



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA19/07281

Date and time of decision: 6 November 2019 17:27:00

M Tubridy, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a national of Afghanistan. On 17 March 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV). On 3 October 2019 a delegate of the Minister (the delegate) refused to grant the visa. On 7 October 2019 the matter was referred to the IAA.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). I have also obtained new information in the form of several recent reports which provide substantive information about the situation in Afghanistan for persons returning to Afghanistan after having lived in a western country like Australia.¹ Given that the applicant claims to fear harm from the Taliban because he has lived in Australia, and given that there is otherwise very little country information before me about this matter, I consider that there are exceptional circumstances to justify considering this new information.
3. On 31 October 2019 the applicant requested that he be allowed until at least 8 November 2019 to make a submission to the IAA. He asserted that he had only received the IAA's 8 October 2019 "Acknowledgement of Referral" letter on 24 October 2019 and that, this being the case, he effectively had only four days in which to make a submission and that in this time he was unable to secure an interpreter to assist him in providing instructions to his representative. The applicant has provided no evidence to establish that the IAA's letter took over two weeks to reach his address in South Australia. In any event, on 3 October 2019 the applicant had been notified by the Department of the referral of his matter to the IAA by way of an email to his representative, and the IAA's *Practice Direction for Applicants, Representatives and Authorised Recipients* is available on the IAA website. Given this, and given that the applicant's request to the IAA has provided no specific indication of what he would say in a submission such as might warrant further delay, and given that it would seem that the applicant had the opportunity to provide any evidence he wished in support of his application to the delegate before she decided his case, I have not agreed to the applicant's request for a delay of this matter so that he can provide a submission to the IAA. I consider that the applicant has had a fair and reasonable opportunity to put his case and I have proceeded to a decision.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He is a national of Afghanistan and an ethnic Pashtun and a Sunni Muslim who originates from the village of [Village 1] in [District 1] of Afghanistan's Paktya (or Paktia or similar) Province.
 - In 2012 he received three letters from the Taliban in which he was told that he had to join them. He fled to Pakistan and then travelled to Australia.

¹ Amnesty International, "Forced Back to Danger Asylum-Seekers Returned From Europe To Afghanistan", 5 October 2017, CISED50AD5846; EASO, "Afghanistan - Individuals targeted under societal and legal norms", 12 December 2017, CISED50AD7870; UK Home Office, "Afghans perceived as "Westernised", 1 January 2018, OG9EF76792.

- He fears that because he did not join the Taliban, and because he has escaped from them, and because he would not join the Taliban if he returned, and because he has now lived in Australia, that the Taliban would kill him.

Refugee assessment

5. 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

6. 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.
7. The applicant claims to be a national of Afghanistan and an ethnic Pashtun and a Sunni Muslim who was born on [date] and who originates from the village of [Village 1] in the [District 1] of Afghanistan's Paktya Province.
8. The applicant claims to have travelled from Afghanistan to Australia by way of Pakistan where a smuggler provided him a fraudulent Pakistan passport (and also a Pakistan national identity card) which enabled him to travel by air from Pakistan to [Country 1] to [Country 2], and then to be smuggled without the use of passport by boat to Indonesia and then by boat to Christmas Island. He has never provided for examination either the Pakistan passport or the Pakistan national identity card which he claims he made use of and which he claims were both fraudulent documents. When the delegate interviewed the applicant about his SHEV application on 11 April 2019 (the SHEV interview) the applicant submitted that he no longer possessed these documents because they were taken from him in Indonesia by a smuggler when he boarded the boat (for Christmas Island). I note, however, that in his written SHEV application of March 2017 the applicant submitted (in response to questions 52 and 53 of part-c) that his passport was taken as soon as he got to [Country 2] (rather than when he was boarding a boat in Indonesia). Moreover, the applicant also gave a different answer to this question at [in] June 2013 during the second part of his Departmental IMA & Induction interview. At that time he stated that he could not provide his purportedly fraudulent

Pakistan passport because he had thrown this document into the water during his boat journey from [Country 2] to Indonesia.

9. At the SHEV interview the applicant submitted that there may have been some mistakes in the second part of his first interview (his IMA & Induction interview) because the interpreter employed on that occasion spoke Farsi as his first language which led to problems about which other applicants have also complained. The IMA & Induction interview was indeed conducted in two parts with two different interpreters (with the first part being conducted [in] May 2013 and the second [in] June 2013) and the applicant did speak about the matter of his passport's whereabouts in the second part of that interview. However, it is not apparent on the evidence before me that the applicant or anyone else had ever made any complaint about the interpreting in question until at the SHEV interview the delegate began to press the applicant about some inconsistencies in his evidence. Moreover it is not apparent from the interview itself that there were any significant interpreting problems on [that day in] June 2013 as the applicant has claimed. In any event, and even if the responses interpreted at the IMA & Induction interview were disregarded, it would remain the case that the applicant's statements at his SHEV interview would be at odds with what he had said in his SHEV application. This raises doubts about whether the applicant really is unable to provide the passport he travelled on.
10. As documentary evidence of this identity, nationality and citizenship the applicant has provided documents which purport to be his taskera (Afghan national identity document) and Afghan driving license. The taskera presents as having been issued [in] August 2012 and the applicant claims that he obtained this by going to Gardez (the provincial centre of Paktya) where he stayed for a week to obtain this document. The applicant claims that he went to Kabul to obtain his driving licence but they told him he would have to wait for two weeks before it would be issued and as he could not wait that long (because of his travel plans for reaching Australia) he left Kabul and had the document sent to him here in Australia. The applicant claims to have departed Afghanistan in early October 2012 and the driving licence presents as having been issued [later in] October 2012. The driving licence presents the applicant as having been born on [date] and the applicant since his arrival in Australia the applicant has consistently claimed that this is his date of birth. If so, he would have been [age] when he was issued his taskera [in] August 2012. But the taskera states that the applicant was [younger] age in 2012. At the SHEV interview the delegate put it to the applicant that his [date of birth] did not match with his taskera. The applicant responded that the administrators he had dealt with regarding his driving licence were speaking Farsi, and that this made it difficult for him to make himself understood, and that they were telling him he should learn to speak Farsi. He said that all the administrators were like this. He also said that he was aware of this issue because when he came to Kabul he requested that these things should be made equal and that the officers there told him they would fix it but they did not this.
11. I note that Dari (Afghan Persian or Farsi) is the lingua franca of Afghanistan but Pashto is also among Afghanistan's official languages and it is not apparent from the country information before me that there has been a trend of Afghan officials refusing to assist persons speaking in Pashto (whether in Dari speaking dominated areas like Kabul or anywhere else) and I note that at another point in the SHEV interview he specifically indicated that his father was an expert in the Pashto language and provided assistance to other local residents in corresponding with Afghan government offices (thus indicating that Pashto was an accepted language for dealing with Afghan government officials). In any event, it made no sense that the applicant would have attempted to have this rectified in Kabul and by the officials of Kabul's Traffic Management Department when the problem was with the details in his

taskera which was a document issued to him in Pashto speaking dominated Paktya by officials of the Department of Population Status Registration of Ministry of Interior Affairs.

12. While the applicant claimed that he was aware of the inconsistency in his Afghan documents with regard to his age it seemed in fact that he was not aware of this, and at the SHEV interview he appeared to be (unconvincingly) attempting to improvise a fabricated explanation for this problem (he had certainly said nothing about this in his written SHEV application about being aware of this issue). Given the extent to which taskeras are often issued with an estimated age² for the bearer rather than an exact date of birth it is possible that a taskera might be issued in this manner with an error in the bearer's stated age as the result of an honest error. Alternatively it may also be the case that taskera was fraudulently obtained. Given that at the SHEV interview the applicant was able to demonstrate a reasonable degree of familiarity of the geography of Afghanistan's Paktya Province I am willing to accept that the former was the case. I accept that the applicant is a national of Afghanistan and that his Afghan taskera and driving licence were issued to him by the appropriate authorities in Galrez and Kabul respectively, and that his date of birth is [date] and that he originates from [District 1] in Paktya Province. I also accept that like most persons from that district he is a Sunni Muslim Pashtun of the Mangal tribe. I do not accept that the applicant has ever suffered any discrimination in Afghanistan as a result of his being a Pashto speaker, and given that the available reporting does not indicate that Pashto speakers are at risk of official discrimination, or discrimination of any other kind, in Afghanistan I am not satisfied he would ever suffer any such harm on this basis if he were to return to Afghanistan and to [District 1].
13. At the SHEV interview the delegate asked the applicant if he had had any contact with UNHCR and the applicant responded that in Indonesia he had got the refugee status and been accepted as a refugee and that he was issued a document in this regard which he had given to the Department on Christmas Island. However, in his SHEV application he was asked if he had ever been registered with UNHCR, and also whether he had ever been assessed for refugee status by the UNHCR, and in response to both questions he had answered: no. In the first part of his IMA & Induction interview the applicant did indicate that he had registered with UNHCR while he was in Indonesia and that he had provided the Department with the card which was issued to him in this regard, and that he had this with him (in his "box" in immigration detention), but he did not indicate that he had been assessed by UNHCR and found to be a refugee. On the evidence before me I can accept that the applicant was registered with UNHCR while he was in Indonesia but I am not satisfied that his claims were assessed by UNHCR or that he was found to be a refugee by UNHCR.
14. In is convenient at this point to briefly consider what the situation³ has been in recent decades in Paktya Province and in [District 1]. According to the Afghanistan CSO, the population of Paktya is estimated at 590,668 for 2018/19 and is composed mainly of Pashtuns, followed by Tajiks. Paktya is located in eastern Afghanistan, on the Afghanistan-Pakistan border. It borders Logar to the north, Pakistan to the east, Khost to the south-east, Paktika to the south and Ghazni to the west. The provincial capital of Paktya is Gardez. The Kabul-Gardez highway connects the provincial capital to Kabul city by crossing through Logar.

² IMF, "Afghanistan - Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism", 1 November 2011, CIS22293.

³ EASO, "Afghanistan: Security Situation", 12 June 2019, 20190613124844; DFAT, "DFAT Country Information Report: Afghanistan", 27 June 2019, 20190627113333; UNHCR, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, 30 August 2018, CIS7B839419284; EASO, "Afghanistan: Individuals targeted by armed actors in the conflict", 12 December 2017, CISED50AD7868; ISW, "Regional Command East", 20 June 2016, CIS38A80121119; DFAT, "AFG10865 Taliban presence in Paktia", 7 December 2010, CX254673.

Although Paktya's population is reported to have largely welcomed the end of Taliban rule in 2001 it subsequently proved the case that much of the province's population has wavered in its support for an Afghan government (reported to be increasingly seen as corrupt and ineffective) while the Taliban has increasingly enjoyed greater support and asserted greater influence over the region. As elsewhere, in Paktya the Taliban's main objective has been to undermine public confidence in the Afghan government and its security forces by targeting Afghan and foreign security forces (and their civilian employees) and also civilian government officials and employees. By 2010 the districts of Janikheli, Shwak, Zurmat and Chamkani were considered to be under the control of the Taliban such that government associated research groups like the Asia Foundation could not operate there. In June 2016 it was reported that in the northern districts of Jaji and Chamkani roughly 40 percent of the population was sympathetic to the Taliban. It was also reported that Afghan police were sparsely deployed and continued to be targeted by the Taliban, and that more than half of the population in the province had received threatening letters from the Taliban in the last few years.

15. In August 2018 the Afghan Analysts Network reported that Paktya's active insurgency was constrained by the region's robust tribal affiliation and united local communities on which the Taliban has to rely in order to coordinate its operations. As hostility from even a minor community would be counterproductive for the insurgents this discouraged insurgents from perpetrating acts that would antagonize whole communities. Perhaps for this reason such civilian casualties as have occurred in Paktya have tended to affect civilians working for the Afghan government or for a foreign government or foreign security forces. Taliban militants are reported to search vehicles and look for government employees on the Gardez-Kabul highway, and according to Khaama Press, they kidnapped 22 passengers on the Kabul-Gardez highway in late July 2018 with a view to exchanging these persons for release of some Taliban members held by the Afghan government. Also in July 2018 and on the same highway, the Taliban purportedly attacked the convoy of Paktya's governor and the vehicles of the provincial prosecutor. The Ghazni-Paktya highway was closed by Taliban militants after fights with the Afghan security forces in Ghazni province, in May 2018. Insofar as other civilian casualties have occurred in Paktya these casualties have generally been the result of persons being unfortunate enough to have been caught in the vicinity of a clash between the Taliban and Afghan security forces (during ground engagements and aerial attacks).
16. There have been some notable exceptions to this. November 2014 was unusual in that it saw a suicide bomber attack a crowd watching a volley ball match (killing 45 attendees and wounding 50 more), and the 2018 was unusual in that it saw a sectarian attack upon Shia Muslim worshippers by the Islamic State movement which caused 38 civilian deaths and some 80 wounded, and also because it saw an incident in Janikhel district where the Taliban were reported to have planted landmines on the Janikhel-Samkani highway forcing civilians to surrender to them in Janikhel district. Such incidents, however, would not appear to be the norm in Paktya Province. Moreover, and notwithstanding the rise in Taliban activity in Paktya, civilian casualties have recently been in decline. In 2018, UNAMA documented a total of 428 civilian casualties (152 deaths and 276 injured) in Paktya province which represented a decrease of 13% compared to 2017, and in which the leading causes of casualties were suicide/complex attacks, followed by ground engagements and aerial attacks. Most of the conflict severity which affects Paktya occurs in Gardez District followed by the Zurmat and Jani Khel districts, with Laja Mangal District being much less affected. As elsewhere in Afghanistan it would seem that the Taliban in Paktya has targeted persons like government officials and employees, and western security forces and their employees, because such persons are seen by the Taliban as being actively supportive of the Afghan government and actively opposed to the Taliban. As elsewhere in Afghanistan it would seem that generally the Taliban takes little interest in causing harm to persons who might be personally opposed to

them or who might personally support the Afghan government and/or its western backers, but who are not actively working for any such rival actors.

17. In his written claims the applicant has submitted that when he was [age] years old (that is, in around 2010) a bomb was planted in the road outside his village and he was in a car and the bomb exploded and blew up the car in front. The people in the car were injured. A piece of metal from the bomb went into his [body part] and another piece went in under his chin. [Another injury deleted]. The metal piece under his chin was removed by a nurse in Afghanistan and in 2014 in Australia he had an operation during which a metal piece was removed from his [body part]. The applicant has provided medical evidence of the medical attention he received in Australia in this regard and it would seem that a small metallic foreign body was removed from the applicant in this regard and that he told his doctor in August 2013 that this was the result of a bomb blast which had occurred some three years earlier. Given that the Taliban active in [District 1] in 2010 where they were targeting Afghan government officials and security forces and foreign forces, including by way of the use of roadside improvised explosive devices (IEDs) such that it is plausible that the applicant was injured by way of being unfortunate enough as to be travelling in a vehicle which was behind a vehicle which struck an IED. At his SHEV interview the applicant told the delegate that this incident occurred when he went to Kabul and he thus appeared to be implying that it occurred in 2012 since he had not ever mentioned travelling to Kabul at any other time. In any event, given that he had previously always reported that this incident had occurred in around 2010 (including to his doctor) I consider that this incident occurred in 2010.
18. Since arriving in Australia the applicant has consistently claimed that his principal reason for not wanting to return to Afghanistan is that he received three letters from the Taliban in which he was invited to join them and that the third letter threatened that there would be it would be bad for him if he did not do this, and that he fled the country and that he fears that he will be killed by the Taliban if he returns to Afghanistan. In his SHEV application the applicant claimed that when he was being held at the [Detention Centre] (presumably a reference to his time at [a named] Detention Centre) he provided the Department with one of the letters he received from the Taliban, and that he does not know if his father has kept any of the other letters. I find it doubtful that the applicant would be unaware of whether his father did or did not possess evidence of the matters which have been at the heart of his claim; and I note that the applicant has remained in contact with his family to the extent that he has been able to have original documents such as his taskera sent from Afghanistan to Australia. All this has struck me as an attempt by the applicant to assert that he has provided evidence to the Department to establish his claim while also providing him some flexibility in terms of how he might respond if no such evidence could be found by the Department, which indeed it could not. At the SHEV interview the delegate put it to the applicant that she could find no record of his having provided to the Department a Taliban letter as evidence of his claim. In response, the applicant insisted that he had provided the Department with this evidence and that there must have made an error. When the delegate asked the applicant if his family had any of the other letters the applicant responded unconvincingly: no, it would be hard, no. I am not persuaded that the applicant ever provided the Department with such a letter.
19. From the country information before me it would appear that local Taliban networks do actively seek to recruit fighters and that when they do this this tends to involve the issuance of an invitation for a family, or a tribe or some other community group, to provide a certain

number of members or money or some other kind of support in lieu of this.⁴ The applicant claims that he absconded from his area after being invited to join the Taliban and that he was threatened with harm if he did not do so. It can sometimes be the case that local Taliban networks will attempt to recruit support via coercive methods but if the Taliban had been so intent upon recruitment as to have made a threat of this kind in the case of the applicant I find it doubtful that – with the applicant gone from the area but with several young males of fighting age still living at the applicant's family home – the Taliban would have ceased making requests of this kind to the applicant's family. Doubts about the credibility of the applicant's claims are thus raised by the fact that the applicant has several brothers of a similar age who have remained in Afghanistan but without themselves becoming the focus of invitations to join the Taliban movement or of any harm for having not done so.

20. In his March 2017 SHEV written claims the applicant sought to imply that his brothers were avoiding the Taliban by hiding at home; and that his brother helped on the farm and at home but beyond this his father would not let them go away from home because it was not safe. I find it implausible that the applicant's brothers would have been able to avoid the attention of the Taliban by hiding at their home (the very place to which the applicant claims the Taliban sent their three letters). Moreover, at the SHEV interview the applicant indicated that his next eldest brother was not always at home but was in fact travelling between the family home and Kabul and that this brother spent a month at a time in the capital and that his brother undertook this travel to avoid the Taliban. I can accept that the applicant's brother is undertaking movements of this kind but given the extent to which the Taliban operates checkpoints along the roads to Kabul in a number of districts I find it implausible that he would be doing this to avoid the Taliban since it would more likely bring him into direct contact with them. Given the presence of the Taliban in [District 1] the area it is not implausible that a general invitation was issued to local families in 2012 or earlier to contribute a son or sons to the Taliban cause, but from the applicant's evidence about these matters it would not seem that such invitations have been ongoing or that families in [District 1] have been threatened in this regard or that they are at risk of any harm from the Taliban for not having contributed a son or support of some other kind to the Taliban.
21. That the applicant is not of interest to the Taliban, and that he is not at risk of harm for having not joined the Taliban, is also suggested by the issuance dates of the applicant's taskera and driving licence in combination with his SHEV interview evidence about his movements prior to his departure from Afghanistan. His initial claim had been that he had been in hiding between when he received the third letter until he departed Afghanistan. In his March 2017 SHEV application (and also at his IMA & Induction interview) the applicant submitted that he had received three letters from the Taliban within 20 days, and that after the third letter his father told him that he must leave Afghanistan, and that he (the applicant) then spent one month in Gardez before he departed for Pakistan. In his SHEV application travel table the applicant has indicated that he departed Afghanistan [in] October 2012, and this would match with his evidence regarding his [later in] October 2012 issued driving licence (which at the SHEV interview he indicated was issued around two weeks after his departure). Thus, if all of this is true, and if the applicant had been in hiding in Gardez for the month prior to his departure (that is, if he was in hiding during September 2012) then he would have received the three Taliban letters over the [a period in] August 2012. The problem with this is that the applicant obtained his taskera [in] August 2012 and at the SHEV

⁴ EASO, "Afghanistan: Individuals targeted by armed actors in the conflict", 12 December 2017, CIS5B50AD7868; EASO, "Afghanistan Recruitment by Armed Groups", 15 September 2016, CIS38A80122067; EASO, "Afghanistan, Taliban Strategies – Recruitment", 1 July 2012, CIS23515; UNHCR, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, 30 August 2018, CIS7B839419284.

interview the applicant indicated that when he did this he was in Gardez for only a week. Moreover, the applicant then indicated that subsequent to this he went to Kabul to obtain a driving licence, and as noted above it would appear that the applicant did this in later September 2012 or early October 2012 (since his driving licence was issued [in] October 2012 and since the applicant had departed Kabul after being told that it would take two weeks for this to be issued after he had lodged his application for this document). Thus, it would not appear that the applicant spent a month hiding in Gardez prior to his departure but that instead he was moving about obtaining his taskera in Gardez (where he spent only a week) and then later travelling to Kabul and then returning again to Paktya before departing for Pakistan. Given all this I do not accept that the applicant was living in hiding during this period and this raises real doubts about his claim that he had been threatened by the Taliban as he claims.

22. I note also that in his SHEV application the applicant claimed that even before the matter of the three letters he and his brothers were all hiding at home from the Taliban because otherwise the Taliban would force them to pray. The applicant also claimed that the Taliban would target you if you did not have long beards like them, or would try to force you to join them. During the SHEV interview the delegate asked the applicant if any members of his family had ever been targeted or harmed by the Taliban. The applicant replied that some people in his village had been targeted but not specifically his family. Then, later in the SHEV interview, when the delegate questioned the applicant about why no harm had ever come to his brothers, the applicant submitted that his next eldest brother was once beaten by the Taliban for not saying his prayers. I did not find this convincing. I do not accept that such an attack ever occurred or that the applicant or his brothers have ever been in hiding, or that they have ever restricted their movements to avoid the Taliban, while in Afghanistan.
23. From the country information before me it is apparent that the Taliban have been active throughout Paktya over the recent decade and that the Taliban's activities in this province have included the issuance of threat letters. Indeed, in June 2016 it was reported that more than half of the population in the province had received threatening letters (night letters) from the Taliban in the last few years.⁵ However, Taliban threat letters can cover a broad range of declarations with the most typical of these being that local inhabitants must not work for the Afghan government or its western backers (and that persons who go against this directive will be punished). With regard to the issue of recruitment there is some evidence of the Taliban in Paktya having actively sought to invite and perhaps even pressure some persons into joining them. EASO has noted that in 2013 in Paktika there was an invitation from the Taliban to convince enemy fighters (such as pro-government militia and local police) to switch sides. More significantly, EASO has also noted that at the end of 2014 a UNHCR Monthly IDP update reported that persons displaced into Paktya had claimed to have faced "forced recruitment" by insurgents. This noted, EASO also underlined that UNHCR did not explain what was meant by "forced recruitment"; the significance of this being that whereas EASO reserves the term "forced recruitment" for instances where individuals or their families are directly approached and forced to join up under threat of retaliation or violence if they refuse – with EASO reporting that instances of this appear to be rare – other sources use the term "forced recruitment" more broadly and UNHCR has used this term to refer to any kind of child recruitment and also to broader recruitment mechanisms based on various "coercive strategies" (including tribal and family pressure, and also to instance of the use of threats following recruitment to compel recruits, and in particular child suicide bombers, to follow

⁵ ISW, "Regional Command East", 20 June 2016, CIS38A80121119.

orders).⁶ It is not apparent from the evidence that any of Paktya's local resident communities have ever complained about or reported instances of the Taliban making demands that persons must join the Taliban.

24. In short, there is little evidence to indicate that Paktya has seen a trend of the Taliban seeking to recruit persons by issuing threats of harm. I can accept that the applicant's family, like many other families in Paktya Province, have received letters from the Taliban in the form of an invitation for a family member or members to join the Taliban. This would not be unusual in a region like Paktya. But given the absence of any significant evidence of the use of threats of harm against members of Paktya's local communities by the Taliban in association with such invitations, and given that I do not accept that the applicant or his brothers have ever been living in hiding in Afghanistan or that they have ever restricted their movements in Afghanistan, and given that the applicant does not claim that any further such letters were ever received by his family, I am not satisfied that the applicant was ever threatened with harm if he did not join the Taliban. Moreover, given the circumstances of the applicant's brothers it would seem that the Taliban in Paktya does not threaten or punish families who do not contribute a son to the Taliban movement. I am therefore not satisfied that the applicant would face a real chance of harm from the Taliban because he has not and will not join the Taliban.
25. With regard to the applicant's claim to have feared harassment about the extent to which he has or has not prayed, and about his not having a beard like the Taliban, I note that in recent years there have sometimes been reports of Taliban networks in some parts of Afghanistan employing coercive or punitive measures to regulate the growth of beards and the extent to which people attend prayers. In Paktya, however, it is not apparent that the Taliban have been targeting people with beards or that the Taliban have sought to compel other Muslims to pray. Given this, and given that I do not accept that the applicant's next eldest brother was ever beaten in this regard, and given that I do not accept that the applicant was avoiding the Taliban in Afghanistan, and given that he has given no indication that his appearance or manner of practising his Muslim faith has changed in any way since that time, and given in any case that it would not appear that the Taliban are actively monitoring such matters in Paktya (or for that matter to any great extent in any of the areas he would travel through to reach his home district from Kabul) I am not satisfied that the applicant would face a real chance of harm of any kind if he were to return to [District 1] either because he does not have a beard like the Taliban, or for any reason associated with the extent to which he does or does not pray in the practice of his Sunni Muslim faith.
26. The applicant has also claimed that if he were to return to Afghanistan he would be killed because he has lived in Australia. Some sources, and in particular asylum seeker advocacy groups like the Refugee Support Network, have asserted that many Afghans who are returned to Afghanistan from western countries (and in particular Afghans who arrived in western countries as children and who have lost touch with their Afghan languages and customs of behaviour) are at risk of being identified as returnees from western countries and of being thus viewed as wealthy and targeted in a criminal manner, and that some have also claimed to have been rejected by their families for having lapsed in their practice of Islam, and that some claim to have been chased by the Taliban. It has also been asserted that returnees can be harassed by Afghan police particularly if they do not have taskeras. Such sources claim that experiences of this kind are not rare. This, however, is not supported by

⁶ EASO, "Afghanistan: Security Situation", 12 June 2019, 20190613124844; EASO, "Afghanistan Recruitment by Armed Groups", 15 September 2016, CIS38A80122067; EASO, "Afghanistan, Taliban Strategies – Recruitment", 1 July 2012, CIS23515; UNHCR, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, 30 August 2018, CIS7B839419284.

the views of more impartial observers, and EASO has noted that in August 2017 the national programme manager on return, reintegration, and resettlement for the IOM in Afghanistan commented that, based on his work with over 20,000 Afghan returnees from Europe and Australia, IOM has not documented state targeting of Afghan returnees due to "Westernisation" from time spent abroad, and that there had been no ethnically-based killings of returnees coming back from Western countries, unless someone had become caught in a crossfire between government forces and insurgents (that is, unless they were unfortunate enough as to be unintentionally harmed as a consequence of being in the vicinity of such a clash). UNHCR, for its part, takes the view that whether a person will be in need of international protection on the basis of being perceived as westernised will depend on the particular circumstances of the case.⁷

27. Over the recent decade there have been very few reports of actual incidents⁸ in which returnees from western countries have come to harm in Afghanistan, be it for reason of their having lived in and/or sought asylum in a western country, or for any other reason. Two notable incidents were alleged to have occurred in 2014 and another in 2015. In September 2014 it was reported that an Australian Afghan dual citizen of Hazara ethnicity had been killed by the Taliban on the road from Ghazni. Some source claimed that the Taliban had taken him from a bus after specifically identifying him as being an Australian citizen but sources did not consistently state that it this man was targeted as a consequence of his association with a western country. In October 2014 an ethnic Hazara who had been deported to Afghanistan from Australia (after seeking asylum here) claimed that he had been stopped by Taliban at a roadside checkpoint where he was found to have in his possession an Australian driving licence and on this basis he was abducted and tortured for two days before he was able to escape. His claims have never been confirmed. In 2015 a teenage Hazara who had been deported from Denmark with his younger brother claimed that shortly their after arrival they travelled to their home province of Wardak and that they were robbed and his younger brother went missing and was later found dead having been killed by the Taliban because he was a Hazara. A few other similar incidents are alleged to have occurred by sources like the Refugee Support Network but beyond this there is little evidence of returnees from western countries coming to harm notwithstanding the large numbers of persons involved.
28. In October 2017 Amnesty International⁹ published a major report with a view to arguing that Afghans should not be returned from Europe and other western countries because they will be at risk of harm. In this regard Amnesty International noted that between 2015 and 2016 the number of Afghan citizens returned by European countries to Afghanistan had nearly tripled from 3,290 to 9,460 while during the same period the number of civilian casualties caused by the conflict had risen rather than fallen. However, and although thousands of persons have in recent years been returned from western countries to Afghanistan, Amnesty International's report provided very few examples of instances in which returnees from a western country had actually suffered harm, and within these few cases it would not appear that the persons in question had been targeted as a consequence of their having lived in a western country. For instance, it was reported that it was suspected that one returnee had

⁷ Bureau of Investigative Journalism, "Migration Crisis", 16 July 2015, CXBD6A0DE10558; UNHCR, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, 30 August 2018, CIS7B839419284; EASO, "Afghanistan - Individuals targeted under societal and legal norms", 12 December 2017, CISED50AD7870.

⁸ EASO, "Afghanistan - Individuals targeted under societal and legal norms", 12 December 2017, CISED50AD7870; UK Home Office, "Afghans perceived as "Westernised", 1 January 2018, OG9EF76792.

⁹ Amnesty International, "Forced Back to Danger Asylum-Seekers Returned From Europe To Afghanistan", 5 October 2017, CISED50AD5846.

been murdered with the deceased man's wife claiming that he disappeared and may have been targeted by persons who had targeted him previously before they went to the west. In other examples two different family groups claim to have been traumatised after witnessing a suicide attack upon a place of worship in Kabul. Several men reportedly claimed to fear harm because they have converted to Christianity, and another man told Amnesty International he feared harm because he was gay. Others said they feared harm because they had immediate family members in the Afghan security forces, but it was not apparent that any such returnees had suffered harm for reason of their having lived in a western country, and there seemed little indication that the persons in question feared any harm on this basis.

29. DFAT reports that it has no information to suggest that returnees from western countries attract negative attention from state authorities for having sought and failed to gain asylum, and assesses that these cases are more likely to have related to the highly dangerous general security situation, which affects all Afghans. DFAT understands that most returnees take measures to conceal their association with the country from which they have returned, and keep a low profile on return. DFAT assesses that people in this situation do not face a significantly higher risk of violence or discrimination than other Afghans with a similar profile.
30. Afghans who are employed in Afghanistan by the security forces or governments of western countries like Australia are plainly seen by the Taliban and other insurgent groups as being actively opposed to the insurgency. Such persons are targeted on this basis by the Taliban and other insurgent actors on this basis. However, it would also seem that generally insurgent groups like the Taliban and Islamic State do not take an adverse interest in Afghans who have lived in (and/or sought asylum in) a western country like Australia. Thousands of Afghans have returned to Afghanistan from western countries like Australia over the recent decade but (even allowing for the fact that most such returnees have remained in government controlled Kabul) there have been very few reports of such persons being targeted by the Taliban (or by Islamic State or some other actor) or of their having otherwise come to harm. It may be the case that some such persons have had to take steps to keep a low profile after returning from a western country to ensure that they did not become a person of interest to an insurgent group but, in the case of the applicants, it is not apparent that he would have to take any such steps since he is anyway already a low profile figure who worked on his father's farm and was not involved in any government employment (nor has he indicated that he has any such interest in doing this in the future). About the only thing which the applicant claimed was remarkable about his family was that his father was well educated in the Pashto language such that local persons sought his father's help to assist them in dealing with the government. It is not apparent that this ever led to any problems for the applicant's father or his family from the Taliban or anyone else, and this seems unlikely to change since the Taliban in Paktya would not appear to punish locals just for having dealings with the Afghan government (such as are inevitable for any Afghan). Even if the Taliban were to become aware that the applicant had lived in Australia the possibility that he would be harmed by them, or any other actor, seems remote. I am therefore not satisfied that the applicant would face a real chance of harm of any kind on the basis of his having lived in Australia.
31. All this noted, and notwithstanding the fact that the applicant is not of a profile that would attract a real chance of any adverse attention from the Taliban or anyone else in Afghanistan, the applicant's concerns about returning to Afghanistan and to his home area are understandable given the extent to which generalised violence can occur in Afghanistan,¹⁰

¹⁰ EASO, "Afghanistan: Security Situation", 12 June 2019, 20190613124844; EASO, "Afghanistan: Individuals targeted by armed actors in the conflict", 12 December 2017, CISED50AD7868; EASO, "Afghanistan: Key socio-economic indicators:

and given in particular that he was himself unfortunate enough as to have been injured as a consequence of having been in the vicinity of an incident near his village when a vehicle travelling ahead of him struck an IED. However, and as has already been discussed above, it would seem that civilian casualties in Paktya, insofar as these do occur, tend to affect civilians who are Afghan government officials and employees, and most of the conflict severity which affects Paktya occurs in Gardez District followed by the Zurmat and Jani Khel districts, with [District 1] being much less affected. Given this, and given the manner in which at the SHEV interview the applicant indicated that his next eldest brother was travelling back-and-forth between [District 1] and Kabul (the applicant sought to claim that his brother did this as a means of avoiding the Taliban but given the extent to which the Taliban stage checkpoints along the road to Kabul to search for government officials it would seem in fact that his brother was able to travel safely notwithstanding the presence of the Taliban), and by the manner in which the applicant indicated that his mother has been travelling back-and-forth between [District 1] and Pakistan (the applicant unconvincingly sought to claim that this could be done more safely by women but given that his mother undertook this travel by way of being driven by a male relative it would seem that male Afghans can typically undertake such movement in-and-out of [District 1] without complication) the possibility of the applicant's suffering any future harm in [District 1] seems remote.

32. In returning to Afghanistan via Kabul the applicant would be required to spend some time transiting the capital and in recent years violence in the capital has resulted in some 500 deaths each year and twice this number injured. However, as elsewhere, the targets of such attacks have typically been Afghan and foreign government officials and employees, and also journalists and NGO workers, and also persons employed by foreign companies, and in the case of Islamic State members of the Shia sect of Islam. Although some other civilians have been killed also as a result of being unfortunate enough to be in the vicinity of such an attack, and although some years have seen occasional attacks in the vicinity of the airport, the possibility of the applicant being affected by such violence or by such crime as can occur in Kabul, would appear to be very remote given the size of Kabul's population and given that I consider that the applicant would return to [District 1] and that he thus would not spend a prolonged period in the capital. In travelling the Kabul-Gardez highway to reach [District 1] the applicant would pass through some districts which UNOCHA has ranked in its second highest category for conflict severity (including the districts of Mohammad Agha, Pul-e Alam, Gardez and Sayedkaram) but, again, in these areas when violence does cause harm to civilians it almost always takes the form of targeted attacks upon Afghan government officials and employees.
33. Over recent years security levels in these various localities have deteriorated as a result of the insurgency and some areas have experienced a gradual increase in the level of harm caused to civilians. These trends may continue. However, given that such harm to civilians as occurs generally affects Afghan government officials and employees rather than the wider populace, the possibility of the applicant suffering any harm on the basis of such generalised violence or from crime seems remote.
34. Given all this, and given the remote level of risk faced by the applicant as a consequence of his having lived in Australia, and as a result of his not being willing to join the Taliban, and given that it would not appear that the Taliban take an interest in the extent to which other

Focus on Kabul City, Mazar-e Sharif and Herat City", 1 April 2019, 20190403091405; "Kabul Attack Death Toll Rises To 43", Tolo News, 25 December 2018, 20190103093816; ISW, "Regional Command East", 20 June 2016, CIS38A80121119; UK Home Office, "Afghanistan: security and humanitarian situation", 1 July 2019, 20190726145917; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 30 August 2018, CIS7B839419284.

Muslims pray or have beards within the applicant's home district or the areas he would travel to reach that district, and given the remote level of risk faced by the applicant in terms of his being a Pashto speaker, and when the applicant's circumstances are considered in their totality, the evidence before me is such that for the foreseeable future I am not satisfied that the applicant would, if he returned to Afghanistan, face a real chance of harm of any kind for any reason including that of generalised violence and criminality. I am therefore not satisfied that the applicant would face a real chance of serious harm if he were to return to Afghanistan.

Refugee: conclusion

35. 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

36. 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

37. 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.
38. For the reasons already given above I am not satisfied that the applicant would face a real risk of harm of any kind for any reason if he were to return to Afghanistan. I am therefore not satisfied that he would face a real risk of significant harm if he returned to Afghanistan.

Complementary protection: conclusion

39. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

Applicable law

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.