 15:51:00

J Jennings, 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 Hazara Shia from Afghanistan. He came to Australia in 2012 as an unauthorised maritime arrival and on 7 April 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790. He claims that he fears harm in Afghanistan from the Jihadi Commander [Commander A].
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 30 May 2017. The delegate was not satisfied that the applicant had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in Afghanistan.
3. On 3 April 2018 the IAA affirmed the decision not to grant the applicant a protection visa. [In] March 2020 the Federal Circuit Court of Australia, by consent, quashed the IAA's decision and directed the IAA to determine the matter according to law.
4. On 30 April 2020 the IAA again affirmed the decision not to grant the applicant a protection visa. [In] July 2022 the Federal Circuit and Family Court of Australia, by consent, quashed the second decision of the IAA and directed the IAA to determine the matter according to law. The matter is now before the IAA pursuant to those orders.

Information before the IAA

5. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
6. The review material included a National Police Clearance issued by the Australian Federal Police pertaining to a third person unrelated to this review. I conclude that this document has been provided erroneously and accordingly I have not had regard to it.
7. Also included in the review material were a number of documents, one of which formed the basis for the [March] 2020 Federal Circuit Court decision and some of which the applicant's then representative addressed in the 2017 IAA submission. I note the history related to these documents, most particularly [Psychiatrist A's] report and that Minister conceded the Secretary failed to comply with s. 473CB(1)(c) by not providing this report to the IAA. While it is evident this material was in the 'possession' of the department the indications are that it was not considered by the delegate. As such I find this is new information.
8. The three documents which are medical/case managements reports set out matters related to the applicant's mental health and are relevant to claims he has made on this basis.¹ They also go to issues related to assertions his mental health issues may have adversely impacted his ability to remember and provide evidence at various times. I am satisfied that exceptional circumstances exist to justify considering these medical reports. The remaining documents relate to treatment funding matters and I am not satisfied that they add value to assessment

¹ [Psychiatrist A], dated 5 March 2013; [Doctor A], General Practitioner, dated 3 December 2013; Case Management Assessment and Referral summarising mental health treatment in Australia

of the applicant's claims.² I am not satisfied that exceptional circumstances exist to justify considering these documents.

9. The IAA received submissions on behalf of the applicant in 2017, 2020 and 2022. I have also obtained new information.

Information obtained by the IAA

10. The delegate's decision was made in 2016. At that time a democratically elected national government ruled Afghanistan with US-led international coalition forces based in the country to support the government. The delegate's decision was made in the context of this situation and on the basis of the country information current at the time. But in 2021 the coalition forces withdrew from the country resulting in the Taliban resuming its efforts to take power by force and Taliban forces overwhelming the Afghan National Army and taking control of Kabul in August 2021. By September 2021 the Taliban announced the formation of an interim government and declared an Islamic Emirate of Afghanistan. This represents a significant change in the circumstances since the delegate's decision and the Taliban remains in effective control of the country.
11. I have therefore obtained new information reporting on the current situation in Afghanistan. As I have noted above there has been a significant change in the country since the delegate made his decision and I am satisfied that there are exceptional circumstances to justify considering the following new information:
 - Tracking Disorder during Taliban Rule in Afghanistan', Armed Conflict Location & Event Data Project (ACLED), Afghan Peace Watch (APW), 14 April 2022
 - Danish Immigration Service, "Afghanistan: Taliban's impact on the population", 1 July 2022
 - United Nations Human Rights Council, "Situation of human rights in Afghanistan - Report of the United Nations High Commissioner for Human Rights", 4 March 2022
 - Department of Foreign Affairs and Trade (DFAT), "Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022
 - European Union Agency for Asylum (EUAA), "Country Guidance: Afghanistan (April 2022)", 20 April 2022
 - European Asylum Support Office (EASO), "Afghanistan: Country focus (January 2022)", 7 January 2022
 - United Nations High Commissioner for Refugees (UNHCR), "UNHCR Guidance Note on the International Protection Needs of People Fleeing Afghanistan", 9 February 2022
12. The previous IAA Reviewers also obtained updated country information; however, this is now dated. As I have obtained the above new information which updates this information and reflects the current situation in Afghanistan I do not consider the circumstances justify me considering the information obtained by the previous IAA Reviewers.

² Quote for counselling from [Agency 1], Request for Approval of Costs, dated 12 December 2013, and related emails dated 17 December 2013

2022 IAA submission

13. This submission from the applicant's current representative addressed and sought to introduce new information. The new information relates to his mental health and access to mental health services in Afghanistan, country information and photographs about [Commander A], and incidents of violence in Afghanistan.
14. The applicant advised soon after arrival in Australia that he had been treated for a mental health condition in the past. The report from [Agency 2] accompanying the submission and the reports about health care conditions in Afghanistan are new information. The [Agency 2] report post-dates the delegate's decision and is personal information and I am satisfied had it been known may have affected the consideration of the applicant's claims. The other reports are not personal information but on the basis they post-date the delegate's decision they meet s.473DD(b)(i). This information is relevant to claims made by the applicant in regard to accessing mental health care in Afghanistan and as such I am satisfied that exceptional circumstances exist that justify the IAA considering this information.
15. The new country information cited included the 2022 DFAT report which I have already obtained.³
16. The report from Amnesty International reports the killing of 13 Hazaras in 2021 and it is stated the photographs relate to this incident. The photographs have been titled seemingly by the applicant, they are not dated nor is the source or content verified in any manner by an independent body, but there is no reason to believe they are other than what they are described to be. I accept that the first four photographs relate to the Daikundi killing. The remaining photographs are described as photographs of the buildings in Dahani Qul destroyed by the Taliban and [Commander A]. While it is only the applicant's 'belief' [Commander A] was involved in this incident I note the reference to Dahani Qul in the Amnesty International report and I am willing to accept there is a correlation between the photographs and the Daikundi killings. The Amnesty International report both post-dates the delegate's decision and identifies the victims by name and I accept that had this information and the related photographs been known they may have affected the consideration of the applicant's claims and as such meet the requirements of s.473DD(b). As this information reports an attack on Hazaras in Daikundi, which as stated below I have found to be the area to which the applicant would return, I am satisfied that this information is of probative value to my assessment and that exceptional circumstances exist that justify me considering this information.
17. Other media articles provided (footnote 4) are said to corroborate that [Commander A] led a militia in Daikundi province and surrendered to the Taliban and that the applicant fears that on his return [Commander A] would hand him over to the Taliban to be killed. It is also stated that the applicant "instructs that [Commander A] played a role in the execution in Daikundi" and although it not apparent that this assertion is borne out by the media articles these articles do indicate [Commander A] has been involved in recent militant attacks. To an extent the information includes information about identifiable people and may have affected the consideration of the applicant's claims had it been known, but as it post-dates the delegate's decision this information meets the requirements of s.473DD(b) on that basis. While in my

³ Contrary to the requirements of the Practice Direction for Applicants, Representatives and Authorised Recipients the submission did not include a copy of this document. The submission stated this is a document "which must be taken into consideration by the IAA" which I take to be a reference to Direction 56 and the requirement delegates consider current DFAT reporting, but the IAA is not bound by this Direction. However, as noted I have already obtained this report.

decision below I have not accepted the applicant's claims about [Commander A] or that he was threatened by him I do accept that the information in these articles about the current political landscape in Afghanistan is of value in my assessment of the applicant's claims and that exceptional circumstances exist that justify the IAA considering this information.

18. The submission suggests unless a favourable review can be conducted on the papers, the IAA exercise its discretion to invite the applicant to provide information at an interview, putting forward that "there are strong reasons for such an interview to be conducted". These reasons are stated to include; previous findings of inconsistencies which are disputed by the applicant; a history of mental health issues which have affected his ability to recall important events; and the passage of time since the interview with the delegate. But the applicant has had ample opportunity to dispute previous findings of inconsistencies and extensive submissions have already been received in this regard and I have considered these. I note the comments as to the mental health issues which have affected his ability to recall important events and the passage of time since the interview with the delegate, but it is not apparent how an interview now would assist in this regard or be of any useful purpose. The suggestion that the mental health issues have affected recall of important events tend to call into question the utility of obtaining information from the applicant by way of an interview. I am not satisfied that the circumstances warrant the IAA obtaining new information from the applicant by way of an interview.

2020 submission

19. The 2020 submission comprised a submission from the applicant's then representative, a statutory declaration from the applicant and various supporting documents and country information.
20. The applicant's statutory declaration and the statement from the representative addressed claims already made and in regard to the applicant's mental health expanded on his fear of harm in Afghanistan on this basis. They also addressed the delegate's decision and issues relating to credibility assessment and seek to clarify aspects of claims already made. The representative's statement also set out information not referred by the Secretary and which, it is advanced, should be before the IAA. This is essentially argument about matters that were before the delegate and not new information and I have had regard to this.
21. This submission also proposed that the IAA interview the applicant; the bases for this are the same as those laid out in the later 2022 submission and which I have already considered above.
22. In other part the applicant's and the representative's statements set out new information clarifying the current circumstances of family members and information seeking to support previously made protection claims.
23. The applicant advised his wife and children have left Afghanistan and are now in [Country 1] and have been recognised as refugees. Copies of their UNHCR documents have been provided which advises they have been registered as asylum seekers (rather than recognised as refugees as described by the applicant). I am satisfied that this information is both personal and may have affected the consideration of the applicant's claims and post-dates the delegate's decision and thereby meets s.473DD(b). This information has some relevance to assessment of where the applicant would return in Afghanistan and as such I am satisfied that exceptional circumstances exist that justify considering it and the UNHCR documents.

24. The submission provided updated information on the situation of the applicant's brother; this brother was previously stated as missing and whereabouts unknown since his attempt to leave Afghanistan. The new information is that this brother is now in prison in Iran and that he left Afghanistan because he was having problems with [Commander A]. Related documents provided are a statement from the applicant's nephew and copy of his Iranian visa demonstrating his travel to Iran in attempts to locate his father (the applicant's brother). I have some concerns about this claim and information; this information indicates that the applicant's brother was being harassed by [Commander A] but the applicant made no mention of any harassment of his brother by [Commander A] in any earlier information given to the Minister. I have difficulty accepting he would have omitted such significant information when recounting the circumstances of his missing brother, if true. However, while I have concerns that this information may not meet the requirements of s.473DD(b)(ii) the claim that his brother is in prison and his nephew's statement and travel to Iran as evidenced by the visa does post-date the delegate's decision and on that basis the alternative arm of s.473DD(b) is met. But I am not persuaded this information is of corroborative value in my assessment of the applicant's claims even taking into account the comment that this information evidences the "fractured relations" of the family with [Commander A]. As the applicant's brother went missing around 2008 any harassment by [Commander A] would pre-date the applicant's claimed interaction and problems with the Commander and noting there is no claim any other relatives have been harassed by the Commander I am not persuaded it lends weight to a claim of "fractured relations". Nor am I satisfied that his brother being in prison has any bearing on my assessment of the applicant's claims. Considered overall I am not satisfied that any exceptional circumstances exist that justify the IAA considering the new information about the applicant's brother.
25. Further information is a document described as a "statement translated 2014 in which [the applicant] provided details of the names of the people who came to look for him in Herat". The submission does not set out why this information was not and could not have been given to the Minister although I note the request the IAA advise if this document is on the department's records and if not asks for the opportunity to provide further submissions on the application of s 473DD. This document was not part of the referred material and there is no indication in her decision or in the protection visa interview that this was before the delegate, as such I am satisfied that this is new information. This document pre-dates the delegate's decision and I am not satisfied it could not have been given to the Minister. However, I accept it is credible personal information to the extent that it is capable of being believed and given the delegate's negative findings in regard to the [Commander A] claims I accept that had this information been known it may have affected the consideration of the claims. On that basis I find that exceptional circumstances exist that justify the IAA considering this document.
26. The country information provided with the submission meets the requirements of s.473DD(b)(i) as it post-dates the delegate's decision. To the extent that some of these reports contain information about identifiable people and had this information been known it may have affected the consideration of the applicant's claims this information would also meet the requirements of s.473DD(b)(ii). But all this information pre-dates the important events of 2021 which have resulted in the Taliban takeover of Afghanistan and the substantially different social and political environment in the country. As already noted I have obtained new information that sets out the current conditions in the country and I have accepted information given with the 2022 IAA submission that similarly updates the information accompanying this 2020 submission, including information about accessing health care in the country. Accordingly, I am not satisfied that exceptional circumstances

exist that justify considering the new country information submitted with the 2020 submission.

2017 submission

27. The 2017 submission comprised a submission from the applicant's then representative, a further submission addressing new information, a statement from the applicant and country information.⁴
28. The submission addressed the delegate's decision and findings, set out why the applicant disagrees with this and identifies material it is asserted the delegate overlooked. Referencing case law relevant guidance, the submission was critical that some of the delegate's findings were not based on evidence and are "illogical and unsupported". I have had regard to these submissions addressing the delegate's decision and findings.
29. The applicant's statement in part clarified aspects of protection claims already put. He outlined the nature of his [small business] in Herat, his employment in Kabul and the situation for his family who were then still residing in Herat. I am satisfied that this information is largely an extension or clarification of information already before the Minister and not new information.
30. Other material provided with the submission and addressed by the submission statements is country information, DFAT Smarttraveller advice and social media posts and includes material that both pre-dates and post-dates the delegate's decision. This information was not before the delegate and is new information.⁵ No explanation has been provided as why the information that pre-dates the delegate's decision was not and could have been given to the Minister beyond the assertion it was "not available" to the applicant at the time. In this regard I note the applicant had the benefit of representation when completing his protection visa application, at the protection visa interview and in completing post-interview submissions. Some of the reports contain information about identifiable people and I am satisfied that had this information been known it may have affected the consideration of the applicant's claims. But even noting that some of this information may meet one or both of the limbs of s.473DD(b) I am not satisfied that exceptional circumstances exist that justify the IAA considering it. I have already noted the significant change of circumstances in Afghanistan in 2021 and since this material was published and that I have obtained new information and have accepted new information from the 2022 IAA submission that provides updated information on the current situation in Afghanistan. I have not considered this new information in the 2017 submission.

Applicant's claims for protection

31. The applicant's claims can be summarised as follows:
 - The applicant is an Hazara and a Shia Muslim.
 - He was born in in [a named village in] Daikundi Province, Afghanistan and is a citizen of Afghanistan.

⁴ The representative's submission dated 28 June 2017 was initially sent containing formatting mark ups. A revised version of the submission without the mark ups was sent in a later email the next day.

⁵ I note the assertion that the May 2016 Washington Post article was cited within a report from Afghanistan Analysts Network that was before the delegate but having reviewed that report I am not satisfied that it was.

- The applicant had land in Daikundi and a business in Herat Province and spent time living in both locations.
- Travelling on the roads in Afghanistan was dangerous; in 2009 he was attacked by thieves when travelling on the roads.
- The applicant has also spent time living in Iran as a refugee.
- In Daikundi one of the applicant's neighbours was [Leader A] who was [a security official] in the province. A Jihadi Commander, [Commander A], who was opposed to the (then) government tried to enlist the applicant in his attempts to kill [Leader A].
- The applicant refused to become involved in the venture to kill [Leader A] and as a result [Commander A] and his associates threatened him. One of [Commander A's] associates also proposed that he marry the applicant's [Relative A] so that he could get close to the family and have better access to [Leader A].
- As a result of the threats the applicant and his family moved to their property in Herat. In Herat a man made enquiries about the applicant. The applicant was suspicious and afraid and decided to leave Afghanistan.
- The applicant left Afghanistan legally in 2012 and came onto Australia.
- He fears if he should return to Afghanistan he would be killed or harmed by [Commander A].
- He also fears that Pashtuns or the Taliban would kill him because he is Hazara/Shia.
- On arrival in Australia the applicant advised immigration officials he has received treatment in the past for his mental health. In Australia the applicant has also sought care and commenced treatment with [Agency 1] in 2013 and consulted a psychiatrist in March 2013 who diagnosed major depressive disorder. The comprehensive 2020 report from [Agency 2] advised he reported symptoms indicative of post-traumatic stress disorder. The applicant will have difficulty accessing mental health support in Afghanistan due to stigma and also discrimination against him because of his ethnicity and religion he may be denied services and due to the Taliban's targeting of international agencies in the past attempting to access mental health services would expose him to harm.

Factual findings

Identity and background

32. The applicant has consistently claimed to be an Hazara and a Shia Muslim born in Daikundi Province, Afghanistan. He has provided identity documents in support of his claimed identity although I note the delegate's concerns as to the details of his bio data and variations and anomalies across these documents and his own account. I also note his periods of residence in Iran however I accept he has no right of residence in or return to Iran. I accept the applicant's identity as determined by the delegate and that he is a national of Afghanistan and that Afghanistan is the receiving country for the purpose of this review.
33. I accept the applicant is Hazara and a Shia Muslim.
34. The delegate identified both Daikundi and Herat as the applicant's home areas (place to which he would return). I have taken into account the links to Herat but the indication is that while the applicant managed a business in Herat his principal residence was Daikundi; this

was where he and his family resided and his travel to Herat was seemingly for business purposes only. It was not until the last months of his time in Afghanistan that he claims he and his family lived in Herat. Notwithstanding that I have not accepted his claimed reason for moving to Herat was to escape the threats in Daikundi (as set out below) I take into account that the move to Herat was for only a brief period and that the family retained the property in Daikundi. He also spent a period in Kabul, but this was similarly brief and there is no indication of any ongoing links. I also note his family are no longer in Herat having travelled to [Country 1].

35. Considering the information before me, and the representative's comments in submissions that the applicant would not return to Herat and taking into account the applicant has lived and worked most of his life in Daikundi and continues to own property in the area I am satisfied that if returned to Afghanistan the applicant would return to Daikundi.
36. I accept that the applicant has received treatment for his mental health and may require further treatment or support in Afghanistan should he return.

Credibility

37. I have significant concerns about the applicant's claims and large parts of his account of his background and experiences and I am concerned these bring into question the reliability of his claims and evidence. I note the comments as to his mental health and the submissions cautioning against making any adverse credibility findings based on any inconsistent evidence.
38. The [Agency 2] report advises that the applicant regularly experiences intrusive thoughts and memories of his past and that one of his coping strategies is to intentionally avoid remembering his past. The applicant reported to [Agency 2] that he has problems with his memory and "found it difficult to recall events of his past during the interview process".
39. I have also taken into account post-interview submissions (September 2016) from the applicant and his then representative advising he felt confused and "lost" during the protection visa interview and the criticism that the applicant was hindered from giving further information at that interview as the delegate appeared to be 'rushing' and closed the interview and did not provide an opportunity for a 'natural justice' break or for the representative to make any submissions. I note the assertions the applicant and his representative felt the delegate was rushing the assertion that they felt her questions were unclear but toward the close of the interview the representative was given an opportunity to make any comments but her only comments were that the applicant's address was incorrectly recorded on the department's system; she gave no indication she wished to make any oral submissions. The delegate closed the interview as the interpreter had to leave but offered to continue using a new interpreter by telephone if the applicant had anything further to discuss but the applicant declined.
40. But even taking the stated concerns at face value I remain concerned at serious issues about the veracity of many claims and evidence that I am not satisfied are explained by the complaints about the protection visa interview. Nor am I satisfied that they are explained by mental health concerns or memory problems. These include the following:
 - The applicant maintains he is illiterate but managed a business in [Herat] and arranged contract work for [others] in Kabul. The applicant explained that he was able to manage the Herat business with the assistance of agents who looked after any documentation

and I note his detailed explanation in the 2017 IAA statement, but even with these explanations I have difficulty reconciling the claim of illiteracy with his ability to manage these businesses.

- The applicant's claim is that he has no contact with [Relative A] as the family did not approve of her marriage. But other evidence is that his [Relative A] married a relative selected for her and arranged by their mother to avoid her being married to the associate of [Commander A]. There was no wedding party or celebration because of the claimed threats, not for any stated reason of any disapproval of the match or family rift.
 - There is some variation in his account of his work/residence in Kabul. In both his arrival entry interview and protection visa application the applicant declared working in Kabul in 2011/2012. This period overlaps with other evidence that he was living in Daikundi or Herat at this time. In explanation the applicant has stated that this was contract work he was arranging for others and does not signify that he himself was present and working in Kabul at this time. In further explanation it is stated this may be the result of some difficulty with the interpreter assisting him complete the application. But this does not account for him giving essentially the same information at the arrival entry interview. Furthermore, his description at that interview of this employment was working in Kabul for a guy called (name) and describing the employment details as [specified tasks]. I have significant difficulty reconciling these descriptions with the now given account he was only organising contract workers.
 - Variations in account of his residence in and return from Iran. At Question 4 of Part B of the protection visa application the applicant ticked Yes for the question had he ever been removed or deported from another country and in explanation stated he was deported from Iran. The applicant similarly stated in the arrival entry interview that he had been deported from Iran, but in the statement of claims accompanying his protection visa application he stated that this was not correct. Although this statement sought to correct the information given at the arrival entry interview it does not explain why the applicant gave that information at that interview. Nor does it explain the reference to deportation at Question 4. That the applicant returned to Afghanistan voluntarily in [specified year], rather than being deported, is supported by the UNHCR document provided which is a Voluntary Repatriation Form. I am concerned that the applicant has sought to change the evidence he gave at the arrival entry interview because it is not supported by the UNHCR document. It is also of concern this form indicates the applicant was "in exile" for 15 years, which is substantially different from the three years the applicant claimed he was resident in Iran. He was unable to explain why the document referred to 15 years when asked about this matter at the protection visa interview. I have considered if this may be a simple mistake but other of the applicant's evidence indicates that he may have been resident in Iran for longer than claimed and up to 15 years. The UNHCR document was issued in [year] and 15 years would date the 'exile' from [year], which is around the time the applicant married his first wife (in the statement of claims he stated he was about [age] years of age when they married). The applicant stated their child was born when they were in Iran. No year of birth has been given for this child but he stated the couple were married for five to six years and noting they married around [year] this would place the first child's birth in Iran at some date prior to [year], indicating a substantially longer residence in Iran than that claimed by the applicant.
41. Submissions to the IAA are that any perceived inconsistencies are slight, and that the applicant should be given the benefit of the doubt in light of his mental health issues, and the significant passage of time over which he has been expected to restate his claims.

42. I take these matters into account and while the above matters may be of little material value in assessing the applicant's claims I remain concerned that they cast doubt on the applicant's reliability as a credible witness.

Claims of harm in Afghanistan

43. I accept the applicant had property and business interests in Daikundi and Herat and that this necessitated travel between the two. Country information confirms that travel on the roads has been dangerous at times and the applicant's claim that he was attacked and robbed is plausible. I accept this claim.
44. The applicant's essential claim to fear harm should he return to Afghanistan is based on the claim [Commander A] asked him to kill [Leader A]. I have considered this claim and for the reasons set out I find it so implausible as to be fanciful and contrived to enhance his protection claims.
45. The information before me provides some background into the activities and history of [Commander A]. It is apparent he is an Hazara warlord who was at times opposed to the (then) government and linked or allied to the Taliban. Other information is that he has had links to the government and been protected by government officials. There is information linking him to the Taliban's push into Daikundi from Uruzgan and being involved in extortion, harassment and more violent activities; he claimed responsibility for the kidnap of [people] in 2008. In this context it is plausible that [Commander A] had an animosity to [Leader A] and sought his death. But I do not accept that he sought the applicant's assistance to kill him.
46. The indications are that [Commander A] was a powerful and influential war lord with command over his own fighters. It may be that he had made previously unsuccessful attempts to kill [Leader A] but I do not accept that after such unsuccessful attempts he turned to the applicant for assistance. The applicant was a farmer, landowner and small business operator. There is no indication he had any fighting experience, or experience with weaponry that would make him a suitable choice for the task. [Leader A] was stated to be guarded and there is no indication that the applicant would have the opportunity to breach the guards and kill him, even accounting for them being neighbours and sometimes attending the same events such as religious celebrations. [Leader A] was stated to be [a security official] in the province and I consider it farfetched that a Jihadi commander with the resources available to him through his own troops or through his links to the Taliban and also agencies in Iran, would resort to confiding in and trusting the applicant, a person otherwise unknown to him or without family or tribal links to him, with such a task.
47. In support of his claims the applicant referred to a document he described at the protection visa interview as being from local elders. But this document is essentially just the applicant's account which has been signed by local elders or the mullah. I give this document no weight.
48. In regard to the claim the applicant was being searched for in Herat the 2022 IAA submission gave a further document the applicant asserted provided corroborating details in a witnessed statement and included the name of the people pursuing him in Herat. The document itself is an English language translation made in 2014 of a what is seemingly an undated statement made by the applicant. That this document identifies by name the people searching for him in Herat sits in contrast to his other evidence, which post-dates this 2014 document, that the person asking about him in Herat "did not mention his name". When asked at the protection visa interview who would have been pursuing him in Herat the applicant speculated it was someone associated with [Commander A] but did not identify those involved by name or

indicate that he knew their names. I am concerned as to the reliability of the information in this document and I give it no weight.

49. I also note the variations in his account of related matters such as his activities from this time until he departed Afghanistan, including how long he remained in Herat, the location of his family in Herat or if they moved, the matter of the time in Kabul in 2011/2012, and I find other aspects of his account regarding the claimed attack on the Herat house to be unconvincing. Furthermore, I find it difficult to accept that [Commander A] would have people make enquiries about him in Herat or seek him there. If [Commander A] had any intentions to pursue him further, or harm him because he did not accede to his request then he seemingly had ample time to do so while the applicant remained in Daikundi.
50. Considered overall I do not accept the applicant's claims that [Commander A] and or his associates asked him to kill [Leader A] or that when he refused to do so they threatened him. I reject this claim in its entirety and the associated claims regarding the attempt to marry his [Relative A], enquire about him in Herat or that he and the family moved to Herat as a result of threats.
51. I accept that the applicant left Afghanistan legally in 2012.

Refugee assessment

52. 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

53. 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.
54. In summary I have accepted that the applicant is an Hazara Shia who would return to Daikundi if he should return to Afghanistan. I have also accepted the applicant may require

mental health services in the future and I note the concerns about accessing mental health services in Afghanistan.

55. As the World Health Organization and other reporting noted mental health care has always been scarce in Afghanistan as a result of decades of war, instability and poverty and the Taliban takeover has further impacted the problems with accessing care. I note the concern that the applicant may be discriminated against and denied services because of his ethnicity and/or religion but the information before me, including that provided by the applicant, does not indicate that lack of services or difficulty accessing care is due to discrimination.⁶
56. The Taliban takeover has had a major impact on the economy and on the availability of employment, accommodation, medical care and basic essential services such as water and power. In large part the economy, and the provision of health and other services, was supported by the foreign agencies present in the country and by international donors but these agencies and donors have now withdrawn leading to widespread shortages. DFAT describe the economy as in crisis and close to collapse. The UNHCR has reported the country is confronted with widespread economic collapse and a humanitarian crisis of “unprecedented proportions”.⁷
57. Noting the dire economic situation and limited employment opportunities and other services, together with his mental I accept he may experience significant difficulties establishing himself in Afghanistan and while this and the general economic situation is concerning, the information before me does not indicate that people are denied access to basic services, including health care, or denied the capacity to earn a livelihood for any of the reasons specified in s.5J(1) of the Act. I find that the applicant does not have a well-founded fear of persecution on this basis.
58. The applicant fears he would be viewed as an infidel and harmed because of his extended residence in the west and as a returning asylum seeker.
59. Over the past years citizens have left Afghanistan in vast numbers to escape conflict related instability, and I note the applicant and members of his family have spent some time in Iran and returned to Afghanistan. Millions have left, largely for Pakistan or Iran, and have returned as conditions change; significant numbers have also returned from the west. Reports of individuals who returned from western countries having been tortured or killed by anti-government agents on the grounds that they had become foreigners or that they were spies for a western country include humanitarian workers, development workers and women in the public sphere. In the period of the previous government persons of these profiles were accused by antigovernment agents as having adopted values and/or appearances associated with western countries. The EASO report notes negative perceptions of people who have left Afghanistan and sought asylum but also that many people have fled due to poverty rather than for being anti-Taliban. The negative view is largely predicated on people who had left being seen as not having Islamic values and EASO’s source attribute this to views that those who left around the time of August 2021 as being “elites” and “corrupt ‘puppets’ of the ‘occupation’, opposed to the population”; whereas others left due to poverty and this had “nothing to do with any fear of the Taliban, but life is better economically in the west”.

⁶ 2022 IAA submission: World Health Organization, “Afghanistan; Mental and disability health”, 29 August 2022; Abdul Hameed Latifi, Inspire the mind, “The growing mental health crisis in Afghanistan”, 6 September 2021; HealthNetTPO, “Supporting Mental Health in Afghanistan”, 6 October 2021

⁷ DFAT, “Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)”, 14 January 2022, 20220114090718; UNHCR, “UNHCR Guidance Note on the International Protection Needs of People Fleeing Afghanistan”, 9 February 2022, 20220210080933

Beyond this generalised commentary the EASO report set out concerns expressed by Afghans abroad, and while these are essentially limited to two individuals, the information is instructive in indicating the types of activity engaged in while abroad that agencies have reported may be of adverse interest. The first of these is a woman studying abroad who has asked family members to destroy photographs of her not wearing hijab/being in the company of men; the second is a law professor who has been critical of the Taliban on social media.⁸

60. Negative attitudes to those who have spent time in the west relate particularly to women because of the greater social freedoms they experience in the west as opposed to when in Afghanistan. Restrictive standards regarding appearance have largely been restricted to women. While men are not immune to being seen as westernised those who are so viewed are generally those perceived as un-Islamic for supporting the former government.⁹
61. There is no indication the applicant has been involved in any activities in Australia that may give rise to concern in Afghanistan or would lead him to being viewed as an infidel or in any anti-Taliban/pro-western protests or commentary to cause him to be perceived as an associate of the west. I am not satisfied that there is a real chance he would face harm in Afghanistan on this basis.
62. In addition to concerns about the Taliban the applicant has indicated his concern he may be harmed by Pashtuns because he is Hazara and Shia. Pashtuns comprise the largest ethnic group in Afghanistan's ethnically diverse society with the Hazaras being a minority group numbering around ten percent of the population. In regard to religion the country is dominated by adherents of Sunni Islam with an estimated 85 per cent or more of the population being Sunni and the Taliban is a Sunni dominated group. Shias and Hazaras have historically been victims of sectarian violence perpetrated by the Sunni dominated Taliban and other Sunni insurgent groups.¹⁰
63. As noted above there has been a substantial change in the political landscape in Afghanistan since the applicant departed. The withdrawal of foreign forces and the dramatic collapse of the government in 2021 paved the way for the Taliban offensive and by August/September 2021 the Taliban took effective control of Afghanistan. Widespread concern was voiced by many citizens and the international community have voiced significant concern about the incoming regime noting the past history of violence under Taliban rule and the targeted large-scale attacks perpetrated against the Hazara community in particular when the Taliban came to power in 1996.¹¹
64. Soon after taking power in 2021 the Taliban announced a general amnesty, saying that they have pardoned "all of those who had fought against us". But despite such reassurances, after the Doha Agreement (the multi-party negotiations designed to effect the orderly withdrawal of foreign troops) was concluded and prior to taking power nationally in August 2021, the Taliban launched what DFAT noted has been described as a "wave of targeted killings". DFAT advised these were directed at influential and prominent Afghans, including journalists, human rights activists, judicial workers, doctors and clerics. Citing data compiled by UNAMA DFAT noted that in the year 2020 there was an increase in the number of civilians killed and injured by Taliban targeted killings. In September 2021 a source reported that the Taliban

⁸ European Asylum Support Office (EASO), "Afghanistan: Country focus (January 2022)", 7 January 2022, 20220110085950
⁹ EUAA, "Country Guidance: Afghanistan (April 2022)", 20 April 2022, 20220421101054; Danish Immigration Service, "Afghanistan: Taliban's impact on the population", 1 July 2022, 20220704104853

¹⁰ DFAT, DFAT Thematic Report, Hazaras in Afghanistan and Pakistan, 26 March 2014, CIS2F827D91264

¹¹ DFAT, DFAT Thematic Report, Hazaras in Afghanistan and Pakistan, 26 March 2014, CIS2F827D91264; 2022 IAA submission: Gandhara, "Afghanistan Sees Resurgence of Warlords, In Familiar Echo of Civil War", 22 April 2021

using a blacklist had rounded up and targeted people with suspected links to the previous administration/US forces. It was reported house-to-house searches were conducted to find blacklisted individuals in addition to visits to local mosques and police offices to gain information on certain individuals.¹²

65. The IAA submission noted that the applicant has been researching events in Afghanistan and has isolated himself from friends and that his mental health has declined further. It is clear that widespread abuse, reprisals, and targeted attacks occurred leading up to and around the time of the Taliban takeover in August 2021 and soon after. At the time of the Taliban takeover in August 2021 a number of people were targeted for attack; the profiles of such were largely those with some prominence and influence such as journalists, human rights activists, judicial workers, doctors and clerics and former government authorities, interpreters for foreign troops and embassy staff. The Armed Conflict Location and Event Data Project (ACLED) has noted the challenges of obtaining accurate information from Afghanistan and in particular restrictions on media reporting but ACLED has explained steps taken and the expanded methodology adopted to provide a dataset that more accurately reflects political disorder in Afghanistan than some reporting which is at risk of underreporting incidents. Overall, the ACLED reporting shows Taliban violence targeted primarily former government officials and security forces. ACLED noted the Taliban also targeted tribal and minority communities perceived to support previous governments, forcibly seizing land belonging to such communities and that Hazaras, along with Uzbeks, and Tajiks have been targeted due to their participation in anti-Taliban alliances in the 1990s. I accept that such reports may be alarming for the applicant and I note the references in the clinical reporting to the applicant's past trauma but the applicant has not claimed to be so involved.¹³
66. Tensions between Shia and Sunni Muslims in Afghanistan are historic and ingrained and have been evident throughout the various iterations of post-colonial government in Afghanistan. Shias are derided as infidels by many Sunnis, in particular by extremist groups. Attacks on Shias, and most particularly the Hazara Shia group who numerically are the most significant Shia group in Afghanistan, have been common in the country but increased significantly from 2015/2016 as insurgency groups escalated their operations. Mass-casualty attacks targeted Shias, particularly at large gatherings where Shias were identifiable and gathered in numbers, such as attending mosque or demonstrations or attacks on public transport in Shia neighbourhoods.¹⁴
67. However, in an attempt to distance itself from this past pattern of repression the Taliban made early conciliatory gestures in 2020 at the time of the Doha Agreement negotiations and leading up to the withdrawal of foreign troops when the leader of the Haqqani Network (HQN) faction described his desire that "the killing and the maiming must stop" and stated that the Taliban was "committed to working with other parties in a consultative manner of genuine respect to agree on a new, inclusive political system in which the voice of every

¹² EUAA, "Country Guidance: Afghanistan", 20 April 2022, 20220421101054; ACLED/APW, "Tracking Disorder during Taliban Rule in Afghanistan", 14 April 2022, 20220419113116; Danish Immigration Service, "Afghanistan: Taliban's impact on the population", 1 July 2022, 20220704104853

¹³ ACLED/APW, "Tracking Disorder during Taliban Rule in Afghanistan", 14 April 2022, 20220419113116; DFAT, "Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022, 20220114090718

¹⁴ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660; US Department of State, "Afghanistan - Country Reports on Human Rights Practices 2015", 13 April 2016, OGD95BE926165; Landinfo, "Hazaras and Afghan insurgent groups", 3 October 2016, CIS38A80122778; DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186

Afghan is reflected and where no Afghan feels excluded". Since taking power in 2021 the Taliban have made overtures to be inclusive and have vowed to protect Shia communities and have not restricted Shia worship or practices; Taliban members have been deployed to protect Shia mosques.¹⁵

68. Despite these positive gestures from the Taliban attacks on the Hazara/Shia community have continued since the Taliban takeover in 2021, although the Taliban has denied involvement and the perpetrator of such attacks have been identified as the Islamic State in Khorasan Province (ISKP), Islamic State (ISIS) and similar militant groups. These attacks have occurred in Kabul and other major city centres and the ISKP, ISIS and other Sunni militant groups have publicly claimed responsibility for the carnage, but some smaller attacks have been attributed to Taliban members.¹⁶ The information provided with the 2022 IAA submission indicates that warlords such as [Commander A] continue to have a presence in the country. Such attacks have added to some concern at the Taliban's ability to control its own members and further concern at its ability to address the serious security concerns the ISKP and similar groups pose. DFAT noted that the Taliban was "surprised" by the speed of its takeover and subsequently was "ill prepared for government". This has resulted in some concern that the Taliban's fighting force styled command-control structure appears to be struggling with the now required administration of government role and appears unable to regulate the actions of tens of thousands of foot soldiers and regional commanders, let alone combat the security threat posed by the ISKP and similar groups.¹⁷ Such concerns were virtually conceded by the Taliban's defence minister when he publicly acknowledged that some militants had committed revenge killings despite the declared amnesty and that "miscreants and notorious former soldiers" within Taliban units had committed abuses but he went on to declare that no Taliban fighters had the right to break the amnesty and he issued a rebuke over the misconduct.¹⁸
69. Despite the efforts of the Taliban leadership to improve security for minority groups, including Shias and Hazaras, there are still incidents of ethnic minorities in Afghanistan being harassed and discriminated against by low-ranking members of the Taliban. Observers comment that the organisational structure and the lack of control over the low-ranking members is "one of the biggest challenges of the Taliban leadership now that they are the de facto government. Their organisational structure was set up for fighting an insurgency, and now they have to perform a completely different task. This requires a restructuring of the Taliban, and this takes time."¹⁹
70. That the Taliban has reneged on earlier commitments such as reversing or backtracking on promises relating to women and girls and their ability to access education and engage in society has raised concern in the international community and some observers have also cautioned that attacks around the time and after the Taliban takeover indicates the Taliban stepping back from its August 2021 promised amnesty and their ability to oversee this

¹⁵ DFAT, "Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022, 20220114090718; Danish Immigration Service, "Afghanistan: Taliban's impact on the population", 1 July 2022, 20220704104853

¹⁶ EASO, "Afghanistan: Country focus (January 2022)", 7 January 2022, 20220110085950; DFAT, "Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022, 20220114090718

¹⁷ DFAT, "Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022, 20220114090718; Danish Immigration Service, "Afghanistan: Taliban's impact on the population", 1 July 2022, 20220704104853

¹⁸ United Nations Human Rights Council, "Situation of human rights in Afghanistan - Report of the United Nations High Commissioner for Human Rights", 4 March 2022, 20220310103511; EASO, "Afghanistan: Country focus (January 2022)", 7 January 2022, 20220110085950

¹⁹ Danish Immigration Service, "Afghanistan: Taliban's impact on the population", 1 July 2022, 20220704104853

amnesty has been questioned by commentators. Concerns have also been widely voiced about restrictions on journalists and media reporting and at the potential return to power of warlords remobilising their old militias. Lack of Hazara representation in the administration has been noted and the presence of the HQN within the Taliban power structure has also been noted as being of concern. I note the conciliatory message by the HQN leader in 2020 (cited above) but it remains that the HQN is known as being strongly anti-Shia and was responsible for some of the highest-profile attacks of the conflict in Afghanistan and is listed in the US as a terrorist organisation and their presence in the Taliban network has attracted some criticism. The UNHCR and other agencies have expressed concern that the Taliban's administration is beset by uncertainty, arbitrariness, and disregard for the rule of law and that it lacks a functioning official justice system.²⁰

71. Noting the events of 2021, DFAT's assessment in January 2022 is that the level of mistreatment of Hazaras is currently less widespread than initially forecast by many sources concerned about the Taliban's incoming regime, but that nevertheless Hazaras face a high risk of harassment and violence from both the Taliban and ISKP, because of their ethnicity and sectarian affiliation. This is borne out by reports of attacks outlined in the country information, including that provided with the 2022 IAA submission.²¹ The reporting shows that such attacks are largely conducted in Kabul and other major urban centres, but attacks have also been reported in areas of the Hazarajat and in October 2021 Amnesty International reported on the unlawful killing of 13 Hazaras in Daikundi province, although I note most of the victims were members of the security forces rather than ordinary civilians.²²
72. The 2022 DFAT report advised of "multiple attacks" in Kabul; one significant attack in November 2021 in which 25 people were killed and scores injured was claimed by the ISKP. DFAT attributes the risk of ongoing attacks in part to factional tensions and conflict with militant groups, most notably the ISKP with whom the Taliban have been in violent conflict for some time. ISKP are reported to have carried out multiple terrorist attacks in 2020/2021 against the government and also against the Taliban. Of the mass casualty terrorist attacks conducted since the Taliban takeover ISKP has claimed responsibility for most and DFAT considers terrorist attacks remain possible anywhere in the country, but major attacks are most likely in key cities.²³
73. It is of concern that in addition to Taliban targets the ISKP's primary targets are the Shia community. The Danish Immigration Service report noted the Taliban has shown a willingness to protect Shia mosques in the aftermath of attacks by the ISKP, but despite reassurances to protect the Shia community in two weeks alone in April/May 2022 more than 100 Shias died

²⁰ EASO, "Afghanistan: Country focus (January 2022)", 7 January 2022, 20220110085950; DFAT, "Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022, 20220114090718; UNHCR, "UNHCR Guidance Note on the International Protection Needs of People Fleeing Afghanistan", 9 February 2022, 20220210080933; 2022 IAA submission: Gandhara, "Afghanistan Sees Resurgence of Warlords, In Familiar Echo of Civil War", 22 April 2021

²¹ DFAT, "Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022; EUAA, "Country Guidance: Afghanistan", 20 April 2022, 20220421101054; ACLED/APW, "Tracking Disorder during Taliban Rule in Afghanistan", 14 April 2022, 20220419113116; Danish Immigration Service, "Afghanistan: Taliban's impact on the population", 1 July 2022, 20220704104853

²² 2022 IAA submission: Amnesty International, "Afghanistan: 13 Hazara killed by Taliban fighters in Daykundi province – new investigation", 5 October 2021

²³ DFAT, "Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022

in several attacks launched mainly against the Shia minority and for most of which the ISKP has claimed responsibility.²⁴

74. The country information before me indicates that the security situation has somewhat stabilised since August 2021, and in some parts general security has improved.²⁵
75. But the country is suffering a humanitarian crisis and militant groups such as ISKP remain active. While this is largely in major cities attacks have occurred in Hazara dominated areas, including in the Hazarajat. The country information provided with the 2022 IAA submission identifies attacks in the applicant's home area. The Taliban have declared itself in control and proclaimed the Islamic Emirate of Afghanistan but the administration is not recognised by the international community and faces significant and damaging internal opposition from the ISKP and similar groups. I take into account the overtures of conciliation and reports of an overall improvement in the security situation but I am concerned the security situation in Afghanistan for Hazara Shias is not stable and remains unpredictable. I am concerned that the impact to Hazara Shias now or in the reasonably foreseeable future from the Taliban regime, together with ongoing Sunni militant action and ongoing instability, is unstable.
76. Despite approaches of conciliation since the takeover there have been reports of Shias being targeted and killed by the Taliban and the Taliban remains a majority Sunni organisation whose ideology is an Islamic State adhering to their strict interpretation of Islam, an interpretation which abjures the "inferior" Shia sect. The country information reports discrimination in accessing the legal system and resources, forced evictions by the Taliban and/or by local Pashtuns taking advantage of the Taliban takeover.
77. Notwithstanding reported improvements the country information before me reports considerable instability in the security situation for Hazara Shias; Hazara Shias face death or serious injury from targeted attacks and in this context I find the chance the applicant may face serious harm in this manner is more than remote.
78. I find that the applicant would face a real chance of serious harm in Afghanistan and that this harm would involve systematic and discriminatory conduct amounting to persecution. I am also satisfied that the essential and significant reason the applicant would face this harm is his Shia religion and Hazara ethnicity and that these 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 this reason. ISKP/Sunni militant attacks have continued to occur despite measures taken by the Taliban and I am not satisfied the applicant could obtain effective protection in Afghanistan. Furthermore, despite attempts from the Taliban leadership to protect Hazaras and Shias there remain credible reports that members of the Taliban have perpetrated attacks on Hazaras and Shias. These attacks are occurring across Afghanistan and I am satisfied the applicant would face a real chance of persecution in all areas of the country.
79. For the above reasons I am satisfied that the applicant has a well-founded fear of persecution.

²⁴ EUAA, "Country Guidance: Afghanistan", 20 April 2022, 20220421101054; Danish Immigration Service, "Afghanistan: Taliban's impact on the population", 1 July 2022, 20220704104853

²⁵ United Nations Human Rights Council, "Situation of human rights in Afghanistan - Report of the United Nations High Commissioner for Human Rights", 4 March 2022, 20220310103511; DFAT, "Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022; EUAA, "Country Guidance: Afghanistan", 20 April 2022, 20220421101054

Refugee: conclusion

80. 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*.

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.