



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA23/10571

Date and time of decision: 8 September 2023 17:05:00

S MacKenzie, 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 citizen of Afghanistan. He arrived in Australia in February 2013 as an unauthorised maritime arrival. On 28 September 2015 he lodged a valid application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV).
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 16 May 2016, on the basis that the applicant did not face a real chance of serious harm or a real risk of significant harm upon return to Afghanistan.
3. On 1 July 2016, the IAA affirmed the decision not to grant the referred applicant a protection visa. [In] August 2023, by consent, the Federal Circuit and Family Court of Australia remitted the matter to the IAA for reconsideration.

Information before the IAA

4. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. On the 16 August 2023, a solicitor submitted an Appointment of Representative form to the IAA confirming her role as the representative for the applicant in connection with the remittal from the Court. At that time, the representative did not express any intention to submit further information or submissions. Subsequently, on 29 August 2023, the IAA sent an email to the representative confirming the commencement of the reconsideration of the applicant's case. The email emphasised the need for prompt action if there was any additional information to provide, as a decision could be made at any time. The IAA also informed the representative about the provisions of the IAA Practice Direction, which included the opportunity to provide written submissions regarding the applicant's disagreement with the Department's decision and any claims or matters presented to the Department not previously considered. A copy of the Practice Direction was attached for reference. Ten days have now passed since the IAA's communication to the representative and there has been no response or indication that submissions or additional information will be forthcoming in the foreseeable future. In all the circumstances, I consider it is reasonable to proceed with making a decision.
6. I have obtained new information¹ which documents significant change to the political and security situation since the delegate's decision and is material to the issues for

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022, 20220114090718; European Union Agency for Asylum (EUAA), "Country Guidance: Afghanistan (April 2022)", 20 April 2022, 20220421101054; European Union Agency for Asylum (EUAA), "Afghanistan - Targeting of individuals", 16 August 2022, 20220817112505; European Union Agency for Asylum (EUAA), "Country Guidance: Afghanistan (January 2023)", 24 January 2023, 20230130112357; Human Rights Watch (HRW), "Human Rights Watch World Report 2023", 12 January 2023, 20230112144355; Netherlands Ministry of Foreign Affairs, "General Country of Origin Information Report Afghanistan (March 2022)", 28 March 2022, 20220801142319; UK Home Office, "Country Policy and Information Note - Afghanistan: Security situation (April 2022)", 29 April 2022, 20220502132303; UK Home Office, "Country Policy and Information Note - Afghanistan: Fear of the Taliban (April 2022)", 29 April 2022, 20220502130414; United Nations High Commissioner for Refugees (UNHCR), "Guidance Note on the International Protection Needs of People Fleeing Afghanistan - Update I", 14 February 2023, 20230220095752; United States Department of State, "Country Reports on Human Rights Practices for 2022 - Afghanistan", 20 March 2023, 20230321155825; United States Department of State, "International Religious Freedom Report for 2022 - Afghanistan", 15 May 2023, 20230516090632; Radio Free Europe / Radio Liberty (RFE/RL), "Afghanistan's Shi'ite Minority Suffers 'Systematic

determination. Considering the time that has elapsed since the delegate made their decision, and that the information is from credible and authoritative sources relevant to the issues for determination, I am satisfied that there are exceptional circumstances to justify considering this new information.

7. The review material contains a bundle of information² in the Secretary's control which was not provided to the IAA when the applicant's case was referred in 2016. It does not appear this material was before the delegate, there is no explanation provided regarding its relevance, and it appears administrative in nature. Having reviewed this information, it is difficult to see how it is relevant to assessing whether the applicant faces a real chance of serious harm or a real risk of significant harm in Afghanistan. In all the circumstances, I am not satisfied this information is relevant to the review and I have not considered it.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:
 - He is a Shia Hazara from Kabul;
 - In Afghanistan, he worked for a [business 1] that supplied [product 1] to Afghan military training camps;
 - Prior to departing Afghanistan in 2013, he received threats from the Taliban in connection with his employment;
 - If returned to Afghanistan, he fears harm on account of:
 - his ethnicity
 - his religion
 - his adverse profile with the Taliban
 - his profile as a failed asylum seeker and 'western returnee'.

Refugee assessment

9. 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

10. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:

Discrimination' Under Taliban Rule", Abubakar Siddique and Mansoor Khosrow, 17 July 2023, 20230719093325; UN Security Council, "Security Council Emphasizes That Punitive Restrictions on Women's Rights, Escalating Hunger, Insecurity Taking Devastating Toll in Afghanistan", 8 March 2023; Middle East Institute, "Making sense of the Taliban's counterterrorism assurances", 18 August 2013

² Consular Access - [File number]; Detention Notice - [File number]; Form 956 Boat ID [number] - [File number]

- 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.

Identity

11. Since his arrival in Australia, the applicant has consistently claimed to be a Shia Hazara from Kabul and a citizen of Afghanistan. In support of his identity, he provided a copy of his Taskera (Afghan identity document). Although the applicant claimed that he lived in Pakistan between 2000 and 2007, I am satisfied he does not have the right to reside there. Like the delegate, I find that he is a national of Afghanistan and Afghanistan is the receiving country for the purpose of this decision.

Events in Afghanistan

12. The applicant's written evidence about events in Afghanistan was outlined in a written statement dated 26 September 2015 (SHEV statement), which was submitted along with the SHEV application later that same month. He also provided oral evidence about events in Afghanistan during an interview with the delegate on 2 February 2016 (SHEV interview) and I have reviewed the audio recording of the interview. In both his SHEV statement and during the SHEV interview, the applicant claimed that he left Afghanistan due to threats he had received from the Taliban.
13. In his SHEV statement, the applicant drew attention to his entry interview, which took place [in] February 2013 shortly after he arrived in Australia. During that interview, he provided two reasons for leaving Afghanistan: economic hardship and fear of being targeted by a suicide bomber, similar to what had happened to his uncle. He also indicated in the entry interview that there were no armed groups, political groups, or religious groups in the area where he lived. In his SHEV statement, the applicant argued that during the entry interview, he was instructed to provide only one or two brief sentences about his claims, which is why he didn't mention the Taliban threats at that time. He also indicated that the Taliban threats were another reason why he didn't mention these claims. During the SHEV interview, he indicated that these earlier omissions were because he was never specifically asked about these matters during the entry interview.
14. Included with the SHEV application was a written submission from the applicant's then representative, dated 28 September 2015, along with several attachments (SHEV submission). The representative also provided a bundle of documents relating to the applicant's mental health and a drink driving incident in Australia. A letter in that bundle from his counsellor, dated 25 October 2013, stated that the applicant had been undergoing torture and trauma counselling since July 2013 and was experiencing symptoms of Post-Traumatic

Stress Disorder. An inter-Department email from 2013 indicates that the applicant had been diagnosed with depression.

15. The applicant's evidence regarding his family's circumstances was problematic. In his SHEV statement, he claimed that his father had gone missing in 1993. He said his father worked as a taxi driver and did not return home one day. He also claimed that his mother was killed when a rocket hit the family's home, though the date of this incident was unspecified. The applicant claimed that after his mother's passing, he was taken in by a maternal uncle who met same fate during the 2011 Ashura Day bombing in Kabul. Later in the SHEV statement, he mentioned that the attack on the Ashura commemoration was in 2001. The applicant claimed he had no close family remaining in Afghanistan, aside from an uncle who assisted him to leave the country. Question 43 (Part C) of the SHEV application form required applicants to provide information about family members both in Australia and overseas, including parents and siblings. The applicant listed both parents (as deceased), with his wife residing in Australia. In question 45, the applicant indicated that he remained in contact with his [Uncle A], who still resided in Afghanistan. The written evidence in the SHEV application was broadly consistent with the applicant's evidence during the entry interview. In that interview, he mentioned his father's disappearance in 1993, the rocket attack on his mother's home, his subsequent stay with a maternal uncle, and the loss of an uncle during a suicide bombing. He also stated that he had no siblings and that [Uncle A] should be contacted in case of an emergency. The applicant also disclosed that his uncle secured him a passport to leave Afghanistan.
16. During the SHEV interview, the applicant informed the delegate that he couldn't recall the exact date his mother was killed but estimated it to have been when he was aged [age range] (in approximately 1996-97). He also provided oral evidence to the delegate that is difficult to reconcile with his SHEV statement, SHEV application, and entry interview. Firstly, he claimed that prior to his mother's passing he had been residing with her and his siblings. The delegate pointed out that their understanding was that he did not have siblings. In response, the applicant said that maybe he was confused when he arrived and hadn't had enough rest. When asked about the number siblings he had, he expressed uncertainty but indicated he had at least one brother and one sister. Secondly, the applicant informed the delegate that his uncle, who died in the Ashura Day bombing, was named [Uncle A]. He said that [Uncle A's] wife and children were now being supported by the applicant's grandparents. The delegate referenced the applicant's earlier account during the SHEV interview, where he had stated that [Uncle A] had assisted him in obtaining a passport to leave Afghanistan and questioned how this could be if [Uncle A] had indeed died in the Ashura Day bombing. In response, the applicant cited issues with his memory and suggested it may have been a different maternal uncle who had secured the passport.
17. The letter from the applicant's counsellor indicates that, in 2013, the applicant had informed her that his parents and siblings were killed in a bombing, and that his uncle was a victim of a suicide bombing a couple of years earlier. According to the inter-Department email from 2013, the applicant had conveyed a belief that his family had been killed in a mortar attack. The author of the email also noted that during an interview on 10 September 2013, the applicant had stated that his uncle had fallen victim to a suicide attack.
18. When I consider the evidence discussed, I have doubts about the credibility of the applicant's evidence in relation to events in Afghanistan involving his family members.
19. I also have concerns regarding the applicant's claim to have been threatened by the Taliban. In his SHEV statement, he claimed that he worked in a [business 1] supplying [product 1] to

Afghan military training camps. He received warnings from two individuals to cease working for the [business 1]. Similar warnings had been given to other employees, but the applicant, like the others, disregarded them, assuming they originated from disgruntled business competitors. One morning, the applicant's employer and another employee were kidnapped. Their bodies were discovered five days later. Subsequently, a [business 1] cleaner informed the applicant that the Taliban had come searching for him and other employees during his absence from work. The Taliban were not happy that the [business 1] was supplying [product 1] to the training camps and the disregard of their prior warning. The applicant knew he was in danger and fled Afghanistan soon after with the help of an uncle.

20. The applicant's evidence during the SHEV interview was that the [business 1] employed approximately 30 to 40 people. He reported that the two men who initially warned him about working in the [business 1] physically assaulted him and specifically mentioned the [business 1's] ties to the government. He also stated that the cleaner had informed him that the Taliban had specifically mentioned his name. The applicant said he couldn't recall how long it was before he ceased working at the [business 1] and leaving Afghanistan, speculating it might have been one week, one month, or possibly even longer.
21. During the SHEV interview, the delegate raised a concern with the applicant about his failure to mention the Taliban threats during his entry interview. The delegate noted that while he was instructed to provide short responses in that interview, he did mention the disappearance of his father and the killing of his mother and uncle. In response, the applicant explained that he was not questioned about this matter and responded solely to questions asked. The delegate also observed that the applicant was asked in the entry interview why he left Afghanistan, to which he responded that it was due to economic challenges and fear of being the victim of a suicide attack. The delegate further noted that the applicant was specifically asked in the entry interview if there were any armed groups operating in the area where he lived, yet he made no mention of the Taliban or these threats. The applicant responded by claiming that, while he did not mention a Taliban presence where he lived, he did acknowledge the risks when travelling between his home and workplace. The delegate also questioned why the applicant could not or did not change employers in light of the death threats. In response, he said the main reason was due to the high salary.
22. The delegate noted during the SHEV interview that country information supported that the Taliban targeted high profile targets in Kabul, such as government buildings, military targets, and high-level persons associated with the government, but that they were unaware of information suggesting that persons like low level workers in a [business 1] supplying [product 1] to a training base were targeted or exposed to harm. In response, the applicant argued that if the Taliban were unable to reach these higher-profile targets, their strategy including killing innocent people.
23. While country information at the relevant time indicates that individuals in Afghanistan working for or associated with the government or the international community (or perceived to be) were at risk of being targeted by insurgent groups such as the Taliban³, when considering the evidence discussed, I have significant doubts about the credibility of the applicant's account concerning events in Afghanistan involving Taliban threats.
24. The review material includes a letter from the applicant's wife, dated 25 September 2015, confirming his employment in an Afghan [business 1] with a government contract. The letter

³ UNHCR, "UNHCR Eligibility guidelines for assessing the international protection needs of asylum-seekers from Afghanistan", 1 August 2013, CIS26045; DFAT, "DFAT Country Information Report – Afghanistan", 31 July 2013, CIS26000; DFAT, "Hazara Community Update", 12 March 2012, CX283654

also states that the applicant has 'no family member' in Afghanistan. Overall, I give this letter no weight in my assessment of the applicant's claims. The applicant's wife states she first met the applicant after he arrived in Australia and there is no indication that she possesses any firsthand knowledge of his life in Afghanistan beyond what he has shared with her. I also note her assertion that her husband has no family in Afghanistan contradicts the applicant's later statements in both his SHEV statement and during the SHEV interview.

25. While I have concerns, I am willing to accept that the applicant's parents and any siblings were killed when he was young, and that he was subsequently raised by a maternal uncle. I am not satisfied that the applicant has provided a credible account of the circumstances surrounding the death or disappearance of these family members. However, in the overall context of his claims and this case I find that not much turns on that. I do not accept the applicant's claim in his SHEV statement that apart from an uncle he does not have any close family remaining in Afghanistan. He spoke in some detail during the SHEV interview about other uncles, aunts, grandparents and cousins who either lived with him or were involved in his life. I am also prepared to accept that an uncle was killed in an Ashura Day attack in 2011.
26. I accept the applicant's consistent evidence since his arrival in Australia that he had worked in numerous [business 1s] in Afghanistan (and Pakistan) before coming to Australia. I am also prepared to accept the [business 1] he last worked for may have supplied [product 1] to Afghan military training camps. However, I am not satisfied that he was threatened by the Taliban in connection with this employment. I consider his failure to mention these threats in the entry interview, even in general terms, to be significant. The applicant claims these threats were the catalyst for his departure and occurred just prior to leaving Afghanistan. The entry interview was conducted only months or potentially weeks since the purported threats and, in these circumstances, I consider these events would have been at the forefront of the applicant's mind when he was specifically asked in that interview why he left Afghanistan. I am not persuaded by the applicant's reasons for not mentioning the threats in the entry interview. While I acknowledge he was only asked to provide a brief response as to why he left Afghanistan, I am satisfied that he had an opportunity to mention the threats. I consider that if it were true that he was subject to Taliban threats, his response would not have focussed on economic challenges and a general fear of being caught up in a suicide attack. I also note that the applicant was given an opportunity at the end of the entry interview to explain what he thought would happen to him if he returned to Afghanistan and to provide information about any matters he was not specifically asked about. Again, there was no mention of the Taliban and he indicated that there were no other matters that he needed to discuss. Nor am I persuaded that the applicant withheld this information during the entry interview because of the purported threat itself. There is no indication in the applicant's counsellor's letter that he mentioned the Taliban threats to her or that his work colleagues had come to the adverse attention of the Taliban. I also find the applicant's evidence in the SHEV interview that his uncle suggested he come to Australia to assist in supporting his family to be not insignificant.
27. Finding the applicant's evidence as vague and unconvincing, the delegate did not accept that he received threats from the Taliban, or anybody else, in connection with his employment. I note that the IAA Practice Direction also allows applicants to provide a written submission about why they disagree with a delegate's decision or about a claim or matter presented that was overlooked. However, no submissions have been filed in relation to this IAA review or the previous one. In assessing this aspect of the applicant's evidence, I have taken into account several factors. First, the applicant is illiterate, potentially has a history mental health issues, has experienced past trauma, and a significant amount of time has elapsed since the purported events. I also acknowledge the potential for miscommunication due to cultural

differences or language interpretation issues. During the SHEV interview, the applicant mentioned that he had difficulty recalling details and although memory loss is a reported symptom noted in the counsellor's letter from 2013, it lacks support from any medical documentation or a relevant diagnosis. Despite these factors, I am not satisfied that these issues adequately explain the problems with the applicant's evidence. I have also taken into account the country information, which confirms that insurgent groups such as the Taliban targeted individuals associated with the Afghan government, or those perceived to be. Having carefully considered the information and the evidence, I find the applicant is not a credible witness and I am not satisfied he or his work colleagues were threatened by the Taliban before leaving Afghanistan.

Return to Afghanistan

28. The applicant was born and raised in Kabul and the information indicates that his extended family remain living in that city. Like the delegate, I find that if he returned to Afghanistan this is the city to which he would return. The applicant has claimed to fear harm in Afghanistan due to his religion (Shia) and ethnicity (Hazara). The majority of Afghanistan's Shia Muslims are Hazara, and vice versa; the majority of Hazaras are Shia.⁴
29. The information before me indicates a significant change in the political landscape of Afghanistan since the applicant departed in 2013. In August 2021, the Taliban leadership entered the presidential palace and officially declared an end to the war, coinciding with foreign countries organising emergency evacuations in Kabul. Starting from June 2022, the Taliban asserted full control over Afghanistan, with no other entity reported to have territorial control or posing an existential threat to the Taliban's authority. Following the sudden collapse of the former Afghan government, the Taliban declared the re-establishment of the 'Islamic Emirate of Afghanistan,' which had previously governed the country from 1996 to 2001. As of June 2022, no foreign government had formally recognised the Taliban's de facto authority. The Taliban suspended the previous Islamic Republic of Afghanistan's constitution and announced a review of existing Afghan laws to ensure compliance with sharia. However, as of early 2022, the specific legal framework remained unclear, and the Taliban had not officially enacted a constitution by 1 June 2022.⁵ In February 2013, UNHCR described the Taliban's governance to date as characterised by uncertainty, arbitrariness and disregard for the rule of law.⁶
30. The Islamic State in Khorasan Province (ISKP) is an Afghanistan-based offshoot of the Islamic State (Daesh). ISKP opposes Shia Muslims and the West and grew in strength in 2021 through recruitment, including disaffected Taliban members and released prisoners.⁷ The information indicates that following the Taliban's seizure of power in August 2021, ISKP redirected its efforts toward diminishing the legitimacy of the Taliban regime. Subsequently, it has been known to target Taliban security convoys, checkpoints, and personnel, in addition to carrying out assassinations of individuals of various profiles. ISKP has also conducted large scale attacks, with a particular focus on targeting the Shia Hazara community.⁸ ISKP claimed responsibility for several major attacks in 2021, including the Kabul airport bombing in August

⁴ European Union Agency for Asylum (EUAA), "Afghanistan - Targeting of individuals", 16 August 2022, 20220817112505

⁵ European Union Agency for Asylum (EUAA), "Country Guidance: Afghanistan (January 2023)", 24 January 2023, 20230130112357

⁶ United Nations High Commissioner for Refugees (UNHCR), "Guidance Note on the International Protection Needs of People Fleeing Afghanistan - Update I", 14 February 2023, 20230220095752

⁷ Department of Foreign Affairs and Trade (DFAT), "DFAT Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022, 20220114090718

⁸ European Union Agency for Asylum (EUAA), "Country Guidance: Afghanistan (January 2023)", 24 January 2023, 20230130112357

and attacks on two Shia mosques (Kunduz and Kandahar) in October. It was also reportedly responsible for dozens of smaller attacks in the months following the fall of Afghanistan to the Taliban.⁹

31. In January 2022, DFAT reported that ISKP and the Taliban had been in conflict for some time, and with the removal of the Afghan and US Governments as their targets, ISKP was exclusively fighting the Taliban, which viewed it as a clear threat. DFAT assessed that the security situation in Afghanistan remained dangerous and the Taliban's ability to control violent actors, particularly ISKP, was unclear, especially in eastern provinces where ISKP was strongest.¹⁰ In April 2022, a source told EUAA that while ISKP had no territorial control in Afghanistan, it had a strong presence in Kabul.¹¹
32. DFAT observed that the Shia mosques targeted by ISKP in 2021 were primarily used by Hazaras. Following the attack in Kandahar, ISKP released a statement expressing its intent to harm Shias. Reports indicated that the Taliban, who historically regard Hazaras as 'infidels' and thus ineligible for martyrdom, referred to the largely Shia victims of the Kunduz bombing, as 'martyred', suggesting a potential shift in the Taliban's stance. DFAT also reported that since its takeover, the Taliban had executed Hazaras who had been members of the security forces. It also reported that a considerable number of Hazara families had been forcibly removed from their residences in central Afghanistan. While the Taliban claimed these evictions were related to property disputes, NGOs described them as a form of ethnic cleansing. One source suggested the evictions may have been the result of 'local score settling' rather than being ethnically motivated. DFAT's most recent assessment for Hazaras, who are predominantly Shia, is that, on the basis of their ethnicity and sectarian affiliation, they faced a high risk of harassment and violence from both the Taliban and ISKP.¹² DFAT define 'high risk' as it is aware of a strong pattern of incidents.
33. DFAT also observed that while Sunnis and Shias have historically lived side-by-side in Afghanistan, religious hardliners such as the Taliban typically do not consider Shias to be true Muslims. Its most recent assessment for Shias was that they faced 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. DFAT assessed this risk as elevated for those living in Shia majority neighbourhoods in major cities like Kabul and Herat.¹³
34. In March 2022, the Netherlands Ministry of Foreign Affairs reported that despite the Taliban's post-takeover declarations of respecting the rights of ethnic and religious minorities, particularly Hazaras, there were doubts about their sincerity. The Taliban did take some actions to demonstrate goodwill, such as permitting and protecting Shia religious holidays, returning weapons to Hazaras to safeguard their mosques from ISKP attacks, and appointing some Hazaras to local government positions. However, these gestures were met with scepticism due to the Taliban's reputation, the absence of high-level Hazara representation in the interim government, recent instances of violence against Hazaras, and unpredictable

⁹ Department of Foreign Affairs and Trade (DFAT), "DFAT Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022, 20220114090718

¹⁰ Department of Foreign Affairs and Trade (DFAT), "DFAT Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022, 20220114090718

¹¹ European Union Agency for Asylum (EUAA), "Country Guidance: Afghanistan (April 2022)", 20 April 2022, 20220421101054

¹² Department of Foreign Affairs and Trade (DFAT), "DFAT Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022, 20220114090718

¹³ Department of Foreign Affairs and Trade (DFAT), "DFAT Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022, 20220114090718

behaviour by individual Taliban fighters. Some Hazaras and experts believed that the then recent acts of violence against Hazaras and the lack of efforts by the Taliban to prosecute the perpetrators suggested that Hazaras were still being specifically targeted. ISKP was recognised unanimously by sources as engaging in a sectarian struggle against Hazaras, viewing them as infidels due to their Shia religion. Hazaras were explicit targets of ISKP because of their predominantly Shia faith and their distinctive appearance, making them easily identifiable.¹⁴

35. In April 2022, the UK Home Office also reported that attacks by ISKP targeting civilians, particularly Shia Hazaras, had increased since the Taliban takeover.¹⁵ It assessed that ethnic and religious minorities, particularly Hazaras, were likely to be at risk of persecution in Afghanistan, because they might be seen as a threat or not conform to the Taliban's strict interpretation of Sharia law.¹⁶
36. In May 2022, a researcher with Afghanistan Analysts Network identified two distinct patterns of attacks on Shia Hazaras. The first pattern involved attacks primarily aimed at civilian passenger vehicles, especially public transport minivans commonly used by young, educated, and professional Hazaras like government employees, journalists, and NGO staff. Hazaras had also been singled out and targeted when traveling on highways. The second pattern comprised large-scale complex attacks targeting Shia mosques, hospitals, and schools in Hazara-dominated areas. These major attacks against Hazaras mainly occurred in cities such as Kabul, Herat, Mazar-e Sharif, Kandahar, and Kunduz. Human Rights Watch's Associate Asia Director stated in an interview that same month that violence against Shia Hazaras had already been rising for some time before the Taliban takeover.¹⁷ One of the main concerns for the Hazara community is violent attacks by ISKP, and the fact that the Taliban are unlikely or incapable of protecting them.¹⁸ EUAA reported in August 2022 that attacks against Shia Hazaras in Afghanistan have raised questions about the Taliban's ability to provide security to all Afghans. Some sources suggest that the Taliban may have wanted to downplay or conceal the true nature of these attacks to maintain their narrative of being in control. ISKP is seen as a significant threat to the Taliban, despite their claims of defeating it.¹⁹
37. In January 2023, Human Rights Watch reported that ISKP claimed responsibility for numerous bombings and armed attacks targeting the Hazara community in 2022. These attacks resulted in the deaths and injuries of over 700 people. In April, ISKP carried out a suicide bombing at a high school in Dasht-e Barchi, western Kabul, which is predominantly inhabited by Hazara and Shia communities. This attack resulted in the deaths and injuries of 20 students, teachers, and staff. Two days later, ISKP was responsible for an attack at Seh Dokan Mosque in Mazar-e Sharif, which resulted in the deaths of 31 people and the injury of 87 others. In the same month, unidentified gunmen killed five Hazara men while they were on their way to a coal

¹⁴ Netherlands Ministry of Foreign Affairs, "General Country of Origin Information Report Afghanistan (March 2022)", 28 March 2022, 20220801142319

¹⁵ UK Home Office, "Country Policy and Information Note - Afghanistan: Security situation (April 2022)", 29 April 2022, 20220502132303

¹⁶ UK Home Office, "Country Policy and Information Note - Afghanistan: Fear of the Taliban (April 2022)", 29 April 2022, 20220502130414

¹⁷ European Union Agency for Asylum (EUAA), "Afghanistan - Targeting of individuals", 16 August 2022, 20220817112505

¹⁸ European Union Agency for Asylum (EUAA), "Afghanistan - Targeting of individuals", 16 August 2022, 20220817112505; Radio Free Europe / Radio Liberty (RFE/RL), "Afghanistan's Shi'ite Minority Suffers 'Systematic Discrimination' Under Taliban Rule", Abubakar Siddique and Mansoor Khosrow, 17 July 2023, 20230719093325; UN Security Council, "Security Council Emphasizes That Punitive Restrictions on Women's Rights, Escalating Hunger, Insecurity Taking Devastating Toll in Afghanistan", 8 March 2023; Middle East Institute, "Making sense of the Taliban's counterterrorism assurances", 18 August 2013

¹⁹ European Union Agency for Asylum (EUAA), "Afghanistan - Targeting of individuals", 16 August 2022, 20220817112505

mine in Samangan. Another attack occurred at an educational centre in western Kabul in September, also situated in a Hazara-dominated area. This attack resulted in the deaths of 53 individuals and the injury of 100 students.²⁰

38. Consistent with other reporting, the US Department of State observed in 2022 the disproportionate targeting of members of the Hazara community by ISKP. This included attacks at places of worship and educational institutions in Hazara neighbourhoods in Kabul.²¹
39. In January 2023, EUAA opined that the individual assessment of whether there is a reasonable degree of likelihood for a Hazara and/or Shia to face persecution should take into account their area of origin and whether ISKP has operational capacity there, with those from Hazara-dominated areas in larger cities being particularly at risk.²² In February 2023, UNHCR opined that members of minority religious and ethnic groups, including Hazaras, had increased international protection needs.²³
40. The reports before me emphasise the factional nature of the Taliban since their takeover. Sources have reported infighting resulting from differences within the Taliban leadership, as well as divisions along regional, tribal, and ethnic fault lines, along with some policy disagreements.²⁴ In January 2022, DFAT reported that various sub-groups were vying for influence and control. Their traditional command-control structure, effective in warfare, struggled to manage the actions of numerous foot soldiers and regional commanders, leading to inconsistent behaviour on the ground. The hardline Haqqani Network, a powerful and militant faction within the Taliban, is responsible for high-profile attacks in Afghanistan. Unlike the Taliban, it is designated as a terrorist organisation by the United States. Its leader now serves as the Taliban's Interior Minister²⁵ and the network gained control of key government portfolios, including, passports and migration. The network largely oversees security in Afghanistan, including the capital Kabul, where Haqqani special forces operate military bases.²⁶
41. As highlighted in the SHEV submission, violence against Hazaras remained a persistent issue in the two decades following the fall of the first Taliban regime. In the first half of 2021, the United Nations Assistance Mission in Afghanistan (UNAMA) observed a resurgence of deliberate sectarian-motivated attacks against the Shia Muslim religious minority, predominantly against the Hazaras in Afghanistan. During this period, UNAMA documented a total of twenty incidents targeting Shia/Hazaras between 1 January and 30 June 2021. These attacks resulted in 143 lives killed and 357 injured. Most of these attacks were claimed by ISKP.²⁷ As previously mentioned, information indicates that attacks targeting the Hazara

²⁰ Human Rights Watch (HRW), "Human Rights Watch World Report 2023", 12 January 2023, 20230112144355

²¹ United States Department of State, "Country Reports on Human Rights Practices for 2022 – Afghanistan", 20 March 2023, 20230321155825; United States Department of State, "International Religious Freedom Report for 2022 – Afghanistan", 15 May 2023, 20230516090632

²² European Union Agency for Asylum (EUAA), "Country Guidance: Afghanistan (January 2023)", 24 January 2023, 20230130112357

²³ United Nations High Commissioner for Refugees (UNHCR), "Guidance Note on the International Protection Needs of People Fleeing Afghanistan - Update I", 14 February 2023, 20230220095752

²⁴ European Union Agency for Asylum (EUAA), "Country Guidance: Afghanistan (January 2023)", 24 January 2023, 20230130112357

²⁵ Department of Foreign Affairs and Trade (DFAT), "DFAT Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022, 20220114090718

²⁶ European Union Agency for Asylum (EUAA), "Country Guidance: Afghanistan (January 2023)", 24 January 2023, 20230130112357

²⁷ Netherlands Ministry of Foreign Affairs, "General Country of Origin Information Report Afghanistan (March 2022)", 28 March 2022, 20220801142319

community in 2022, after the Taliban takeover, resulted in the deaths and injuries of over 700 people.

42. I give weight to the information highlighting a trend of violence against Shia Hazaras even before the Taliban's takeover of Afghanistan in 2021. While there seems to have been a reduction in major conflicts in the country since the resurgence of the Taliban, security and terrorism threats have increased for individuals like the applicant. The primary concern for Shia Hazaras does not solely emanate from the Taliban but rather from the Islamic State offshoot, ISKP, which opposes both the Taliban regime and specific religious and ethnic groups in Afghanistan, particularly Shia Hazaras. ISKP's strategy is focussed on undermining the legitimacy of the Taliban and disrupting their efforts to govern. Further, as part of this strategy, the information emphasises that ISKP possesses both the intent and capability to carry out large-scale complex attacks against Shia targets, particularly in Hazara-dominated areas like Kabul. The ongoing instability in some parts of Afghanistan, the presence of competing factions within a regime operating without a clear legal framework, and the recent attacks against Shia Hazaras all raise doubts about the Taliban's present ability to control violent actors like ISKP, particularly in regions where ISKP has a strong presence. In my view, the information also raises valid concerns about the present willingness and/or ability of the Taliban regime to protect Shia Hazaras in Kabul or in other parts of Afghanistan.
43. I also give weight to DFAT's assessment that 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. While DFAT's assessment is somewhat dated, more recent reports from the UK Home Office, EUAA and UNHCR appear to support this assessment. Overall, I consider that there are sufficient credible reports of mistreatment of Shia Hazaras since the Taliban's return to power to support a finding that the applicant would be at risk of significant physical mistreatment due to his ethnic and religious profile in Kabul in the reasonably foreseeable future. Considering the country information and the applicant's personal circumstances, I am satisfied that there is a real chance of serious harm, including significant physical harassment and physical ill-treatment of the applicant as contemplated by s.5J(5). I am also satisfied that such conduct would be systematic and discriminatory and for the essential and significant reasons of his ethnicity and religion.
44. For the purposes of Section 5J(3) of the Act, as I am satisfied the applicant will face harm because of his ethnicity and religion, there are no reasonable steps he could take to modify his behaviour so as to avoid the real chance of persecution.
45. Section 5J(1)(c) of the Act requires that the real chance of persecution must relate to all areas of the receiving country. Section 5J(2) of the Act provides that a person will not have a well-founded fear of persecution if effective protection measures are available to them in a receiving country. DFAT has previously advised that large urban areas, which are home to diverse ethnic and religious communities, offer a higher level of state protection.²⁸ In addition to the applicant's home area of Kabul, major Hazara populations can be found in the cities of Herat and Mazar-e Sharif;²⁹ however, as discussed, there have been attacks by ISKP against the Shia Hazara population in those cities. Country information suggests that the Taliban effectively controls Afghanistan, including its capital. Currently, I am not satisfied that a state party or any other organisation could provide the applicant durable protection against groups like the Taliban or ISKP. Further, I have concerns at this time regarding the Taliban's

²⁸ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186

²⁹ European Union Agency for Asylum (EUAA), "Country Guidance: Afghanistan (January 2023)", 24 January 2023, 20230130112357

willingness and/or ability to protect Shia Hazaras in other parts of Afghanistan. I find that the real chance of persecution relates to all areas of the country and effective protection measures are not available to the applicant.

46. As I have found the applicant has a well-founded fear of persecution for the reasons set out above, it is not necessary to consider his remaining claims for protection.

Refugee: conclusion

47. The applicant meets the requirements of the definition of refugee in s.5H(1). The applicant meets s.36(2)(a).

Decision

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

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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