



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

**Decision and Reasons**

**Referred application**

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AFGHANISTAN  
IAA reference: IAA16/00574

Date and time of decision: 8 November 2016 13:17:00  
Denny Hughes, Reviewer

**Decision**

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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 an 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 national of Afghanistan. He applied for a Safe Haven Enterprise Visa [in] January 2016. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] August 2016.

### Information before the IAA

2. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. Two submissions were made to the IAA [in] August 2016 and [in] November 2016.
4. The legal submissions respond to concerns with the delegate's decision and refer to country information previously before the delegate. I am satisfied this is not new information and I have considered those submissions. The first submission also makes reference to a July 2016 press release from the Afghanistan Independent Human Rights Commission and a July 2016 article from the Independent website. While this new information also responds to the delegate's concerns, I am not satisfied that this new information is credible personal information or that it is information that was not and could not have been provided to the Minister before the primary decision was made [in] August 2016. Considering all the circumstances, I am not satisfied that there are exceptional circumstances to justify considering the new information.
5. In the second submission, country information was provided relating to recent security incidents in Afghanistan, and analysis thereof, contained in an Afghanistan Analysts Network report from October 2016. The new information reports on recent events in Afghanistan and is immediately relevant to the applicant's protection claims. As the reports post-date the delegate's decision, I am satisfied that this new information was not and could not have been provided to the Minister before the primary decision was made. I am also satisfied in the circumstances that there are exceptional circumstances to justify considering the new information.

### Applicant's claims for protection

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6. The applicant's claims are contained in the information referred and subsequently given to the IAA. They can be summarised as follows:
  - He is of Hazara ethnicity and Shia Muslim faith who originates from a village near the border between Ghazni and [province 1] provinces in Afghanistan.
  - He fled Afghanistan due to the situation for Hazaras there, especially in his village, and because he was falsely accused of raping a Pashtun [girl].
  - He cannot return to Afghanistan as he is at risk of being killed by the Pashtun people in his area, and the Taliban.
  - Outside of his village, he also fears he will be killed by the Taliban and other extremist Anti-Government Elements (AGEs) if he returns to Afghanistan on account of his ethnicity and religion.

7. He fears serious harm for the following reasons:

- His race as a Hazara.
- His religion as a Shia Muslim.
- His imputed political opinion as someone perceived as supportive of the West or the international community within Afghanistan, or as an opponent to AGEs, including the Taliban, operating around his home village.
- His actual or imputed membership of a particular social group, of failed asylum seekers from a Western Country.

### **Refugee assessment**

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8. 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**

9. 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.

10. The applicant claims to be from a small village in Ghazni province, in the district of Jaghori. While his village is under the administration of the Jaghori district, it is geographically in [province 1]. The delegate relied on information which suggests the village is in Arghandab district,<sup>1</sup> however it appears that the village may instead be in [another district], which borders Jaghori.<sup>2</sup>

11. The applicant claims to fear harm generally from the Taliban and other AGEs on the basis of his religion and ethnicity, and specifically flowing from a false accusation that has been made

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<sup>1</sup> [Information deleted]

<sup>2</sup> Google Maps (2016) <https://www.google.com/maps/d/viewer?mid=10Qz0dzwDWpj6bkfyWN6qoLIhaaU&ll=32.85168800000005%2C67.41585316989744&z=14> (accessed 8 November 2016).

against him relating to the rape of the [Pashtun girl] that worked in his home area. The applicant claims that a group of boys committed the rape, but he was blamed for it. [The girl's Father] complained to the Taliban who concluded that the applicant was responsible and indicated he would be punished under Sharia law. With the aid of his mother, the applicant fled to Pakistan.

12. The delegate had some concerns with the vagueness of the applicant's account to fear harm relating to the claimed rape accusation. She also had a number of concerns about his family composition. I agree that the applicant has been general in his evidence, although I also consider that he has been consistent in his evidence in most respects and has not sought to embellish or vary his evidence, including at the interview when the delegate brought to his attention that his father may have been involved with the Hezbe Wahdat. At this point in the interview, he simply reiterated that he did not know and that he would need to check with his uncle and mother. In my view, this gives some indications of his credibility, at least on these points.
13. Most critically, I accept the applicant's evidence that his home village is in [Ghazni/province 1] as claimed. He was able to provide a reasonable degree of evidence describing where he lived, the composition of his small village, including where his relative's houses were. He described the work of his mother in the village and the types of farming undertaken there, which is consistent with information before me.<sup>3</sup> In terms of his lack of knowledge about his uncle and father's activities with Wahdat, and his lack of knowledge about his father's death, I am satisfied that his mother and uncle concealed this information from him, and that it is only subsequent to the hearing that he has been told the depth of his family's involvement with Wahdat.
14. While I share the delegate's doubts about the false claims made against him, I also agree with her assessment that the key issue here is whether the applicant can safely access and travel within his home area between Ghazni and [province 1] provinces.
15. Ghazni province is an ethnically diverse province located south of Kabul. The population of Ghazni is estimated to be between 1.1 million and 1.5 million, of which around 50 percent is Pashtun, 40 percent Hazara and ten percent other ethnic groups.<sup>4</sup> Ghazni is considered a volatile province, where insurgents/AGEs are operating in various districts and frequently carry out activities, resulting in high numbers of security incidents. From the period 1 January 2015 to 31 August 2015, there were 1,046 security incidents in the province.<sup>5</sup> The security situation in [province 1] is also volatile. While it had far less security incidents over the same period (303), it also has a far smaller population of 304,000.<sup>6</sup> It has seen a number of major security incidents, including kidnappings, executions and beheadings of Hazara Shias,<sup>7</sup> as well as strong evidence that the Taliban controls territory in the area, with EASO indicating that four districts (Daichopan, Naw Bahar, Shamulzai and Atghar) were under threat of falling to the Taliban and [another district], which borders Jaghori and appears to be where the applicant's village is

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<sup>3</sup> EASO, "EASO COI Afghanistan Security Situation 2016", 20 January 2016, CIS38A8012395, at p.90.

<sup>4</sup> DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, at p.4.

<sup>5</sup> EASO, "EASO COI Afghanistan Security Situation 2016", 20 January 2016, CIS38A8012395, at p.86.

<sup>6</sup> EASO, "EASO COI Afghanistan Security Situation 2016", 20 January 2016, CIS38A8012395, at p.85-88.

<sup>7</sup> DFAT, "Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, at p.5, 7-8; The Guardian (UK), "Kabul marchers demand justice for seven decapitated Hazaras", 11 November 2015, CXBD6A0DE15817.

located, fell to the Taliban in June 2015. There is also evidence of an active Islamic State presence in the region.<sup>8</sup>

16. In terms of Ghazni, advice from DFAT is that the security situation appears to have deteriorated since the beginning of 2014, coinciding with the decline in security more generally across Afghanistan. That deterioration has also occurred in traditionally "safer" Hazara majority areas such as Jaghori. Insurgent attacks, community violence and kidnappings are common throughout large parts of the province. And roads linking Hazara-dominated areas in Ghazni with Kabul also suffer from a high level of insecurity.<sup>9</sup>
17. While DFAT advises, and I accept on the basis of the country information before me, that no ethnic group is immune from harm in these areas, that information does indicate that Hazaras travelling around the Hazarajat face a greater risk than other ethnic groups. While not clearly an indication of ethnic targeting, DFAT assesses that Hazaras are more likely to be selected for violence or kidnapping on the roads in these areas.<sup>10</sup> As an indicator of this, DFAT sources have reported that some bus companies are refusing to sell tickets to Hazaras because of the risk to their vehicles and drivers of being stopped by insurgents or criminals because of the possibility of Hazaras being on board.<sup>11</sup>
18. Considering all the country information before me, I am satisfied that the applicant's home area is currently under Taliban control and I find that there is a more than remote chance that he would face serious harm as a Hazara Shia if he travels to and returns to live in his home village. I am also satisfied that there are serious risks to the applicant in accessing his home area, in particular through the Kabul-Ghazni highway, given the volatile security situation in the province and the roads leading through it. The risks stem not only from the Taliban, but other AGEs active in the area, including potentially Islamic State. Considered cumulatively, I find that if the applicant were to travel to and return to live in his home area, there is a more than remote chance that the applicant would be seriously harmed, in terms of kidnapping or execution, for reasons of his ethnicity and religion.
19. While I am satisfied that the applicant would face a real chance of serious harm travelling and living in his home area, s.5J(1)(c) requires that the real chance of persecution must relate to all areas of the receiving country. For the following reasons I find that the applicant does not face a real chance of being seriously harmed for reasons of his ethnicity or religion in all areas of the receiving country.
20. Although the deteriorating security situation in a number of provinces indicates a growing concern for Hazara Shias in several regions in Afghanistan, the country information before me, including DFAT advice, also indicates that incidents of violence against Hazara Shia on the basis of religion or ethnicity remain rare in major centres like Kabul and Mazar-e-Sharif.<sup>12</sup> While the

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<sup>8</sup> EASO, "EASO COI Afghanistan Security Situation 2016", 20 January 2016, CIS38A8012395, at p.87-88; Sarnawesht, "ISIS leaflets try to recruit members in Afghan south - paper", 1 February 2016; Ismael Shahamat, "Kidnapped by IS, saved by the Taliban", British Broadcasting Corporation (BBC), 26 December 2015, CXBD6A0DE17433.

<sup>9</sup> DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, at p.6.

<sup>10</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, at p.7-8.

<sup>11</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, at p.7-8.

<sup>12</sup> EASO, "EASO COI Afghanistan Security Situation 2016", 20 January 2016, CIS38A8012395, at p.34-38, 145-149; DFAT, "DFAT Country Information Report - Afghanistan", 18 September 2015, CISEC96CF13366, p.11-12; DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, p.9-10; DFAT, "DFAT Thematic Report Conditions in Kabul - September 2015", 18 September 2015, CISEC96CF13367, at p.9-10; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3; UNAMA, "UNAMA Protection of Civilians Annual Report 2015", 14 February 2016, CIS38A8012245.

security situation is volatile, there is no clear indication in the country information that this is likely to change in the reasonably foreseeable future.

21. Kabul's population has increased exponentially since the Taliban regime was deposed. In 2001, the population of Kabul was estimated to be around a half a million people, but more recent estimates put the population somewhere over 4 million people. Estimates of the Hazara population in Kabul vary between 1.6 million to two million, or 40-50 per cent of Kabul's population.<sup>13</sup>
22. Major urban areas such as Kabul and Mazar-e-Sharif have not been immune to the insurgency and attacks from AGEs, but over the last several years, attacks directed against the Hazara Shia population in these cities have been rare.<sup>14</sup> The threat from AGEs instead has tended instead to focus on high profile targets such as government institutions, political figures, the ANDSF, NATO-led and ISAF missions, other security forces, foreign missions and international organisations, as well as high profile locations such as schools, mosques and hospitals.<sup>15</sup> According to DFAT, Kabul has a higher level of government control and a greater level of security than other parts of Afghanistan. The city has a higher level of state protection available compared to the rural areas. While the government maintains effective control of Kabul and has a range of counter-measures in place to prevent and respond to insurgent attacks, such attacks still occur frequently. Nevertheless, Kabul's size and diversity means that there are large communities of almost all ethnic, linguistic and religious groups in the city, and ethnic and religious based violence in Kabul is rare.<sup>16</sup> Mazar-e-Sharif is considered to be one of the safest cities of Afghanistan, much more so than Kabul.<sup>17</sup> While some urban centres suffer more insecurity, figures from 2009 until 2015 show Mazar-e-Sharif has one of the lowest numbers of civilian victims in its city centre.<sup>18</sup>
23. As noted above, there have been targeted attacks against the Hazara Shia population, including the Ashura bombings in Kabul and Mazar-e-Sharif in December 2011 by Lashkar-e-Jhangvi.<sup>19</sup> More recently, there have been significant attacks against a Hazara Shia protest in the west of Kabul in July 2016,<sup>20</sup> and in October 2016 there were attacks on Shia worshippers commemorating Ashura in Kabul and in Balkh (approximately 20 kilometres from Mazar-e-Sharif). In terms of these recent attacks, indications are that Islamic State<sup>21</sup> was likely responsible.<sup>22</sup>
24. I have considered whether these attacks are indicative of a major shift in the security situation for Hazara Shia in Afghanistan, both in terms of a risk of harm from Islamic State, or a rise in

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<sup>13</sup> DFAT, "DFAT Thematic Report Conditions in Kabul - September 2015", 18 September 2015, CISEC96CF13367; DFAT, "Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186.

<sup>14</sup> EASO, "EASO COI Afghanistan Security Situation 2016", 20 January 2016, CIS38A8012395; DFAT, "DFAT Country Information Report - Afghanistan", 18 September 2015, CISEC96CF13366.

<sup>15</sup> EASO, "EASO COI Afghanistan Security Situation 2016", 20 January 2016, CIS38A8012395, at p.24, 34-38; DFAT, "DFAT Country Information Report - Afghanistan", 18 September 2015, CISEC96CF13366, at p.9 and 14-15.

<sup>16</sup> DFAT, "DFAT Thematic Report Conditions in Kabul - September 2015", 18 September 2015, CISEC96CF13367, at p.9-10; DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, p.9-10.

<sup>17</sup> EASO, "EASO COI Afghanistan Security Situation 2016", 20 January 2016, CIS38A8012395, at p.145, quoting Landinfo, Temanotat Afghanistan Sikkerhetsoppdatering, 9 January 2014, p.21.

<sup>18</sup> EASO, "EASO COI Afghanistan Security Situation 2016", 20 January 2016, CIS38A8012395, at p.30.

<sup>19</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, p.9-10.

<sup>20</sup> Australian Broadcasting Corporation (ABC) (News), "Kabul attack: Afghans say blasts claimed by IS will not stoke sectarian tension", 25 July 2016, CX6A26A6E6801; BBC News, 'Kabul IS blast: Afghan capital buries victims of huge bombing', 24 July 2016, CX6A26A6E6805.

<sup>21</sup> Islamic State in Afghanistan is variously known as 'Islamic State in Khorasan Province' or 'Islamic State Wilayat Khorasan'.

<sup>22</sup> Borhan Osman, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", Afghanistan Analysts Network, 19 October 2016, CX6A26A6E11358.

sectarianism more broadly. Previous DFAT advice has indicated that Islamic State had limited capacity and influence in Afghanistan, and that civilians in Afghanistan faced a low risk of violence from groups affiliated with Islamic State compared to the risk of violence generally in the country.<sup>23</sup> More recent country information has acknowledged the emergent threat of Islamic State, but raises questions about whether it has the capability to orchestrate anything beyond occasional high profile attacks, and whether its actions are indicative of a return to sectarian violence in the country. A report from the Afghanistan Analysts Network on the recent attacks states that while Islamic State seems capable of planning and executing 'occasional' attacks, it remains a limited threat, and that it is unlikely that the group can single-handedly drive the conflict in a sectarian direction.<sup>24</sup>

25. Beyond the threat of these high profile attacks, there is no clear suggestion in the country information of a shift in the broader security situation for Hazara Shia in Afghanistan. There is no indication of a rise or return of discriminatory or other systematic conduct directed against Hazara Shias in the major urban areas. In fact, indications are that the attacks have been widely condemned across lines in Afghanistan, including by the Taliban.<sup>25</sup> While Islamic State may be seeking to spark sectarian division in Afghanistan through these attacks, and the group remains a genuine threat, the reports indicate that it is unlikely Islamic State has the capacity to single-handedly drive the conflict in a sectarian direction. There are also a range of reassuring factors that would prevent sectarianism from occurring, including a consensus between the Afghan security forces and the Taliban in speaking out against sectarianism, and the fact that the Afghan population in general, and religious leaders from both major sects, have traditionally emphasised the value of co-existence.<sup>26</sup>
26. I have closely weighed the country information before me. I accept there have been recent serious attacks in Kabul and Balkh and that Hazara Shia were deliberately targeted. While I accept the potential for future attacks against Hazara Shia in major urban areas like Kabul and Mazar-e-Sharif cannot be discounted, I also give weight to the country information before me that indicates that Islamic State's presence and capacity to orchestrate attacks in the country in the future is limited, and that the group remains under considerable pressure from Afghan, US and even Taliban forces.<sup>27</sup> I also accept the country information before me that the attacks are not emblematic of a broader return to sectarianism involving Hazara Shias in the country.
27. Considering all the information before me, including the presence of security forces in Kabul, the size and diversity of the city, the limits on Islamic State capabilities and the pressures the group is under from Afghan and International forces, as well as the Taliban, I find that Islamic State has only a limited capacity to undertake further infrequent or occasional attacks in urban areas such as Kabul. While I accept future attacks may occur, I am not satisfied that the threat is at a scale or frequency, where the chance or risk of the applicant being seriously harmed in an attack is more than remote. I find that there is not a real chance of the applicant being seriously harmed as a Hazara Shia from the actions of Islamic State.

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<sup>23</sup> DFAT, "DFAT Country Information Report - Afghanistan", 18 September 2015, CISEC96CF13366, at p.9.

<sup>24</sup> Borhan Osman, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War ", Afghanistan Analysts Network, 19 October 2016, CX6A26A6E11358.

<sup>25</sup> Borhan Osman, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War ", Afghanistan Analysts Network, 19 October 2016, CX6A26A6E1135.

<sup>26</sup> Borhan Osman, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War ", Afghanistan Analysts Network, 19 October 2016, CX6A26A6E11358; Australian Broadcasting Corporation (ABC) (News), "Kabul attack: Afghans say blasts claimed by IS will not stoke sectarian tension", 25 July 2016, CX6A26A6E6801.

<sup>27</sup> Borhan Osman, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War ", Afghanistan Analysts Network, 19 October 2016, CX6A26A6E11358; Karim Amini, "Critics Question Daesh Strength In Afghanistan", Tolo News, 26 July 2016, CX6A26A6E7134; Hamid Shalizi and James Mackenzie, "Afghanistan weighs Islamic State threat after Kabul attack", Reuters, 26 July 2016, CX6A26A6E7074.

28. Considering all the circumstances, I find that there is not a real chance of the applicant suffering serious harm on the basis of his religion or ethnicity. I am satisfied that s.5J(1)(c) is not met. I find that there is not a real chance of the applicant being seriously harmed as a Hazara Shia from the actions of the Taliban, Islamic State or any other AGE.

### **Refugee: conclusion**

29. 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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30. 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**

31. 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.

32. I have found that if the applicant returns to his family village in Ghazni/[province 1] that there is a real chance that he would be seriously harmed, in the form of kidnapping or killing, for reasons of his ethnicity and religion. For the same reasons, applying the authority in *MIAC v SZQRB* (2013) 210 FCR 505, I find that there is a real risk that the applicant would experience significant harm, in terms of being arbitrarily deprived of his life, if he were returned to his home village in Afghanistan.

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

33. 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.



34. I have found that there is a real risk that the applicant would face significant harm in his home area. For the reasons given earlier in this decision, while I accept that there are credible security risks throughout Afghanistan, I am satisfied that the real risk of harm is confined to his home area.
35. As I am not satisfied that the risk of harm is present outside of his home area, I have considered whether it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that he will suffer significant harm. For the reasons that follow, I find that it would be unreasonable for the applicant to relocate elsewhere in Afghanistan, such as a major city like Kabul or Mazar-e-Sharif, where he would not be at a real risk of suffering significant harm.
36. With the exception of a brief period in Pakistan, the applicant has lived in his village in [province 1]/Ghazni since he was a child. He has not claimed to have spent any time outside of that area, including any time in a major city like Kabul or Mazar-e-Sharif.
37. The country information indicates that relocation to urban areas is more successful for those that possess family and tribal connections in proposed relocation areas. I acknowledge the delegate's assessment that the UNHCR considers that the only exception to the requirement of external support is single able-bodied men and married couples of working age without specific vulnerabilities.<sup>28</sup> However, I also note that the UNHCR does not suggest this is an absolute. It indicates that persons may in certain circumstances be able to subsist without family and community support in urban areas, however it also stresses that given the breakdown in the traditional social fabric of Afghan society caused by decades of war, mass refugee flows and internal displacement, a case-by-case analysis will be necessary.
38. The applicant's family, including extended family, live between [province 1]/Ghazni and Pakistan. He has made no claims to have any family or tribal connections to Mazar-e-Sharif or Kabul. While I accept the applicant is single and able-bodied, that he has some education and apparently high level English language skills, I am satisfied he has a range of vulnerabilities. Firstly, he has no employment or work experience or other trade skills. While his education and language skills may assist, it is difficult to contemplate how successful he could be in finding work in a city like Kabul where he would have no support, where unemployment and underemployment are high, and given Kabul's relatively high cost of living, particularly for housing.<sup>29</sup>
39. I am conscious about the country information cited by the delegate, including a Danish Refugee Council report on poverty in Afghanistan. That report found that returnees to Afghanistan tend to do as well or better than those who never left the country in terms of securing employment, food and education, and that returnees come back to the country with sets of skills and networks that increased their resilience upon return.<sup>30</sup> While I accept that returnees may have, in general, comparatively better outcomes than other migration groups, such as internally displaced persons, I do not accept that this report is intended to indicate that returnees are not vulnerable or at risk on return to the country, or that relocation would always be reasonable. In contrast to the advantages suggested by this report, the applicant is young, inexperienced and without family or tribal support networks outside of his home area.

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<sup>28</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3, at p.8-9.

<sup>29</sup> DFAT, "DFAT Thematic Report Conditions in Kabul - September 2015", 18 September 2015, CISEC96CF13367, at p.5-6, 10.

<sup>30</sup> Danish Refugee Council, "Urban Poverty Report: A Study of Poverty, Food Insecurity and Resilience in Afghan Cities", 13 November 2014, CRF909496131.

While he may have some advantages, such as his language skills, I have serious concerns as to whether he could earn a livelihood due to lack of work skills and experiences, and the compounding effect this would have for him in terms of accommodation, health care and education.

40. He is still young, around 20 years old, having come to Australia as an unaccompanied minor. In that regard, I note that he would fall into a similar cohort of returnees referenced in the 2016 UNHCR report who were former unaccompanied minors and who were returned to Afghanistan from the UK. These young persons were vulnerable to harm and exploitation and faced significant challenges in finding work, accommodation and safety and were at risk of being targeted for harm as returnees from the west.<sup>31</sup> While I am not suggesting there is a real chance or risk of the applicant facing serious or significant harm on this basis, I am conscious of, and have given weight to, his similar profile and the similar vulnerabilities he may have on return.
41. While I have found that there is not a real risk of the applicant being harmed for reasons of his ethnicity or religion within urban areas such as Kabul or Mazar-e-Sharif, I nevertheless accept that the security situation in Kabul remains highly volatile.<sup>32</sup> While Mazar-e-Sharif is comparatively safer, the city, and the province of Balkh more generally, is not immune to generalised violence and there is some indication there of an increase in security incidents.<sup>33</sup>
42. Considering all the circumstances, if the applicant were to relocate to Kabul or Mazar-e-Sharif, I find he would have reduced employment prospects given his lack of work experience and skills. I am satisfied he has no family or tribal networks, and while he is single and able-bodied, I am also satisfied he is young, has no work experience, and is potentially vulnerable given his age and the fact that he left Afghanistan as an unaccompanied minor. I have also given weight to the recent deterioration in the security situation in Kabul, Balkh province, and Afghanistan more generally. In view of everything before me, I am not satisfied it would be reasonable for the applicant to relocate from his home village in [province 1]/Ghazni to an area of the country where there would not be a real risk that he would suffer significant harm.
43. In terms of whether the applicant could obtain protection from the Afghan authorities, DFAT has assessed that due to the ongoing insurgency and deteriorating security situation across Afghanistan, the government does not exercise effective control over all parts of the country, particularly in rural and remote areas.<sup>34</sup> The ongoing reduction in the international forces is also having an adverse impact on the ability of the government and security forces to exercise control over the country.<sup>35</sup> The UNHCR indicates that the capability of the government to protect human rights is undermined in many districts by insecurity and the high number of attacks by AGEs.<sup>36</sup> I have earlier referred to information that indicates a deteriorating security situation in both Ghazni and [province 1] provinces and along the roads to his home in [another] district, which I also accept is under Taliban control. I note that DFAT indicates that there are official checkpoints, operated by Afghan National Army or Afghan National Police, with the aim of improving the security on the road, but there are indications that they are operated by poorly-trained, poorly-paid personnel, and corruption is common.<sup>37</sup> Considering

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<sup>31</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3, at p.41.

<sup>32</sup> DFAT, "DFAT Country Information Report - Afghanistan ", 18 September 2015, CISEC96CF13366, p.11-12

<sup>33</sup> EASO, "EASO COI Afghanistan Security Situation 2016", 20 January 2016, CIS38A8012395, at p.145-149.

<sup>34</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, p.7.

<sup>35</sup> DFAT, "DFAT Country Information Report - Afghanistan ", 18 September 2015, CISEC96CF13366, p.21-22.

<sup>36</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3, at p.48.

<sup>37</sup> DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, p.7.

all the circumstances, I am not satisfied that the applicant could obtain protection from an authority of the country such that there would not be a real risk that he will suffer significant harm on his return to his home village in [Province 1]/Ghazni.

44. On the evidence before me, I am satisfied that this risk to the applicant would be due to his religion and ethnicity, that the risk is one faced by the applicant personally, and that this is not a risk faced by the population of the country generally. As I am satisfied that the applicant faces a real risk of significant harm on these bases, it is unnecessary to consider his remaining claims.

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

45. 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. The applicant meets s.36(2)(aa).

#### **Decision**

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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.

## Applicable law

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### ***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.

...

***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.