



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

**Decision and Reasons**

**Referred application**

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AFGHANISTAN

IAA reference: IAA23/10579

Date and time of decision: 9 October 2023 12:02:00

S McNeill, Reviewer

**Decision**

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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

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### Visa application

1. The referred applicant (the applicant) claims to be a Shia Hazara from Afghanistan. He arrived in Australia on 28 April 2013, and on 6 October 2016, he lodged an application for a temporary protection (TPV) visa.
2. A delegate for the Minister for Immigration and Border Protection refused to grant the visa on 14 November 2017. The delegate did not accept the applicant would be targeted by the Taliban on return to Afghanistan because of an alleged incident with his brother-in-law who disappeared after being stopped on the road by the Taliban with photos of the applicant in Australia on his phone. The delegate was satisfied the applicant, as a Shia Hazara and failed asylum seeker returning from the West, would be able to reside in Mazar-e-Sharif safely and legally and was not satisfied that he faced a real chance of serious harm or a real risk of significant harm upon return to Afghanistan.
3. The IAA affirmed the decision on 8 June 2018. The applicant sought judicial review. On 18 August 2023 the Federal Circuit and Family Court of Australia quashed this decision and remitted the matter to the IAA for determination according to the law.
4. My role is to review the applicants' claims for protection afresh. As this is a de novo review, I am not bound by any earlier findings of the delegate, or the IAA.

### Information before the IAA

5. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
6. I have obtained the following new country information: Department of Foreign Affairs and Trade (DFAT) 'Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)', 14 January 2022, United Nations Human Rights Council, (UNHRC), 'Situation of human rights in Afghanistan - Report of the Office of the High Commissioner for Human Rights', 11 September 2023; European Union Agency for Asylum (EUAA), 'Country Guidance: Afghanistan (January 2023)', 24 January 2023; Human Rights Watch (HRW), "Human Rights Watch World Report 2023", 12 January 2023; US Department of State, "International Religious Freedom Report for 2022 – Afghanistan", 15 May 2023.<sup>1</sup>
7. It is almost six years since the delegate's decision and there have been significant political and security changes in Afghanistan during that period of time. I am satisfied there are exceptional circumstances to justify consideration of this new information.

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<sup>1</sup> 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; United Nations Human Rights Council, (UNHRC), 'Situation of human rights in Afghanistan - Report of the Office of the High Commissioner for Human Rights', 11 September 2023, 20230915124140; European Union Agency for Asylum (EUAA), 'Country Guidance: Afghanistan (January 2023)', 24 January 2023, 20230130112357; United Nations High Commissioner for Refugees (UNHCR), 'Guidance Note on the International Protection Needs of People Fleeing Afghanistan - Update I', 14 February 2023, 20230220095752; Netherlands Ministry of Foreign Affairs, 'General Country of Origin Information Report Afghanistan (March 2022)', 28 March 2022, 20220801142319; Human Rights Watch (HRW), "Human Rights Watch World Report 2023", 12 January 2023, 20230112144355; United States Department of State, "International Religious Freedom Report for 2022 – Afghanistan", 15 May 2023, 20230516090632.

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

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8. The applicant's claims can be summarised as follows:
- He was born in [Location], [Town], Parwan province, Afghanistan in [Year 1]. His family relocated to Kabul city in 2002 after the Karzai government came to power.
  - He is a Hazara of the Shia Muslim faith.
  - In 2015 his brother-in-law was travelling in a [vehicle] to Parwan province. The Taliban stopped the [vehicle] and searched all the passengers. They checked his brother-in-law's mobile phone and found photos of him in Australia which he had sent to his sister. His brother-in-law did not return.
  - He fears harm on return to Afghanistan because of his adverse profile with the Taliban who have his pictures; they will kill him.
  - He fears harm from the Taliban, Daesh and other Sunni insurgent groups because of his Hazara ethnicity, his Shia Muslim faith and as a returnee from Australia. He will be harmed because he has sought asylum in Australia, a western country, and he will be considered a spy or non-Muslim.
  - He also fears being subjected to generalised violence in Afghanistan.

## **Refugee assessment**

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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:
- 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.
11. Since his arrival in Australia in 2013 the applicant has consistently claimed to be an Afghan citizen. As identity he has provided a copy of his *taskira*, the primary form of identification for

Afghan citizens, with an English translation. Like the delegate, I find that he is a national of Afghanistan and Afghanistan is the receiving country for the purpose of this decision.

12. The applicant arrived in Australia on 28 April 2023 and on 15 May 2013 he participated in an arrival interview. The audio recording for this interview is unavailable; however, I have a copy of the written record. The applicant's date of birth is recorded as [Date, Year 2] which made him [Age 2]. A responsible adult from [Organisation] was present in the interview given he was under 18 years at the time. The interview was conducted with an interpreter in the Hazaragi language. As noted below the applicant corrected his birth date to [Year 1] in his SHEV application, which would make him approximately [Age 1] in his arrival interview.
13. It is recorded that his father, mother, [brothers] and [sister] had been killed in [an accident] a year prior in [Location] on the way to Mazar-e Sharif. His older sister '[Ms A]' remained in [Suburb 1], Kabul. He helped his father in the morning at his [store]. Asked why he left Afghanistan, it is recorded the applicant stated he had nobody in Afghanistan to look after him and he left to come here to study. He lived with his uncle for some time and then he 'threw' him away from his home. His sister was also unable to look after him. They told him if he would work, it was okay for him to live there. He refused to work because he wanted to study. His uncle '[Mr B]' threw him out four or five months ago. His sister [Ms A] paid for his journey with the sale of their house. Asked what would happen if he returned to Afghanistan, the applicant said his life would be ruined. There was non-one to look after him. He had a house and sold it. He would not be able to study there.
14. In his TPV application lodged on 6 October 2016, the applicant's birth is recorded as [Year 1]. His *taskira* also states the provincial government assigned him as [Age] years old in 2007. In his statutory declaration of 28 July 2016, the applicant again claimed that his parents, [brothers] and sister were killed in [an accident] in the [Location] area traveling to Mazar-e Sharif. He moved to his [uncle]'s house because his sister's husband refused to look after him. His uncle did not treat him well, beat him forced him to leave school and go to work. His Uncle kicked him out and his sister and brother-in-law said if he was working, he could stay. It was really hard to find work and he still wanted to study. When the NATO led troops began to withdraw from Afghanistan, the Taliban recuperated and were killing innocent people. He decided to escape the violence. He also claimed that in 2015 his brother-in-law was taken by the Taliban and photos of him in Australia were found on his phone.
15. On 27 October 2017 his then representative emailed his amended English translation of his *taskira*, Form 1023 Notification of Incorrect Answers and three photographs of him in Australia purportedly sent through to his brother-in-law's phone in Afghanistan in 2015. Form 1023 advised of incorrect information given in his statement of claims where he had responded 'no' to did you experience harm in Afghanistan, he was now responding 'yes'.
16. On 30 October 2017 the applicant's representative emailed a second Form 1023 Notification of Incorrect Answers. In this form in response to the question regarding information, which was incorrect, the applicant stated he did not declare all his family members at the time of his arrival in Australia as well as when lodging his protection visa. The people smuggler advised him not to declare all his family members and people also gave him ideas not to declare all his family members. He was young and did not know that it is against the law to give false information in Australia. A list of his family members was then declared to include his parents, [Number] sisters and [Number] brothers residing in [Suburb 2], Kabul, and another sister '[Ms C]' in [Country 1].

17. The applicant participated in his TPV interview on 2 November 2017 again assisted by an interpreter in the Hazaragi language. Asked about the two Form 1023s received, the applicant said he would like to provide some explanation. When he arrived, he provided inaccurate information and this was because he was young at the time, didn't know anything, he had no information about the procedure or that when he was going to be released into the community that there was going to be an interview.
18. Asked about the harm he now claimed to have experienced in Afghanistan, the applicant said he had received a scar on his [body part] in [Year] during [a] demonstration when there was a suicide bomb blast. [Number] people were killed and [Number] people were injured. He found himself among the dead bodies and injured people. He was covered in blood and scared. He did not realise he was injured and was trying to help the other injured people, carrying them towards the ambulance. Later on, he realised his [body part] was bleeding as well and he had to receive first aid treatment.
19. In relation to his parents and siblings, the applicant said it was a dangerous trip and the people smuggler advised him not to give correct information and he now understood it was against the law and he did not want to proceed with incorrect information. His representative confirmed his family were alive. His parents resided in [Suburb 2], Kabul, he had one sister in [Country 1] and the rest of his siblings were also in Kabul. [Number] of his sisters were married and [Number] were single. He had a paternal uncle in [Suburb 2], [paternal aunts] in [Country 2] and [paternal uncles] in Parwan. One of his mother's sisters had passed away and the other '[Ms D]' was in Mazar-e Sharif. The family still had a small bit of land in Parwan but it was not enough for the family to live off so that is why they had moved to Kabul.
20. I note in his arrival interview the applicant was told he was expected to give true and correct answers to the questions asked and that he should understand that if the information he gave at any future interview was different from what he told now, this could raise doubts about the reliability of what he had said. It is recorded that the applicant responded 'yes' when asked whether he understood the interpreter and what had been said. I note also the applicant was [Age 1] years old at the time given his correct date of birth is [Year 1] and his *taskira* states he was [Age] in 2007. While I understand the applicant must have experienced trauma growing up in a high conflict and poor security environment of Kabul and Afghanistan in general, he had five years of secondary education, and I am not persuaded at the time of his arrival interview he would not have known it was not the correct thing to do provide incorrect information.
21. On the consistent oral and documentary evidence before me, I accept the applicant is a Shia Hazara. Afghanistan's 2004 constitution recognises 14 ethnic groups including Pashtun, Tajik and Hazara. The Hazara are of distinctive East Asian appearance, native to the Hazarajat region of Afghanistan. Their language, Hazaragi, is a variety of Persian that is mutually intelligible with Dari. The majority of Hazara are Shia.<sup>2</sup>
22. I accept the was born in Parwan but grew up in [Suburb 2], Kabul and that he worked part time assisting his father in his [business] while studying. He withdrew from high school and attended technical training in [Job task] prior to his departure from Afghanistan. I accept the applicant's corrected information and that his parents and siblings all remain in Kabul (mostly [Suburb 2]) with the exception of his sister [Ms C] in [Country 1]. I accept that the general ongoing violence, instability and killing of civilians in Afghanistan including in Kabul was a key

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<sup>2</sup> DFAT, 'DFAT Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)', 14 January 2022, 20220114090718.

factor in his departure Afghanistan. While I have some concerns about the delayed declaration of him being injured and receiving a scar from a bomb explosion at [a] celebration in [Year], given the country information of ongoing security incidents in Kabul and the targeting of Shias, I am prepared to accept this claim. I accept the applicant has been working consistently in Australia, mainly [doing a job task], and that he has lived in shared accommodation with other Afghans while in Australia.

23. The applicant claimed in mid-2015 his brother-in-law was going to Parwan province and the [vehicle] he was traveling in was stopped by the Taliban and all passengers were searched. The Taliban checked everybody's mobile phones and they found his photos taken in Australia which he had sent to his sister via Viber on his brother-in-law's phone. His sister was waiting for him, but he did not return. She then approached the area where [vehicles] stand for Parwan and found out that his brother-in-law had been beaten by the Taliban when they found his photos on the phone. His brother-in-law confessed they were pictures of him (the applicant) living in Australia. His brother-in-law has been missing ever since.
24. The applicant provided three screen shots of photographs sent to his brother-in-law's mobile. Above the photos is a few words in a language other than English and it notes SIM 1 and 2 with the WIFI and Bluetooth symbols. The pictures are of the applicant in western clothing in front of buildings and bridges in Sydney. The photos are obviously not taken in Kabul or another part of Afghanistan.
25. At his TPV interview on 2 November 2017 the applicant said his sister [Ms A]'s husband '[Mr E]' was traveling to Parwan, with about five other Hazaras in a car. They were stopped by the Taliban and ordered to get out the car. They took their documents from their belongings including [Mr A]'s phone. The Taliban took him. The driver of the car knew his father and when they arrived at their destination, he called his father and said he didn't know what the problem was with your son-in-law, but the Taliban took his mobile, beat him, took him away. His father contacted [Mr E]'s father and brother and told them what happened.
26. His brother-in-law [Mr E] was [an Occupation], and he was returning to Parwan as the person who had leased their land had contacted [Mr E] to say they wanted to move elsewhere so [Mr E] had to take ownership back. His father, sister and [Mr E]'s father decided to go to the area and check what happened to his brother-in-law, and they sought the assistance of the driver who was working that route. The driver advised them the route was insecure and not to travel.
27. The delegate said he considered it speculative the Taliban had seen photos of him on his brother-in-law's phone and observed the Taliban had not contacted either [Mr E] or his family and there seemed little or no evidence to suggest he was of any interest. This applicant confirmed they had not contacted either family but reiterated he would be of interest to the Taliban if he were to travel to Parwan as the Taliban made lists.
28. The delegate then noted country information indicated that in regard to tribal or family connections, the Taliban keeps tabs on people of interest by intimidating and exploiting family members knowledge of their whereabouts and the Taliban which is well connected exerts pressure on family members on wanted individuals and a targeted persons family may be punished in their absence. This tactic was one of the most important means in tracking down a person. That this tactic had not been used on his family could indicate he was not a person of interest to them. In response the applicant stated the Taliban had his details, but they were not pressuring his family because they knew he was not in Afghanistan at that moment.

29. While I have some concerns as to the reliability of the applicant as a witness given his incorrect evidence given in his arrival interview,<sup>3</sup> country information in the review material indicates 2015 saw a rise in kidnappings of Hazaras especially while traveling. Kidnappings were said to be common in Afghanistan at this time. Kidnappings were often carried out by insurgent groups for the purpose of extracting money through ransom demands, although historical tribal issues can also be a driving factor.<sup>4</sup>
30. While no ethnic group is immune from kidnappings, DFAT assessed in 2015 that Hazaras travelling by road between Kabul and the Hazarajat (which lies in the central highlands and includes Bamiyan, Daykundi, parts of Ghor, Uruzgan, Wardak and Ghazni) faced a risk which was greater than other ethnic groups. It is unclear whether this was due to ethnic targeting or is a result of the high numbers of Hazaras travelling on this route. Kidnappings were also reported in Zabul and Balkh.<sup>5</sup>
31. DFAT assessed that, if a bus with a mixture of ethnic groups on board was stopped in these areas, ethnic Hazaras (and other non-Pashtuns) were more likely to be selected for kidnapping or violence than Pashtun passengers. While ethnicity may not have been a primary motivation for an abduction incident, it may have had an influence on the selection of victims. It is unclear whether this targeting was being conducted because of the Hazaras' ethnicity, because of a perceived association with the government or international community (see below), or because Hazaras could often appear wealthy, making them an attractive target for kidnap and ransom.<sup>6</sup>
32. A total of 97 Hazaras were reported as being abducted in 2015, 67 of whom were confirmed as being subsequently released. While ethnicity was rarely the primary motivating factor in these incidents, DFAT assessed that ethnicity could have been a contributing factor, particularly in the choice of victim, in some circumstance. For example, in November 2015, militants stopped a number of buses traveling through Zabul Province from Kabul to Kandahar. Gunmen reportedly asked passengers for identification and only took away Hazaras passengers.<sup>7</sup>
33. Multiple credible sources informed DFAT at that time that some bus companies refused to sell tickets to Hazaras because of the risk to their vehicles and drivers being stopped by insurgents and criminals. There were anecdotal reports of spotters being used to at bus stations to alert insurgents of buses carrying Hazaras.<sup>8</sup>
34. Parwan lies northwest of Kabul; it borders the Hazarajat and has a mixed Tajik and Hazara population.<sup>9</sup> The applicant claimed it was his sister who was waiting for him, then approached the [vehicles] stand for Parwan and found out. However, this narrative changed

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<sup>3</sup> 'DFAT Thematic Report Hazaras in Afghanistan 2015-16 update', Department of Foreign Affairs and Trade, 08 February 2016, CIS38A8012186; DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366; UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3.

<sup>4</sup> 'DFAT Thematic Report Hazaras in Afghanistan 2015-16 update', Department of Foreign Affairs and Trade, 08 February 2016, CIS38A8012186; DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366.

<sup>5</sup> DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366; UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3.

<sup>6</sup> DFAT Thematic Report Hazaras in Afghanistan 2015-16 update', Department of Foreign Affairs and Trade, 08 February 2016, CIS38A8012186.

<sup>7</sup> 'DFAT Thematic Report Hazaras in Afghanistan 2015-16 update', Department of Foreign Affairs and Trade, 08 February 2016, CIS38A8012186; DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366.

<sup>8</sup> Ibid.

<sup>9</sup> DFAT, 'DFAT Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)', 14 January 2022, 20220114090718.

somewhat at his TPV interview when he stated the driver of the [vehicle] knew his father and when they arrived at their destination, he called his father. Despite this, given the highly corroborative country information, I am prepared to accept the applicant's brother-in-law [Mr E] was kidnapped by the Taliban or in 2015 and that he remained missing at the time of his interview in 2017.

35. With regards to there being photos of him in western clothing in Australia on his brother-in-law's phone, I consider this plausible as a contributing factor as to why they may have abducted his brother-in-law, although other factors may have included his brother-in-law's Hazara ethnicity and conceivably his perception as wealthy or associated with someone perceived as westernised. According to the UNHCR in 2016 AGEs reportedly target individuals who are perceived to have adopted values and/or appearances associated with Western countries, due to their imputed support for the Government and the international community.<sup>10</sup>
36. According to the UK Home Office and as noted by the delegate, the Taliban "keep tabs" on people by exploiting tribal leaders' and families' knowledge of the whereabouts of their family members or tribe members... Sources also report that the Taliban exerts pressure on family members of wanted individuals ... and that a targeted person's family may be punished in their absence.<sup>11</sup> The applicant's brother-in-law was taken in Parwan and I accept it as plausible the applicant may have come to some notoriety in that area, however his immediate family is based in Kabul. Although I do note his extended family, his paternal uncles, reside in Parwan and the applicant has not claimed they were ever threatened or harmed by the Taliban. It is possible that if the applicant returned to the Parwan and were stopped and questioned by the Taliban or otherwise came to their attention in that local, they might connect his association with his kidnapped brother-in-law, but the applicant has not been to Parwan since he departed as a child and a considerable period has passed since the kidnapping. On the information before me I find that the applicant would very likely return to Kabul where he resided since 2002 and where his family continue to do so. I am not satisfied that he would come to the attention of the Taliban on his return to Kabul on account of this kidnapping or that there is a real chance he would face serious harm on this basis.
37. However, there has been momentous change in Afghanistan since the applicant departed 10 years ago in 2013, and since his TPV interview of October 2017 and the delegate's decision of November 2017 of almost six years ago and the previous consideration of his claims by the IAA. In 2020, the US government and the Taliban concluded the Doha agreement of which the Afghan government was not party. Under that agreement, the US would withdraw all forces from Afghanistan in 2021. In April 2021 after the US announced the withdrawal of its troops by September 2021, the Taliban started an advance across rural and later urban Afghanistan, often encountering minimal resistance from the Afghan National Army. The Taliban captured control of the whole Afghan territory including Kabul on 15 August 2021, the same day President Ashraf Ghani fled the country. On 6 September 2021 the Taliban captured the 'last remaining enclave of resistance', the Panjshir Valley. The Taliban announced the formation of an 'interim government' and declared once again an 'Islamic Emirate of Afghanistan'. The Taliban suspended the previous Islamic Republic of Afghanistan's constitution and announced a review of existing Afghan laws to ensure

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<sup>10</sup> UN High Commissioner for Refugees (UNHCR), 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan', 19 April 2016, UN6C8EFBB3.

<sup>11</sup> UK Home Office, 'Country Policy and Information Note - Afghanistan - Fear of anti-government elements', 1 December 2016, OGD7C848D96.



compliance with sharia. The Taliban *de-facto* authorities have not yet been formally recognised by any foreign government.<sup>12</sup>

38. Since the Taliban takeover, the *de facto* authorities have been governing by decree, sidelining the parliamentary process and to date, this governance has been characterised by uncertainty, arbitrariness, and disregard for the rule of law. In October 2022 the Taliban stated efforts to draft a new Constitution were ongoing.<sup>13</sup> The *de facto* authorities have abolished key institutions including the Afghan Independent Human Rights Commission, the Afghanistan Independent Bar Association, Elimination of Violence Against Women (EVAW) prosecution offices and courts and the former Attorney General's Office. The *de facto* authorities have promulgated edicts and other pronouncements which actively discriminate against women and girls and curtail the fundamental freedoms of the population. Human Rights violations are prevalent, with a lack of accountability for perpetrators.<sup>14</sup>
39. The Taliban is divided into factions of moderates and hardliners with different aims and expectations of governance. Multiple sources 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.<sup>15</sup>
40. At its first press conference since taking over in August 2021, the Taliban declared an amnesty, stating it had 'pardoned anyone, all those who had fought against us'.<sup>16</sup> Nevertheless, since the Taliban takeover several sources reported human right violations (extrajudicial killings, arbitrary arrests, detentions, forced disappearances, instances of torture and ill treatment) by the *de facto* authorities against former Afghan National Defence and Security Forces (ANDSF) members, government officials, suspected affiliates, and their family members in almost all parts of Afghanistan, despite the general amnesty. Former pro-government militias members and civilians suspected or accused of National Resistance Front (NRF) affiliation have been targeted, and prisoners of war executed.<sup>17</sup>
41. Since September 2021, Taliban forces have used force to disperse some crowds, including live ammunition, electroshock weapons, tear gas, whips, and beatings and some protesters were subjected to arbitrary detention, house raids, ill-treatment, and torture. Journalists and media workers, human right defenders, activists and healthcare professionals have also been targeted.<sup>18</sup>
42. DFAT opined in January 2022 that Afghanistan was volatile but the country as a whole was (relatively) less dangerous than before August 2021 for many Afghans, due to the cessation of most armed conflict after the Taliban claimed victory. DFAT observed that it nevertheless

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<sup>12</sup> DFAT, 'DFAT Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)', 14 January 2022, 20220114090718; EUAA, 'Country Guidance: Afghanistan (January 2023)', 24 January 2023.

<sup>13</sup> UNHCR, 'Guidance Note on the International Protection Needs of People Fleeing Afghanistan - Update I', 14 February 2023, 20230220095752.

<sup>14</sup> UNHRC, 'Situation of human rights in Afghanistan - Report of the Office of the High Commissioner for Human Rights', 11 September 2023.

<sup>15</sup> DFAT, 'DFAT Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)', 14 January 2022, 20220114090718.

<sup>16</sup> Ibid.

<sup>17</sup> EUAA, 'Country Guidance: Afghanistan (January 2023)', 24 January 2023; 20230130112357.

<sup>18</sup> Ibid.

remained a dangerous country with ongoing threats of terrorism and kidnapping and other forms of violence. Kabul remained insecure and had been subject to multiple attacks. DFAT opined in January 2022 that it was likely the terrorist attacks would continue and potentially increase.<sup>19</sup>

43. The applicant claims to fear harm because of his Hazara ethnicity and Shia religion. The return of the Taliban in 2021 was met with great fear by the Hazara community, which regards the Taliban's promises of amnesty and inclusivity with regards the scepticism. The Taliban's previous period in power (1996-2001) marked a period of considerable repression and hardship for the Hazara nationwide: the worst single recorded massacre in the country's recent history took place in Mazar-e-Sharif when the Taliban massacred 2000 Hazaras. Many Hazaras fled the country and Taliban oppression.<sup>20</sup>
44. After the fall of the Taliban regime in 2001, the Hazaras had improved their position in society. However, new security threats emerged for the Shia Hazara community in 2016 and onwards as the Islamic State in Khorasan Province (ISKP) was established and has been targeting Hazaras. There have been multiple mass-casualty terrorist attacks since the Taliban takeover, with most claimed by ISKP. ISKP is the Afghanistan offshoot of Daesh (also known as Islamic State or IS). It is strongly opposed to Shia Muslims and the West. Sources report that ISKP grew in strength in 2021, including through recruitment of disaffected Taliban members, as well as fighters released from prisons. The European Union Agency for Asylum (EUAA) noted in early 2023 that terrorist attacks were possible anywhere in the country, but major attacks were most likely in key cities given the increased profile ISKP gets from such attacks.<sup>21</sup>
45. DFAT observed in January 2022, that the ISKP and the Taliban have been in conflict for some time, With the removal of the US and Afghan governments, ISKP is now fighting the Taliban regime exclusively in Afghanistan, and the Taliban regards it as a clear threat. Two of ISKP's mass-casualty terror attacks, along with smaller attacks since mid-August 2021, have directly targeted Shi'ite mosques chiefly used by Hazaras. After the Kandahar attack of 15 October 2021, ISKP issued a statement saying it would target Shia in their homes and centres 'in every way, from slaughtering their necks to scattering their limbs... and the news of [ISIS's] attacks...in the temples of the [Shia] and their gatherings is not hidden from anyone, from Baghdad to Khorasan.'<sup>22</sup>
46. Sources report that the Taliban referred to the largely Shia victims of the Kunduz bombing of 8 October 2021 as having been 'martyred', indicating possible support for Hazara victims ordinarily derided by the Taliban as 'infidels' (and therefore incapable of martyrdom). While it has been observed that the Taliban may be attempting to disrupt ISKP and prevent its attacks on Hazaras, this, along with the Taliban's professed amnesty, did not indicate that it had put aside its historical antipathy towards Hazaras. Since its takeover in August 2021, the Taliban has summarily executed Hazaras who were former members of the security forces. Furthermore, hundreds of Hazara families have been forcibly evicted from their homes in central Afghanistan. The Taliban claims these evictions are 'property disputes,' but NGOs

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<sup>19</sup> DFAT, 'DFAT Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)', 14 January 2022, 20220114090718.

<sup>20</sup> Ibid.

<sup>21</sup> EUAA, 'Country Guidance: Afghanistan (January 2023)', 24 January 2023, 20230130112357.

<sup>22</sup> DFAT, 'DFAT Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)', 14 January 2022, 20220114090718.

have described them as a form of ethnic cleansing (although one source suggests these evictions may be the result of local score-settling, rather than ethnically based).<sup>23</sup>

47. DFAT assessed in January 2022 that Hazaras in Afghanistan faced a high risk of harassment and violence from both the Taliban and ISKP, on the basis of their ethnicity and sectarian affiliation. While the level of mistreatment of Hazaras was 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 defines 'high risk' as it is aware of a strong pattern of incidents.<sup>24</sup>
48. The overwhelming majority of Afghan Shia are Hazara. Only per cent of the Muslim population in Afghanistan is Shia while 85 per cent is Sunni. The Taliban, ISKP, Al-Qaida and most other terrorist/insurgent forces in Afghanistan are Sunni. While Sunni and Shia Muslims have lived side-by-side for much of Afghanistan's history, religious hardliners such as the Taliban typically do not consider Shia to be true Muslims. DFAT assessed in January 2022 that Shia 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. This risk increased for those living in Shia majority or ethnic Hazara neighbourhoods in major cities such as Kabul and Herat.<sup>25</sup>
49. According to the EUAA' January 2023 report, Hazaras faced violations in the form of extortion of money through illegal taxation, forced recruitment and forced labour, physical abuse, and detention. Forced evictions of Hazaras also reportedly took place. In some cases, these evictions were ordered by Taliban local leaders while in other cases Hazara residents were reportedly evicted by Kuchi nomads or by 'the Taliban and associated militias'. In spring 2022, there were reports on conflicts between the Hazaras and Kuchi nomads, as the Kuchis brought their livestock to pastures in the Hazara-claimed lands.<sup>26</sup>
50. In May 2022, people in the Hazara dominated provinces of Bamiyan and Daykundi were harassed and arrested due to accusations of having worked for the former government. In September 2022, the UN Special Rapporteur noted reports of an increase in 'inflammatory speech' against Hazaras, both online and in some mosques, including calls for Hazaras to be killed. In September 2022, the UN Special Rapporteur stated that the recent years' attacks on Hazaras and non-Muslim Afghans, often claimed by ISKP, appeared to be 'systematic in nature and reflect elements of an organisational policy, thus bearing hallmarks of international crimes including crimes against humanity'. ISKL considers Shia Muslims to be apostates and, hence, a legitimate for killing.<sup>27</sup>
51. 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 have been stopped and singled out when traveling on the highways. The second pattern was large scale attacks, which have targeted Shia mosques, hospitals and schools including religious commemorations and

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<sup>23</sup> DFAT, 'DFAT Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)', 14 January 2022, 20220114090718.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> EUAA, 'Country Guidance: Afghanistan (January 2023)', 24 January 2023, 20230130112357.

<sup>27</sup> Ibid.

weddings in Hazara dominated areas have mainly taken place in the cities of Kabul, Herat, Mazar-e Sharif, Kandahar, and Kunduz.<sup>28</sup>

52. On 25 May 2022 a series of attacks targeting three minibuses in Mazar-e Sharif was claimed by ISKP. According to a Taliban spokesman all the victims were Shias. A string of ISKP attacks targeting Shia Hazara occurred in Kabul city over three consecutive days (5 to 7 August 2022) before the Ashura commemorations on 8 August 2022. These included the bombing of a Shia religious ceremony, a blast in a busy shopping street, and an attack on a minibus. A ISKP suicide attack on an educational centre in Dasht-e Barchi, the Hazara area of Kabul on 30 September 2022 killed 54 people and wounded 114 others.<sup>29</sup>
53. According to Human Rights Watch (HRW) 2023 report, ISKP claimed responsibility for numerous bombings and armed attacks against Hazaras in 2022, killing or injuring at least 700 people. On April 19, ISKL claimed responsibility for a suicide bombing at high school in Dasht-e Barchi, west Kabul, a predominantly Shia Hazara area, killing or injuring at least 20 students, teachers, and staff. ISKP also claimed responsibility for an attack two days later at Seh Dokan Mosque in Mazar-e Sharif that killed 31 people and wounded 87 others. On April 27, unidentified gunmen killed five Hazara men on their way to the Dare-Suf coal mine in Samangan. It noted the 30 September 2022 attack on the education centre in Dasht-e Barchi. The Taliban's failure to provide security to at-risk populations and medical and other assistance to survivors and affected families exacerbated the harm caused by attacks.<sup>30</sup>
54. Subsequently, in February 2023, the UNHCR listed as a profile with increased protection need 'Members of minority religious groups of members of minority ethnic groups, including the Hazaras'. In view of the volatility of the situation throughout Afghanistan, coupled with the grave economic and humanitarian situation throughout the country, the UNHCR stated it did not consider relocation as appropriate and continued to call on states to suspend forcible return of Afghan nationals.<sup>31</sup>
55. In May 2023 the US State Department published its International Religious Freedom Report for Afghanistan of 2022. According to UN Special Rapporteur Richard Bennett, the human rights situation in Afghanistan remained deeply concerning, and threats and attacks against Hazara Shia and other Shia Muslims continued, resulting in great loss of civilian life. Hazara activists described Taliban repression of Hazaras and the failure of the Taliban to protect them from ISKL attacks as part of a trend toward deepened marginalization and the erasure of the Hazara from society. The UN Assistance Mission in Afghanistan (UNAMA) reported a resurgence of these attacks against the Hazara community by ISKL. In April, the United Nations reported that the Taliban had tortured and killed a midwife in Mazar-e-Sharif, amputating her legs, stabbing her, and shooting her 12 times, simply because she was a woman and a Hazara. According to the Hazara Organization for Peace and Equality, since May 2021, 25 attacks targeting Hazaras had occurred, particularly in the west Kabul area of Dasht-e Barchi, resulting in more than 500 persons killed.<sup>32</sup>

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid; UNHRC, 'Situation of human rights in Afghanistan - Report of the Office of the High Commissioner for Human Rights', 11 September 2023, 20230915124140

<sup>30</sup> HRW, "Human Rights Watch World Report 2023", 12 January 2023, 20230112144355.

<sup>31</sup> UNHCR, 'Guidance Note on the International Protection Needs of People Fleeing Afghanistan - Update I', 14 February 2023, 20230220095752.

<sup>32</sup> US Department of State, 'International Religious Freedom Report for 2022 - Afghanistan', 15 May 2023, 20230516090632

56. The September 2023 UN Human Rights Council report recorded 2,618 civil casualties including 719 killed and 1899 wounded since the Taliban takeover; the majority from improvised explosive device (IED) attacks carried out by ISKL. There was increase in civilian harm resulting from IED attacks on places of worship causing 1281 civilian casualties (368 killed, 850 wounded) between 15 August 2021 and 15 February 2023. Shia communities were found to be most at risk of attacks on places of worship. In addition, IED attacks targeting the predominantly Shia Muslim Hazara community in schools and other educational facilities, crowded streets and on public transportation occurred during the reporting period.<sup>33</sup>
57. In addition to the applicant fearing harm as a Shia Hazara, he also claimed to fear harm for residing in a non-Muslim country since 2013 and as a returnee from a western country. According to the EUAA, already before the Taliban takeover, several accounts of stigma of being returned were reported, and a common, a common perception that a person must have committed a crime to be deported, or that people returning from Europe were 'loaded with money'. Out of fear if being harassed or robbed, some did not disclose they were returnees. Individuals seen as "Westernised" may be threatened by the Taliban, relatives, or neighbours. Men were reported harassed by Taliban fighters for wearing Western style clothing or attacked in public because they were seen as 'traitors' or 'unbelievers.' While the Taliban have encouraged Afghans to return their views on persons leaving Western countries remains ambiguous. Those who have left are not seen as 'Afghans', but as corrupt 'puppets' of the occupation.<sup>34</sup> I accept that being a returnee from a Western country may further elevate the applicant's profile in conjunction with his ethnicity and religion.
58. DFAT's assessment that Hazaras and Shia face a high risk of being targeted by the Taliban, ISKL and other militant groups because of their ethnicity and religion is now over 18 months old. However, the more recent country information from reputable sources including the UNHCR, the EUAA, HRW and US State Department reflect similar concerns that ISKL continues to target Shia Hazaras. The recent reports do not indicate that the situation has dramatically improved for Shia Hazaras or that the overall security situation has sufficiently stabilised. Shia mosques, schools, hospitals, crowded streets, modes of transport, Shia Hazara dominated neighbourhoods like Dashte-e Barchi in Kabul, their religious ceremonies, commemorations, and celebrations, have continued to be targeted by ISKL who see Shias as apostates and legitimate targets of killing. While the Taliban have not openly promulgated the deliberate targeting of Shia Hazaras, concern remains in light of the history of mistreatment of Hazaras, the ongoing human rights violations despite their promises and the abolition of institutions which safeguard against such abuses. In addition, the Taliban leadership is divided and there are reports of their foot soldiers on the ground acting arbitrarily taking matters into their own hands. Furthermore, on the information before me, I am not satisfied the Taliban is in the reasonably foreseeable future, capable of curtailing the actions of ISKL or other militant groups or is able to protect the Shia Hazaras or that they are necessarily willing to do so.
59. I am satisfied there is more than a remote and therefore a real chance of the applicant facing serious harm from on his return to Afghanistan as contemplated in s.5J(5) of Act. I am also satisfied that such conduct would be systematic and discriminatory and for the essential and significant reasons of his Hazara ethnicity, his Shia religion and as a returnee from a Western country.

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<sup>33</sup> UNHRC, 'Situation of human rights in Afghanistan - Report of the Office of the High Commissioner for Human Rights', 11 September 2023, 20230915124140

<sup>34</sup> EUAA, 'Country Guidance: Afghanistan (January 2023)', 24 January 2023,

60. Country information confirms the Taliban, although yet to be recognised as the legitimate government of Afghanistan, are the *de facto* authorities and now control all of Afghanistan. I am satisfied the applicant would face a real chance of persecution in all areas of the receiving country.
61. I am not satisfied effective protection measures are available to the applicant in Afghanistan. For the purposes of s.5LA of the Act, I am not satisfied the Taliban is able or willing to offer protection against other actors of persecution including ISKL.
62. The harm faced by the applicant is a consequence principally of his ethnicity and religion. As avoiding the harm would impermissibly require the applicant to conceal his religious beliefs and ethnicity, I am also satisfied that s.5J(3) does not apply.
63. Accordingly, I am satisfied the applicant has a well-founded fear of persecution in Afghanistan.

**Refugee: conclusion**

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

**Decision**

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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

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### **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.