



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

PAKISTAN
IAA reference: IAA20/08546

Date and time of decision: 6 August 2020 21:11:00
N Becke, 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 Sunni Muslim and ethnic Pashtun from [District 1], Paktia Province, Afghanistan. On 2 December 2016 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 30 June 2020 a delegate of the Minister for Immigration (the delegate) concluded the applicant was a citizen of Pakistan and refused to grant him this visa.

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).
3. On 27 July 2020 the IAA received a legal submission on behalf of the applicant. The submission reiterates claims made to the delegate that are contained in the review material. It also contains arguments in relation to issues before the delegate, which I have noted and considered.
4. At the end of the submission the applicant's representative makes a brief reference to a medical report, which was before the delegate, regarding the applicant's mental health and states, "Considering the paucity of medical resources in Afghanistan (or in the alternative, Pakistan) and that the fact that [the applicant's] symptoms would increase if he were returned to his country, it is clear that he is entitled to a protection visa." The country information before me does indicate that medical resources in Afghanistan (and Pakistan) are, in general, limited; however, the applicant has not previously claimed that symptoms of his mental illness would increase if he were to return. The IAA submission does not explain why this new claim was not raised earlier, nor provide any evidence, or meaningful detail, to corroborate it. Given all the circumstances I am not satisfied exceptional circumstances exist to justify consideration of the new claim in the IAA submission.
5. Attached to the legal submission is also a letter from a Member of Parliament (MP) in Afghanistan, dated 9 July 2020. This letter was not before the delegate and is new information which postdates the delegate's decision. The MP states that he is also from Paktia Province and that the applicant and his father are personally known to him. The MP attests that the applicant and his father are Afghan citizens. The MP also attests that the applicant was threatened by the Taliban and then left for Australia. The IAA submission indicates the applicant has sought this letter to corroborate his claims in this regard. Given the centrality of these matters to his claims for protection, and the letter's potential corroborative value, I am satisfied exceptional circumstances exist to justify its consideration.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - In [year] he was born in [District 1], Paktia Province, Afghanistan. He is an illiterate ethnic Pashtun and Sunni Muslim.
 - Between 1986 and 2005 he and his family resided in [Town 1], Khyber Pakhtunkhwa Province (KPP), Pakistan as undocumented Afghan refugees.

- Upon return to Afghanistan, he opened a [shop] in Kabul and travelled back to his home village in [District 1] once every four to six weeks to see his family.
- In 2009 an Afghan National Directorate of Security (NDS) Captain, called [Mr A], asked him to report on Taliban activities in his home area, to which he agreed.
- In late 2010 he informed [Mr A] about a roadside bomb the Taliban had planted and [Mr A] arranged for it to be immediately defused. On a few other occasions he told [Mr A] when the Taliban had come to his village demanding food, which led to the Afghan National Army (ANA) arresting them.
- In March 2012 he received a letter from the Taliban in which they stated they were aware of his work as an NDS informer and requested he present himself to the Taliban court in Khost Province. The letter threatened he would face an “immense penalty” if he did not comply. Fearing for his safety, he began to keep a low profile and informed [Mr A], who advised him to be careful.
- In early May 2012 Taliban came to his home in the village but he was not there. When told the applicant was in Kabul, the Taliban reiterated that he must present himself to the Taliban court.
- On 15 May 2012 he received another letter, this time from the Haqqani Network, which stated that a jury had sentenced him to death due to his failure to present to the Taliban court.
- In June 2012 he sold the Kabul [shop] and returned to Pakistan with his parents, wife, and children. As an undocumented refugee the Pakistan authorities constantly harassed, abused, and extorted him for money.
- In late 2012 he departed Pakistan using a fraudulent passport.
- He fears serious harm and death from the Pakistani Taliban, who in 2018 killed his [Relative B] in KPP. The Pakistani authorities also seriously mistreat undocumented Afghan refugees such as himself.
- He fears serious harm and death from the Afghan Taliban and Haqqani Network because of his work as an NDS informer. He also fears these groups and other Afghans will seriously harm or kill him because he has been living in a Western country (Australia) and he will be imputed to be a spy on this basis.

Refugee assessment

7. 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

8. 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.
9. Prior to his SHEV interview the applicant provided three general letters of support from friends in the Australian community attesting to his good character. A fourth document provided prior to the SHEV interview also appears to be a letter of support, but is mostly illegible. Following the SHEV interview the applicant provided a fifth letter of support from another friend in the Australian community attesting to his character. I have had regard to these letters. During the SHEV interview the delegate also questioned the applicant about international financial transactions he has made from Australia, for which I am satisfied he provided a reasonable explanation. While I also note the applicant claims to be illiterate, I consider his signatures on departmental documents from his two 2013 arrival interviews, as well as on documents relating to his 2016 SHEV application, and his Australian driver's licence, are uniform and fluid and do not appear to be those of an illiterate person.
10. Nine months after the SHEV interview, the applicant's former representative forwarded a doctor's report to the Department, which appears to be from the applicant's general practitioner. It states that the applicant is under severe stress, suffers from nightmares, takes unspecified antidepressant medication, has been referred to a psychiatrist, and that psychotherapy will be arranged. The GP requests his visa and immigration issues be addressed promptly, and states that his separation from his family, the uncertainty over their future and safety plays a huge role in his mental health deterioration.
11. I note the report does not indicate whether the applicant suffers from a medical condition or not. While the doctor notes that the applicant is his regular patient, the report does not indicate when his symptoms commenced or why he wanted him to commence psychotherapy in May 2020. I also note the applicant did not mention during his August 2019 SHEV interview that he was taking medication or regularly seeing a doctor for any reason. The report briefly mentions the applicant being referred to a psychiatrist, but no evidence has been provided since that the applicant has attended, or even scheduled, such a consultation. If the applicant had indeed been seeing a psychiatrist prior to the date of the doctor's report I consider it surprising there is no direct evidence of this.
12. Finally, I note aspects of the medical report are somewhat at odds with the applicant's own evidence regarding his family's decision to relocate to Punjab Province in 2018, in particular the doctor's statement that the applicant's family are "on the run". While the report briefly touches on the applicant's claims for protection, I do not consider this constitutes independent

corroboration of the claimed events, noting the doctor doesn't purport to have direct knowledge of them.

13. During the August 2019 SHEV interview the applicant referred to having problems with his memory as a result of the 2018 murder of his [Relative B], with whom he had a close relationship. The applicant was audibly upset during the SHEV interview when discussing his [Relative B], and I accept that this incident has had a traumatic effect on him. However I am not satisfied that the claimed memory loss adequately explains why, when the delegate asked the applicant about the circumstances of his [Relative B]'s murder, the applicant said he did not know the details and then only revealed in a post SHEV interview written submission that the Taliban were responsible.
14. Despite my concerns, on the basis of the medical report I accept the applicant is stressed, experiences nightmares, and currently takes an unspecified antidepressant. I note the doctor's opinion that prompt resolution of the applicant's immigration status would alleviate the stress which is caused by the ongoing separation from his family, his uncertain future, and his family's safety. I have taken these matters into account where relevant.

Identity

15. The applicant claims that in [year] he was born in [District 1], Paktia Province, Afghanistan and that he resided there with his parents and brother until approximately 1987 when they relocated to [Town 1], Pakistan to escape the fighting between the Afghan Mujahedeen and Soviet forces. The applicant claims that they rented a home in a refugee camp in [Town 1], and his father set up a [shop]. The applicant's parents went on to have a another [number] children. In 1999 the applicant married his wife and together they have [number] children of their own. The applicant claims that during the twenty years he resided in Pakistan he assisted his father in the [shop] and that due to his undocumented status he never attended school and was subject to constant harassment and extortion from the Pakistani authorities.
16. The applicant claims that his wife, the daughter of his father's brother, is also an Afghan national and was also a resident of the refugee camp in KPP. However, when the delegate asked the applicant whether his wife was born in Afghanistan or Pakistan, he responded that he does not know, but believes it was Afghanistan. I find it difficult to believe the applicant would be unaware of whether his wife was born in Afghanistan or Pakistan.
17. The applicant claims that in 2005 he and his family (parents, siblings, wife, and children) decided to return to their home area in Paktia Province because they had been told the security situation there had improved. As discussed below, the applicant has consistently claimed that in mid-2012 he and his family returned to Pakistan, and that in late 2012 he departed Pakistan for Australia. The applicant has also consistently claimed that his family continue to reside in Pakistan (currently in Punjab Province) purportedly as undocumented, illegal Afghan refugees.
18. In support of his identity, the applicant has provided what he claims is his original Afghan taskera, with an English translation, which identifies his nationality as Afghan. In his decision, the delegate noted that a departmental examination had returned an 'inconclusive' finding on the authenticity of the applicant's taskera and also noted country information that document fraud, particularly in relation to the issuance of taskeras, is widespread in Pakistan and Afghanistan. The delegate also expressed concerns with the applicant's claim that he and his family have been able to reside in Pakistan for more than twenty years as undocumented Afghan refugees, and the delegate concluded that the applicant was in fact a Pakistani citizen.

19. While I also share the delegate's concern regarding the veracity of the applicant's evidence as to his and his family's status in Pakistan, and have taken into account the country information regarding document fraud, I nonetheless consider that the applicant has presented a coherent and detailed account of his personal and family history in relation to Afghanistan. I also consider that the applicant demonstrated a familiarity with the geography and culture of that country, in particular his claimed home area of Paktia Province, and the capital Kabul, where he claims to have worked for a number of years, commensurate with someone who has spent time there. I have also given some weight to the letter from the Afghan MP, who attests that the applicant and his family are Afghan citizens because they are from the same province as himself and he knows them personally. On the basis of all the information before me I am satisfied the applicant's identity is as claimed - that he is a Sunni Pashtun, a national of Afghanistan, and that Afghanistan is the receiving country for the purposes of this review.
20. I am also satisfied that the applicant and his family have longstanding links to their village in [District 1], Paktia Province, where they kept their land and house during their first period of residence in Pakistan (1987 to 2005). While the applicant closed down his business in Kabul prior to his most recent departure in 2012, there is no suggestion that he or his family have disposed of their property in [District 1]. I also note the applicant's two brothers, with whom he co-owned the business in Kabul, now also reside in Pakistan. The applicant has not declared any other links to Kabul. Given the evidence overall I am satisfied that [District 1], Paktia Province is the place to which the applicant would return.

Events in Afghanistan

21. The applicant claims that upon return to [District 1] in mid-2005 he and his family renovated their former home which had been unoccupied for twenty years. The applicant and two of his brothers then set up a [shop] in Kabul using 200,000 Afghanis the family had saved. During the SHEV interview the applicant explained that he primarily resided at the shop premises in Kabul and every four to six weeks would travel to Paktia to see his family, stay for several days, and then return to Kabul.
22. Since his arrival in Australia the applicant has also consistently maintained that he left Afghanistan due to threats from the Taliban relating to his role as an NDS informer. The applicant claims that in 2009 an NDS Captain, [Mr A], with whom he had struck up a friendship at the [shop], asked him to report on Taliban activity around his home area in [District 1]. In his written SHEV statement the applicant claims that he agreed to do so because he was against the Taliban who treated villagers in his home area harshly. In his post SHEV interview statement the applicant added that [Mr A] had paid him [amount] Afghanis on three occasions for his services.
23. However, I consider the applicant's evidence regarding the matter of his recruitment and his purported intelligence gathering activities was farfetched and lacked credibility. Firstly, the applicant's personal value as an intelligence source appears questionable. As the delegate pointed out during the SHEV interview, the applicant had spent the majority of his life in Pakistan and after his return to Afghanistan spent six months in [District 1] following which he primarily resided in Kabul, returning to [District 1] for a few days every month or so. Secondly, the applicant told the delegate that the Taliban were well established in the mountains around his village, and regularly went into the village to demand food from the inhabitants. The applicant also told the delegate that the Taliban did not try to conceal their presence and that they had such power in his home area that the American troops were unable to leave their nearby base. In the applicant's post SHEV interview written statement he also claims that the NDS were also gathering information from other local people who were anti-Taliban. Overall it

is difficult to see why the NDS would recruit and pay the applicant to collect information on Taliban activity in his local village, where he spent very limited time.

24. Thirdly, I consider the applicant's evidence at SHEV interview regarding the 2010 roadside bomb incident, and his responses to the delegate's questions regarding this matter, were unconvincing at best. While I accept that this event was said to have occurred ten years ago, it has also been put forward as a significant event in the applicant's narrative and it reasonable to expect that he would be able to provide more meaningful detail than what he has provided. When asked how he came to know about the roadside bomb the applicant responded that if you see the Taliban it means they are planning on "doing something", and after further questioning he claimed that he had seen them from his house. When asked again if he had actually witnessed the Taliban planting the roadside bomb he responded that he had seen them "do something". When asked how he informed [Mr A] about this, he claimed to have contacted [Mr A] by phone and that the next morning the bomb was defused. This is somewhat at odds with his written SHEV statement that [Mr A] arranged for the bomb to be defused immediately. When asked by the delegate if he had provided [Mr A] with any information prior to this incident, the applicant made a general reference to other occasions both before and after the roadside bomb, but did not provide any examples or elaborate further.
25. Fourthly, I have serious concerns regarding the authenticity of the threat letters which the applicant claims to have received from the Taliban and from the Haqqani Network regarding his claimed involvement with the NDS. When asked about the first letter, dated [March] 2012, the applicant explained it had been delivered to his village and that a fellow villager had read it to him. When asked why he would allow his role as an NDS informer to become publicly known in this way the applicant did not respond directly. When asked how the villager reacted to the news that the applicant had been working as an NDS informer, the applicant responded that the villager had been very upset by the contents of the letter and told him to take care of himself because the Taliban are cruel people. When asked why the letter was addressed to the applicant but with "Mohammad" included as a prefix, the applicant responded that the Taliban address everyone to whom they write letters as Mohammad.
26. I also note that both letters, handwritten in Pashto, are dated using Roman numerals and in the Western (Gregorian) calendar, with the first letter dated "2012/[3]" and the second letter dated "2012/[5]". When the delegate put to the applicant that it seemed unusual that the Taliban and the Haqqani Network would use this format, he responded that he was also "surprised" and "confused" by this. Country information before the delegate indicates that the Persian Islamic solar calendar has been in official use in Afghanistan since 2002 and I find highly implausible that the Taliban would use Roman numerals and the Western calendar instead an Islamic solar calendar, particularly given their well published attitudes. It is also somewhat anomalous that in the first letter the Taliban summoned the applicant to a court in Khost Province, when he claims to have informed the NDS about Taliban activities in Paktia Province.
27. Fifthly, the applicant's description of events between March and June 2012 are also problematic. Like the delegate, I consider the applicant's written claim statement that he kept a low profile after receiving the first letter at odds with his decision to continue working in his [shop] in Kabul, noting he co-owned it with two of his brothers, who could have maintained the business. In his written SHEV statement the applicant claims that in early May 2012 the Taliban knocked on the door of his family home in the village and asked for him, to which his mother responded that he was in Kabul. When the delegate asked the applicant why his mother, who was aware of the first threat letter, would divulge this information the applicant responded that "our women" are ignorant and don't have much concentration when it comes

to such matters. I am not convinced by this explanation and it is difficult to accept that the applicant's mother would endanger him in this way.

28. The applicant claims that [in] May 2012 he received another letter, this time from the Haqqani Network, which stated that due to his failure to present to the Taliban court, a jury had sentenced him to death and he would be shot on sight. The applicant also told delegate that upon learning that the Taliban and Haqqani Network had sentenced him to death, he sold his [shop] and the following month returned to Pakistan with his parents, wife, and children. Again, I find it difficult to accept that if the applicant genuinely believed these militant groups would shoot him on sight, that he would take the time to sell the [shop] before leaving the following month, given his two brothers remained in Kabul and could have managed this for him.
29. Finally, during the SHEV interview the delegate asked the applicant about another original document attached to the SHEV application, which consists of a series of forms that are not in English and have been filled out by hand. The applicant responded that he did not know what the document was, but guessed that it was probably information relating to him from Afghanistan, possibly evidence that he had helped "them" [the NDS]. Following the SHEV interview the delegate received a 21 page English translation of the document from the applicant's former representative, which is titled "an application for individual control", and declares that it is "top secret after endorsement". The document appears to be the applicant's NDS file, and includes an application from [Mr A] to the NDS to recruit the applicant as an informer. As noted earlier the applicant states that he is illiterate but I am not satisfied this explains his claimed lack of awareness of the contents. I do not accept the applicant would be unaware of the contents of this document which he elected to provide in support of his own SHEV application.
30. I note that the document, which is dated [January] 2011, states the applicant's "Workplace and Current Address" as "[Town 1]" (Pakistan), his "Actual Residence" as "[District 1]", the "number of family members and their jobs" as "24 people – Hotel In Kabul", and "Level of Education" as "Grade Five". The applicant states he left [Town 1] in 2005 and has not claimed that he or his family members have ever lived or worked at a hotel in Kabul. He also claims to have never attended school. These marked inconsistencies with the applicant's own claims leads me to seriously question the authenticity of the document. I also consider it implausible that an official NDS document, purportedly classified as "top secret", would make specific and repeated references to [Mr A], as well as three other Colonels, and a Lieutenant Colonel, by their ranks and personal names. I note that one of the translated pages consists of a "pledge of cooperation" to assist the National Security Agency and the translation indicates the applicant signed this [in] April 2011. I find it difficult to accept that the applicant would have signed this pledge and yet be unaware of the document's contents or relevance to him. The applicant was also unable to explain to the delegate how he came to obtain a copy of his official NDS file and I consider it not credible that he would have been given a copy in light of its official 'top secret' classification.
31. While I have taken the MP's letter into account in my assessment, it only briefly notes that the applicant was threatened by the Taliban. The letter provides no other details and the MP does not purport to have any direct knowledge of the circumstances in which the threats occurred. Given this, the MP's letter does not overcome my concerns as discussed above and I do not accept that the warning letters from the Taliban and the Haqqani Network, or the applicant's ASD file, are genuine. Given the evidence overall, I am not satisfied that the applicant ever assisted the NDS or is a person of adverse interest to the Afghan Taliban, the Haqqani Network, or any other group.

2018 Death of [Relative B]

32. During the SHEV interview the applicant made several references to the 2018 murder of his [Relative B], which he claims occurred in KPP, Pakistan. The applicant has also provided several photos which show him and another man together, and then photos of that man apparently deceased and in an open casket. The applicant was also audibly upset when discussing this during the SHEV interview and I accept the man in the photos is the applicant's [Relative B] and that he was killed. However, when the delegate asked the applicant for more details he responded that he did not know much about the circumstances except that his [Relative B] was shot. Following the SHEV interview the applicant provided a new written statement in which he claims that, like himself, his [Relative B] was anti-Taliban and was killed because he had spoken out against the group when they tried to forcibly recruit his son in [Pakistan]. The applicant claims that as a result of his [Relative B]'s murder the rest of the applicant's family left KPP and relocated to Punjab.
33. While I accept that his [Relative B]'s murder was traumatic for the applicant, given his SHEV application is based on his own claimed fear of the (Afghan) Taliban and his own anti-Taliban political opinion, as well as his claim that the murder was the trigger for his family to relocate to Punjab, I find it difficult to accept he did not know of the circumstances of his [Relative B]'s death when asked. Nor do I accept that the applicant not knowing the circumstances of the murder is the same as having his memory affected by the trauma of event itself, as he claims. While the IAA submission asserts that the applicant's account of his [Relative B]'s murder is typical of the Taliban's 'modus operandi', there is no information provided as to demonstrate how this is the case. On the evidence before me I am not satisfied that the murder of the applicant's [Relative B] in KPP was linked to the Pakistani Taliban. In any event, I am satisfied that the applicant is a national of Afghanistan (as he himself claims), and that Afghanistan is the receiving country for the purpose of this review.

Returnee from the West/Anti-Taliban Political Opinion

34. The applicant claims if he returns to Afghanistan he will be imputed to be a spy due to the amount of time he has spent seeking asylum in a Western country (Australia), and that the Taliban, another militant group, or other Afghans, will seriously harm or kill him for this reason. DFAT notes that Amnesty International has reported that there have been cases in which returnees from Europe have been killed after arrival in Afghanistan. DFAT assesses that these cases are more likely to have been connected to the dangerous general security situation, which affects all Afghans.¹
35. DFAT also 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, but does not suggest that cases of returnees facing harm for this reason are common or widespread. Nor does DFAT suggest that such persons are imputed to hold an anti-Taliban, or anti-militant, political opinion.² On the evidence before me I am not otherwise satisfied that the applicant indeed holds such a political opinion. Furthermore, the applicant has not claimed that the fact that he has been residing in the West from a number of years would be readily apparent to others upon his return. In any case, given the applicant claims to fear harm on the basis of his time in the West, I satisfied that he would not seek to publicise his absence for this very reason.

¹ DFAT, "DFAT Country Information Report Afghanistan", 27 June 2019, 20190627113333

² Ibid.

On the evidence before me I am not satisfied that the applicant faces a real chance of harm as a returnee from the West.

Travel to [District 1], Paktia Province

36. I have also considered whether the applicant would be able to safely access [District 1] upon return to Afghanistan. DFAT indicates that returnees from Western countries are almost exclusively returned to Kabul,³ and I am satisfied the applicant would very likely transit there on his way to [District 1], a journey by road which I note he made frequently between 2005 and 2012.
37. DFAT notes that when abductions of travellers do take place it is difficult to establish motivation as criminals and insurgents on the roads tend to target people of all ethnicities, who appear wealthy, in attacks that can include kidnapping for ransom. DFAT also concurs with the assessment of the United Nations Assistance Mission in Afghanistan (UNAMA) and other international sources that the primary motivations for kidnapping/abductions include taking hostages for ransom or prisoner exchange, or to target those with connections to the government or international community.⁴ Some two years ago, the Taliban abducted 22 civilian men, who were en route from Paktia Province to Kabul. When Afghan national security forces arrived to rescue the abductees, a fire fight broke out and six civilians managed to escape. The Taliban took the remaining 16 to an unknown location. According to sources, the Taliban wanted to exchange the civilians for the release of some of their members from Government detention facilities. The Taliban released all of the abductees 10 days later, following mediation by elders.⁵ There are no more recent reports of similar activity in the material before me.
38. Given the evidence before me I accept that journeys by road in Afghanistan in general present some risks for all travellers and that in 2018 an incident occurred involving civilians travelling from the applicant's home province of Paktia to Kabul. However, on the evidence before me regarding the frequency of such incidents overall, I am not satisfied that the chance of an attack occurring on the roads in Afghanistan is any more than remote. Nor do I accept that the applicant is known to the Taliban, the Haqqani Network, or any other group, and there are no reports before me to indicate that persons who have been resident in a Western country are being targeted on the roads between Kabul and Paktia Province (or anywhere else). In making my assessment regarding the applicant's overall profile I also give weight to the fact that he is not from an ethnic or religious minority, nor has he claimed to be wealthy, which in some circumstances may plausibly contribute to a profile of risk.
39. Although the applicant has not claimed that he would travel from Paktia Province to Pakistan to visit his family, I have had regard to the possibility that he may do so, a journey which he claims to have made on at least six occasions during his life. Similarly, the applicant may choose to travel Kabul again for economic reasons as he has done in the past. I note the applicant has not claimed to have ever faced harm when making these journeys previously, including when crossing the border in Pakistan, and I am not satisfied he would face a more than remote chance of harm if he were to do so in the future.
40. I have also considered the general security situation in Paktia Province. In its most recent report DFAT observes that in 2018 Kabul and Nangarhar provinces suffered the most civilian casualties, with the next three highest ranking provinces being Helmand, Ghazni and Faryab, with Wardak Province experiencing the highest rise in civilian casualties from the previous

³ Ibid.

⁴ Ibid.

⁵ Ibid.

year.⁶ I give significant weight to the fact that DFAT does not make any specific reference to Paktia Province in its assessment of civilian casualties in Afghanistan and there is nothing else in the material before me to suggest the security situation in Paktia is particularly volatile. Given the country information before me, I am not satisfied that generalised violence in Paktia Province is at such a level, or frequency, that the applicant would face anything more than a remote chance of harm there, or that it would be for one of the reasons set out in s.5J(1)(a).

41. Given all the evidence I am not satisfied the applicant, returning after a number of years in the West, faces a real chance of harm when accessing, or when in, Paktia Province.

Refugee: conclusion

42. 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

43. 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

44. 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.
45. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
46. I have concluded that the applicant does not face a real chance of harm for any reason. Based on the same information, I am not satisfied that the applicant has a real risk of suffering significant harm.
47. After having regard to the applicant's circumstances, I find that he does not face a real risk of suffering significant harm.

Complementary protection: conclusion

⁶ Ibid.

48. 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.