



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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AFGHANISTAN

IAA reference: IAA16/00423

Date and time of decision: 23 August 2016 09:36:34

Fraser Syme, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicant a protection visa.

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

## Background to the review

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### Visa application

1. The referred applicant (“the applicant”) claims to be a Hazara, Shia from Afghanistan. He arrived in Australia as an unaccompanied minor. [In] September 2015 he lodged an application for a safe have enterprise visa (“SHEV”).
2. The delegate accepted that in 2012, the applicant and his family relocated to Kabul from his home village in Wardak province because Kuchis attacked the family home. The delegate was not satisfied the applicant would face a real chance of serious or significant harm if he returned to Kabul.

### Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. [In] August 2016 the IAA received a submission dated [in] July 2016 from the applicant’s migration agent (“the IAA submission”). The IAA submission is in part legal argument in response to the delegate’s decision, in part repeats country information in the delegate’s decision and in part repeats some of the applicant’s claims. I do not consider these parts of the IAA submission to be new information and I have had regard to these parts of the IAA submission.
5. The IAA submission also in part extracts new country information related to an attack on Hazaras in Kabul by Islamic State (“*daesh*”) in July 2016. I consider this is new information. In compliance with Practice Direction 1 dated May 2016 (“the Practice Direction”) made by the President under s.473FB, the IAA submission includes a statement addressing the requirements of s.473DD(b). The migration agent submits there are exceptional circumstances which justify my having regard to that new information because it was unknown at the time of the delegate’s decision and demonstrates a significant deterioration in the security situation for Hazaras in Kabul. Were that information known, the delegate may have made a different finding about risk of harm to the applicant if he lived in Kabul. I am satisfied there are exceptional circumstances justifying my having regard to that new information.

### Applicant’s claims for protection

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6. The applicant’s claims are contained in the information referred to the IAA. They can be summarised as follows:
  - The applicant is a Hazara and a Shia Muslim, from Wardak province.
  - His home village was subject to annual attacks by Kuchi nomads. Kuchis help and are protected by the Taliban, because both of those groups are Pashtun. The Kuchis annually come to his home village looking for pasture land.
  - His school was largely attended by Hazara children. Kuchis would burn their books and burnt down the school. That made it hard for him to attend school. After he left school, his life was in constant danger from attacks by Kuchis.

- In summer of 2012, his home village was targeted by Kuchis. The Kuchis shot some other villagers. One was killed, others were injured. The Kuchis then attacked his family farm and burnt down his home. The applicant was tending the family sheep at the time of the attack. His father told him what happened and took the applicant to hide in the mountains with the rest of his family.
  - His family then moved to Kabul, where they still live. They have now sold their livestock and lost their land. There is no process to reclaim it.
  - Hazaras are frequently targeted for sectarian violence in Kabul. In 2012, he attended a Muharram prayer day at a mosque in Kabul in at which there was an explosion. His friends was amongst a number of fatalities.
  - He saw a video on Facebook of the Taliban using guns and sticks to hit a man who had returned to Afghanistan.
  - His Taskera was destroyed when the family house was burnt down. His father has since arranged a replacement Taskera to be issued for him.
  - The Afghan government cannot protect him and his family from Kuchis and the Taliban because they are Pashtun too and do not care about Hazaras.
  - It is too dangerous for him to return to Kabul. He cannot relocate to another part of Afghanistan because he is physically identifiable as a Hazara and therefore identifiable as a Shia. Sunni militias exist throughout Afghanistan. He has no relatives in other areas of Afghanistan.
7. The applicant fears he will be harmed by the Talban, Kuchis, Sunni militant groups and/or *daesh* if he returns to Afghanistan because: he is a Hazara; he is Shia; his family have lost their land, and/or he has lived in Australia and would be considered an infidel or have a pro-western political opinion.
8. The delegate considered too whether the applicant would be owed protection obligations because his personal information was included in a departmental data breach.

## Refugee assessment

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9. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

### Well-founded fear of persecution

10. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
  - the real chance of persecution relates to all areas of the receiving country
  - the persecution involves serious harm and systematic and discriminatory conduct

- the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
- the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
- the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

*Kuchis in Wardak*

11. I note the country information quoted in the delegate's decision that the applicant's home area is in a part of Wardak province which has a majority Hazara population. The delegate quotes country information too confirming that conflicts between Hazaras and Kuchis in Wardak are well documented, with increasing levels of violence since 2007 and that there was a series of fatal conflicts in the summer of 2012 in the applicant's home area. The applicant provided consistent, detailed evidence about the Kuchi attacks on his home area.
12. I accept the applicant's claims in 2012 Kuchis attacked his family farm and burnt down his home. I accept his family then relocated to Kabul, where his parents and siblings still reside. I accept too that his family sold their livestock and abandoned their family farm.
13. I have had regard the DFAT country and thematic reports on Afghanistan<sup>1</sup> and the most recent assessment for Afghanistan from UNHCR<sup>2</sup> which are included in the review material. I have also had regard to the country information quoted by the delegate regarding conflicts between Hazaras and Kuchis in Wardak. I am satisfied if the applicant was to return to his home village in Wardak, he would face more than a remote chance, and therefore would face a real chance of serious harm from Kuchis for the combined essential and significant reasons of his race as a Hazara and his religion as a Shia Muslim. I am satisfied the harm he would face, such as serious physical assault and/or loss of his life would be instances of serious harm. I am satisfied the Kuchis would inflict that harm against the applicant in a systemic and discriminatory way.
14. I am satisfied the applicant has a well-founded fear of persecution from the Kuchis for the combined reasons of his race and/or religion, now or in the reasonably foreseeable future, if he returns to Wardak.
15. I must now turn my mind to whether the applicant has a real chance of persecution throughout all areas of Afghanistan and in particular, Kabul.

*Taliban, daesh, Sunni militants, failed asylum seeker in Kabul*

16. The applicant said it was not safe for him to return to Kabul because of attacks by the Taliban. There are many innocent people killed in attacks, and in suicide attacks in Shia mosques. [Number of] friends from his neighbourhood were killed in a suicide bomb attack in 2012 on a mosque together with [number of] of their [relatives]. I note the statement accompanying his SHEV application ("the SHEV statement") the applicant referred only to one friend being killed in a bombing at a mosque in Kabul during Muharram in 2012. I note too the delegate was unable to locate any country information about a bomb attack on a mosque in Kabul

<sup>1</sup> CISEC96CF13366: "DFAT Country Information Report - Afghanistan September 2015", Department of Foreign Affairs and Trade, 18 September 2015, CIS38A8012186: "DFAT Thematic Report – Hazaras in Afghanistan", Department of Foreign Affairs and Trade, 8 February 2016 CISEC96CF13367: "DFAT Thematic Report Conditions in Kabul - September 2015", Department of Foreign Affairs and Trade, 18 September 2015

<sup>2</sup> UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", UN High Commissioner for Refugees, 19 April 2016, UN6C8EFBB3

supporting that claim of the applicant. I would expect such an event to be heavily reported on. The IAA submission does not address this inconsistency in the applicant's claims or include any supporting country information. I consider the applicant has fabricated the claim that during Muharram in 2012 he attended a mosque at which there was a bomb blast and it follows I reject any of his friends died. I consider the applicant's evidence during the SHEV interview contained multiple instances of exaggerations such as he would be killed by any Taliban or *daesh* fighters as soon as they see him, or that he will be considered a spy or an infidel because he has lived in Australia. I consider he also exaggerated when stating all police in Afghanistan are Pashtun and will not protect Hazaras.

17. As noted above, the IAA submission contains new information regarding a suicide bomb attack in Kabul in July 2016 by *daesh* on a protest by Hazaras against a government decision. The death toll was 80 people and 230 were injured. The reports state a *daesh* commander ordered an attack targeting Hazaras because of Iran's recruiting Hazaras from Afghanistan and Pakistan to protect Shia holy sites and to fight against *daesh* in Syria. As at the date of my decision, the evidence before me is there are no reports of any additional targeting of Hazaras or Shias in Afghanistan by *daesh*. The IAA submission includes reports of *daesh* killing seven Hazaras in two incidents in Ghazni province in November 2015. The migration quotes an opinion piece that *daesh* are opposed to Shias and target them for harm. I conclude these reports demonstrate *daesh* has conducted 'one-off' attacks, but I am not satisfied these attacks mean Hazaras or Shias face a real chance of serious harm from *daesh* throughout Afghanistan or in Kabul.
18. The IAA submission further quotes from the United States Department of State ("USDOS") 2014 Country reports on human rights practices in Afghanistan (which the delegate also relied on in his decision and is included in the review material) that Shia Hazaras suffer societal discrimination, including extortion through illegal taxation, forced recruitment, labour, abuse and detention. The migration agent extracted information too from the DFAT reports, UN guidelines and USDOS regarding conditions in Kabul for returnees. I have had regard too to the two reports of harm to returnees from Australia (one voluntary and one forced) who were seriously harmed by the Taliban and I note neither incident occurred in Kabul.
19. The migration agent submits the applicant will face a real chance of persecution in Kabul. Furthermore, he will be particularly vulnerable because he has not lived in Kabul for several years, and he was young when he did live there, so he lacks social networks and knowledge to avoid danger and exploitation in Kabul. I am not persuaded by that submission. It overlooks the applicant's family are residing in Kabul and he will have the benefit of their networks and knowledge acquired since they lived there in July 2012. The evidence before me is that the applicant's parents and siblings have been living in Kabul since July 2012. The applicant told the delegate that his father is working in a shop. His mother is not working. He thought his siblings are attending school. They live in an OK neighbourhood with many Hazaras. I note while the family farm may be abandoned in Wardak province, I am not satisfied the loss of the family farm will mean the applicant will face a real chance of serious harm if the applicant is living in Kabul. I am also not satisfied on the evidence before me the applicant would face a real chance of serious harm from Kuchi if the applicant is living in Kabul.
20. The DFAT reports conclude returnees who are Hazara, Shias and/or who return to Afghanistan as failed asylum seekers from a Western country do not face a real chance of serious harm in Kabul. The advice in the UNHCR guidelines also suggests that is the case. This is due to the large Hazara population in Kabul and the Afghan state having effective control of security in that city. Both the DFAT reports and UNHCR guidelines however note the level of general insecurity in Kabul due to attacks from anti-government entities, including the Taliban and

*daesh*, but consider those threats are faced by the population generally. On the basis of the evidence before me, I am not satisfied the applicant has a well-founded fear of persecution from the Taliban or *daesh* or Sunni extremists for any of the reasons in s.5J(1)(a), now or in the reasonably foreseeable future if he returns to Kabul.

### **Refugee: conclusion**

21. 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**

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22. 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**

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

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

24. I found above that the applicant does face a real chance of persecution in Wardak. For the same reasons, and applying the authority in *MIAC v SZQRB*<sup>3</sup>, I am satisfied the applicant faces a real risk of significant harm in Wardak.

### **Qualifications to the real risk threshold**

25. 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
- 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.

26. In relation to relocation, I found above the applicant would not face a real chance of serious harm in Kabul. Again, for the same reasons, and applying the authority in *MIAC v SZQRB*, I am not satisfied the applicant faces a real risk of significant harm in Kabul. However, I must now

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<sup>3</sup> (2013) 210 FCR 505

turn my mind to whether it would be reasonable for the applicant to relocate to Kabul where there would not be a real risk of him suffering significant.

27. As noted above the evidence before me is the applicant's family are all living in Kabul in an ok home in a Hazara neighbourhood. His father is working and that the applicant believes his siblings are attending school. When asked by the delegate had anything happened to his family since they relocated to Kabul, the applicant referred only to the death of friends in a Muharram bomb blast, which I rejected above as not being credible.
28. I note the information in the DFAT reports and the UNHCR guidelines regarding difficult conditions in Kabul for returnees in relation to access to accommodation, essential services and employment opportunities. I am mindful the applicant spent part of his childhood in Kabul, and that he has a place to live in that city, with his family members. I am mindful too of the applicant's young age of [age], that he has been receiving education in Australia and has shown himself to be resourceful in adapting to life here. I place weight on the advice of the UNHCR it would usually only be reasonable for a returnee to relocate to Kabul without support networks where the returnee is a single man or a couple of working age.
29. On the balance of the evidence before me and having regard to the personal circumstances of the applicant, I am satisfied it is reasonable for the applicant to relocate to Kabul for the purpose of s.36(2B).

#### **Complementary protection: conclusion**

30. There are not 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. The applicant does not meet s.36(2)(aa).

#### **Decision**

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The IAA affirms the decision not to grant the referred applicant a protection visa.

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

#### **5H Meaning of refugee**

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

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

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

...



## **5J Meaning of well-founded fear of persecution**

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

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

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

## **5K Membership of a particular social group consisting of family**

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

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

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

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

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

#### **5L Membership of a particular social group other than family**

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

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

#### **5LA Effective protection measures**

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

...

#### **36 Protection visas – criteria provided for by this Act**

...

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

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

...

#### *Protection obligations*

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

#### *Determining nationality*

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

#### **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.

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**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.

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