



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA23/10496

Date and time of decision: 20 July 2023 14:25:00

D Hughes, 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 a national of Afghanistan. He applied for a protection visa on 10 March 2016. A delegate of the Minister for Immigration refused to grant the visa on 7 February 2017.
2. This matter was previously before the IAA. A decision to affirm the delegate's decision was made by the IAA on 19 September 2017 (IAA17/01942). The matter was remitted to the IAA by consent orders of the Federal Circuit and Family Court of Australia on 25 May 2023.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. Following the remittal on 25 May 2023, the Secretary gave an additional set of material to the IAA. That material included information already before the IAA (a recording of the applicant's visa interview, a copy of his Taskera, and a written record of his arrival interview). This is not new information.
5. The material includes information not previous before the IAA – a consular notice, a detention notice, and IAS form. The latter appears to be a Departmental document record containing an extract from the written record of his arrival interview, specifically a verbatim account of his travel in [Country]. I do not consider any of this information is material or relevant to this assessment and it has not been considered.

Submissions – new country information

6. The applicant provided a written submission in the course of the first IAA review, dated 1 March 2017. A further written submission was provided following remittal of this matter on 28 June 2023.
7. The written submission from March 2017 contained reference to country information previously included in a post interview submission (and which is not new information), as well as reference to four new articles that were not previously referenced and would be new information. Only one of those reports, from Radio Free Europe (16 February 2017) postdates the delegate's decision. The written submission of 1 March 2017 was also supplemented by series of subsequent emails containing various updated country information which were provided to the IAA between 24 April 2017 and 26 August 2017. The new country reports in these emails each postdate the delegate's decision.
8. There is no claim that the country information in the 2017 written submission or the subsequent emails contains information specifically about the applicant or his claims. I am not satisfied these new country reports contain credible personal information in the relevant sense, or credible personal information that may have affected the consideration of the applicant's claims.
9. In terms of the new country information in the written submissions that predates the delegate's decision, no indication is provided for why it could not be provided earlier. In view

of what information is before me, I am not satisfied the new information could not have been provided to the Minister before the delegate made the decision.

10. In terms of the country information that postdates the delegate's decision, I am satisfied the new information could not have been provided to the Minister before the delegate made the decision. While it satisfies s.473DD(b)(i), and while I accept it is relevant, it is now very dated in terms of any forward assessment. In his more recent submissions, the applicant has provided updated country advice, and the IAA has also obtained current advice regarding the situation in Afghanistan. In all the circumstances, I am not satisfied that there are exceptional circumstances to justify considering the new country information provided in the 2017 submissions and supplementary emails.
11. In terms of the country advice provided in the 28 June 2023 submission, this is recent information relating to the current security situation in Afghanistan. It includes the most recent report on Afghanistan from the Australian Department of Foreign Affairs and Trade (DFAT). I am satisfied the new information could not have been provided to the Minister before the delegate made the decision. The representative states that there has been a significant shift in the situation in Afghanistan with the Taliban taking control of the country. He contends this development has profound implications for the safety and security of individuals, particularly those who may face harm upon returning to Afghanistan. I accept that security environment has changed significantly since the delegate's decision and warrants consideration of current country information. With one exception, I am satisfied that there are exceptional circumstances to justify considering the new information.
12. The one exception relates to the submission of an unrelated IAA decision. There is no suggestion this case is directly relevant to the applicant's case – for clarity, it does not relate to the applicant, his wife or children. While it is personal information in terms of the party in that review, I am not satisfied that it contains credible personal information in the relevant sense, or credible personal information that may have affected the consideration of *this* applicant's claims. While I have accepted this decision satisfies s.473DD(b)(i), and I accept the information in that decision would have at least broad relevance to this assessment, the IAA is not bound by other decisions made in this jurisdiction. Each matter turns on its particular facts and the information available. In all the circumstances, I am not satisfied that there are exceptional circumstances to justify considering this unrelated IAA decision.
13. In addition to accepting the new country advice from the applicant, I have also obtained new country information,¹ and for the same reasons I am satisfied that there are exceptional circumstances to justify considering the new information. Having obtained more recent country advice reports, I do not consider it necessary to consider the reports obtained by the IAA for the previous review in 2017. I am not satisfied that there are exceptional circumstances to justify considering the new information obtained by the previous IAA in 2017.

Submission – new information relating to applicant's profile

14. In the 2017 submissions, the applicant sought to clarify that his siblings had changed their residence in [Location 1] in Kabul many times since his incident with the Taliban because they

¹ European Union Agency for Asylum (EUAA), 'Country Guidance: Afghanistan (January 2023)', 24 January 2023, 20230130112357; Jane's Terrorism & Insurgency Monitor, 'Growing militancy in northern Afghanistan indicates renewed threat from Wilayat Khorasan', 3 May 2022, 20220504091212; Danish Immigration Service, 'Afghanistan - Taliban's impact on the population', 1 July 2022, 20220704104853; UNHCR, 'Guidance Note on Afghanistan (Update I)', February 2023, 20230220095752.

feared being identified and harmed by the Taliban. They had remained in the same district but moved to various homes. I note this was the subject matter of the remittal to the IAA for further consideration.

15. There was some indication about the movements of his siblings in the applicant's evidence at the visa interview. The applicant was asked who lived at his old address and he said that he did not know. He also stated that he was living there with his brothers and sister. He also indicated his brother no longer worked for the [Workplace]. When asked if his siblings were ever contacted by the Taliban, the applicant said they were not. The applicant did not indicate where his siblings were at that point, or if they felt they were at threat from the Taliban.
16. The delegate's decision placed some emphasis on the lack of approach by the Taliban to his siblings and the owner of the [Vehicle] ([Mr A]). I consider the applicant's clarification and addition of information is relatively minor and consistent with his previous evidence. I am satisfied the new information is credible personal information which was not previously known and may have affected the consideration of the applicant's claims. In all the circumstances, I am satisfied there are exceptional circumstances to justify considering the new information.
17. In the 2023 submissions, the applicant provided further new information relevant to his claims, specifically he contends:
 - He is now married and has a wife and children who currently reside in Australia. He has provided a copy of [birth certificates] (from [Years]) and his marriage certificate ([Year]). He states his family connections in Australia demonstrate strong ties and a significant change in circumstances that warrant a reassessment of his application.
 - His brother has fled Afghanistan and lives in [Country]. He claims his brother fled Afghanistan because he feared of being harmed and killed by the Taliban and other terrorist groups. He claims his brother's circumstances further demonstrate the ongoing risks faced by persons belonging to their ethnic and religious background in Afghanistan.
18. I accept the applicant is married and has [children]. I do not accept these are factors that 'warrant a reassessment of his application' as contended in the submission. The matter is before the IAA by orders of the Federal Circuit and Family Court of Australia. That is the proper basis by which the current review is being reconsidered.
19. The information about his wife and children, and his brother, is new information. I am satisfied the new information could not have been provided to the Minister before the delegate made the decision. I consider the information may to some extent be relevant to his assessment –in terms of relocation and whether he is entitled to a protection visa as a member of their family unit. Equally, I have no reason to consider his wife and children, who now have legal status in Australia, would be compelled to return (or be able to return) to Afghanistan.
20. I accept there has been a significant shift in the security situation in Afghanistan, and that the economic and humanitarian situation in the country has deteriorated. Like many others in Afghanistan, I consider it plausible his brother has left the country. In terms of his family developments, and the security changes in Afghanistan, I am satisfied that there are exceptional circumstances to justify considering the new information.

Applicant's claims for protection

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

- He is a Shia Hazara and citizen of Afghanistan. He was born in [Location 2] in [District], Ghazni Province in [Year]. This was a Hazara dominant area but was surrounded by Pashtun areas. At a young age, he moved to the [Location 1] area in Kabul.
- He has [siblings], who were also living in [Location 1] area in Kabul. His mother is deceased. His father went missing in [Year] while carrying American supplies to Kandahar. He was transporting material to American and foreign bases in Afghanistan. The applicant was told that his father's truck was stopped while part of a large convoy. His father was told to exit his vehicle. His truck was burned and he believes his father was taken by the Taliban. He believes his father was stopped because he was a Shia Hazara, and because he was driving trucks that were clearly marked as being for American and foreign forces.
- The applicant found a job driving [Vehicles] not long after his father disappeared. He was regularly stopped by the Taliban, who were recognisable from their beards, turbans and weapons. They would point weapons at him, ask him to get out and then search his [Vehicle].
- The Taliban would sometimes receive tip offs to stop drivers, other times it was random, but Hazaras and other whom the Taliban suspected of working for the Americans would be stopped and taken away.
- In the year he left Afghanistan, the applicant was transporting two or three regular passengers to [City] – a non Hazara area. They were [Ethnicity] and he believed they were working on [a Project].
- In or about July/August 2012 the applicant was on his way back to Kabul from [City] when he was stopped by two members of the Taliban travelling on a motorbike. He did not have any passengers with him. He said the men knew his name and taxi registration and were specifically looking for him.
- He was made to exit his vehicle and the Taliban men pointed a gun at him. They put him in the [back] of his [Vehicle] and took him to a place called [Location 3] and then Wardak. They were all gathered in a mosque in the evening. There was an interpreter and many other people. Some of these people were killed in front of him. When he was chosen, they dragged him by his collar and his hands were tied. There were 4 or 5 people from the Taliban. They said that by the law of the country he was an infidel because he was transporting spies.
- He did not think at the time that he was transporting spies, but if his passengers had been spies, he would be associated too and targeted by the Taliban.
- A Mullah or commander of the Taliban came up to him and said they had a report from people that he had been transporting people from [City] and that the applicant had been assisting with their spying.
- The applicant plead his innocence, explaining that he was a poor man working as a taxi driver. The Mullah said he would be let go on the condition that he cooperated with the Taliban. He was told to let the Taliban know when he was transporting spies/infidels. They said they would pay him 20,000 Pakistani rupees.
- They took his name and said they would check on him every month. They would pay him and have all his details. They took his licence and mobile, and took a photograph,

and asked him to sign a contract to cooperate with them. They told him if that he did not put his thumbprint on the papers, they would kill him.

- The next day he was let go in an area called [District] in Wardak. He did not receive any of the money he was told the Taliban would give him.
- He returned to Kabul and handed the [Vehicle] back to its owner. He believed there was no point in living there and he decided to come to Australia. He also left Afghanistan because of the discrimination and threats he faced as a Shia Hazara. He fears harm from the Taliban as well as Islamic State and Jihadis.
- He also fears harm having lived in Australia. He considers every group, including warlords, will assume he has money. They will try to extort him and threaten to kill him if he returns to Afghanistan.
- He cannot relocate as the Taliban would be able to identify and kill him anywhere in Afghanistan.

Factual findings

22. The applicant has provided a copy of a Taskera and Afghan drivers licence as evidence of his identity and citizenship. While there were some concerns with the initial translations, it appears this was due to an error on the part of the translator. The translations were corrected in post interview submissions. I am satisfied there was no intention to mislead in terms of his identity documents.
23. The applicant was born in [District], Ghazni Province. His family moved to [Location 1] in Kabul in [Year]. He lived, studied and worked in Kabul before he left the country in or about late 2012. The applicant's Taskera indicates his birthplace is [District] in Ghazni, and his Afghan Drivers Licence indicates it was issued by the Kabul Traffic Authority in 2010. On the basis of his documentary and oral evidence, I accept the applicant is a citizen of Afghanistan originally from Ghazni, and that he later moved to Kabul when he was [young]. Other than a period of a year or so in the mid-late [Decade] when he left Kabul, I am satisfied he lived in Kabul until he left Afghanistan, and that his siblings were living there at that time. I find that Kabul is his home area and would be the area he would return to live in Afghanistan.
24. The applicant was consistent about his religious and ethnic profile. The applicant spoke through a Hazaragi interpreter at the visa interview. I note that a majority of Hazaras are Shia. I have no concerns with his claims related to his ethnic and religious profile. I am satisfied he is a Shia Hazara.

Claims related to Afghanistan

25. The applicant claims that his father went missing in [Year] while working as a truck driver. He claims his father was transporting supplies to a military base in Kandahar. He believes his father was taken by the Taliban. In his visa application, he claimed he had not heard any news about his father. The applicant has not contended he or his family believed they were ever at threat from the Taliban in connection with these events.
26. The country advice before me indicates a history of insecurity on the roads and risks to persons associated with the Afghan and international security forces.² The applicant also

² UNHCR, 'Eligibility Guidelines for Afghanistan', 19 April 2016, CIS38A8012660.

believes his father was additionally vulnerable because of his religious and ethnic profile as a Shia Hazara. I accept there has been country advice indicating additional risks to Hazaras while travelling on the roads.³ The applicant has been consistent about this claim since his arrival in Australia. On the information before me, I am prepared to accept his father was abducted and likely killed by the Taliban while working as a truck driver transporting goods for US or international forces in [Year]. I am also satisfied the applicant has no profile or fears in connection with his father's abduction.

27. The applicant has consistently claimed that he worked as [an Occupation] in Kabul, before working as a self-employed [Vehicle] driver. His Taskera, issued in 2003, indicates his occupation as [Occupation]. His licence was issued in 2010. I consider his employment claims and documentation are internally consistent and corroborated by this evidence. I accept his claims about his employment history.
28. The applicant claims that he worked as a [Vehicle] driver between 2011 and 2012 when he left Afghanistan. There is some indirect support for this in his Kabul licence, which indicates it was issued in July 2010. The applicant has again been consistent about this work since his arrival interview in 2013, and he provided a persuasive account of how he 'rented' this [Vehicle] from its owner [Mr A], and his experiences as a driver during this period, working mostly within Kabul, but also travelling outside of the city at times. I did not get any impression he was seeking to embellish or exaggerate his work experiences.
29. The applicant's claims relate to his work as a driver and his interactions with the Taliban. He claimed he was regularly stopped by the Taliban. They would point at him, ask him to exit his [Vehicle], and his [Vehicle] would be searched. Sometimes the Taliban acted on tip-offs to stop drivers, other times it was more random. He said that Hazaras and others that the Taliban suspected of working for the Americans would be stopped and taken away. I consider his account as a driver is consistent with advice before me about insecurity on the roads, Taliban checkpoints, and the targeting of those perceived to be opponents of the Taliban, particularly Hazaras suspected of association with the Afghan Government or international forces.⁴ I accept he was stopped and searched on multiple occasions. As a Hazara, I accept he was fearful during these interactions, however it must also have been the case that he did not feel specifically at threat because he continued to undertake this work.
30. The applicant provided what I consider to be a plausible and consistent account of his abduction while returning to Kabul from [City]. He had dropped off some regular passengers who claimed to work on [a Project] in [City], when he was stopped by the Taliban, placed in the boot of his vehicle and taken to [Location 3] and then Wardak.
31. He claims he was taken to a small mosque where many other people were present. He claims he witnessed people being killed before he was taken and accused of transporting spies (the passengers he had taken to [City]). He did not believe he had done so. The applicant claimed he plead his innocence, and a Taliban Mullah agreed to let him go on the condition that he cooperated with the Taliban and inform them whenever he was transporting infidels. He claimed they took his name and details, his licence and mobile, and photo. They also made him sign an agreement with his fingerprint. He claims he was released in Wardak and he drove back to Kabul. He returned the [Vehicle] to its owner and started arrangements to leave Afghanistan.

³ DFAT, 'Country Information Report – Afghanistan', 18 September 2015, CISEC96CF13366; DFAT, 'Thematic Report: Hazaras in Afghanistan', 8 February 2016, CIS38A8012186; and others.

⁴ EASO, 'Afghanistan Security Situation', 20 January 2016, CIS38A8012395; DFAT, 'Country Information Report – Afghanistan', 18 September 2015, CISEC96CF13366; and others.

32. The applicant's account of this incident has been consistently advanced since his arrival in Australia. I give some weight to the consistency of his account. I consider it plausible his passengers, if they were working on critical infrastructure like telephone lines, may have had (or were perceived to have) associations with the international forces.
33. One of the concerns identified by the delegate related to the timing of this incident and the applicant's departure from Afghanistan. I have considered the submissions on this issue. I am not satisfied the applicant was intending to mislead in anyway. I find there has been some confusion between his claim in the arrival interview that the incident took place around five months prior to that interview in March 2013 (being October/November of 2012) and the separate contention that it occurred in the fifth month of that year. I am not satisfied this confusion in the dates is anything other than a misunderstanding in the evidence.
34. I accept the applicant worked as a [Vehicle] driver. I accept he transported passengers to rural areas like [City] and that he had regular passengers. I accept the Taliban stopped him on multiple occasions, and that on one occasion he was abducted and forcibly threatened to become an informant. I accept he did not assist the Taliban, that he ceased working as a driver, and several weeks later he left the country.
35. One concern I share with the delegate is the lack of any further threat or interaction between the applicant and the Taliban, or any Taliban approach to the [Vehicle] owner or his siblings.
36. It is arguable the applicant did not remain in Afghanistan long enough for the Taliban to find him. I also acknowledge the submission that while the Taliban has a strong network, it is not necessarily the case that the applicant could have been tracked quickly – particularly if he moved and destroyed his sim card as he suggests. I do not consider the lack of any approach to the applicant during this period resolves the question of whether they were interested in him or not, but it is also the case that he was not approached or threatened by the Taliban during his remaining period in Afghanistan. I find that relevant.
37. Of more significance to me is the lack of any approach to his siblings or [Mr A]. Assuming the Taliban would eventually come to know that the applicant left the area, was no longer driving a [Vehicle], and was not cooperating with their demands, then I consider the lack of any subsequent Taliban approach to his siblings or [Mr A] raises serious doubts as to whether the Taliban were looking for the applicant, whether in the weeks or months after his abduction in 2012.
38. In terms of [Mr A], the applicant claims he never said he gave details about [Mr A] to the Taliban and they know nothing about the applicant's relationship to [Mr A]. He also claims he has never said that he was in contact with [Mr A] since leaving Afghanistan. He claims he knows nothing about [Mr A]'s whereabouts or whether he is alive. That may be the case, but [Mr A] owned the [Vehicle] and the Taliban told the applicant they knew the registration details of the [Vehicle]. If the Taliban was interested in the applicant for failing to assist them, then the most obvious and direct line of inquiry for the Taliban would be to visit [Mr A] at his premises. The applicant said at the interview that he did not know if [Mr A] was ever contacted. I accept he may not know what happened to [Mr A], but I consider there is no evidence to indicate that [Mr A] was ever approached, questioned or threatened by the Taliban.
39. It was also the applicant's evidence that his siblings in Kabul were not approached, whether in those initial weeks and months, or in the years that followed. I am prepared to accept his evidence in his IAA submission that his siblings moved from their residence on several

occasions, but it is also his evidence that they remained in the same district in [Location 1] in Kabul. I do not consider simply moving residence in the same area would have removed the potential for the Taliban to find and question his siblings if they were motivated to do so. Moreover, if his siblings remained in this area [Location 1], I find it even more significant that they had not heard from people in the area that the Taliban was ever looking for him.

40. I accept that his personal details were taken by the Taliban, including his photo. I do not accept they could use his thumbprint to track him – I am not aware that the Taliban has its own biometrics database – but I do accept the Taliban has a complex network. I consider if the Taliban was seeking to find the applicant, I consider they would have done so.⁵
41. I consider a more plausible assessment of his situation is that the applicant was the victim of an abduction. I accept that the incident was traumatic and that he was fearful for his life. I consider the Taliban, likely a rural group of Taliban, sought to intimidate and threaten the applicant so that he would become an informant. Had the applicant continued to drive [Vehicle] in that area, I consider they would have sought to intimidate and threaten him for intelligence using violence and their 'agreement' with him. Similarly, if he ceased working, but remained in that area, he may have been at threat from these members of the Taliban if they found him. But as he ceased driving a [Vehicle], and no longer travelled in that area, I do not consider he remained a person of interest for that group of Taliban. I consider he would have been one of many informants, or attempts to obtain such informants, and his disappearance from that area was of no major significance. The applicant had no real intelligence about foreign spies – I consider his role as an informant would have been opportunistic.
42. I accept the applicant was fearful and it is plausible his siblings were also fearful of any approach by the Taliban. But I am satisfied there was no approach and I find that the Taliban, whether local or regional, were not seeking the applicant and never sought to track him or find him in Kabul or anywhere else. The fact that his siblings remained in [Location 1] for several years is evidence to me that they also did not feel specifically at threat from their brother's profile. I accept one of his brothers has since left Afghanistan, but I consider that relates to the recent security situation, not the applicant's specific claims.
43. Over ten years have passed since this violent incident. I have not accepted the Taliban were seeking to find the applicant when he left, and I consider whatever limited profile he had has almost certainly dissipated in the decade that has followed. While I consider the applicant likely still feels the gravity of that day and his resultant decision to leave Afghanistan, I am not satisfied that there would be any specific threat to the applicant from the Taliban if he were to return to Afghanistan, now or in the reasonably foreseeable future. I find his fears of persecution in this regard are not well founded.

Ethnic, religious profile and time in the west

44. I have accepted the applicant is a Shia Hazara from Kabul. I am satisfied that is the area he would seek to return and live. I note Kabul has a significant Shia Hazara population and neighbourhoods where such populations live, work, study and practice their faith.
45. The applicant has made submissions and country advice regarding the risks to Shia Hazaras and those with links to the west. Beyond the incident involving his father, and his own experiences being stopped by the Taliban while working as a driver, he has not described any

⁵ Immigration and Refugee Board of Canada, 'Afghanistan: Whether the Taliban has the capacity to pursue individuals after they relocate to another region; their capacity to track individuals over the long term', 15 February 2016, CX6A26A6E2839.

other incidents of harm for these reasons. I have assessed his claims in terms of such profile factors in the assessment below.

Family in Australia

46. The applicant claims it would be impossible for him to return to Afghanistan without his wife and children. He claims taking his wife and children to Afghanistan would put his life and their lives at risk of harm at the hands of the Taliban, Islamic State and other groups due to their ethnic and religious profile, his wife's gender, as well as his personal profile.
47. The applicant has been in Australia for over ten years. His personal circumstances have changed considerably since the visa application. On the basis of the marriage and birth certificates he has provided, I am satisfied the applicant is married and has [children] living with him in Australia. I am also satisfied his wife and children hold protection visas.
48. As his wife and children hold protection visas in Australia, I am not satisfied they would return to Afghanistan, nor do I consider the applicant would seek to take them back if he himself was to return to the country. I consider any separation from his family would have a profound impact on the applicant, but these are matters of personal choice. Beyond the potential financial and logistical impact of him seeking to support his family from Afghanistan, I am not satisfied these matters impact or increase his own risk profile on return to Afghanistan.
49. I note that his wife and children were granted Class XD Subclass 785 (Temporary Protection Visa) visas as secondary applicants on 1 June 2021. The applicant applied for a Class XE Subclass 790 (Safe Haven Enterprise Visa) visa on 10 March 2016. As the protection visas granted are not of the same class as that applied for by the applicant, it appears the applicant would not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

Refugee assessment

50. 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

51. 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.
52. I find the applicant would return to Kabul. I have accepted the applicant is an ethnic Hazara and Shia Muslim. I have weighed the applicant's fears in relation to Taliban, Islamic State Khorasan Province (ISKP), and other extremist groups active in Afghanistan, on the basis of his ethnic and religious profile more broadly, and his other related profile – including that related to his time in the west. I have accepted his claims in relation to his past interactions with the Taliban, but I am not satisfied that the Taliban is seeking the applicant. I consider the risks to the applicant from the Taliban on the basis of these past interactions are near zero.
53. Nearly two years have passed since the Taliban took control of Afghanistan, yet the security situation in Afghanistan remains complex and difficult to predict. The end of conflict has resulted in some degree of peace in the country, as the previous conflict between the former Afghan and International forces and the Taliban no longer defines the security environment in the country. According to DFAT, the cessation of hostilities has made many parts of the country, especially rural areas, effectively free from armed conflict.⁶ I am satisfied the general security environment has stabilised, however I accept the submission that the country remains in a perilous economic and humanitarian position.⁷
54. While the risk from generalised violence and insecurity appears to have in large part abated in the country, that is not the case for the country's religious and ethnic minorities.
55. The Taliban controls Afghanistan under the auspice of the Islamic Emirate of Afghanistan (IEA). It is undeniable that the Taliban was responsible for the systematic persecution of Shia Hazaras in Afghanistan's not distant past.⁸ However, for some time the Taliban has not held an obvious ethno-sectarian agenda.⁹ In recent years, attacks against Hazaras by insurgent groups were mostly attributed to ISKP. Although conflict between the Taliban and Shia Hazara groups did occur from time to time, it typically involved control of territorial areas or the targeting of Hazaras with additional profiles (e.g., those associated with the government).
56. In 2023, the EUAA reported that after the Taliban took over Afghanistan, there seemed to be no Taliban policies in place against the Hazara minority. Shia Muslims were allowed to perform their religious ceremonies, such as annual celebrations of the Ashura. The Taliban vowed to protect the Hazara community and Taliban fighters reportedly guarded Shia Mosques. Hazaras were appointed to posts in the new Taliban administration at the central and provincial levels, albeit it was debated whether these people were regarded as truly representatives of the Hazara minority since they had already been part of the Taliban insurgency.¹⁰
57. Despite the Taliban's overtures, there have been contrary indications in the country advice. There have been recent reports of forced evictions of Hazaras by the Taliban, or other groups (e.g. Kuchi nomads). In some instances, the Taliban at local levels vowed to investigate and/or address these issues. However, on other occasions local Taliban leaders claimed that

⁶ DFAT, 'Thematic Report - Political and Security Developments in Afghanistan', 14 January 2022, 20220114091740.

⁷ Human Rights Watch, 'Afghanistan: Economic Crisis Underlies Mass Hunger', 4 August 2022, 20220805100822.

⁸ DFAT, 'Thematic Report: Hazaras in Afghanistan', 8 February 2016, CIS38A8012186.

⁹ Borhan Osman, 'With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War ', Afghanistan Analysts Network, 19 October 2016, CX6A26A6E11358.

¹⁰ EUAA, 'Country Guidance: Afghanistan (January 2023)', 24 January 2023, 20230130112357.

the evictions took place in accordance with relevant court decisions. Taliban officials in Kabul had also reportedly retracted some eviction orders in Daikundi.¹¹

58. The UNHCR describes the Taliban's governance as being characterised by uncertainty, arbitrariness, and disregard for the rule of law.¹² The Taliban has been ruling by decree. The Taliban has stated that its governance would be based solely on Sunni Hanafi jurisprudence, and there are significant concerns about how this will impact Shia Hazaras in particular, with some reports of Shia Hazaras facing discrimination in accessing the legal system.¹³
59. According to DFAT, a number of its sources have emphasised the factional nature of the Taliban, with different sub-groups within the organisation competing for influence and control. These sources also emphasised that the Taliban's command-control structure, which proved effective for a fighting force, appears to be struggling to regulate the actions of tens of thousands of foot soldiers (and their regional commanders). This means that behaviour on the ground, including violence towards at-risk groups, may be inconsistent with proclamations from the central Taliban authorities, or may reflect local grievances.¹⁴ One example is the reported extra-judicial killing of a Hazara family by the Taliban in Daikundi in November 2022, including four boys aged between 1 and 14. A spokesperson for the de facto Ministry of Internal Affairs stated that those killed were armed rebels and denied the killing of any children.¹⁵
60. In that context, it is unsurprising the Taliban's return to power has been met with fear by the Hazara community who view the Taliban's promises of inclusivity and amnesty with scepticism, as propaganda or attempts at public relations.¹⁶
61. There is less uncertainty in the advice before me about the threat to Shia Hazaras from ISKP. That threat was clearly identified by the applicant in his post interview submissions.¹⁷ In the years that followed his submission, ISKP has had a devastating impact on the country's Shia Hazara population. Attacks by ISKP targeted places where Hazaras and Shias gathered, such as religious commemorations, weddings, and sites (e.g. hospitals) in Hazara-dominated neighbourhoods in large cities, including Kabul and Herat. Despite its small size (estimated to be around 4000 members) ISKP has retained the ability to carry out terrorist attacks, targeted killings and bombings in Afghanistan, and this has continued since the Taliban takeover.¹⁸ UNAMA's most recent figures indicate a significant increase in civilian harm resulting from IED attacks on places of worship compared to the three-year period prior to the Taliban takeover.¹⁹
62. DFAT considers that the situation in Afghanistan is highly volatile and the ability of the Taliban to control violent actors such as ISKP is not currently clear. DFAT assesses that there is significant potential for violence across the country, especially in the eastern provinces

¹¹ EUAA, 'Country Guidance: Afghanistan (January 2023)', 24 January 2023, 20230130112357.

¹² UNHCR, 'Guidance Note on Afghanistan (Update I)', February 2023, 20230220095752.

¹³ Danish Immigration Service, 'Afghanistan - Taliban's impact on the population', 1 July 2022, 20220704104853; EUAA, 'Country Guidance: Afghanistan (January 2023)', 24 January 2023, 20230130112357.

¹⁴ DFAT, 'Thematic Report - Political and Security Developments in Afghanistan', 14 January 2022, 20220114091740.

¹⁵ United Nations Human Rights Council, 'Situation of human rights in Afghanistan - Report of the Special Rapporteur on the situation of human rights in Afghanistan, Richard Bennett', 9 February 2023, 20230302103714.

¹⁶ DFAT, 'Thematic Report - Political and Security Developments in Afghanistan', 14 January 2022, 20220114091740.

¹⁷ Borhan Osman, 'With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War', Afghanistan Analysts Network, 19 October 2016, CX6A26A6E11358.

¹⁸ EUAA, 'Country Guidance: Afghanistan (January 2023)', 24 January 2023, 20230130112357.

¹⁹ UNAMA, 'UNAMA report records heavy toll on Afghan civilians by IED attacks', 27 June 2023.

where ISKP is strongest.²⁰ Other advice indicates that while ISKP is still relatively small, it remained active, appeared to have a presence in nearly all provinces, and the group continues to seek to recruit from other ethnic groups and those dissatisfied with the Taliban.²¹

63. DFAT concludes that Shia Hazaras in Afghanistan face a high risk of harassment and violence from both the Taliban and ISKP, on the basis of their ethnicity and sectarian affiliation. DFAT states that while the level of mistreatment of Hazaras is currently less widespread than was predicted by some sources upon the fall of Kabul, members of the Hazara community have suffered from ISKP terror attacks and Taliban violence, including hundreds of evictions. DFAT assesses that Shia face a high risk of being targeted by ISKP and other militant groups on the basis of their religious affiliation when assembling in large and identifiable groups, such as during demonstrations or when attending mosques during major religious festivals. This risk increases for those living in Shia majority or ethnic Hazara neighbourhoods in major cities such as Kabul and Herat.²²
64. In 2023 EUAA reported that ISKP had carried out 13 attacks against Shia Hazaras since the Taliban takeover in August 2021, and that the group could be linked to three additional attacks, resulting in the death of at least 700 people. EUAA assesses that there have been two patterns of attacks targeting Shia Hazaras after the Taliban takeover. The first pattern was attacks mainly targeting civilian passenger vehicles, particularly public transport minivans favoured by 'young, educated and professional Hazaras' such as government employees, journalists, and NGO staff. Hazaras had also been stopped and singled out when travelling on the highways. The second pattern was large-scale complex attacks, which have targeted Shia mosques, and hospitals and schools in Hazara dominated areas.²³
65. As is apparent from the applicant's own experiences and submissions, the roads have long been insecure in Afghanistan, particularly between Kabul and Ghazni.²⁴ The applicant's post interview submissions placed particular emphasis on the risks to Shia Hazaras travelling on the roads, including killings and abductions.²⁵ It is my understanding that the specific risks for Hazaras travelling on the road eased in the years that followed these submissions, however I am conscious there are no longer Afghan National Army or Police presences seeking to secure these areas or on the roads. Given the EUAA analysis above, I consider there are again credible indications of risks to Shia Hazaras travelling on the roads in Afghanistan.
66. I consider the risks to the applicant living and travelling in other areas would be compounded by his lack of history with those areas, his limited family networks outside of Kabul, and also potentially his time in the west. In terms of the latter, while I am of the view that past country advice has somewhat overstated the risks to those returning from the west, I consider there is a dearth of recent and reliable guidance about the risk to those returning to a Taliban-controlled Afghanistan from the west – in part due to the fact that there are few recent examples of Afghan nationals being returned to Afghanistan from western countries. The most recent EUAA assessment is that the assessment of risk in this regard would turn on the individual circumstances of the applicant.²⁶ There is nothing obviously

²⁰ DFAT, 'Thematic Report - Political and Security Developments in Afghanistan', 14 January 2022, 20220114091740.

²¹ EUAA, 'Country Guidance: Afghanistan (January 2023)', 24 January 2023, 20230130112357.

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

²³ EUAA, 'Country Guidance: Afghanistan (January 2023)', 24 January 2023, 20230130112357.

²⁴ EASO, 'Afghanistan Security Situation', 20 January 2016, CIS38A8012395.

²⁵ Human Rights Watch (HRW), 'Afghanistan's Shia Hazara Suffer Latest Atrocity. Insurgents' Increasing Threat to Embattled Minority', 13 October 2016, CX6A26A6E11758; UNAMA, 'Protection of Civilians in Armed Conflict Midyear Report 2015 August', 5 August 2015, CISEC96CF13007.

²⁶ EUAA, 'Country Guidance: Afghanistan (January 2023)', 24 January 2023, 20230130112357.

westernised about the applicant, however I accept he has spent a considerable period in 'the west' and has strong family ties here. It is not clear whether that would expose him to a chance or risk of harm on return, but I do consider it creates further uncertainty, particularly given the IEA's public criticism of those fleeing to the west at the time of the Taliban takeover.

67. Indeed, nearly two years removed from the Taliban takeover, there is still considerable uncertainty about the future in Afghanistan. The situation remains complex and unresolved. As DFAT has indicated, the level of mistreatment of Shia Hazaras is currently less widespread than was predicted. Some sources quoted in other country advice before me are more equivocal about the risk to Shia Hazaras in Afghanistan.²⁷ Nevertheless, the threat from ISKP remains significant and there are few indications that the Taliban has the ability or will to protect the Shia Hazara community against such attacks.²⁸ I note ISKP has been able to orchestrate attacks in areas previously immune from the group's reach, such as Mazar-e-Sharif.²⁹
68. Based on the advice before me, I consider ISKP remains a credible and far reaching threat to Shia Hazaras living in Afghanistan. I am not satisfied the Taliban can or will protect Shia Hazaras from ISKP attacks in Afghanistan. I find there is a more than remote chance that the applicant would be harmed by ISKP if he were to return and live in Afghanistan. I consider the chance or risk of harm is most acute in the major cities, such as his home area in Kabul, but I also consider those risks are increasingly present in all areas of Afghanistan, particularly the eastern side of Afghanistan (inclusive of his birth area in Ghazni), in areas previously considered to be more secure, such as Mazar-e-Sharif in the north, and the insecure roads leading to those areas. Given DFAT's assessment that the Taliban leadership is struggling to regulate actions of its regional soldiers and commanders, I consider the risks to Shia Hazaras expand to include regional Taliban and other militant groups. Until there is clear advice that indicates there are secure and accessible areas available to Shia Hazaras, I find the real chance of persecution relates to all areas of Afghanistan.
69. On current advice, I am not satisfied that effective protection measures are available to the applicant against the threat of harm he would face from ISKP and other militant groups. Indeed, I am also not satisfied the Taliban can reliably provide effective protection in relation to its own fragmented factions throughout the country.
70. I find the harm the applicant fears would amount to serious harm, in the form of significant physical harassment, ill treatment, loss of liberty, or death. I am satisfied this harm would amount to systematic and discriminatory conduct and that the essential and significant reasons for persecution would be the applicant's ethnic and religious profile. I consider these aspects of his profile are immutable, and therefore there are no steps, reasonable or otherwise, he could take to avoid persecution.

²⁷ Danish Immigration Service, 'Afghanistan - Taliban's impact on the population', 1 July 2022, 20220704104853.

²⁸ United Nations Human Rights Council, 'Situation of human rights in Afghanistan - Report of the Special Rapporteur on the situation of human rights in Afghanistan, Richard Bennett', 9 February 2023, 20230302103714; UNAMA, 'UNAMA report records heavy toll on Afghan civilians by IED attacks', 27 June 2023; HRW, 'Afghanistan: ISIS Group Targets Religious Minorities', 6 September 2022; Amnesty International, 'Afghanistan: Kabul blasts signal utter failure of Taliban to protect minorities', 30 September 2022, 20221004110826.

²⁹ Jane's Terrorism & Insurgency Monitor, 'Growing militancy in northern Afghanistan indicates renewed threat from Wilayat Khorasan', 3 May 2022, 20220504091212.

71. As I am satisfied the applicant has a well-founded fear of persecution throughout the country, it is not necessary to consider the issue of his family in Australia or the challenges if he were to relocate within the country.

Refugee: conclusion

72. 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.