



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

**Decision and Reasons**

**Referred application**

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AFGHANISTAN  
IAA reference: IAA19/06529

AFGHANISTAN  
IAA reference: IAA19/06530

Date and time of decision: 9 May 2019 16:58:00  
J McLeod, Reviewer

**Decision**

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In respect of the referred applicant (IAA19/06529) 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.

In respect of the other referred applicant (IAA19/06530), the IAA remits the decision for reconsideration with the direction that:

- the other referred applicant is a member of the same family unit as the above-named applicant and satisfies the criteria in s.36(2)(c)(i) of the *Migration Act 1958*.

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

## Background to the review

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### Visa application

1. The above named referred applicants ('the applicants') are members of a family unit comprising a father ('the applicant') and his [child] ('the applicant child').
2. The applicant claims to be a Shia Pashtun citizen of Afghanistan who has been residing illegally in Pakistan since he was [age] years old. He claims he received threats in Pakistan and his family decided he should come to Australia for safety. He arrived in Australia in March 2013 and was transferred to Nauru for a few months and then back to Australia.
3. In September 2014 the applicant married his wife, [a Country 1] national, and the applicant child was born to them in [date]. The applicant's wife was granted a Protection (subclass 866) visa on 7 December 2018 but as the applicant child had not been added to her application he was not granted a visa. The applicant child has been included in [the] father's SHEV application which was lodged on 9 September 2016.
4. The applicants' SHEV application was assessed by a delegate of the Minister for Immigration ('the delegate'). The delegate accepted the applicant would face a real chance of harm if he returned to Logar Province but found he could relocate to Mazar-e-Sharif where he would not face a real chance of persecution or a real risk of significant harm and that it would be reasonable in the circumstances. She refused the grant of visa to the applicant on 1 April 2019 and on this basis also refused the grant of visa to the applicant child.

### Information before the IAA

5. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) ('the review material'). This includes inter alia, a copy of the applicant child's birth certificate and notification of his mother's 866 visa grant which were also forwarded to the IAA on 17 April 2019.
6. In order to determine the applicant child's legal status, I have obtained new country information in the form of the Law on Citizenship of the Islamic Emirate of Afghanistan<sup>1</sup> which inter alia, addresses the status of children born outside Afghanistan to Afghan parents. The delegate's finding of the applicant child's nationality had been based on the premise that "[u]nder Australian law, the child follows the citizenship of their parents." However the Act provides that nationality is to be determined solely by reference to the law of the relevant country. In this case, that country is Afghanistan and it is necessary to consider Afghan citizenship law. I am satisfied that the Law on Citizenship of the Islamic Emirate of Afghanistan from 2000 sets out the current relevant law in this respect. As there was nothing in the review material to assist in the determination of the applicant's child's status, I am satisfied there are exceptional circumstances to justify considering this new information.
7. I have also obtained new country information on the situation in Afghanistan for Shia Muslims, particularly in Kabul, and for returnees.<sup>2</sup> The information obtained was published recently in

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1 National Legislative Bodies, "Law on Citizenship of the Islamic Emirate of Afghanistan", 1 June 2000, CIS20709

2 European Asylum Support Office (EASO), "Afghanistan: Key-socio-economic indicators – Focus on Kabul City, Mazar-e-Sharif and Herat City", 1 April 2019, CIS20190402094533; The United Nations Assistance Mission in Afghanistan (UNAMA), "Afghanistan: Protection of Civilians Annual Report 2018" 24 February 2019, CIS20190226143710; UNAMA, "Afghanistan: Protection of Civilians Annual Report 2017" 1 February 2018, CIS7B8394110044; The United Nations High Commissioner

2018 and 2019 and contains updated analysis of the security situation relevant to these classes of persons and therefore to the applicant. The delegate's decision also turned in part, on earlier versions of some of these same reports or earlier reports from the same source.<sup>3</sup> They are analytical and/or factual reports from sources I consider authoritative. Given the fluidity of the security situation in Afghanistan, I consider it is necessary to give proper consideration to this information. I am satisfied that there are exceptional circumstances to justify considering this new information.

### **Applicants' claims for protection**

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8. The applicant's claims can be summarised as follows:

- He left Afghanistan in 1992 with his family due to the rise of Taliban groups who were destroying the lives and property of Shias.
- They migrated to a small Shia tribal area in [City 1], Kurram Agency, Pakistan and he has lived there undocumented, ever since. Since 1986 Shias have been killed all over Pakistan. His uncle was killed by Taliban because he was Shia and was not participating in illegal activities with them. Soon after, in 1996, another of his uncles was killed by them, and in 2010, so was his father. In 2012 he and his family were then threatened by insurgent groups including the Taliban, LeJ, LeT and the Haqqani Network via letter delivered to his shop. They left [City 1] as soon as possible and moved to Quetta. However, still they were not secure and he was compelled to move to Australia to save his own life.
- He fears returning to Afghanistan as it is full of terrorists. He fears he will be harmed because he is a Shia Muslim who has been living in, and his [child] was born in, Australia which is considered an infidel country. His wife is from [Country 1] and has converted to Islam which would make it more dangerous for him if he returned to Afghanistan. There are also risks for poor people. He fears harm from people in general and from terrorist groups in Afghanistan.

9. While his circumstances were raised in the context of his father's claims, no further claims were raised specifically in regards to the applicant child.

### **Refugee assessment**

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10. 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.

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for Refugees (UNHCR), United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 30 August 2018, UN3079B839; Oxfam, "Returning to Fragility - Exploring the Link between Conflict and Returnees in Afghanistan", January 2018; UNHCR, Returnee and Internally Displaced Persons Monitoring Report, May 2018; Jamestown Foundation, "Terrorism Monitor", Volume XVI, Issue 19, 12 October 2018; ANALYSIS, "Global Threat Forecast 2019", 13 January 2019; Al Jazeera, "Death toll rises to 11 in attack on Shia gathering in Kabul", 8 March 2019; The Sydney Morning Herald, "Explosions target Shiite shrine in Kabul: official", 21 March 2019

<sup>3</sup> The UNHCR, UNAMA and EASO reports obtained are updated versions of those the delegate considered.

## Well-founded fear of persecution

11. 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.
  
12. The applicant claims he is an Afghan national who was born in, and whose family originates from, [District 1] in Logar Province, Afghanistan, but that he has been living in Pakistan undocumented since he was [age] years old and departed Pakistan on a passport arranged by a smuggler. He has provided what are purportedly his Afghan identity documents including a driver's licence (issued [in] Kabul [in] 2009, valid until [2019]) and Taskera (issued by [in] Logar Province [in] 2009) which he claims he and his father travelled to Afghanistan to obtain.
  
13. The delegate was not entirely convinced about the applicant's claimed Afghan nationality and although she did not go so far as to make a positive finding, she suggested he was most likely a citizen of Pakistan. This was based on concerns she held arising from: potential irregularities in the purported identity documents, problems in the applicant's evidence regarding their acquisition, and the prevalence fraud in the acquisition and/or issuance of such documents; the fact that the applicant departed Pakistan using a Pakistani passport bearing his name and photograph, money transfers to persons in Pakistan and potential undeclared family linkages to persons in Australia. I share these concerns and I also have some concerns due to the vague nature of the applicant's evidence in relation to his claimed nationality and origins. At the SHEV interview, the applicant claimed to know very little about his own circumstances and that of his parents. For instance, he claimed not to know where in Afghanistan his parents were born and did not know if his family had owned land in Afghanistan. I also note that in a written response to concerns raised by the delegate in a post-interview letter, it was submitted that the applicant would be willing to contact the Afghan consulate in Australia to have his documents verified but there is no evidence to indicate that he ever did.
  
14. However, I take into account the applicant's very young age when he departed Afghanistan, his limited education and plausible explanations about why he knew so little about his parents' life in Afghanistan. His evidence regarding the impact of his living undocumented in Pakistan is also plausible, as his explanation of acquiring the Pakistani passport through an agent. I also note that the forensic examination of the applicant's documents bore inconclusive results and there is no positive evidence before me that the applicant holds Pakistani citizenship. In these circumstances I am not satisfied the applicant has Pakistani citizenship; I accept he is an Afghan national and that Afghanistan is the 'receiving country' for the purpose of this review.

15. As for the applicant child, while the applicant indicated in the SHEV interview that his [child] would be stateless, applying Articles 9 and 11 of the Law on Citizenship of the Islamic Emirate of Afghanistan (2000), I am satisfied the applicant child is an Afghan citizen by virtue of [the] father's citizenship. I accept Afghanistan is the 'receiving country'.
16. While the delegate treated Logar province as the applicant's home area and assessed his claims against Logar, I am not satisfied this is the area to which he would return. The applicant claims that while he was born in [District 1], Logar and lived there with his family until he was [age] years old, he has no memory of his village or surrounding areas, has no knowledge of any significant landmarks in the area and has limited knowledge of his family's life there. On reviewing the evidence, I am not satisfied he has ever, at any time, indicated that if returned to Afghanistan, he would return to Logar. He claims he has only visited Logar once, to obtain his Taskera but that he did not visit his village on that trip, nor any other time. I accept the applicant no longer has any family in Logar, or in Afghanistan and on the evidence, his family have not retained any land or other ties with the area.
17. DFAT's 2015 and 2017 reports considered by the delegate advise that returnees from western countries are almost exclusively returned to Kabul. I find that the applicant would be returned to Kabul, as many tens of thousands of returnees from the west and Pakistan have also been. The UNHCR's Returnee and Internally Displaced Persons Monitoring report of May 2018 noted that 38% of returning refugees in 2017-2018 did not settle in their province of origin for reasons including insecurity, the presence of non-state armed groups and lack of services and economic opportunities, factors I consider would also bear on the applicant's mind. I note that Kabul has a large population of Shias, and Pashtuns. I also take into account that if returned, the applicant would be accompanied by, and have responsibility for, the applicant child, who is currently around [age] years old. In these circumstances, and noting his main source of income came previously from running a shop in the township of [City 1], I consider it highly unlikely that the applicant would return and settle in [District 1], Logar, a rural part of Afghanistan, a place he has no memory of, little knowledge of, no family in, and which his links to are not current but historical. I consider that, as a question of fact, the applicant would return to, and seek to establish himself, in Kabul. I have assessed his claims on that basis.
18. I accept, as the delegate also did, that the applicant is a Shia Muslim. I accept he fears being harmed and killed by insurgent groups because he is a Shia Muslim who has been living in, and his [child] was born in, Australia, which they perceive as an infidel country.
19. The country information before me from consecutive UNAMA reports (2017, 2018, 2019) and recent news reports indicates that since 2016 there have been 55 incidents of sectarian-motivated violence against Shia Muslims in Afghanistan, resulting in 2128 civilian casualties (681 deaths and 1447 injured). The yearly breakdown includes 12 attacks resulting in 689 civilian casualties (230 deaths and 689 injured) in 2016; 22 attacks resulting in 557 civilian casualties (211 deaths and 346 injured) in 2017; 19 attacks resulting in 747 civilian casualties (223 deaths and 524 injured) in 2018; and two attacks resulting in 135 civilian casualties (17 deaths and 118 injured) to date in 2019. This data reflects a 34% increase in civilian casualties amongst Shia communities in 2018 compared with 2017 and an 8% increase against 2016. As UNAMA noted in their February 2019 report, it reflects a continuing trend of extreme harm to civilians from these communities.
20. Looking at Kabul, since July 2016 there have been at least 17 multiple/mass casualty attacks against Shia places (including places of worship, cultural centres and neighbourhood) in Kabul killing almost 500 and injuring more than almost 1300, the most recent of which were conducted in March 2019. The reporting indicates that while the Taliban has been condemning

these attacks, the local branch of Islamic State, 'ISKP in Khorasan Province' ('ISKP') claimed responsibility for most of these attacks. ISKP has also messaged that the attacks were religiously motivated and called for further attacks against Shias.

21. Relevantly, UNAMA points out that while the majority of sectarian-motivated attacks against Shia Muslims in 2017 occurred in places of worship, from December 2017 onwards, the majority of attacks against Shias have occurred in other civilian areas including in Shia Muslim majority neighbourhoods or ethnic Hazara neighbourhoods. This has included attacks on a Shia cultural centre, a voter registration/Taskera office, an education centre, a wrestling club and commemorations for deceased Hazara political leader Ali Mazari, all in the Shia areas of Kabul, particularly, the Hazara area, Dashte Barchi.
22. The attacks on Shias constitute a small amount of the overall number of attacks in Kabul and could be said to be infrequent. According to DFAT and UNAMA, most of the attacks in Kabul are primarily executed by the Taliban who I am satisfied on the basis of reporting from UNAMA and the Afghanistan Analysts Network, have shifted in their ideology and do not target Shias on account of their religion. I also take into account the overall security presences in the city, that the government maintains effective control despite ongoing security incidents, that the Shia area is itself large in size, as is the Shia population in Kabul (with Hazara Shias comprising around 1.6 – 2 million or 40 – 50 per cent). I also have no reason to conclude the applicant has a profile connected to those government / international community groups (who are the groups primarily targeted by insurgents) or that he would be in proximity to such people or institutions.
23. Notwithstanding this, given the pattern of attacks since 2016, I consider ISKP to be a credible threat for Shias in Kabul. I accept that despite increased joint international and Afghan military operations aimed at eradicating the group, ISKP has an operational presence in Kabul and has demonstrated the capability and willingness to carry out multiple/mass casualty attacks against Shias there, not only in places of worship, but in general civilian community locations. I accept the predictions from observers such as ANALYSIS who in October 2018 assessed that Islamic State would persist throughout 2019, supported by fighters relocating from places such as Syria and Iraq. As UNHCR commented to EASO, the Shia community has in the past couple of years been disproportionately represented among civilian casualties in Kabul and Herat. DFAT's more recent assessment in 2017 assessed that the number and scale of the 2016-2017 attacks indicates a risk of Shias (both Hazara and non-Hazara) being attacked by ISKP based on their religious affiliation. Notably, DFAT did not qualify a level or threshold of such risk but it assessed Shias to be particularly vulnerable when assembling in large and identifiable groups, such as during demonstrations or when attending mosques during major Shia religious festivals. However, relevantly, the level of violence specifically targeting Shias and Hazaras in Kabul has increased since DFAT issued this advice and as noted above, from late 2017 the target locations have broadened beyond the scope of mass religious gatherings or demonstrations. UNAMA considers the recent attacks on Shia Muslims infringe their right to freedom of religion, and the wide scope of these attacks beyond places of worship – at education centres, sports clubs, celebratory events and other social gatherings - directly impeded their ability to carry out their daily lives. The Jamestown Foundation (JF) has also recently reported on the impeded daily goings on of the communities in the Shia (mostly Hazara Shia) areas of Dashte Barchi. JF described Dashte Barchi as a once vibrant community, now a ghost city of civilians too fearful to operate their businesses and clubs for fear of attack.
24. Having regard to this information, I accept that Shias in Kabul face a level of risk in their day-to-day lives and this risk has been increasing since 2016. I take into account that the applicant knows no one in Kabul, or in Afghanistan, has never worked in the country and has only been

to the country twice (and once to Kabul) since he left as a [age] year old, and that he was escorted on these trips. While he has lived in [City 1], an area of relative danger in Pakistan and been directly affected by insecurity in his life, given his unfamiliarity with Afghanistan and Kabul I am mindful that he will be less attuned to warning signs, danger areas and other issues of personal risk management in Kabul. I also consider that given his personal circumstances (including his returning as the breadwinner and carer for a [child], his illiteracy, lack of knowledge of the area and absence of any friends or family), it is likely he will need to frequent Shia community locations such as mosques, community centres and offices (areas which trends suggest may continue to be targets for ISKP) to find work, assistance with childcare and establish himself and his child there. Given this and taking into account the increase in attacks on Shias by ISKP in Kabul despite increased security measures, and the broadening of targeted locations to include areas where ordinary Shia civilians assemble, work, study or worship, I consider that the chance that the applicant may currently be harmed in violence targeting Shias in Kabul is more than remote. I accept the applicant faces a real chance of persecution as defined in the Act, in Kabul.

25. Section 5J(1)(c) of the Act requires that the real chance of persecution relates to all areas of the receiving country. In this regard I have considered, as the delegate did, whether the applicant could reside without a real chance of persecution: Mazar-e-Sharif city, the capital of Balkh province.
26. I have considered the country information from sources including EASO, UNAMA, UNHCR and others. The information indicates that Mazar-e-Sharif is government controlled and has an established Pashtun and also a Shia population. Unlike in Kabul and Herat, there have been no recent attacks on Shias in Mazar-e-Sharif. The last such attack was in 2011 when Lashkar-e-Jangvi carried out coordinated attacks on locations in Mazar-e-Sharif, Kabul and Kandahar. Beyond Mazar-e Sharif itself, there was one attack in Balkh province on 12 October 2016 approximately 20 kilometres from Mazar-e-Sharif in Khwaja Ghulak when a bomb exploded outside a Shia mosque during Ashura commemorations. 18 people were killed and 67 injured in this attack. While some sources suggested ISKP claimed responsibility, most reported that there was no such declaration by any group and the incident has not sparked any further sectarian attacks or conflict in the area.
27. I have taken into account the ISKP presence and the scale, frequency and locations of attacks against Shias in recent years, as well as the wider conflict formations and the patterns of insurgent activity across the country. Sources before me indicate that ISKP has moved beyond the nascent stages and has some presence outside those areas over which it has control. I accept that ISKP has the skills, willingness and capability to conduct more attacks against Shias in urban centres and that it will continue to sporadically do so. However, I give weight to the fact that the government maintains effective control in Mazar-e-Sharif, that there is no evidence before me that ISKP has taken control of any parts of Balkh province. Even considering insurgency activity in the broader region including in neighbouring and nearby provinces, weighing all the evidence before me I am not satisfied that these threats indicate the consequential fall of Mazar-e-Sharif in the reasonably foreseeable future, nor targeted harm against the applicant. I give weight to these factors and that there is no evidence before me of any further attacks on Shias in Mazar-e-Sharif since 2011 and nor is there evidence of further such attacks near Mazar-e-Sharif or in other parts of Balkh since October 2016. While I accept it is possible that ISKP will conduct attacks in Mazar-e-Sharif in the future, I am not satisfied it will occur more than sporadically or that the chance that the applicant will be harmed in such way is more than remote.

28. The Taliban has been quick to deny involvement in recent attacks against Shias and on the evidence I am not satisfied that credible sources suspect the Taliban of having perpetrated any of the recent urban based Shia attacks. While the Taliban has carried out attacks in Mazar-e-Sharif, and has strongholds in nearby provinces the targets of the Taliban are generally high-profile and associated with government or international community institutions with no apparent sectarian motivation. Apart from the October 2016 attack in Balkh, there is little other evidence of sectarian targeting in and around Mazar e-Sharif and I am not satisfied that that attack is indicative of the onset of a sectarian campaign in this region. On the evidence I am not satisfied that ISKP's attempts to stoke sectarian violence with its attacks against Shias have influenced a rise in sectarianism against Shias such that a violent sectarianism is likely to take hold in Balkh province in the reasonably foreseeable future. Furthermore, the government maintains effective control of Mazar-e-Sharif and I am not satisfied that state institutions are weakened such that this will change, or that the city will otherwise fall to the control of the Taliban, ISKP or other insurgents or extremist groups in the reasonably foreseeable future. Shias have not been targeted in Mazar-e-Sharif city since 2011 and even taking into account the October 2016 attack outside the city, no further incidents have occurred which indicate that sectarian attacks by ISKP (nor any other actor) against Hazaras/Shias in or in proximity to Mazar-e-Sharif will extend beyond sporadic incidents.
29. When having regard to these factors, the applicant's lack of other profile or proximity connected to those in government, international community or other high profile groups and that I am satisfied the applicant is not personally of adverse interest to any insurgents/extremists, I find the chance of the applicant being seriously harmed by ISKP, the Taliban, or any other insurgent/extremist group in the reasonably foreseeable in Mazar-e-Sharif for reasons of his religion is remote and therefore not real.
30. I have noted Islamic State's attempts to stoke sectarian conflict and I accept there have been clashes between ethnic groups from time to time. However even so, I am not satisfied that sectarianism has taken or is likely to take hold at the community level such that incidents will occur with such frequency and / or severity that there is a real chance the applicant would suffer serious harm as a consequence of societal violence in the reasonably foreseeable future in Mazar-e-Sharif.
31. The applicant would be returning to Afghanistan as someone who has spent most of his life outside of Afghanistan including in a western country where he sought asylum, got married and had his [child]. He would be returning as a returnee asylum seeker from the west.
32. DFAT (2015, 2016, 2017) and UNHCR (2016, 2018) indicate that some individuals perceived as having adopted values and/or appearances associated with western countries have been targeted due to their imputed support for the Government and the international community. DFAT acknowledges that people who have been identified as having international associations face a high risk of being targeted by anti-government elements (AGEs) and that this may possibly include returnees from western countries. DFAT notes there are occasional reports of returnees from western countries (including two from Australia in 2014) allegedly being targeted for having spent time in a western country.
33. However there have been no reports of individual returnees from Australia being targeted since the two incidents in 2014 (both involving persons of a different ethnicity to the applicant and both on roads in Ghazni, removed from Mazar-e-Sharif) and other incidents reported by the UNHCR relate to various types of incidents involving mostly young (teenage/young adult) returnees with and in particular circumstances which I do not accept are reflective of the applicant's. Overall, the country information does not indicate there is systematic targeting of



returnees in Afghanistan, including those who return from Australia, those with western clothing or mannerisms or who are failed asylum seekers. It does not indicate they are targeted due a perception that they are infidels or spies. It also does not indicate that returnees from Iran or Pakistan are targeted and there are millions who have returned since the fall of the Taliban. Taking all of this information into account I am not satisfied that the applicant faces a real chance of harm on account of being a returnee asylum seeker from the west- nor for any related opinion or profile.

34. I have considered whether the applicant faces a real chance of harm through generalised violence and/or criminality or any other reasons in and in accessing Mazar-e-Sharif.
35. Country information indicates that most returnees are returned to Kabul airport. In terms of making the onward journey to Mazar-e-Sharif, I am satisfied that he can travel there by air from Kabul. The applicant has not claimed and there is no other evidence before me to indicate that the applicant would not be able to finance this air travel and I note he has been employed in Australia. I accept the applicant may transit through Kabul airport on return or wait briefly in Kabul for his onward flight to Mazar-e-Sharif. However I am satisfied that any amount of time the applicant would need to spend in Kabul city would be brief, as would any period of time he would need to spend in and around Kabul airport or on the road linking the airport to Kabul city. While I have found that the applicant would face a real chance of persecution if he returned and lived in Kabul with ongoing residency and presence amongst the Shia community there, I do not consider the applicant would face this same level of risk during a brief time in Kabul before accessing Mazar-e-Sharif. Rather, I consider the risk would be substantially lower. I have taken into account the specific security situation in Kabul city and in and around the airport but I find that the chance that the applicant would be harmed during a brief period in Kabul before going on to Mazar-e-Sharif would be very small indeed, such that it would be remote.
36. I have considered the general security situation in and around Mazar-e-Sharif. Country information does not support that persons with the applicant's profile factors, or his cumulative profile, are targeted in Mazar-e-Sharif, nor at the airport or in transit from the airport to the city which is around 9km away from the city centre. I accept the security situation in Afghanistan remains fluid and I accept that insecurity has affected Mazar-e-Sharif. However, the country information indicates that insurgents' primary targets are persons and locations associated with the government and international community and I have not accepted the applicant holds such profile, or that he would be in requisite proximity of those who do or of such institutions. The information does not support that the Afghan government or security forces are losing control of Mazar-e-Sharif. Taking into account these factors, I find the chance the applicant would be harmed as a bystander, inadvertently getting caught up in attacks, or otherwise through generalised violence is remote. I am not satisfied that he faces a real chance of suffering serious harm through generalised violence in Mazar-e-Sharif.
37. As for criminality, I accept that all of Afghanistan is affected by crime and that police capacity to maintain law and order is constrained by a lack of resources, and equipment, poor training, low education levels and corruption. Country information does not indicate that persons with the applicant's profile including returnees from Pakistan or the west are systematically targeted for money or any perception of wealth and I am not in any case satisfied the applicant would be perceived as wealthy or that he has any other profile factors that would lead him to be targeted by criminal elements in Mazar-e-Sharif or in his brief time in Kabul. I am not, on the evidence, satisfied that the applicant would face a real chance of harm in Afghanistan as a consequence of criminality.

## Refugee: conclusion

38. 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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39. Under s.36(2)(aa) of the Act, 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

40. 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.
41. I have found above that the applicant would face a real chance of being seriously harmed if he returned and lived in Kabul. For the same reasons, and applying the authority in *MIAC v SZQRB* (2013) 210 FCR 505, I am also satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's removal to Afghanistan, the applicant will face a real risk of significant harm if he returns and lives in Kabul.
42. However, s.36(2B) of the Act 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.
43. I found above the applicant would not face a real chance of persecution in Mazar-e-Sharif. For the same reasons, I do not accept the applicant faces a real risk of significant harm in (or in accessing) Mazar-e-Sharif.
44. I have considered whether, under all the circumstances, it is reasonable to expect the applicant to relocate to Mazar-e-Sharif.
45. Consistent with its previous version (2016), UNHCR's most recent guidelines (2018) considers that relocation within Afghanistan is reasonable only where the individual has access to shelter, essential services (sanitation, health care, education) and livelihood opportunities, and a traditional support network of extended family members or members of his or her larger ethnic community. DFAT has also consistently noted (2015, 2016, 2017) that in Afghanistan, ethnic, tribal and family affiliations are important factors. Kinship is central to identity and acceptance in the community, including for finding shelter and employment, and therefore Afghans tend to reside in places their ethnic group constitutes the local majority. Traditional

extended family and tribal community structures of Afghan society are the main protection and coping mechanisms for people in Afghanistan, who rely on these networks for their safety and economic survival, including access to accommodation and an adequate level of subsistence.

46. UNHCR advises that there are exceptions to the requirement of external support, being, single able bodied men and married couples of working age without identified specific vulnerabilities. UNHCR considers that such persons may, in certain circumstances, be able to subsist without family and community support in urban and semi-urban areas that have the necessary infrastructure and livelihood opportunities to meet the basic necessities of life and that are under effective Government control (as Mazar-e-Sharif is). DFAT also assesses internal relocation is generally more successful for single men of working age - provided they are able to make use of family or tribal networks. In 2018 Oxfam 2018 also emphasised family networks as being vital for returnees in finding and maintaining employment and housing.
47. DFAT has stated that a lack of financial resources and lack of employment opportunities are the greatest constraints on successful internal relocation and that unemployment and underemployment are high across Afghanistan but that large urban areas offer greater opportunities for employment and access to services. Mazar-e Sharif has been known as the economic hub of the north, a regional trading centre for northern Afghanistan and also as an industrial centre with large-scale manufacturing operations and a huge number of small and medium enterprises. The city remains under government control and attracts economic migrants from rural areas with its work opportunities and relative safety. However, EASO reporting from 2017 and 2019 also indicates that Mazar-e-Sharif is under considerable urbanisation pressure and there are indicators that construction, investment and trade have declined in Mazar-e Sharif, with casual labourers finding less work and stagnant or lower wages. Those who arrive for casual labour in Mazar-e Sharif are at a disadvantage relative to those who are better known and make better use of their networks to find work. UNHCR stated in 2017 that both Internally Displaced Persons (IDPs) and returnees faced significant challenges in accessing meaningful employment and livelihood opportunities. Returnees mostly rely on daily wage jobs which can be difficult to obtain and are more limited during fall and winter seasons. In May 2018 UNHCR reported that finding work was an 'overwhelming difficulty' both for returnees and IDPs and that while returnees were not perceived as a source of conflict in general, they clearly represented competition for resources and employment, and that this led them to face difficulties with the host communities.
48. EASO (2017) notes that Mazar-e Sharif has the largest proportion of income earners only earning an irregular income. Only about 15% of inhabitants of Mazar-e Sharif live above the poverty line and food diversity is an issue with food being less affordable than in other areas. Balkh province is therefore the exception to the trend whereby more urbanised provinces generally have a lower official poverty rate than rural provinces.
49. In 2017 UNCHR told EASO that despite providing a wider range of basic services compared to other provinces, the absorption capacity of Balkh remains far stretched in proportion to the resources available with the municipal authorities and the humanitarian and development actors and that since 2016, there have been no humanitarian agencies to assist with shelter for returnees and conflict-induced IDPs in Mazar-e Sharif. Fragile social services and an ailing economy allow little opportunities for IDPs and returnees to (re)integrate.
50. Having regard to this country information I am satisfied that the applicant would face substantial difficulties trying to establish himself and find work in Mazar-e-Sharif. I take into account that he is an able bodied man of around [age] years (working age). He has varied work

experience including some farming related experience and experience running his own shop in [City 1], and in Australia has worked in a [factory], as [an occupation] and most recently, as [another occupation]. However, the applicant left Afghanistan when he was a very young child and spent the majority of his life in Pakistan, where he did very little schooling (just three years) and always had the support of his mother, siblings and after his father's death, his [uncle]. His only return to Afghanistan was for very short trips to obtain documents with his father and he had little awareness of his surroundings on those trips. He has never worked in Afghanistan. He has no family or friends in Afghanistan.

51. Although he is married, his wife is [a Country 1] citizen and permanent visa holder in Australia. Rather than returning as a single adult male he would effectively be returning to Afghanistan as a single parent with a [child] of mixed race, who would necessarily be reliant on him in every way, for [security] and every basic need.
52. I have had regard to the information considered by the delegate in relation to reintegration assistance, however in light of the information above, I have concerns about the scope of assistance available. I am also not satisfied it would replace the need for the applicant to obtain work and an adequate place for him and his [child] to live and I do not consider that the applicant given his circumstances, would be in a position to obtain and keep work such that he could provide for his [child], and supervise, chaperone and protect [both] in the home and outside in an unfamiliar city and country, particularly when they have no family or other personal links to support them. Overall, I am not satisfied the applicant has the necessary capacity to enable himself and his [child] to subsist in Mazar-e-Sharif.
53. In addition to Mazar-e-Sharif, I have considered whether it would be reasonable for the applicant to relocate to another area under government control such as Herat or somewhere else. However, I am satisfied the applicant child would still require the same level of supervision, provision and accompaniment and while much of the above focusses on economics, employment and living conditions in Mazar-e-Sharif, comparable situations exist in the other urban centres, and difficulties rise further in rural parts. I am therefore also not satisfied that relocation elsewhere in Afghanistan would be reasonable for the applicant in all the circumstances. Taking into account the same reasons discussed above in relation to Mazar-e-Sharif, I am also not satisfied that it is reasonable for the applicant to relocate to another part of Afghanistan.

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

54. 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).

#### **Member of same family unit**

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55. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include dependent children.

56. In this case, the applicant child is of [age] and I accept [the child] resides with the applicant ([the] father) and [the] mother. I am satisfied on the evidence that the applicant child is the dependent child of the applicant and that [the child] therefore meets the definition of 'member of the same family unit'.

57. As the applicant (IAA19/06529) is a person mentioned in s.36(2)(aa), the applicant child (IAA19/06530) meets s.36(2)(c)(i).

## **Decision**

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In respect of the referred applicant (IAA19/06529) 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.

In respect of the other referred applicant (IAA19/06530), the IAA remits the decision for reconsideration with the direction that:

- the other referred applicant is a member of the same family unit as the above-named applicant and satisfies the criteria in s.36(2)(c)(i) of the *Migration Act 1958*.

## Applicable law

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

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

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
  - (c) that is not inconsistent with Article 7 of the Covenant; or
  - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

...

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



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

...

#### *Protection obligations*

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

#### *Determining nationality*

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

#### **91WB Application for protection visa by member of same family unit**

- (1) This section applies to a non-citizen in Australia (the **family applicant**):
- (a) who applies for a protection visa; and
  - (b) who is a member of the same family unit as a person (the **family visa holder**) who has been granted a protection visa.
- (2) Despite anything else in this Act, the Minister must not grant the protection visa to the family applicant on the basis of a criterion mentioned in paragraph 36(2)(b) or (c) unless the family applicant applies for the protection visa before the family visa holder is granted a protection visa.