



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA15/00111

Date and time of decision: 29 January 2016 12:19:39

Patricia Tyson, Reviewer

Decision

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

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a national of Afghanistan. [In] August 2015 he lodged an application for a Safe Haven Enterprise visa (SHEV). His claims for protection arise from his asserted Hazara ethnicity, Shia Muslim religion and employment on [projects] contracted by [Organisation 1] and Afghan government.
2. The delegate accepted that the applicant was a national of Afghanistan, of Shia religion and Hazara ethnicity. The delegate also found credible the applicant's claim that he was employed by [a] [Company 1] group of companies, which worked in conjunction with [Organisation 1] on [projects] in Afghanistan, and that he later established his own [company], [Company 2]. The delegate appeared to accept that the applicant had received anonymous phone calls asking about his work locations, but found these had been dealt with and did not require further consideration.
3. On the basis of country information, the delegate concluded that the applicant did not have a well-founded fear of persecution on account of his Hazara ethnicity or Shia religion. Regarding the applicant's [work], the delegate had regard to factors including the nature of the applicant's role, his willingness to continue to work for [Company 1] despite the perceived risk, the lack of past harm and the period of time since the applicant had worked at [Company 1]. The delegate found it improbable that the applicant would be identified as a supporter of the government or international community and found that it would be reasonable for the applicant to modify his work-related behaviour to avoid persecution. Assessing complementary protection, the delegate relied on country information to find that the applicant did not face a real risk of significant harm at the hands of the Taliban or Islamic State and the Levant¹ or the ongoing civil conflict in Afghanistan, as such a risk was not faced by the applicant personally but by the population generally.

Information before the IAA

4. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. The applicant's representative made a submission to the IAA on his behalf dated 11 January 2016, which:
 - Argues that the delegate misconstrued and mischaracterised the applicant's profile and failed to consider relevant information within the cited sources which is supportive of the applicant's claims. The mischaracterised claims and evidence relate to the phone calls the applicant received in connection with his own company, suggesting he was personally targeted and identified by the Taliban and his reasons for leaving his job and Afghanistan.
 - Submits that even if the applicant were to cease employment as a contractor to [a western agency], this would not eliminate the risk of harm because of his imputed political opinion, and that the fact of the applicant regularly travelling to [western sites]

¹ Islamic State in Iraq and the Levant, which will be referred to in this decision as ISIS or by its Arabic acronym, Daesh.

(and that he had been identified as doing so) makes his profile more significant than just any contractor.

6. In support of the above arguments, the representative has referred to country information cited in the delegate's decision, and has attached a 'rough' transcript of the interview between the delegate and the applicant [in] September 2015 (SHEV interview) which I find to be non-verbatim but broadly accurate. I do not consider the above aspects of the submission to amount to 'new information' within the meaning of s.473DC, as the material is either not new, or is argument rather than 'information'. I am therefore not prevented from having regard to it by s.473DB(1) or s.473DD.
7. The representative requested that the IAA provide the applicant with an opportunity to correct the record by providing complete testimony about the phone calls he claims to have received. The submission does not explain what further information the applicant wished to provide. As set out below, I find the applicant a credible witness and accept the evidence in his statutory declaration regarding the phone calls. Given this, and in the absence of any indication as to what additional evidence the applicant might be able to provide, I have decided not to invite the applicant to provide further evidence on these phone calls.
8. The submission argues that the delegate did not consider the applicant's claim to fear harm from ISIS for reasons of his religion and ethnicity. In this regard, it refers to DIBP's 'Protection Assessment Guidance Note No.5 – Afghanistan – Hazara ethnicity and/or affiliation with government or international organisations' (PAGN No.5) issued 14 December 2015, which advises delegates to ensure that they review the most up to date country information about the security situation in Afghanistan. It is argued that because that guidance was available to the delegate, and the Department of Foreign Affairs and Trade (DFAT) assumes that DIBP have regard to the most recent country information, the information is not 'new information' but rather, information that the delegate failed to consider. The representative submits that the policy guidance must constitute part of the delegate's findings, particularly as it goes to the specific harm the applicant has claimed.
9. While the delegate may well have been able to access the PAGN had he chosen to, the decision sets out the material to which he had regard, which does not include the PAGN. Given this, and noting that the PAGN is not part of the Guidelines to which Ministerial Direction No.56 requires the delegate to have regard, I do not accept that the material is taken to have been before the delegate or constituted part of his findings. However, I have nonetheless had regard to the PAGN. As it is recent departmental guidance of direct relevance to the applicant's claims and was not considered by the delegate, there are exceptional circumstances, for the purpose of s.473DD(a), to justify considering it.
10. Finally, the representative puts forward new information, referring to reports of an attack by ISIS affiliates on a Shia religious hall in Kabul in October 2015, and the abduction and beheading of seven Hazaras by ISIS in November 2015. The information is not credible personal information and nor has the applicant provided any reason as to why the news articles referenced in the submission could not have been provided earlier. As the information predates the decision, and in the absence of any explanation as to why it was not put forward earlier, I am not satisfied that it could not have been provided to the Minister prior to the making of the decision. I am therefore prevented from considering that information by s.473DD(b).

11. However, as there is no other information before me regarding the October 2015 attack referenced in the representative's submission, I have obtained a report on that incident². For the purpose of s.473DD(a), I am satisfied that there are exceptional circumstances to justify considering that information, given the fluidity of the situation in Afghanistan and the relevance recent of ISIS-affiliated attacks on Shia targets in Kabul to assessment of the applicant's claims. I note that material already before me refers to the November 2015 beheadings³.

Applicant's claims for protection

12. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:

- The applicant is of Afghan nationality but was born in [Country 1] and lived there until the age of approximately [age] as a refugee. He completed his education, including a [Diploma], whilst in [Country 1]. In early 2004 the applicant and his family returned to Afghanistan with the assistance of the UN.
- Although the applicant's parents were from Daikundi province, on returning to Afghanistan the family settled in Mazar e Sharif, Balkh province, where they established a [business]. In 2004 the applicant moved to Kabul, where he lived until his departure from Afghanistan in 2012. Between 2004 and 2010 he worked for [Company 1], later part of [Company 1] Group. In 2009 the applicant established his own company, [Company 2], which supplied [products]. After 2010 he continued to work part-time for [Company 1] while conducting that business. From 2006, he also worked casually for his family's business and, at one point, had a side [project].
- The applicant's positions at [Company 1] included [different positions]. [Company 1] was contracted by the [Organisation 1] ([details deleted]) and the applicant travelled to various parts of Afghanistan to oversee completion of [projects] for [the western agency] and also the Afghan government.
- The Taliban and its supporters target [the western agency] and its contractors. While working on projects, the applicant had to exercise caution and travel privately and discreetly. He experienced a number of security incidents. In April 2007 he was attending a training camp run by [the western agency], and the bus to his compound was delayed due to bombs being planted on the road close to the camp. On other occasions, the applicant fled from worksites on hearing that the Taliban or their supporters were approaching the site.
- The applicant would have to travel with documents which identified that he worked for [the western agency], and feared that if he was searched by the Taliban, he would be killed. On one occasion in 2007 he was travelling near Kandahar with his wife and was stopped, but avoided harm by giving the documents to his wife who, as a woman, was not searched.
- The applicant's company, [Company 2], was also involved in [contracting]. The applicant was circulating his business card in attempts to attract business, and began to receive anonymous phone calls from people asking about the work he was doing for [the

² <http://afghannews.com.af/2015/10/09/isis-claims-responsibility-for-the-attack-on-religious-hall-in-kabul/> [accessed 19 January 2016]; <http://middleeastpress.com/english/blast-in-capital-kabul-kills-1-wounds-3/> [accessed 19 January 2016]; <http://www.khaama.com/1-dead-3-wounded-in-kabul-explosions-1613> [accessed 19 January 2016].

³ "Kabul marchers demand justice for seven decapitated Hazaras ", Guardian (Unlimited) (UK), 11 November 2015, CXBD6A0DE15817.

western agency]. By 2012 he was receiving these calls about once a week. The applicant was afraid that giving these details could place him in danger of harm from the Taliban.

- The applicant claimed that although he had escaped harm, his work put him at constant danger of attack, and that as more [projects] were being developed in the more dangerous south, he was at greater risk particularly as there are few Hazaras in the south and he would easily be identified and targeted.
 - In 2012 [the west] began to withdraw its army from Afghanistan, fighting increased and there was a decline in [Company 1's] operations. The applicant was finding it difficult to get contracts for his own company, with lots of the available work located in the more dangerous southern Pashtun areas. The applicant did not want to live in an environment of war and began making plans to leave Afghanistan.
 - Around July 2012, the applicant departed Afghanistan and travelled to Australia via [various countries] (where he registered as an asylum seeker with UNHCR), arriving in Australia in October 2012. He travelled on a passport in a different name but does in fact have a genuine Afghan passport in his own name on which he travelled previously.
 - The applicant is of Hazara ethnicity and Shia religion, but is open-minded about religion. In Australia, he practices his Shia religion at home, and has also attended Christian fellowship. He claims that in Afghanistan he is unable to freely practice his Shia religion, and faces discrimination because of his ethnicity. In the past, he has been refused employment because he does not speak Pashto, and on one occasion, was confronted in a restaurant [because] he did not speak Pashto.
 - The applicant was once involved in a protest against the government when Kuchi invaded a Hazara area.
13. The applicant claims to fear harm (abduction, physical assault or death) at the hands of the Taliban and ISIS due to his Shia religion and Hazara ethnicity, former occupation as a [employee]contracted to [a western agency], potential future work with the Afghan government or [western agency], and the combination of these factors. The applicant claims that the risk extends throughout the country due to his travel for work and the risk of being picked up and searched while travelling on the roads. He says that even if he moved to a Hazara area, he would need to move across Pashtun areas to access basic resources, and so would be at risk from the Taliban and ISIS because of his ethnicity and religion. He also says that he is unable to obtain protection from the government and that the private security provided by [Company 1] was not always available and sometimes could increase the risk of targeting.

Factual findings

14. For the reasons given below I find the applicant to be a credible witness who has made consistent claims throughout the protection visa process, and accept his claims in their entirety.

Nationality, ethnicity and religion

15. The applicant has consistently maintained that he was born in [Country 1]. He was able to describe the area in [Country 1] in which he lived, including the type of industry there and its proximity to [a] city. He also consistently named the schools he attended in [Country 1]. Although the applicant's passport says that he was born in Daikundi, I accept the explanation given by the applicant at the SHEV interview that this is incorrect refers to his father's place of

birth. This explanation is consistent with information from DFAT that the place of birth listed in Afghan identity documents, including passports, is the father's place of birth rather than that of the passport holder.⁴

16. The applicant consistently claimed that his family lived in Mazar e Sharif after returning to Afghanistan, and that he then moved to Kabul. Throughout the SHEV interview the applicant referred naturally to various locations in Afghanistan when describing his work and travel. I accept that the applicant lived in Afghanistan after 2004, staying primarily in Kabul, although returning to visit his family in Mazar e Sharif on a regular basis as he claims. In these circumstances, I find both Kabul and Mazar e Sharif to be the applicant's home areas in Afghanistan.
17. Although I have found the applicant was born in [Country 1], based on his consistent evidence regarding his family's status in [Country 1] and their return to Afghanistan, and country information that [certain people] do not meet the residency requirements for [Country 1] citizenship⁵ and that large numbers of Afghan refugees have been repatriated since [year],⁶ I accept that he lived in [Country 1] as a refugee and in fact has Afghan nationality. Furthermore, the applicant provided copies of his Afghan passport and Taskera. Although there are different dates of birth on these documents, I draw no adverse inference given that country information indicates that dates of birth on Afghan identity documents are often estimated.⁷ I accept that the applicant is a national of Afghanistan and find that to be the relevant receiving country for the purpose of this assessment.
18. Regarding his claim to be of Hazara ethnicity, I place weight on the fact that the applicant undertook the arrival interview [in] November 2012 (arrival interview) with the assistance of an interpreter in the Hazaragi language. That his preferred language is Dari, rather than Hazaragi, is consistent with DFAT information that '[m]any Hazaras in major urban areas such as Kabul, Mazar-e-Sharif and Quetta, no longer speak Hazaragi but speak regional varieties of Persian'⁸. He claims (and his passport evidences) that his family originate from Daikundi, which forms part of the traditional Hazara area, known as the Hazarajat.⁹ Tied in with this is his claim to be Shia, the majority Hazara religion.¹⁰ The applicant was able to discuss differences between the Sunni and Shia sects, and compare his personal experience of living as a minority Shia in Afghanistan with his life in [Country 1]. I accept that the applicant is of Hazara ethnicity and Shia religion, as he claims.

[Work] for [a western agency] and Afghan government

19. The applicant has consistently claimed that he completed a [diploma] at [a] University, [Country 1], and that he worked at [Company 1] in Kabul after returning to Afghanistan, which was a contractor to [a western agency]. He has also consistently said at both the arrival and SHEV interviews that he began his own [company] in 2009 and worked for [Company 1] part-time after that, as well as helping in his parent's company.
20. At the SHEV interview, the applicant was able to discuss matters relating to [his profession], such as describing the [process], [details deleted].

⁴ "A Guide to Afghan Documents", US Embassy, 1 June 2011, CISD9559B12105, p.3.

⁵ [Information deleted].

⁶ [Information deleted].

⁷ "A Guide to Afghan Documents", US Embassy, 1 June 2011, CISD9559B12105, p.3.

⁸ "DFAT Thematic Report, Hazaras in Afghanistan and Pakistan", DFAT, 26 March 2014, [2.3].

⁹ "Country Information Report – Afghanistan", DFAT, 18 September 2015, CISEC96CF13367, [3.11].

¹⁰ Ibid, [3.10].

21. In support of his claim that he worked with [Company 1], the applicant presented work ID cards from 2010, 2011 and 2012, untranslated documents which appear to be some form of employment records for those same years, and a reference from a person named [name] which indicates that the applicant worked for [Company 1] from 2005 to 2010. The applicant referred in the SHEV interview to [name] being the [Manager] when he was working there, and holding a [degree], which is consistent with information on the [Company 1] website.¹¹ While the applicant claims to have worked from 2004 rather than 2005, and to have continued to work part time from 2010, I consider the reference, taken together with the ID cards, to generally corroborate his claims.
22. Furthermore, the applicant displayed knowledge of [Company 1] company consistent with information on its website¹². He accurately explained the history of the company and naturally referred to different projects on which he had worked during the course of his oral evidence.
23. Taking the evidence as a whole, I accept that the applicant has qualifications in [industry] and that he worked for [Company 1] Group, formerly [Company 1], [details deleted], from around 2004 or 2005. Given his general credibility and the facts I have found, I accept that after finishing full time work with [Company 1] in 2010, he continued to work for that company in various part-time roles while working on his own business, [Company 2]. I note in this regard that he has submitted an untranslated business certificate, presumably for [Company 2], which bears resemblance to a specimen Afghan business registration document published by [deleted].¹³
24. I also accept that the applicant worked on various projects for [the western agency] and Afghan Government. During the SHEV interview he spontaneously referred to working on [details deleted], and was able to describe its uses and practical considerations such as limitations on building such facilities near airports. He was able to describe in a general sense, consistent with his technical position in the company, the process by which [Company 1] bid for contracts with [Organisation 1]. A brochure on the [Company 1] website refers to [Company 1]'s work as a contractor to [Organisation 1], including awards received from that organisation for its work, consistent with the applicant's claim.¹⁴ The same brochure outlines numerous [projects] that [Company 1] has undertaken for [the western agency] and the Afghan government.¹⁵
25. The numerous sources of country information cited in the well-founded fear analysis below indicate a risk to [workers] and [contractors]. There is also information evidencing that such a risk existed at the time the applicant was in Afghanistan: according to the US Department of State, in 2012 the Taliban targeted [projects], teachers, and citizens perceived to be cooperating with the international community.¹⁶ Given this, and my above findings, I consider it plausible that the applicant experienced the security incidents he described, including bombs on the road near a facility where he was [training], an incident in which he was stopped by the Taliban when travelling but avoided problems by giving his documents to his wife, and having to flee from areas where he was working due to the approach of armed men on motorbikes, who he suspected to be Taliban-affiliated.

¹¹ [Information deleted].

¹² [Information deleted].

¹³ [Information deleted].

¹⁴ [Information deleted].

¹⁵ [Information deleted].

¹⁶ [Information deleted].

26. The applicant's representative submitted that, contrary to the findings of the delegate, the applicant had also claimed to have undertaken work for [the western agency] through his company [Company 2]. I accept that he made this claim. When the delegate asked the applicant at the SHEV interview why he didn't just focus on his own company, he replied that his company was also involved in subcontracting and [industry]. When it was put to him that he may be safer if he was not associated with [the western agency] and did his own company's work, the applicant explained that the work available in Afghanistan was funded by foreign interests and particularly [the west], and that there wasn't much other contract or building work available. Later, he said that with his company he had tried to find jobs inside [the western agency], and had obtained a contract and entered into a joint venture with a friend's company. He expressly claimed that he was receiving phone calls in connection with his own company, and not [Company 1]. Taking this evidence as a whole, I accept that the applicant was saying that [Company 2] was involved in [industry] and contracting (or subcontracting) to [the western agency], and that he received the phone calls in connection with that work.
27. The applicant's evidence at the interview regarding the phone calls was broadly consistent with his statutory declaration, and was unexaggerated in the sense that he did not claim these calls had led to any harm. While I note that the applicant did not raise these at the SHEV interview until directly asked (despite having been asked earlier whether he had experienced any other situations of concern) I do not draw any adverse inference from this. The applicant did not claim to have been expressly threatened during these calls, they were set out in his statutory declaration, and his earlier evidence had focused on more direct threats or security incidents. I accept that the applicant received telephone calls from unknown persons asking about the location of [Company 2]'s work with [the western agency].

Refugee assessment

28. 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

29. 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
 - 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

Association with the [industry], [western agency] and Afghan government

30. The applicant claims to fear harm from the Taliban and ISIS as a result of his work in the [industry], and particularly because he has worked as a contractor to [the western agency] and the government of Afghanistan. Numerous sources confirm a risk to those seen to be aligned with the international community, Afghan government or [western agencies]. In 2014, the Taliban publically announced its intention to target a range of actors associated with the government or opposed to Taliban objectives, including civilian contractors,¹⁷ and in 2015 indicated an intention to target “officials of the stooge regime...and other pernicious individuals”¹⁸. ISIS is a Sunni extremist group which is anti-Western and promotes sectarian violence.¹⁹ It has announced its intention to expand its operations into ‘the Islamic State of Khorasan’ which refers to regions in Afghanistan and Pakistan.²⁰
31. In 2014, 11% of civilian casualties from conflict in Afghanistan were directly targeted - in attacks that were largely attributed to anti-government elements including the Taliban - on account of their perceived affiliation with government or opposition to anti-government elements.²¹ A similar trend appears to have continued, with United Nations Assistance Mission in Afghanistan (UNAMA) reporting in its 2015 mid-year report that in most civilian hostage cases, among those targeted by anti-government elements were civilian government workers and contractors and persons perceived to be supporting the government or security forces.²²
32. DFAT assesses that groups including the Taliban openly target those associated with the international community in attacks occurring throughout Afghanistan, including in Kabul,²³ stating that “individuals working for, supporting or associated with the government and/or the international community are at high risk of violence perpetrated by anti-government elements”. Relevantly to the applicant, DFAT has said that “[w]hile ethnicity and religion are unlikely to be primary motivations for attacks on government workers, in some cases these issues may be contributing factors.”²⁴
33. A UK Home Office report reiterates the risk to those supporting or perceived as supporting the government or international community, saying that targeted groups include, relevantly, [workers] and civilians perceived to be cooperating with or working with the international community, including contractors and logistics personnel.²⁵ Specifically including ‘civilians working for/co-operating with the [international agencies] as a risk category, the Home Office report refers to the opinion of a Kabul-based political analyst that interpreters, contractors and suppliers [are] primary targets.²⁶ Supporting this, an extract in the report from UNHCR’s 2013 Eligibility Guidelines for Assessing the International Protection Needs for Asylum-Seekers from Afghanistan states that the Taliban and other militant groups’ systematic targeting of civilians

¹⁷ “Country Information Report – Afghanistan”, DFAT, 18 September 2015, CISEC96CF13367, [3.32]; “Country Information and Guidance - Afghanistan: persons supporting or perceived to support the government and/or international forces”, UK Home Office, 1 February 2015, OG8F59D8D7, [2.2.5].

¹⁸ “UNAMA Protection of Civilians in Armed Conflict Midyear Report 2015 August”, UNAMA, 5 August 2015, CISEC96CF13007, p.55.

¹⁹ DIBP, “Protection Assessment Guidance Note No.5 – Afghanistan – Hazara ethnicity and/or affiliation with government or international organisations”, issued 14 December 2015.

²⁰ Ibid.

²¹ “Country Information Report – Afghanistan”, DFAT, 18 September 2015, CISEC96CF13367, [3.35].

²² “UNAMA Protection of Civilians in Armed Conflict Midyear Report 2015 August”, UNAMA, 5 August 2015, CISEC96CF13007, p.59-60.

²³ “Country Information Report – Afghanistan”, DFAT, 18 September 2015, CISEC96CF13367, [3.34].

²⁴ Ibid, [3.38].

²⁵ [Information deleted].

²⁶ Ibid, [2.2.32].

associated with or perceived to support the international community intensified from 2012, and names [industry] workers as among the primary targets of such attacks.²⁷

Harm arising from past employment

34. Turning first to the question of whether the applicant will face a real chance of harm as a result of his previous work for the US army and Afghan government, I accept that the applicant had contracted to [a western agency] through his own company, [Company 2], and that he had worked on [international] and government projects for a number of years. As such, I accept that there are persons in Afghanistan, including those who made the phone calls which he received and who may well be connected to insurgent groups, who are aware that he has done this work, and of his visits to [western sites]. However on his evidence, while he found the calls threatening and they added to his sense of unsafety, the callers were seeking information about his work rather than expressly making threats against the applicant. The incidents he experienced in the past, while connected to his work, appeared to be targeting the [industry] projects or [facilities] he was working on at the time, rather than specifically targeting him as an individual. There is no evidence before me, and the applicant has not claimed, that in the three years following his departure there have been inquiries made about him or threats made against him, such as to family, friends or colleagues, after his departure.
35. Country information before me suggests that the Taliban would be less likely to trace a lower profile person outside the area in which they had been targeted. A European Asylum Support Office (EASO) report of December 2012, cited by the UK Home Office, states that while those with higher profiles face a real risk of being targeted by insurgents in all parts of Afghanistan, including Kabul, those of lower profiles generally do not face a risk of targeting in Kabul or Mazar e Sharif because of their position, activity or job as such, although individual and specific circumstances might lead to an increased risk.²⁸ I am mindful when considering this information that the report appeared to be referring to the risk for persons who had been targeted elsewhere but moved to urban centres to escape that threat, with one source quoted as saying “[i]f a low profile person quits his activity and can flee the area and resettle in a safer area ... he can normally escape targeting by insurgents, unless there are specific individual circumstances which would preclude this possibility.”²⁹
36. Similarly and more recently, IOM has said that Taliban cells are operating in Kabul and their networks getting stronger, but that if a low profile person had contact with the Taliban in their place of origin, the Taliban would probably not make it a priority to track that person down in Kabul.³⁰
37. The applicant’s representative points to information from EASO as indicating that [contractors] to [western agencies] may continue to face a risk even if they ceased their employment: “[workers] could face a risk of being targeted by insurgents while they are on duty or on site in different regions of Afghanistan. In general, when [workers] are off duty, they do not risk being targeted by insurgents because of their job, unless a particular circumstance increases the risk, for example working for [a] contractor”.³¹

²⁷ [Information deleted].

²⁸ Ibid, [2.3.3].

²⁹ Ibid, [2.4.2].

³⁰ "General Security Situation in Afghanistan and Events in Kabul", European Country of Origin Information Network, 1 September 2014, CIS29805, p.5.

³¹ [Information deleted].

38. A UK Home Office report refers to a judgment of the European Court of Human Rights (ECtHR) which considered the situation of a former contractor (an interpreter) to the US armed forces and found that not every person with links to the international community would automatically be at risk, but that their level of risk would depend on their individual circumstances, connections to the international community and profile.³² It was concluded that “[a]n individual may be able to reduce the risk of being targeted by [anti-government elements] if they leave their job or post, though the degree to which the risk is reduced will depend on the person’s former role, the organisation they worked for and the nature of their work, and the ability of the AGE to pursue the individual.”³³ This is further supported by EASO’s analysis of the impact of leaving a job to avoid harm. Sources cited by EASO have indicated that other than one case, there was no evidence of further targeting by the Taliban after someone ceased a particular job or activity,³⁴ although one source indicated that it would depend on the individual circumstances and the Taliban may not be satisfied with a targeted person quitting if they had worked for [western agencies] (as the applicant has) or were an ANSF soldier.³⁵
39. The representative’s submission to the IAA has argued that the more recent UNHCR 2013 Eligibility Guidelines for Assessing the International Protection Needs for Asylum-Seekers from Afghanistan and other material within the Home Office report confirms that [industry] workers are among those at risk. While I accept that submission and those guidelines have been cited above and have formed part of my consideration, I must nonetheless assess whether there is a well-founded fear of persecution in the circumstances of this particular applicant.
40. Over three years have now passed since the applicant ceased his business and left Afghanistan. Despite the applicant having been identified, evidenced by the phone calls, as a contractor to [a western agency], he did not experience any harm. He is not aware of any recent threats against him, and there is nothing in the material before me to suggest that he has been pursued or sought following his departure. I am not satisfied that this particular applicant has a profile such that the Taliban, ISIS or other anti-government elements would seek to pursue him based on his past work with [the western agency] and Afghan government. I find there is no real chance that the applicant will be harmed as a result of his past affiliation with [the western agency] and Afghan government, either with [Company 1], with [Company 2], or a combination of the two.

Conduct on return to Afghanistan

41. While I have found that the applicant does not have a real chance of being persecuted on the basis of his past employment, considering the above country information as a whole, I have concluded that the Taliban is increasingly targeting civilians and has expressly indicated an intention to target contractors associated with the government, defence forces or international community and that if the applicant were to continue to work as a [contractor] as he did in the past, he could face harm amounting to persecution.
42. Section 5J(3) of the Act has the effect that the applicant nonetheless does not have a well-founded fear of persecution if he could take reasonable steps to modify his behaviour so as to avoid a real chance of persecution, other than certain types of modification. On my findings, the chance of harm to the applicant arises from his employment as a contractor on [projects] for the Afghan government, [western agency] or potentially other international projects in the

³² Ibid, [1.3.5-6].

³³ Ibid, [1.3.7].

³⁴ Ibid, [2.4.1].

³⁵ Ibid.

[industry]. I consider that were the applicant to modify his behaviour by obtaining a different type of employment, not connected to [the western agency], Afghani government, or international community, he would avoid the real chance of persecution.

43. I find that this is not a type of modification prohibited by s.5J(3). The applicant's evidence at the SHEV interview regarding his reasons for working on dangerous projects related to the availability of work in Afghanistan, and the prospect of making good money. He has not claimed that his work is fundamental to his identity or conscience or motivated by political beliefs. I am not requiring the applicant to conceal an innate or immutable characteristic, such as having worked on such projects in the past, and the modification does not fall within one of the other categories in s.5J(3)(c).
44. Section 5J(3) requires me to consider whether the steps that the applicant could take to modify his behaviour are 'reasonable'. The applicant gave evidence at the SHEV interview that a lot of the money coming into Afghanistan is [foreign], that there aren't other contract or building work available, and that if he says he is not willing to go to a certain place because of the risk, 'they' (presumably future employers) will 'say goodbye'. He further said that there are not a lot of opportunities in other fields, it is not easy to change jobs, and that with the withdrawal of foreign forces there is even less work available.
45. Country information supports these assertions. The drawdown of international forces has been a key factor behind decline in economic growth over the past few years,³⁶ with industries that have a heavy reliance on the international community [experiencing] a sharp decline in growth rates.³⁷ Most workers are in vulnerable employment, with agriculture, wholesale and retail trade, manufacturing and construction being the main sectors of employment.³⁸ Unemployment is widespread and underemployment common in Kabul, with the influx of IDPs, returnees, and decrease in international presence all reducing employment opportunities.³⁹ Country information indicates that the cost of living in Kabul is comparatively higher than the rest of the country, such that many live in informal settlements, borrow money to survive, and enter a cycle of poverty.⁴⁰
46. However, the applicant has a tertiary education and a number of years of work experience. He also speaks English and has some computer skills (given that he completed tertiary studies, referred in the SHEV interview to using software for work, and provided the Department with an email address in his own name in his SHEV application form). According to DFAT, those with foreign language and computer skills tend to be best placed to find well-paid employment.⁴¹
47. Further, the applicant's family own a [business] in Mazar e Sharif city, and he has provided occasional assistance with that business over the years. The applicant gave evidence that his family's [business] is small, they don't need lots of people and that he would still need to go to a larger area or different province for the business. However, from the applicant's evidence at the SHEV interview that he travelled to [Country 2] to sign a [contract] for the family business, I infer that their business is relatively successful.
48. I accept that without working in the lucrative [industry], the applicant will likely be unable to continue to earn the high salary (up to [amount] per month) that he has in the past.

³⁶ "Country Information Report – Afghanistan", DFAT, 18 September 2015, CISEC96CF13367, [2.11].

³⁷ [Information deleted].

³⁸ "Country Information Report – Afghanistan", DFAT, 18 September 2015, CISEC96CF13367, [2.20].

³⁹ "DFAT Thematic Report Conditions in Kabul - September 2015", DFAT, 18 September 2015, CISEC96CF13367, [2.14].

⁴⁰ Ibid, [2.11].

⁴¹ Ibid, [2.14].

Nonetheless, based on the applicant's skills and experience, and given the position of his family, I find that he would be able to earn an income sufficient to support himself and his family, either in connection with the family business, through a combination of that business and other employment (in either Mazar e Sharif or Kabul), or through other employment alone. I do not consider the fact that this income may be considerably less than he earned in the past to render the behaviour modification unreasonable. Similarly, I acknowledge that the applicant may not obtain work in [his field], commensurate with his level of education and past employment, and that this would no doubt be frustrating. However, I find that the inability to work in his chosen field does not make the steps to modify his behaviour unreasonable.

49. My findings are contingent upon the applicant being able to travel between Kabul and Mazar e Sharif, if necessary, to earn an income. There are airports in both Kabul and Mazar e Sharif.⁴² Although there are reported safety concerns about Afghan airlines,⁴³ the applicant gave evidence at the SHEV interview that he has previously travelled by air domestically in Afghanistan for work and that it is 'not too bad'. It is not clear whether the applicant has travelled by air or road in the past, but in any event he does not claim to have encountered any harm or threats on his frequent travel between the two cities. I find that should the applicant need to travel between Mazar e Sharif and Kabul in order to earn a sufficient income to support his family, or to visit family in either location, he will be able to do so without needing to take dangerous road journeys.
50. Considering the applicant's circumstances as a whole, I find that there are reasonable steps that he can take to avoid a real chance of persecution, namely by ceasing to work on [projects] contracted by [the western agency], Afghan government or international community. I therefore find that the applicant does not have a well-founded fear of persecution arising from his [contracting work].

Hazara Shia

Harm from the Taliban or ISIS

51. The applicant claims to fear persecution from both the Taliban and ISIS due to his Hazara ethnicity and Shia religion. As part of my finding under s.5J(3) above relies on the possibility of the applicant obtaining work in Kabul and/or Mazar e Sharif, I have considered the prospect of harm in both cities. There is a significant Hazara population in Kabul, on some reports making Hazaras the largest ethnic group in the city.⁴⁴ While not as large, Mazar e Sharif also has a sizeable Hazara population, amounting to 10% of the city.⁴⁵
52. According to DFAT, all ethnic groups are subject to a high risk of violence from anti-government elements, although no group is systematically targeted solely on the basis of ethnicity. Despite DFAT's indication that Hazaras are widely perceived to be affiliated with both the Government and the international community and that many Hazaras have expressed

⁴² "Country of origin information report Afghanistan", UK Home Office, 8 May 2013, OGC0D145410, map, p.9.

⁴³ DIBP, "Protection Assessment Guidance Note No.5 – Afghanistan – Hazara ethnicity and/or affiliation with government or international organisations", issued 14 December 2015.

⁴⁴ "DFAT Thematic Report Hazaras in Afghanistan and Pakistan", DFAT, 26 March 2014, CIS2F827D91264, [2.8].

⁴⁵ "Hazara Cultural Orientation", Defense Language Institute Foreign Language Center (DLIFLC), 31 January 2012, CIS961F9402053, p.3.

concern that they are targeted by insurgents as a result of this perception,⁴⁶ DFAT assesses that in Kabul, Hazaras are not disproportionately targeted by criminals or insurgents.⁴⁷

53. There have, however, been incidents of attacks on Shia targets including an attack on a mosque on the Shia Ashura holiday, 6 December 2011, which reportedly killed over 70 people⁴⁸ (with simultaneous attacks in other locations including an attack on the Blue Mosque in Mazar e Sharif⁴⁹). The Taliban denied responsibility for that attack⁵⁰ and DFAT assess it as an isolated incident.⁵¹
54. There have also been numerous reports of attacks on Hazaras in various parts of Afghanistan, particularly the Hazarajat in central Afghanistan, but also including Balkh province. In July 2014, the Taliban killed at least 15 Hazaras in Ghor province⁵². The United Nations Assistance Mission in Afghanistan (UNAMA) reports that anti-government elements abducted at least 97 members of the Hazara community in the first half of 2015, with the abductions occurring in Ghazni, Balkh, Sari Pul, Faryab, Uruzgan, and Ghor provinces. Of the 97, 67 were released.⁵³
55. In February 2015, 31 Hazara men were kidnapped in Zabul,⁵⁴ 19 of whom were later released in exchange for Taliban prisoners⁵⁵. In March, ten Hazaras were abducted in Ghazni, with nine later released.⁵⁶ In April, four Hazaras were kidnapped and later beheaded in Ghazni.⁵⁷ Also in Ghazni, four Hazaras were kidnapped by the Taliban in June 2015.⁵⁸ In July 2015 16 people, mostly Hazaras, were reported abducted in Baghlan, although the incident was said to be personally motivated, and four were abducted while travelling from Jaghori to Gilan.⁵⁹ An August 2015 media report indicates that unknown gunmen abducted ten Hazaras near Qarabagh in Ghazni province, 'against the backdrop of rising attacks by the Taliban and other militants on members of the Hazara Shia community'⁶⁰. The incident followed the discovery of the bodies in Nawur, Ghazni of four men abducted the previous week in Zabul ([details deleted]).⁶¹ In September, 13 Hazaras were killed, this time in Balkh province, in an incident condemned by the Taliban⁶². In November, the beheaded bodies of seven Hazaras, believed to

⁴⁶ "DFAT Thematic Report Hazaras in Afghanistan and Pakistan", DFAT, 26 March 2014, CIS2F827D91264, [3.40].

⁴⁷ Ibid, [4.7].

⁴⁸ Ibid, [4.7].

⁴⁹ "Country of origin information report Afghanistan", UK Home Office, 8 May 2013, OGC0D145410, [21.25]; "At least 55 dead in Kabul suicide attack on Shia pilgrims", Guardian (Unlimited) (UK), 6 December 2011, CX277952.

⁵⁰ "Country of origin information report Afghanistan", UK Home Office, 8 May 2013, OGC0D145410, [21.25].

⁵¹ "DFAT Thematic Report Hazaras in Afghanistan and Pakistan", DFAT, 26 March 2014, CIS2F827D91264, [4.7].

⁵² "Peril and Persecution in Afghanistan", Foreign Policy, 27 August 2015, CXBD6A0DE12997

⁵³ "UNAMA Protection of Civilians in Armed Conflict Midyear Report 2015 August", UNAMA, 5 August 2015, CISEC96CF13007, p.61.

⁵⁴ "Militants abduct 10 Shia Hazaras in Afghanistan's Ghazni", Press TV, 12 August 2015, CXBD6A0DE12491; "Peril and Persecution in Afghanistan", Foreign Policy, 27 August 2015, CXBD6A0DE12997.

⁵⁵ "Peril and Persecution in Afghanistan", Foreign Policy, 27 August 2015, CXBD6A0DE12997

⁵⁶ DIBP, "Protection Assessment Guidance Note No.5 – Afghanistan – Hazara ethnicity and/or affiliation with government or international organisations", issued 14 December 2015.

⁵⁷ "Militants abduct 10 Shia Hazaras in Afghanistan's Ghazni", Press TV, 12 August 2015, CXBD6A0DE12491.

⁵⁸ "Peril and Persecution in Afghanistan", Foreign Policy, 27 August 2015, CXBD6A0DE12997

⁵⁹ DIBP, "Protection Assessment Guidance Note No.5 – Afghanistan – Hazara ethnicity and/or affiliation with government or international organisations", issued 14 December 2015.

⁶⁰ "Militants abduct 10 Shia Hazaras in Afghanistan's Ghazni", Press TV, 12 August 2015, CXBD6A0DE12491.

⁶¹ Ibid; DIBP, "Protection Assessment Guidance Note No.5 – Afghanistan – Hazara ethnicity and/or affiliation with government or international organisations", issued 14 December 2015.

⁶² DIBP, "Protection Assessment Guidance Note No.5 – Afghanistan – Hazara ethnicity and/or affiliation with government or international organisations", issued 14 December 2015.

have been held hostage for a number of months, were found, amid (unverified) claims that ISIS sympathisers had carried out the killings.⁶³

56. According to an analysis in *Foreign Policy* magazine, there have also been public expressions of anti-Hazara or anti-Shia sentiment, citing the example of Amrullah Saleh, a former director of the National Directorate of Security, who accused Iran of interfering in Afghanistan through Shias, and later Gulbuddin Hykmatyar, amir of the Hezb-e-Islami and an ally of the Taliban, who accused Hazaras of being infidels and harbouring pro-Iran sentiments, a message which attempted to incite ethnic division in the community.⁶⁴ That same article points to the emergence of ISIS as increasing the risk to Hazaras.⁶⁵
57. Despite these attacks and statements, various analysts appear reluctant to conclude that Hazaras are being targeted on the basis of their ethnicity. DIBP's PAGN refers to the Afghan Analysts Network's view that there is no evidence to indicate that these incidents were examples of ethnic targeting,⁶⁶ and points out that of 196 reported abduction incidents in the first six months of 2015, only ten involved Hazaras. The PAGN acknowledges that there have been attacks against Hazara during 2015 and although at September 2015, neither DFAT nor UNAMA considered these incidents to have been motivated by ethnicity, given the limited intelligence on attacks that have occurred since these assessments were made, ethnicity cannot be ruled out as a factor.⁶⁷ UNAMA cites the motives for these kidnappings as including ransom, exchange of detainees and suspicion of membership of the Afghan national security forces.⁶⁸
58. Specifically regarding the threat posed by ISIS, there are reports that various Afghan militants have declared allegiance to or otherwise endorsed ISIS and that ISIS is attempting to recruit fighters in Afghanistan,⁶⁹ although some were later denounced as fake.⁷⁰ A bombing in Jalabad in April 2015 has, at least in some reports, been attributed to ISIS-affiliated groups.⁷¹ UNAMA has documented instances of executions of civilians by groups associated with Daesh in Nangarhar province,⁷² reporting ten incidents that caused ten civilian casualties (seven deaths and three injured), primarily in the eastern part of the country.⁷³ In November 2015, the beheaded bodies of seven Hazaras, believed to have been held hostage for a number of months, were found, amid (unverified) claims that ISIS sympathisers had carried out the killings.⁷⁴ There are also reports of an ISIS attack on a Shia congregation hall in Kabul in October 2015. A media article states that ISIS affiliates in Afghanistan claimed responsibility for that

⁶³ "Kabul marchers demand justice for seven decapitated Hazaras", Guardian (Unlimited) (UK), 11 November 2015, CXBD6A0DE15817, p.61.

⁶⁴ "Peril and Persecution in Afghanistan", *Foreign Policy*, 27 August 2015, CXBD6A0DE12997.

⁶⁵ *Ibid.*

⁶⁶ DIBP, "Protection Assessment Guidance Note No.5 – Afghanistan – Hazara ethnicity and/or affiliation with government or international organisations", issued 14 December 2015.

⁶⁷ *Ibid.*

⁶⁸ "UNAMA Protection of Civilians in Armed Conflict Midyear Report 2015 August", UNAMA, 5 August 2015, CISEC96CF13007, p.61.

⁶⁹ "Afghanistan: Post-Taliban Governance, Security and US Policy April 2015", Congressional Research Service, 27 April 2015, CISEC96CF1979, p.19; "UNAMA Protection of Civilians in Armed Conflict Midyear Report 2015 August", UNAMA, 5 August 2015, CISEC96CF13007, p.12; DIBP, "Protection Assessment Guidance Note No.5 – Afghanistan – Hazara ethnicity and/or affiliation with government or international organisations", issued 14 December 2015.

⁷⁰ "Hekmatyar's Afghan militants deny joining Islamic State", Reuters, 13 July 2015, CXBD6A0DE10569

⁷¹ "Afghanistan: Post-Taliban Governance, Security and US Policy April 2015", Congressional Research Service, 27 April 2015, CISEC96CF1979, p.19.

⁷² "UNAMA Protection of Civilians in Armed Conflict Midyear Report 2015 August", UNAMA, 5 August 2015, CISEC96CF13007, p.12.

⁷³ *Ibid.*, p.67.

⁷⁴ "Kabul marchers demand justice for seven decapitated Hazaras ", Guardian (Unlimited) (UK), 11 November 2015, CXBD6A0DE15817.

attack, via an Arabic language statement circulated online. While the group claimed numerous deaths, the reports cite security officials as indicating that one person was killed and three injured.⁷⁵

59. As at September 2015 DFAT acknowledged that there have been a small number of credible reports of Daesh expanding limited influence in parts of Afghanistan, although the numbers of active Daesh militants remain low. However, it assessed that Daesh currently has only limited capacity and influence in Afghanistan, and that the risk of violence from Daesh-affiliated groups is low.⁷⁶
60. Some of the above reports suggest increasing levels of violence against Hazaras. However, the evidence does not suggest that these incidents occur at such a scale or frequency that Hazaras face a real chance of being victim of such an attack. While I accept that there appears to be some evidence of both the Taliban and ISIS targeting Hazaras in Afghanistan, very few of these incidents have occurred in Kabul, Mazar e Sharif or Balkh province more broadly. The prospect of the applicant being caught up in such an incident, while not impossible, is remote and I do not accept that the applicant faces a real chance of harm from either the Taliban or ISIS in Kabul on the basis of his ethnicity or religion.

Discrimination

61. The applicant claims that Shia Hazaras are discriminated against, giving the example of being rejected when applying for work because he does not speak Pashto. The applicant's experience is consistent with claims by Hazara advocates that Hazaras have been denied employment in government agencies through administrative barriers, including the requirement for fluent Pashto.⁷⁷ DFAT assess that while official discrimination against Shias is low, societal discrimination exists, with preferential treatment given to members of one's own family, tribal or ethnic group,⁷⁸ such that ethnic, tribal or family connections will often be more important than merit in employment decisions for both government and private sector positions.⁷⁹ The Minority Rights Group assesses that while their situation has improved since the overthrow of the Taliban, Hazaras continue to face persistent discrimination in many areas of the country.⁸⁰
62. While I accept that such discrimination exists, and that the applicant may again in the future be subject to discrimination in finding employment, I find that in his particular circumstances, this will not amount to serious harm. The applicant is educated, skilled and speaks both Dari and English. His family own what I have found to be a relatively successful business, and he has significant work experience. Even considering my finding above that it is reasonable for the applicant to modify his behaviour and work other than on projects contracted by the government, [western agencies] or foreign interests, I am not satisfied that the applicant will face discrimination in obtaining employment such that it will amount to a denial of the ability to earn a livelihood, threaten his capacity to subsist or rise to the level of serious harm within the meaning of s.5J(4)(b).

⁷⁵ <http://afghannews.com.af/2015/10/09/isis-claims-responsibility-for-the-attack-on-religious-hall-in-kabul/> [accessed 19 January 2016]; <http://middleeastpress.com/english/blast-in-capital-kabul-kills-1-wounds-3/> [accessed 19 January 2016]; <http://www.khaama.com/1-dead-3-wounded-in-kabul-explosions-1613> [accessed 19 January 2016].

⁷⁶ "Country Information Report – Afghanistan", DFAT, 18 September 2015, CISEC96CF13367, [2.34].

⁷⁷ "Situation of the Hazara Minority", Australia: DFAT, 17 September 2010, CX249511.

⁷⁸ "Country Information Report – Afghanistan", DFAT, 18 September 2015, CISEC96CF13367, [3.25].

⁷⁹ Ibid, [3.8].

⁸⁰ "World Directory of Minorities and Indigenous Peoples - Hazaras", Minority Rights Group International (MRG), 1 December 2011, CX320410.

63. I have also had regard to information from the US Department of State that in 2015 societal discrimination against Hazaras continued along class, race, and religious lines in the form of extortion of money through illegal taxation, forced recruitment and forced labour, physical abuse, and detention.⁸¹ While I accept that there may be instances of harm of this nature against Hazaras, the applicant has not experienced such harm in the past. Having regard to the applicant's past history, skills, experience and family position, I find the prospect of the applicant being harmed in this way to be remote.

Freedom of religion

64. The applicant claimed to be unable to practice his religion freely, saying that he would be harmed if he entered a Sunni mosque. However, I do not accept the inability to enter a Sunni mosque amounts to serious harm, or that the applicant will in fact enter one given that, on the applicant's own evidence and as supported by the country information, there are Shia mosques in Kabul and Mazar e Sharif.⁸²

Christianity

65. The applicant said in the arrival interview that while he prays as a Muslim, he also goes to Christian fellowship and that he is open minded. He similarly claimed at the SHEV interview that he has been to church. Blasphemy and apostasy by Muslims are considered capital crimes in Afghanistan.⁸³ However, the applicant has not claimed that he intends to convert to Christianity, or practice that religion in any way if he were to return to Afghanistan, and has not claimed to fear harm as a result of attendance at Christian activities in Australia. In the absence of such claims and considering the evidence before me that the applicant continues to identify as a Shia and practice his Shia religion, I do not accept that he has an intention to pursue any sort of Christian activities in Afghanistan. There is nothing to suggest that his activities in Australia activities have or will come to the attention of any person in Afghanistan and I find that there is no real chance of the applicant being harmed because of such.

Kuchi

66. The applicant claimed to have been involved in a protest against the government when Kuchi invaded a Hazara area. According to country information, seasonal migration of Pashtun Kuchi herders to the central highlands has been a cause of ethnic conflict between the Kuchi and Hazara people, sometimes flaring into violence.⁸⁴ The applicant does not claim to be personally impacted by Kuchi migration or to have been involved in any violence, and given that this issue affects the central highlands, rather than Kabul or the north of the country, I am not satisfied there is a real chance that he will be caught up in any clashes between Kuchi and Hazaras in the future. He similarly does not claim to fear any harm as a result of having protested. DFAT reports that moderate sized demonstrations in Kabul are not uncommon, are generally peaceful, and that it is not aware of systemic efforts to suppress political demonstrations.⁸⁵ I find that there is no real chance that the applicant will suffer harm either as a result of his

⁸¹ Cited in DIBP, "Protection Assessment Guidance Note No.5 – Afghanistan – Hazara ethnicity and/or affiliation with government or international organisations", issued 14 December 2015.

⁸² "DFAT Thematic Report Conditions in Kabul - September 2015", DFAT, 18 September 2015, CISEC96CF13367, [2.24];

"Country of origin information report Afghanistan", UK Home Office, 8 May 2013, OGCOD145410, [21.25].

⁸³ "Country of origin information report Afghanistan", UK Home Office, 08 May 2013, OGCOD145410, [21.01].

⁸⁴ "DFAT Thematic Report Hazaras in Afghanistan and Pakistan", DFAT, 26 March 2014, CIS2F827D91264, [3.11].

⁸⁵ "Country Information Report – Afghanistan", DFAT, 18 September 2015, CISEC96CF13367, [3.31].

previous involvement in a protest, or if he were to become involved in such a protest in the future.

Conflict in Afghanistan

67. The applicant claimed that part of his motivation to leave Afghanistan was that he did not want to live in an environment of war. There are high levels of violence in Afghanistan, including in Kabul. The UNAMA documented a 78 per cent increase in civilian casualties attributed to anti-government elements from complex and suicide attacks in the first half of 2015.⁸⁶ Suicide and complex attacks carried out in urban areas in the first half of 2015, including Kabul, caused extreme harm, with 12 incidents in Kabul in that period resulting in 302 civilian casualties.⁸⁷ However, although Kabul district has a high number of victims compared to most other areas, the UN Office for the Coordination of Humanitarian Affairs views the risk to a civilian in Kabul province as relatively low, given its very high population,⁸⁸ and both Kabul and Balkh provinces rated amongst the lowest risk indicators for conflict incidents and civilian casualties.⁸⁹ Similarly, while DFAT assesses that no part of the country can be considered free from conflict-related violence, it identifies that the situation is better in areas under strong government control, including Kabul, although that attacks are nonetheless common.⁹⁰
68. While accepting that all parts of Afghanistan are affected by violence arising from attacks and/or armed conflict, I find that any harm that the applicant may suffer as a result of the conflict in Afghanistan will not be inflicted for one of five the reasons in s.5J(1)(a).

Returnee from the West

69. The applicant will be returning to Afghanistan from Australia, a western country. There have been reports of Hazara Shias who had spent time in Australia or, in one case, was an Australian citizen, being targeted while travelling in regional areas.⁹¹ DFAT has most recently advised that “[r]eturnees from western countries...face a similar [high] level of risk to other people in Afghanistan who are associated with support for the government or the international community”⁹². However, there is no evidence before me to indicate that any returnees have been harmed in Kabul or Mazar e Sharif, the applicant’s home areas. I am not satisfied that the applicant will face a real chance of harm because of his connection to Australia.

The applicant’s circumstances as a whole

70. I have considered whether there is a real chance that the applicant will suffer harm as a result of the combination of his circumstances – particularly his past work with [a western agency] and Afghan government, Hazara ethnicity, Shia religion, and association with the West, including having spent time in Australia and speaking English.
71. DFAT assesses that those working for or associated with the government and international community are at high risk of insurgent violence on the roads, and that because Hazaras are

⁸⁶ "UNAMA Protection of Civilians in Armed Conflict Midyear Report 2015 August", UNAMA, 5 August 2015, CISEC96CF13007.

⁸⁷ Ibid, p.49.

⁸⁸ "Afghanistan Security Situation: EASO Country of Origin Information Report", European Asylum Support Office), 31 January 2015, CISEC96CF1191, p.37.

⁸⁹ Ibid, p.31.

⁹⁰ "Country Information Report – Afghanistan", DFAT, 18 September 2015, CISEC96CF13367, [2.33].

⁹¹ Ibid, [5.22].

⁹² Ibid, [5.21].

perceived to be affiliated with the government or international community, Hazaras who travel those routes and work for the government or international community take precautions to ensure that they cannot be identified if stopped.⁹³ Further, DFAT has acknowledged that ethnicity or religion may sometimes be a contributing factor in attacks on government workers⁹⁴ and that returnees from western countries face a similar risk to those associated with support for the government or the international community⁹⁵.

72. Were the applicant to encounter the Taliban or other insurgents who were or became aware of his particular history and circumstances, I accept that he would face a real chance of harm. However, on the information provided by DFAT, such risk exists primarily while travelling on the roads. I have found above that the applicant does not face a real chance of harm on the basis of his past work alone, and further find that as he will no longer be working in [his occupation], the prospect of the applicant being questioned by insurgents in Kabul or Mazar e Sharif to ascertain his background, or of insurgents in those cities otherwise becoming aware of his background, is remote. I find that there is no real chance of harm to the applicant arising out of his general profile and past history.

Refugee: conclusion

73. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

74. A criterion for a protection visa is that the applicant is a non citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

75. Under s.36(2A), a person will suffer 'significant harm' if

- the person will be arbitrarily deprived of his or her life; or
- the death penalty will be carried out on the person; or
- the person will be subjected to torture; or
- the person will be subjected to cruel or inhuman treatment or punishment; or
- the person will be subjected to degrading treatment or punishment.

76. I have found above that it is reasonable for the applicant to modify his behaviour to avoid a real chance of harm and that, as such, he does not have a well-founded fear of persecution. The complementary protection provisions of the Act do not expressly require consideration of behaviour modification and the Federal Circuit Court has held that the principle in *Appellant*

⁹³ "DFAT Thematic Report Hazaras in Afghanistan and Pakistan", DFAT, 26 March 2014, CIS2F827D91264, [4.24].

⁹⁴ "Country Information Report – Afghanistan", DFAT, 18 September 2015, CISEC96CF13367, [3.38].

⁹⁵ Ibid, [5.21].

*S395/2002 v MIMA*⁹⁶, that an applicant should not be expected to modify certain kinds of behaviour, extends to complementary protection.⁹⁷ As such, I have assessed the applicant's claims under s.36(2)(aa) on the basis of what I find he will in fact do on return to Afghanistan.

77. With the exception of occasional work for his parent's company and what appears to be a hobby interest in cultivating [produce], the applicant's past [work experience] (for which he holds tertiary qualifications), [occupation]. He has previously continued to work on projects for [the western agency] notwithstanding various security incidents. As he claims, and the country information referred to above supports, the work in such areas is primarily on projects funded either by the international community or (particularly with the withdrawal of international forces), the Afghan government.
78. In the combination of these circumstances, I find that the applicant will in fact continue to work in [his] field and that this will entail working on projects funded by the Afghan government or foreign governments, whether by establishing his own company or as an employee to a contracting company. I have considered the country information cited above indicating that as a result of the drawdown of international forces, industries that have a heavy reliance on the international community, including [his] industry, have experienced a sharp decline in growth rates.⁹⁸ However, [the industry] nonetheless remains one of the main sectors of employment⁹⁹ and given the applicant's education, experience and language abilities, I find that even in the current environment he would obtain work on either Afghan government or internationally-funded projects. While this work may be centred in Kabul or Mazar e Sharif, I accept it will take him outside those cities to work, as it has in the past.
79. I find that the prospect of the applicant being harmed on the basis of the combination of his past work, religion and ethnicity and association with the West would increase if he were to continue to work as a contractor on Afghan government, [or] internationally-funded [projects] in regional areas, giving him a profile that would attract the attention of insurgents or otherwise placing him at risk of attack on his worksites or while travelling to those sites.
80. The information before me suggests that while attacks on contractors, [workers] or others associated with the Afghan government or international community occur throughout the country, the level of risk varies between the different provinces. Targets in Kabul tend to be higher profile, with DFAT assessing that government institutions, political figures, Afghan National Defence and Security Forces (ANDSF), personnel from the Resolute Support mission (the NATO-led mission that replaced the International Security Assistance Force or ISAF on 1 January 2015), other security services, and international organisations¹⁰⁰ are the primary targets.¹⁰¹ 'Representative examples' of 2014-2015 attacks in Kabul include employees of the Ministry of Justice, a guesthouse where foreigners stayed, the Ministry of Finance, military installations at Kabul International Airport and vicinity and the National Parliament building.¹⁰² Kabul came under regular rocket attacks in 2014, aimed mostly at government property, although most attacks caused no civilian casualties.¹⁰³

⁹⁶ *S395/2002 v MIMA* (2003) 216 CLR 473.

⁹⁷ *MZAIIV v MIBP* [2015] FCCA 2782.

⁹⁸ [Information deleted].

⁹⁹ [Information deleted].

¹⁰⁰ "DFAT Thematic Report Conditions in Kabul - September 2015", DFAT, 18 September 2015, CISEC96CF13367, [2.29].

¹⁰¹ *Ibid*, [2.29].

¹⁰² *Ibid*, [2.30]; see also "Afghanistan Security Situation: EASO Country of Origin Information Report", European Asylum Support Office, 31 January 2015, CISEC96CF1191, p.36.

¹⁰³ "Afghanistan Security Situation: EASO Country of Origin Information Report", European Asylum Support Office, 31 January 2015, CISEC96CF1191, p.37.

81. The UK Home Office quotes a 2012 Danish Immigration Service report as saying that persons associated with or employed by the US military do not run a high risk if their workplace is in Kabul,¹⁰⁴ and, in a different report, an assessment from EASO that most sources agree that low ranking profiles in general face a low to non-existent risk of being targeted by insurgents in Kabul or Mazar e Sharif.¹⁰⁵ According to a slightly more recent report from UNHCR however, all Afghans who are associated with foreigners could be at risk in Kabul, although the risk is higher outside that city.¹⁰⁶ DFAT asserts generally that although security measures have been put in place by the ANDSF and ISAF in Kabul, violent attacks remain common,¹⁰⁷ and that those associated with the government and/or international community are at a significantly higher risk than ordinary Afghans in Kabul.¹⁰⁸
82. Regarding the risk in Mazar e Sharif, that city has been relatively isolated from conflict and is reportedly one of the safest cities of Afghanistan, much more so than Kabul.¹⁰⁹ Nonetheless, it is not free from violence with EASO reporting 37 security incidents in Mazar between January and the end of October 2014.¹¹⁰ Although civilian casualties have been relatively significantly lower than the rest of the country, there have been sporadic explosions in the city of Mazar e Sharif. The target of these has not always been clear, and EASO has stated that “[i]t is therefore unclear whether these attacks were aimed at creating the perception of a vulnerable city or at terrorising the population”.¹¹¹ In April 2015, Taliban insurgents assaulted a court complex in the city.¹¹² However, I do not have specific information that any of these incidents have been targeted at [workers], contractors, those associated with the international community or (with the exception of the attack on the court complex) those associated with the Afghan government.
83. From this information I conclude that the prospect of harm in Kabul, and particularly Mazar e Sharif, is significantly lower than other areas of Afghanistan. However, the applicant’s work will entail travel outside the relatively safe cities of Kabul and Mazar e Sharif to areas where there is a higher risk of harm to [industry] workers and contractors associated with the Afghan government, international military forces or international community. Furthermore, the applicant’s ethnicity and religion may increase the likelihood of attacks.¹¹³ Although the risk to the applicant is one towards the lower end of the scale, placing weight on DFAT’s assessment and that of UNHCR, I am nonetheless satisfied that there is a real risk of harm¹¹⁴ to the applicant on the basis of the combination of his personal circumstances on return to Afghanistan, most particularly his future work in the [industry] as a contractor to the Afghan government or on internationally-funded projects.
84. Having regard to the entirety of the applicant’s circumstances, and most particularly the work I have found he will undertake in the future, I find that there is a real risk that the applicant will suffer harm in the nature of kidnapping, targeted killing or injury, or death or injury in an

¹⁰⁴ "Country of origin information report Afghanistan", UK Home Office, 8 May 2013, OGCOD145410, [17.16].

¹⁰⁵ "Country Information and Guidance - Afghanistan: persons supporting or perceived to support the government and/or international forces", UK Home Office, 1 February 2015, OG8F59D8D7, [2.3.2].

¹⁰⁶ "Country of origin information report Afghanistan", UK Home Office, 8 May 2013, OGCOD145410, [17.16].

¹⁰⁷ "DFAT Thematic Report Conditions in Kabul - September 2015", DFAT, 18 September 2015, CISEC96CF13367, [2.31].

¹⁰⁸ *Ibid*, [3.1].

¹⁰⁹ "Afghanistan Security Situation: EASO Country of Origin Information Report", European Asylum Support Office, 31 January 2015, CISEC96CF1191, p.135-6

¹¹⁰ *Ibid*, p.137-8.

¹¹¹ *Ibid*.

¹¹² "At least 10 people killed in Taliban siege at Afghan courthouse", Agence France Presse (AFP) - France, 10 April 2015, CXBD6A0DE4258; see also "Afghan attack: Deadly gun battle in Mazar-e-Sharif", British Broadcasting Corporation, 10 April 2015, CXBD6A0DE4260.

¹¹³ "Country Information Report – Afghanistan", DFAT, 18 September 2015, CISEC96CF13367, [3.38].

¹¹⁴ As explained in *MIAC v SZQRB* (2013) 210 FCR 505.

attack on a [project]. I find that this harm will amount to significant harm as defined in s.36(2A) of the Act, taking the form of either arbitrary deprivation of life or cruel and inhuman treatment or punishment within the meaning of s.5(1).

Qualifications to the real risk threshold

85. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:

- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm; or
- the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm; or
- the real risk is one faced by the population of the country generally and is not faced by the person personally.

86. As I find that the applicant will continue to work on [projects] that entail travel, relocating within Afghanistan will not avoid the real risk of harm.

87. Regarding the question of protection, the level of protection offered by an authority of the country must reduce the risk of significant harm to something less than a real one.¹¹⁵ DFAT assesses that the government maintains effective, although not absolute, control in major urban areas such as Kabul and Mazar e Sharif and that while violent attacks still occur, security in urban centres is typically better than in rural areas.¹¹⁶ It has also been reported that the Afghan National Police are functioning well in terms of providing security in some parts of Afghanistan, including in Kabul and Mazar e Sharif.¹¹⁷

88. However, the information I have set out in the 'well-founded fear' consideration above nonetheless indicates an ongoing risk to [industry] workers, contractors and those associated with the government, US or international community. As a result of the ongoing insurgency, the government struggles to exercise effective control over many parts of the country, particularly outside major urban areas, and as a result lacks the ability to address human rights issues or protect vulnerable groups.¹¹⁸ Further, other country information indicates that even in areas under government control, people often do not go to the police if they receive threats, as the police do not usually take action in such cases, the protection is not effective, and there have been instances of killings even of those who have sought police protection after receiving warnings.¹¹⁹ As such, I find that although there is some availability of protection, the applicant could not obtain protection from an authority of the country such that there would not be a real risk that he would suffer significant harm.

89. I further find that the risk is not one faced by the population of Afghanistan generally but, rather, arises from the applicant's own circumstances and is faced by him personally.

¹¹⁵ *MIAC v MZYLL* (2012) 207 FCR 211 at [40].

¹¹⁶ "Country Information Report – Afghanistan", DFAT, 18 September 2015, CISEC96CF13367, [5.1]; "DFAT Thematic Report Hazaras in Afghanistan and Pakistan", DFAT, 26 March 2014, CIS2F827D91264, [5.2].

¹¹⁷ "General Security Situation in Afghanistan and Events in Kabul", European Country of Origin Information Network, 1 September 2014, CIS29805, p.5.

¹¹⁸ "Country Information Report – Afghanistan", DFAT, 18 September 2015, CISEC96CF13367, [5.1].

¹¹⁹ "Country Information and Guidance - Afghanistan: persons supporting or perceived to support the government and/or international forces", UK Home Office, 1 February 2015, OG8F59D8D7, [2.5.7].

90. The qualifications in s.36(2B) do not apply. As found above, I am satisfied that there is a real risk that the applicant will suffer significant harm and that this will occur as a necessary and foreseeable consequence of him being returned from Australia to Afghanistan.

Complementary protection: conclusion

91. There are substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm.

Third country protection

92. Section 36(3) of the Act (as set out in the attachment to this decision) provides that, subject to certain qualifications, Australia is taken not to have protection obligations to an applicant who has a right to enter and reside in any country apart from Australia and has not taken all possible steps to avail themselves of that right.

Application of s.36(3) to this case

93. The applicant was born and spent the first twenty or so years of his life in [Country 1]. On his evidence, he has returned to [Country 1] as a tourist on a number of occasions and his wife and child now live there illegally. On the basis of my above findings regarding the applicant's circumstances in [Country 1], I am satisfied that the applicant does not currently have a right to enter and reside in [Country 1]¹²⁰, either temporarily or permanently.

94. The applicant has given evidence that he has travelled variously for business and personal reasons to [country], [Country 2], [Country 3] and [country]. His passport evidences that he was previously granted short-term visas to [Country 2] and [Country 3], although these have now expired. The applicant also claims that en route to Australia, he travelled through [various countries]. However, there is no evidence before me to indicate that the applicant currently has a right to enter and reside in any of these countries and I am satisfied that he does not.

95. Section 36(3) does not apply to the applicant.

Decision

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

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm

¹²⁰ Within the meaning of *MIMAC v SZRHU* [2013] FCAFC 91.

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.

...

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.

...

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.

...

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 them 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 under the Refugees Convention as amended by the Refugees Protocol 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.

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
 - (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:

- (i) produces documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

...