



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA22/10349

Date and time of decision: 1 August 2022 10:40:00

J Jennings, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tajik Shia born in Logar Province, Afghanistan. On 12 November 2015 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790. He claims that he fears harm in Afghanistan from the Taliban.
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 8 February 2017. The delegate found that there was a real chance the applicant may be persecuted in his home area of [District] in Logar Province which at the time was experiencing instability due to opposing insurgent groups, including the Taliban, fighting to gain control of the area but found that the applicant could relocate to Kabul which was then under government control.
3. On 20 December 2017 the IAA affirmed the decision not to grant the applicant a protection visa. [In] June 2022 the Federal Court of Australia quashed the decision of the IAA and directed the IAA to determine the matter according to law.

Information before the IAA

Review material

4. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. The review material included a statement from the applicant dated 18 August 2016 however the department has advised this statement was not before the delegate who decided the visa application. The statement itself indicates it was sent by email on 8 February 2016 to the direct email address of the officer who conducted the protection visa interview; as such it was evidently received by the department but was not before the delegate who decided the application; there is no reference to the submission in her decision. It follows that this statement is new information. In the circumstances I am not satisfied that s.473DD(b)(i) can be met, but this is credible personal information and had it been known it may have affected the consideration of the applicant's claims and as such meets s.473DD(b)(ii). I am satisfied that these circumstances are exceptional and justify the IAA considering the statement.
6. The IAA received submissions in 2017 and 2022 and I have also obtained new information.

Obtain own information

7. The delegate's decision was made on 8 February 2017 at which time a democratically elected national government ruled Afghanistan and was in control of Kabul and most of the country. The government was supported by a US-led international coalition forces based in the country. The delegate's decision was made in the context of this situation and on the basis of the country information current at the time. But in 2021 coalition forces withdrew from the country resulting in the Taliban resuming its efforts to take power by force and Taliban forces overwhelming the Afghan National Army and taking control of Kabul in August 2021. By September 2021 the Taliban announced the formation of an interim government and declared an Islamic Emirate of Afghanistan. This represents a significant change in the circumstances since the delegate's decision and the Taliban remains in effective control of the country.

8. I have obtained new information reporting on the current situation in Afghanistan. Considering the significant change in the country since the delegate made her decision I am satisfied that there are exceptional circumstances to justify considering the following new information:
- Danish Immigration Service, “Afghanistan: Taliban's impact on the population”, 1 July 2022
 - European Union Agency for Asylum (EUAA), “Country Guidance: Afghanistan (April 2022)”, 20 April 2022
 - European Asylum Support Office (EASO), “Afghanistan: Country focus (January 2022)”, 7 January 2022
 - Armed Conflict Location & Event Data Project (ACLED), Afghan Peace Watch (APW), “Tracking Disorder during Taliban Rule in Afghanistan”, 14 April 2022
 - United Nations Human Rights Council (UNHRC), “Situation of human rights in Afghanistan - Report of the United Nations High Commissioner for Human Rights”, 4 March 2022
 - Department of Foreign Affairs and Trade (DFAT), “Country Information Report Afghanistan”, 27 June 2019
 - DFAT, “Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)”, 14 January 2022
9. The previous IAA Reviewer also obtained new information from a range of sources regarding the general/security situation in Mazar-e-Sharif. By letter dated 29 November 2017 the IAA invited the applicant to comment on this information and on the reasonableness of relocation to Mazar-e-Sharif. The new information addressed the matter of relocation in Afghanistan, but as outlined in my assessment below I have found it unnecessary to address the matter of relocation. Furthermore this information is now somewhat dated and does not reflect the current situation in Afghanistan. Accordingly, I do not consider that there are exceptional circumstances to justify considering the new information obtained by the previous IAA Reviewer.

2017 submissions to the IAA

10. The 2017 submissions stretch across multiple communications (dated 6 March 2017, 5 and 27 July 2017, and 13 December 2017); in summary these comprise statements from the applicant’s representative, a statutory declaration from the applicant, corrections to that statutory declaration, new country information, medical reports, and a response to the IAA’s invitation to comment letter.
11. To the extent that the representative’s statements and the applicant’s statutory declaration addressed the delegate’s decision and findings I am satisfied this is essentially argument about matters that were before the delegate and not new information and I have had regard to the sections of the submission that address the delegate’s decision and findings.
12. The delegate’s decision was based on her finding the applicant could reasonably relocate to Kabul and the applicant’s statutory declaration addressed reasons why it would be unreasonable to do so and noted the lack of family support in Kabul due to the death of his uncle and other family members leaving the country. The statutory declaration purported

that these incidents occurred after the protection visa interview and that because the applicant did not think he could provide further information more than seven days after that interview he did not advise the department. This would indicate this was new information but as the corrections issued on 5 July 2017 advise the applicant stated in his statutory declaration dated 27 October 2015 his uncle had died one year earlier and he did not have anyone left in Kabul to support him.

13. It is of considerable concern that in the 2017 statutory declaration in 2017 the applicant gave information about his uncle's death which was clearly not factually correct. This was not simply a matter of confusing a date, he very specifically stated the death occurred "several months after [the] interview". This is compounded by his assertion that he did not give this information to the department in part because he thought he could not add to his claims more than seven days after the interview, which again indicates that was not just a simple confusion in dates. His account of his uncle's death as given in this statutory declaration is clearly at odds with the information he gave in 2015, before the protection visa interview, that his uncle had died in 2014. I note the comments that "following a later discussion with the applicant with the assistance of an interpreter and seeking clarification on some issues the applicant wishes to correct some information in the submission and supporting statutory declaration" but I find it difficult to accept such a significant variation in accounts can be attributed to some difficulty with 'clarity'. It is also purported that his sisters did not leave Afghanistan until eight months after news of his uncle's death was spread, not eight months after his death, which would date their departure sometime in 2016. But it remains that the account he gave in 2015 was that he had no one remaining in Afghanistan for support, which belies the assertion his sisters left in 2016.
14. Putting these concerns aside, what remains after the corrections are taken into account is new information put by the applicant to explain his family circumstances, lack of support in Afghanistan and difficulties he would face relocating to Kabul. The lack of family support in Afghanistan was information given in the protection visa application but this statement expands considerably on the family circumstances and is new information. As relocation to Kabul was central to the delegate's findings I am satisfied that this is personal information which had it been known may have affected the consideration of the applicant's claims. I am not satisfied that this information could not have been given; it is apparent that the applicant was on notice that relocation to Kabul was a matter for consideration as the post-interview submission addressed this matter. But as I have found it unnecessary to consider the question of relocation I am not satisfied that this information is of relevance to my decision and I am not satisfied there are exceptional circumstances to justify considering this new information.
15. The March and July 2017 submissions cited and were accompanied by country information, some of which was not before the delegate and is new information. Most of the information post-dated the delegate's decision and meets s.473DD(b)(i). Some pre-dated the delegate's decision and it was submitted that it could not have been given as the delegate's findings were not known until the decision was made. But the matter of relocation to Kabul was discussed at the protection visa interview and as I have noted the post-interview submission addressed this matter. I am not persuaded the information that pre-dates the delegate's decision meets s.473DD(b)(i). The new information is general country information and is not personal information in the relevant sense. I have already noted the significant change in the situation in Afghanistan since the Taliban takeover in 2021 and as noted I have obtained new country information reporting on the current situation. Accordingly, I am not satisfied there are exceptional circumstances to justify considering the new country information in the March and July 2017 submissions.

16. Accompanying the March and July 2017 submissions are medical reports from [Medical centres]. The reports themselves post-date the delegate's decision but the information contained therein is historical medical history and it not apparent why such information was not and could not have given to the Minister. This is however personal information and given that the information addressed the matter of reasonableness of relocation had it been known I am satisfied it may have affected the consideration of the applicant's claims. But noting I am not addressing relocation in my decision I am not satisfied as to the probative value of this information. I am not satisfied that there are exceptional circumstances to justify considering this information.
17. The 13 December 2017 submission was received in response to the invitation letter from the IAA to comment on new information and the matter of relocation to Mazar-e-Sharif. The submission responded to the invitation to comment directly addressing the new country information cited in the invitation and by providing further new information. I accept that the submission and the further new country information could not have been given before the delegate's decision as the matter of relocation to Mazar-e-Sharif was not raised at that time. The new country information is not personal information. As I have noted above in regard to the new country information obtained by the IAA in 2017 I have found it unnecessary to address the matter of relocation in this decision and the new country information accompanying this submission does not reflect the current situation in Afghanistan. This submission in small part addressed the applicant's health and personal circumstances but this is information already before me in the earlier submissions. As such, I do not consider that there are exceptional circumstances to justify considering the 13 December 2017 submission and the accompanying new information.

2022 submissions to the IAA

18. Following the decision of the Federal Court the applicant's representative alerted the IAA of intentions to make submissions and requested a period of time in which to do so. The IAA responded by email on 24 June 2022 and as part of its response advised the applicant had previously provided submissions to the IAA in 2017 and that the length of the submissions already provided will be taken into account when assessing whether any further submissions comply with the Practice Direction and that any further submissions which, when considered together with existing submissions, exceed the total allowable length of five pages will generally not be considered. The IAA's correspondence further advised that submissions are an opportunity for applicants to set out why they disagree with the decision of the department, or about any claim or matter that they presented to the department that was overlooked and if the representative was of the view that the earlier submissions do not do that then they can be withdrawn and replaced with accurate submissions in order to ensure any new submissions comply with the Practice Direction.
19. Further submissions have now been received and the representative requests that the IAA consider these and the applicant's previous submissions. None of the earlier submissions have been withdrawn despite the caution given by the IAA in correspondence with the representative and as such I need to take into account the length of previous submissions in my consideration of the 2022 submissions.
20. I have examined the 2017 submissions in their entirety to determine their length under the requirements of the Practice Direction that submissions by applicants setting out why they disagree with the decision of the department, or about any claim or matter that they presented to the department that was overlooked, should not exceed five pages. Noting I have not accepted the new country information the submissions sought to introduce I have

similarly not attributed the commentary in these submissions that addressed that new country information as submissions for the purpose of the five-page limit set out in the Practice Direction. Nor have I taken into account the applicant's statutory declaration for this purpose as I have found that there are not exceptional circumstances that justify considering this. What remains across the submissions dated 6 March 2017, 5 July 2017 and 29 July 2017 is argument about why the applicant disagrees with the delegate's decision, discussion of internal relocation to Kabul, discussion of the circumstances personal to the applicant and his health. Overall, this argument and discussion amounts to five pages.

21. The 2022 submissions comprised statements from the representative and a statutory declaration from the applicant, new country information and new medical reports/articles. One of the representative's statements addressed the new medical reports/articles and another addressed new country information. A further submission, while also titled "New Information Submission" in part comprised argument about the applicant's claims although this is largely in the context of the changed situation in Afghanistan, and I have therefore not attributed this as submissions for the purpose of the five-page limit set out in the Practice Direction.
22. The applicant has submitted a statutory declaration dated 13 July 2022. I have a similar concern with some of the content of this statutory declaration as to that which I have expressed about the 6 March 2017 statutory declaration, being that the applicant has given information in this 2022 statutory declaration that conflicts with his earlier accounts. In 2015 he advised he had no one remaining in Afghanistan to support him and in 2017 he stated his sisters had left Afghanistan and were in Pakistan, yet in this 2022 statement he stated that his sisters left Afghanistan "following the Taliban take-over", which would date their departure in 2021 or later. This information clearly conflicts with his earlier accounts. However again, I will put this concern aside.
23. The applicant's statutory declaration largely restated his protections claims and put argument as to why his fears are well-founded. In small part in this statutory declaration the applicant addressed the changed situation in Afghanistan and his updated personal circumstances, but I consider the bulk of this statutory declaration to be submissions for the purpose of the five-page limit set out in the Practice Direction and that the portion of such amounts to at least three pages. Therefore overall the submissions before me exceed the five-page limit set out in the Practice Direction. The submissions do not advance any explanation as why they are not or could not be compliant with the Practice Direction in regard to length.
24. The IAA is not required to accept any new information that fails to comply with the Practice Direction. The provisions of s.473FB are discretionary and in considering this discretion I have taken into account that the representative was put on notice as to the Practice Direction limitations. I have also taken into account that the statutory declaration largely restated the applicant's claims, and I am not satisfied that this information adds value to the information already before me. In the circumstances I have decided not to accept the applicant's 2022 statutory declaration in its entirety.
25. The sections of the statutory declaration that address new personal circumstances and the changed conditions in Afghanistan are new information and not subject to this limit. As these matters post-date the delegate's decision this information could not have been given earlier and I am satisfied that this information is personal information that if it had been known may have affected the consideration of the applicant's claims. I am further satisfied there are exceptional circumstances to justify considering this information. Therefore I have had regard

to the section of the applicant's statutory declaration in which he addressed new personal circumstances and the changed conditions in Afghanistan.

26. The new country information, and the commentary from the representative linking this information to the applicant's claims all post-dates the delegate's decision and on that basis meets the requirements of s.473DD(b)(i). It is country information and not personal information in the relevant sense.
27. I have already noted the significant change of circumstances in Afghanistan since 2021 and I acknowledge the importance of having regard to current information on the situation in the country. On that basis and noting the relevance of the information and its probative value in assessing the applicant's claims I am satisfied that exceptional circumstances exist that justify considering the new country information submitted with the 2022 submission at annexures 6, 8, 10, 11, 14, 15, 16, 17, 18, 20, 21 and 23. Annexure 13 is the DFAT country information report issued in January 2022 which as noted above I have already obtained.
28. Notwithstanding that I have found s.473DD(b) is met, for the reasons given below I am not satisfied that exceptional circumstances exist that justify considering the following new country information submitted with the 2022 submission:
 - Annexure 3; article from the Guardian describing how Afghanistan has fallen under Taliban rule. This media article dates from August 2021 and reports the events of the fall of Kabul and distrust of the incoming Taliban rule; this is information already before me in new information I have obtained.
 - Annexure 4; United Nations Human Rights press release which summarises the Special Rapporteur's trip to Afghanistan. It is stated the Special Rapporteur reported attacks specifically targeting members of the Shia and other minority communities. The media release is a very general outline of the human rights situation in Afghanistan. I do not discern any specific reference to Shias in the document presented. I already have before me the more detailed UNHRC report, "Situation of human rights in Afghanistan - Report of the United Nations High Commissioner for Human Rights", and I am not satisfied this press release adds value to the information before me.
 - Annexure 5; media article reporting an attack in Mazar-e-Sharif and provided as being relevant to the matter of relocation to Mazar-e-Sharif, but as noted I have not found it necessary to consider relocation.
 - Annexure 7; media article reporting Taliban action in the Panjshir region stated to be relevant to human rights abuses against the Tajiks. While the article does report fighting and detentions in the region and the concerns of Human Rights Watch it is evident that those involved have been accused of association with an armed opposition group and I am not satisfied the content of the article points to abuse against Tajiks for being Tajik.
 - Annexure 9; article reporting capital punishment for selling and consuming alcohol. This is stated to be relevant to the applicant having lived in the west and his deemed westernisation, including drinking alcohol. There is no indication the men convicted had any links to the west or that such punishment is being meted out to returnees. I find the link between the punishment in this case and the applicant's protection claim to be tenuous.
 - Annexure 12; media report regarding Christian converts in Afghanistan. The submission stated that this is "relevant given the applicant has been pictured attending church on several occasions and may be targeted if deemed a Christian". There is no indication in

the applicant's claims that he has attended church, been photographed doing so, or is a Christian convert. I am not satisfied that this information is relevant to his protection claims.

- Annexure 19; article from Human Rights Watch reporting media restrictions in Afghanistan and stated to establish the difficulty in obtaining information about the situation of ethnic minorities in Afghanistan. The challenge of obtaining accurate information is information already before me in the detailed discussion in the prelude to the ACLED report which I have obtained.
 - Annexure 22; article from The Conversation which it is stated details the extent to which members of the Tajik ethnic group in Afghanistan are being targeted under the Taliban regime". The article itself is an outline by an academic explaining the ethnic and religious factors and conflicts which have influenced politics in Afghanistan. In regard to Tajiks it says the majority Pashtun group have generally regarded the Tajiks as "part of the fabric of life in Afghanistan", that together Pashtuns and Tajiks resisted Soviet rule, and that three members of the post 2021 Taliban regime are Tajik. I am not persuaded this article details the targeting of Tajiks or is of probative value in an assessment of the applicant's claims.
 - Annexures 24/25/26/27; media reports of conflict in Panjshir Province. That there is conflict between the Taliban and opposition groups who are predominately Tajik and that this has resulted in violence in the north of the country is information already before me. But as noted above in regard to Annexure 7 this information indicates the targets of Taliban attention are those involved with, or suspected of being members of armed opposition groups, rather than people being targeted for their Tajik ethnicity.
 - Annexures 28 to 36 come under the heading "Humanitarian and Economic Crisis". While not explicitly stated I conclude that these have been submitted in support of claims regarding the reasonableness of relocation. But as I have noted in regard to Annexure 5 I have not found it necessary to consider relocation.
29. The submissions include medical reports regarding the applicant's mental and physical health and his ongoing treatment requirements and relevant comments from his representative. An article discussing the stigma associated with mental illness has also been provided. These reports and the article post-date the delegate's decision. The medical reports are personal information; the article is not. As this information reports on ongoing medical needs and access I am satisfied this may have affected the consideration of the claims in regard to the issue of relocation. I am satisfied that exceptional circumstances exist that justify the IAA considering this information.
30. A further document has been cited and hyperlinked in the accompanying representative's submission at footnote 3. No copy of this document was provided. The Practice Direction advises that hyperlinks to publicly available documents are not acceptable and advises that a copy of any document an applicant wishes to rely on should be provided to the IAA. The hyperlinked material is not compliant with the Practice Direction and I have decided not to accept it.

Applicant's claims for protection

31. The applicant's claims can be summarised as follows:
- The applicant is a Shia Muslim of Tajik ethnicity from Afghanistan.

- He was born in [District], Logar Province, but attended school in Kabul where he had extended family.
- His local area in [District] was predominately Shia but the larger area was dominated by Sunni villages, either comprising Sunni Tajiks or Sunni Pashtuns. The Taliban were also present in the area and they harassed the general population, particularly Shias. Shia businesses were attacked and Shias were prevented from practising their religion or observing Shia religious commemorations such as Ashura Day.
- When he was around 22 years of age the applicant was arrested by the Taliban and was released when a Sunni Tajik man from his village intervened on his behalf.
- The applicant was concerned for his safety and that of his spouse and children and they travelled to [Country] around [Year 1] entering illegally and where they lived as refugees.
- Living in [Country] was difficult but the applicant was fearful of returning to Afghanistan. In 2012 he made arrangements with a people smuggler to come to Australia.
- Due to his extended separation from his family and the prolonged uncertainty and fear of being returned to Afghanistan the applicant suffers from anxiety, poor sleep, poor diet and depression. He also has a [medical] condition for which he takes medication.
- The applicant fears that if he returned to Afghanistan he will be harmed because of his Shia faith; he is recognisable as a Shia. His fear extends to all of Afghanistan and he cannot obtain protection in the country.
- The applicant has also advanced reasons why he could not relocate within Afghanistan.
- He also fears harm on the basis of his Tajik ethnicity.
- He fears the Taliban will know from social media that he has lived in Australia and he fears harm as a failed asylum seeker who has lived in the west and due to his imputed anti-Taliban, pro-government and pro-western opinion.
- The applicant has mental and physical health conditions requiring ongoing care. He will not be able to obtain care in Afghanistan as due to the humanitarian and economic crisis in the country there is a shortage of medical resources and there is a stigma associated with mental illness.

Refugee assessment

32. 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

33. 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.
34. The applicant has consistently claimed to be a Tajik Shia from [District], Logar Province, Afghanistan. The applicant has provided taskera identity documents in support of his claimed identity. In her decision the delegate noted concerns about the taskera provided and the proliferation of fraudulent identity documents from Afghanistan. Despite these concerns the delegate noted the applicant's account of his background in Afghanistan and accepted the claimed identity. I accept the applicant's identity and nationality as stated. I accept that Afghanistan is the receiving country for the purpose of this review.
35. The applicant spoke at the protection visa interview of his Shia faith and being a member of the [Name] tribe. He spoke of his Tajik ethnicity and was able to explain the different ethnic/religious compositions in and around the area of Logar where he lived. I accept that the applicant is Tajik Shia. I accept that the applicant is identifiable as a Shia.
36. I accept that the applicant lived in a Shia dominated village in [District] but that in the surrounding area Sunnis and Pashtuns formed the majority population.
37. I accept that the Taliban had a presence in the area and I accept that this may have been concerning for the applicant, particularly as the Sunni dominated Taliban viewed adherents of the Shia faith with disdain.
38. I have significant concerns with the applicant's claim that he was caught by the Taliban when he was 22 years of age, which would place this incident around [Year 2]. As the interviewing officer noted at the protection visa interview the applicant did not advance this claim at the arrival entry interview conducted on 3 November 2012 when asked about his experiences in Afghanistan. At that interview he commented that he left Afghanistan because of the Taliban and he stated they threatened him, but when asked to provide specific incidents that occurred, he simply responded that the area he lived in was surrounded by the Taliban. He was further asked if the Taliban harmed him, and he responded "no" and when asked what they did to him his reply was just that it was not safe for him. Despite these specific questions the applicant did not mention the claimed [Year 2] incident and that he did not do so raises concerns that it is not genuine. The applicant's explanation for not mentioning this incident at that interview is that he was cautious to do so because he was concerned about the interpreter; he stated the interpreter had a beard and he thought he was Sunni and/or Pashtun. My difficulty with this explanation is that the now stated concern about the interpreter did not impede the applicant from making other comments about threats from the Taliban and general comments about the presence of the Taliban compromising safety and security in the area and hindering his religious practice.

39. Of further concern is his account that the Taliban members he claimed had caught him were persuaded to release him following the intervention of a fellow Sunni villager. The applicant's account is that this villager then warned him he should leave the area and never come back, but I have difficulty accepting this account as had the Taliban had an interest in the applicant of such significance it was important the applicant immediately leave the area it seems incongruous that they let him go in the manner described. His account that the Taliban let him go indicates they had no ongoing interest in him.
40. However, even if I were to accept the applicant's claim as advanced by him, I am not satisfied that there is a real chance this incident would result in any harm to him should he return to Afghanistan. This incident occurred more than 25 years ago, and I am not satisfied it points to the applicant having a profile of concern to the Taliban now. I have discussed further below the profile of persons in Afghanistan viewed by the Taliban as being of concern.
41. The applicant has resided in [Country] for an extended period and claims to have done so illegally. Yet from his account he was deported from [Country] for being illegal but his immediate family were not and when asked at the protection visa interview if he attempted to return to re-join his family in [Country] he stated he did not because he could not get a visa, which is somewhat difficult to accept noting he originally travelled there illegally. However, the country information advises that around two million Afghans reside illegally or undocumented in [Country] and are generally unable to obtain permanent residence.¹ I am satisfied that the applicant does not have any right to enter or reside in [Country].
42. In summary the applicant fears harm in Afghanistan on the basis of his religion, ethnicity and as a failed asylum seeker from the west. The 2022 submissions highlight that the Taliban are now in effective control across Afghanistan and set out the applicant's concerns that he will be targeted by the Taliban and suffer serious harm on these bases.
43. Afghanistan is an ethnically diverse society with some 14 distinct ethnic groups recognised in the constitution; Pashtuns comprise the largest ethnic group followed by the Tajik group. But in regard to religion the country is dominated by adherents of Sunni Islam with an estimated 85 per cent or more of the population being Sunni and the Taliban is a Sunni dominated group. Shias are a minority in the country and have historically been victims of sectarian violence perpetrated by the Sunni dominated Taliban and other Sunni insurgent groups.²
44. As noted above the Taliban now have effective control of Afghanistan. Noting the past history of violence and abuse many citizens and the international community decried the return of the Taliban to power and expressed concerns and fear of a return of widespread brutality and mistreatment.
45. In its first media conference after taking power the Taliban announced a general amnesty, saying that they have pardoned "all of those who had fought against us". But despite such reassurances, after the Doha Agreement (the multi-party negotiations designed to effect the orderly withdrawal of foreign troops) was concluded and prior to taking power nationally in August 2021, the Taliban launched what DFAT noted has been described as a "wave of targeted killings". DFAT advised these were directed at influential and prominent Afghans, including journalists, human rights activists, judicial workers, doctors and clerics. Citing data compiled by UNAMA DFAT noted that in the year 2020 there was an increase in the number of civilians killed and injured by Taliban targeted killings. In September 2021 a source

¹ [References deleted]

² Department of Foreign Affairs and Trade (DFAT), "Country Information Report Afghanistan", 27 June 2019, 20190627113333

reported that the Taliban using a blacklist had rounded up and targeted people with suspected links to the previous administration/US forces. It was reported house-to-house searches were conducted to find blacklisted individuals in addition to visits to local mosques and police offices to gain information on certain individuals. There is some indication that such searches may be ongoing, but it is unclear from The Times of India article provided to the IAA what profile of person is involved although one European diplomat suggested this was affecting “ordinary citizens”. The reporting goes on to note individuals who were working for foreign military troops, such as interpreters, “are living in hiding and are being searched for. The Taliban also have reportedly summoned some interpreters to appear in court, with their families being informed that they might be held responsible if the interpreters failed to appear in court. Executions of persons under this profile have been reported”.³

46. The country information informs that at the time of the Taliban takeover in August 2021 a number of people were targeted for attack; the profiles of such were largely those with some prominence and influence such as journalists, human rights activists, judicial workers, doctors and clerics and former government authorities, interpreters for foreign troops and embassy staff. The Armed Conflict Location and Event Data Project (ACLED) has noted the challenges of obtaining accurate information from Afghanistan and in particular restrictions on media reporting but ACLED has explained steps taken and the expanded methodology adopted to provide a dataset that more accurately reflects political disorder in Afghanistan than some reporting which is at risk of underreporting incidents. Overall the ACLED reporting shows Taliban violence targeted primarily former government officials and security forces. ACLED noted the Taliban also targeted tribal and minority communities perceived to support previous governments, forcibly seizing land belonging to such communities and that Hazaras, Uzbeks, and Tajiks have been targeted due to their participation in anti-Taliban alliances in the 1990s.⁴
47. It is clear that widespread abuse, reprisals, and targeted attacks occurred leading up to and around the time of the Taliban takeover in August 2021 and soon after.⁵ I accept that such reports are alarming but I am not satisfied that the applicant has a profile of concern to the Taliban or that there is a real chance he would be targeted for harm in the manner described in this reporting, notwithstanding the reporting from Amnesty International that innocent bystanders were killed in a targeted operation in August 2021.⁶ Nor am I satisfied that the claimed encounter in [Year 2] would cause the applicant to be of concern and targeted for harm.
48. The applicant fears harm in Afghanistan because of his Tajik ethnicity and has pointed to attacks in the Panjshir. I accept there has been antipathy between the Taliban and Tajiks in Afghanistan and that this continues. The period of Taliban rule from 1996 was challenged by many elements in Afghanistan and from their traditional power base in the north Tajiks, through the Northern Alliance, had a significant involvement in the overthrow of Taliban rule in 2001.⁷ During the period of the coalition administration the Taliban conducted widespread attacks on those associated with the government, and in such attacks, Tajiks were amongst

³ EUAA, “Country Guidance: Afghanistan”, 20 April 2022, 20220421101054; ACLED/APW, “Tracking Disorder during Taliban Rule in Afghanistan”, 14 April 2022, 20220419113116; Danish Immigration Service, “Afghanistan: Taliban’s impact on the population”, 1 July 2022, 20220704104853; 2022 submission: The Times of India, “Taliban increases presence in Tajik, Hazara areas, conducts house-to-house searches”, 1 March 2022

⁴ ACLED/APW, “Tracking Disorder during Taliban Rule in Afghanistan”, 14 April 2022, 20220419113116

⁵ DFAT, “Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)”, 14 January 2022, 20220114090718

⁶ 2022 submission: Amnesty International, “Afghanistan: 13 Hazara killed by Taliban fighters in Daykundi province – new investigation”, dated 5 October 2021

⁷ DFAT, “Country Information Report Afghanistan”, 27 June 2019, 20190627113333

the victims. But the Taliban has since achieved its objective to oust the prior regime and is now in power and as DFAT explains in its January 2022 report, apart from the minority Hazara group DFAT is not aware that other ethnic groups in Afghanistan face discrimination or violence on the basis of their ethnicity, despite the dominance of Pashtuns within the Taliban.⁸ Where Tajiks have been targeted for harm this has been attributed to their political activities rather than on the basis of ethnicity.⁹ Indicative of this are reports in Kabul of Tajiks from the northern Panjshir region coming to attention and on raids on homes linked to the National Resistance Front to confiscate weapons. This attention had been attributed to Panjshiris being perceived as a “hot bed” of resistance.¹⁰ But the applicant was not involved with the Tajik resistance associated with the Taliban overthrow in 2001, nor is he from the north where the Tajik resistance has been based.

49. DFAT has noted that armed resistance to the Taliban has ended with there being limited potential for future challenge to the Taliban in the near term, including from prominent Tajik warlords. DFAT assesses that people from these ethnic groups may face some risks of harassment from the Taliban if they are associated with any military threat, should it emerge, but the applicant has not been involved in such activity in the past and has not indicated he would be so in the future.¹¹ I am not satisfied that there is a real chance the applicant would experience harm in Afghanistan now or in the reasonably foreseeable future on the basis of his ethnicity.
50. The applicant has lived in Australia for almost ten years and he fears he would be viewed as an infidel and harmed because of his extended residence in the west.
51. As a result of conflict-related instability Afghanistan has seen large scale population movements with millions of Afghans leaving, mostly for Pakistan and Iran, and returning to the country as conditions change; significant numbers have also returned from the west. At the time of its 2019 report DFAT advised it had no information to suggest that returnees from western countries attract negative attention for having sought and failed to gain asylum. DFAT acknowledged the Amnesty International reporting that there have been cases in which returnees from Europe have been killed after returning to Afghanistan but assessed that these cases are more likely to have related to the highly dangerous general security situation, which affects all Afghans.¹²
52. In the period of the previous government there have been reports of individuals who returned from western countries having been tortured or killed by anti-government agents on the grounds that they had become foreigners or that they were spies for a western country. Humanitarian workers, development workers and women in the public sphere were notably those accused by antigovernment agents as having adopted values and/or appearances associated with western countries. The 2021 EASO report acknowledges that there may be both a negative view of people who have left Afghanistan and sought asylum but also a pragmatic view that many people have fled due to poverty rather than for being anti-Taliban. The negative view is largely predicated on people who had left being seen as not having Islamic values and EASO’s source attribute this to views that those who left around the time of August 2021 as being “elites” and “corrupt ‘puppets’ of the ‘occupation’, opposed

⁸ DFAT, “Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)”, 14 January 2022, 20220114090718

⁹ ACLED/APW, “Tracking Disorder during Taliban Rule in Afghanistan”, 14 April 2022, 20220419113116

¹⁰ Danish Immigration Service, “Afghanistan: Taliban’s impact on the population”, 1 July 2022, 20220704104853

¹¹ DFAT, “Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)”, 14 January 2022, 20220114090718

¹² DFAT, “Country Information Report Afghanistan”, 27 June 2019, 20190627113333

to the population”; whereas others left due to poverty and this had “nothing to do with any fear of the Taliban, but life is better economically in the west”. Beyond this generalised commentary the EASO report set out concerns expressed by Afghans abroad, and while these are essentially limited to two individuals, the information is instructive in indicating the types of activity engaged in while abroad that agencies have reported may be of adverse interest. The first of these is a woman studying abroad who has asked family members to destroy photographs of her not wearing hijab/being in the company of men; the second is a law professor who has been critical of the Taliban on social media.¹³

53. I am not satisfied the applicant had a profile of concern to the Taliban when he departed Afghanistan or that he would be perceived as having such should he return. Nor does the country information before me support his assertion the Taliban monitor the social media accounts of Afghans living abroad who are not otherwise of interest for activism or similar activities that may attract attention. Negative attitudes to those who have spent time in the west relate particularly to women because of the greater social freedoms they experience in the west as opposed to when in Afghanistan. Restrictive standards regarding appearance have largely been restricted to women. While men are not immune to being seen as westernised those who are so viewed are generally those perceived as un-Islamic for supporting the former government.¹⁴ There is no indication the applicant has been involved in any activities in Australia that may give rise to concern in Afghanistan that he has repudiated Islam or cause him to be perceived as an infidel or that he has been involved in any anti-Taliban/pro-western protests or commentary or cause him to be perceived as an affiliate of the west.
54. I accept that the applicant has mental and physical health conditions requiring ongoing care. Since the Taliban takeover the international aid agencies who previously provided significant medical service have withdrawn. This together with the economic crisis has resulted in a dire shortage of medical resources.¹⁵ I also accept that stigma associated with mental illness may impact the ability to access relevant services in Afghanistan. But, while the general economic situation is of course concerning, the information before me does not indicate that people are denied access to basic services or denied the capacity to earn a livelihood for any of the reasons specified in s.5J(1) of the Act. I find that the applicant does not have a well-founded fear of persecution on this basis.
55. Tensions between Shia and Sunni Muslims in Afghanistan are historic and ingrained and have been evident throughout the various iterations of post-colonial government in Afghanistan. Shias are derided as infidels by many Sunnis, in particular by extremist groups. Attacks on Shias, most notably the Hazara Shia group who numerically are the most significant Shia group in Afghanistan, have been common in the country but increased significantly from 2015/2016 as insurgency groups escalated their operations. Mass-casualty attacks targeted Shias, particularly at large gatherings where Shias were identifiable and gathered in numbers,

¹³ European Asylum Support Office (EASO), “Afghanistan: Country focus (January 2022)”, 7 January 2022, 20220110085950; DFAT, “Country Information Report Afghanistan”, 27 June 2019, 20190627113333

¹⁴ EUAA, “Country Guidance: Afghanistan (April 2022)”, 20 April 2022, 20220421101054; Danish Immigration Service, “Afghanistan: Taliban’s impact on the population”, 1 July 2022, 20220704104853

¹⁵ United Nations Human Rights Council, “Situation of human rights in Afghanistan - Report of the United Nations High Commissioner for Human Rights”, 4 March 2022, 20220310103511; EASO, “Afghanistan: Country focus (January 2022)”, 7 January 2022, 20220110085950; DFAT, “Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)”, 14 January 2022, 20220114090718; 2022 IAA submission: Khaama Press, “Stigma and Taboos: The absence of mental health awareness in Afghanistan”, 10 March 2019

such as attending mosque or demonstrations or attacks on public transport in Shia neighbourhoods.¹⁶

56. Leading up to the withdrawal of foreign troops the Taliban made early conciliatory gestures in 2020 at the time of the Doha Agreement negotiations when the leader of the Haqqani Network (HQN) faction described his desire that “the killing and the maiming must stop” and stated that the Taliban was “committed to working with other parties in a consultative manner of genuine respect to agree on a new, inclusive political system in which the voice of every Afghan is reflected and where no Afghan feels excluded”. Since taking power in 2021 the Taliban have made overtures to be inclusive and have vowed to protect Shia communities and have not restricted Shia worship or practices; Taliban members have been deployed to protect Shia mosques.¹⁷ Some reporting seems to dispute this and a media report published in May 2022 stated Taliban forces prohibited dozens of Shia mosques from holding Eid prayers; however the article goes on to note recent bomb attacks on mosques and it is not clear if the “prohibition” was in fact related to security measures put in place.¹⁸ However, for whatever reason any prohibition has been put in place this does indicate that Shias may be hindered in the practice of their religion.
57. Despite these positive gestures from the Taliban attacks on the Shia community have continued since the Taliban takeover in 2021, although the Taliban has denied involvement and the perpetrator of such attacks have been identified as the Islamic State in Khorasan Province (ISKP), Islamic State (ISIS) and similar militant groups. These attacks have occurred in Kabul and other major city centres and the ISKP, ISIS and other Sunni militant groups have publicly claimed responsibility for the carnage, but some smaller attacks have been attributed to Taliban members.¹⁹ These attacks had added to some concern at the Taliban’s ability to control its own members and further concern at its ability to address the serious security concerns the ISKP and similar groups pose. DFAT report noted that the Taliban was “surprised” by the speed of its takeover and subsequently was “ill prepared for government”. This has resulted in some concern that the Taliban’s fighting force styled command-control structure appears to be struggling with the now required administration of government role and appears unable to regulate the actions of tens of thousands of foot soldiers and regional commanders, let alone combat the security threat posed by the ISKP and similar groups.²⁰ The Taliban’s defence minister publicly acknowledged that some militants had committed revenge killings despite the declared amnesty and that “miscreants and notorious former soldiers” within Taliban units had committed abuses but that no Taliban fighters had the right to break the amnesty and he issued a rebuke over the misconduct.²¹

¹⁶ DFAT, "DFAT Country Information Report: Afghanistan", 18 September 2015, CISEC96CF13366; DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367; UN News Service, "Afghanistan - UN mission condemns killings of worshippers in two mosque attacks", 12 October 2016, CX6A26A6E10910; Human Rights Watch, "Afghanistan's Shia Hazara Suffer Latest Atrocity", 13 October 2016, CX6A26A6E11295; UNAMA, "Special Report on 23 July 2016 Kabul Attack", 01 October 2016, CIS38A80122353; Stirling Assynt, "Shia interests in Kabul will face increased risk as IS seeks to capitalise on sectarian tensions to boost recruitment", 29 July 2016, CIS38A80121955; Jane's Intelligence Review, "Wilayat Khorasan unleashes new wave of violence but loses leader", 6 September 2016, CX6A26A6E11053

¹⁷ DFAT, "Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022, 20220114090718; Danish Immigration Service, "Afghanistan: Taliban's impact on the population", 1 July 2022, 20220704104853

¹⁸ 2022 submission: WION, "No Eid for Shias? Taliban forces prohibit Shia mosques from holding Eid prayers", 5 May 2022

¹⁹ EASO, "Afghanistan: Country focus (January 2022)", 7 January 2022, 20220110085950; DFAT, "Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022, 20220114090718

²⁰ DFAT, "Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)", 14 January 2022, 20220114090718; Danish Immigration Service, "Afghanistan: Taliban's impact on the population", 1 July 2022, 20220704104853

²¹ United Nations Human Rights Council, "Situation of human rights in Afghanistan - Report of the United Nations High

58. But in spite of efforts from the Taliban leadership to safeguard security for minority groups, including Shias, there are still incidents of ethnic minorities in Afghanistan being harassed and discriminated against by low-ranking members of the Taliban. Observers comment that the organisational structure and the lack of control over the low-ranking members is “one of the biggest challenges of the Taliban leadership now that they are the de facto government. Their organisational structure was set up for fighting an insurgency, and now they have to perform a completely different task. This requires a restructuring of the Taliban, and this takes time.”²²
59. I note the concerns that the Taliban has reneged on earlier commitments such as reversing or backtracking on promises relating to women and girls and their ability to access education and engage in society. Concerns have also been widely voiced about restrictions on journalists and media reporting. Some observers have also cautioned that attacks around the time and after the Taliban takeover indicates the Taliban stepping back from its August 2021 promised amnesty and their ability to oversee this amnesty has been questioned by commentators. The presence of the HQN within the Taliban power structure has also been noted of being of concern. I note the conciliatory message by the HQN leader in 2020 (cited above) but it remains that the HQN is known as being strongly anti-Shia and was responsible for some of the highest-profile attacks of the conflict in Afghanistan and is listed in the US as a terrorist organisation and their presence in the Taliban network has attracted some criticism.²³
60. The ISKP and ISIS are significant concerns for the Taliban and the persistent fractious relationship between the Taliban and other Sunni militant groups presents an ongoing challenge for the Taliban as ISKP/ISIS/militant attacks continue seemingly unabated.²⁴ The attack by ISIS on the Kabul military hospital in which senior Taliban military commander Hamdullah Mokhlis was killed indicates the Taliban is vulnerable to attack and casts further doubt on their ability to protect the minority groups such as the Shias.²⁵
61. The 2022 DFAT report advised of “multiple attacks” in Kabul; one significant attack in November 2021 in which 25 people were killed and scores injured was claimed by the ISKP. DFAT attributes the risk of ongoing attacks in part to factional tensions and conflict with militant groups, most notably the ISKP with whom the Taliban have been in violent conflict for some time. ISKP are reported to have carried out multiple terrorist attacks in 2020/2021 against the government and also against the Taliban. Of the mass casualty terrorist attacks conducted since the Taliban takeover ISKP has claimed responsibility for most and DFAT considers terrorist attacks remain possible anywhere in the country, but major attacks are most likely in key cities.²⁶ It is of concern that in addition to Taliban targets the ISKP’s primary targets are the Shia community.²⁷ The Danish Immigration Service report noted the Taliban has shown a willingness to protect Shia mosques in the aftermath of attacks by the ISKP, but despite reassurances to protect the Shia community in two weeks alone in April/May 2022

Commissioner for Human Rights”, 4 March 2022, 20220310103511: EASO, “Afghanistan: Country focus (January 2022)”, 7 January 2022, 20220110085950

²² Danish Immigration Service, “Afghanistan: Taliban’s impact on the population”, 1 July 2022, 20220704104853

²³ EASO, “Afghanistan: Country focus (January 2022)”, 7 January 2022, 20220110085950; DFAT, “Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)”, 14 January 2022, 20220114090718

²⁴ 2022 submission: Alarabiya News, “ISIS claims bombing targeting Shias in north Afghanistan”, 19 April 2022; Aljazeera, “At least 16 killed as explosions rick Afghan cities”, dated 21 April 2022

BBC News, “Afghanistan: ‘Blood and fear everywhere’ after deadly IS blast”, 22 April 2022

²⁵ 2022 submission: Aljazeera, “Afghanistan: Deadly blasts, gunfire hit Kabul military hospital”, dated 2 November 2021

²⁶ DFAT, “Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)”, 14 January 2022

²⁷ EUAA, “Country Guidance: Afghanistan”, 20 April 2022, 20220421101054

more than 100 Shias died in several attacks launched mainly against the Shia minority and for most of which the ISKP has claimed responsibility.²⁸ These attacks included bomb blasts in two schools in the Hazara Shia area of Kabul.²⁹

62. The country information before me indicates that the security situation has somewhat stabilised since August 2021, and in some parts general security has improved.³⁰ But the country is suffering a humanitarian crisis and militant groups such as ISKP remain active. The Taliban have declared itself in control and proclaimed the Islamic Emirate of Afghanistan but the administration is not recognised by the international community and faces significant and damaging internal opposition from the ISKP and similar groups. I am concerned the security situation in Afghanistan for Shias is not stable and remains unpredictable. I am concerned that the impact to Shias now or in the reasonably foreseeable future from the Taliban regime, together with ongoing Sunni militant action and ongoing instability, is unclear
63. Despite overtures of conciliation since the takeover there have been reports of Shias being targeted and killed by the Taliban and the Taliban remains a majority Sunni organisation whose ideology is an Islamic State adhering to their strict interpretation of Islam, an interpretation which eschews the “inferior” Shia sect. The country information reports discrimination in accessing the legal system and resources, forced evictions by the Taliban and/or by local Pashtuns taking advantage of the Taliban takeover. Soon after the Taliban takeover attacks perpetrated by ISKP on Shia mosques in Kunduz in October 2021 resulted in some 90 deaths and widespread casualties and a similar mass attack was perpetrated by ISIS in Kandahar.³¹
64. The country information before me reports considerable instability in the security situation for Shias; Shias face death or serious injury from targeted attacks and in this context I find the chance the applicant may face serious harm in this manner is more than remote.
65. I find that the applicant would face a real chance of serious harm in Afghanistan and that this harm would involve systematic and discriminatory conduct amounting to persecution. I am also satisfied that the essential and significant reason the applicant would face this harm is his Shia religion and that this is an innate or immutable characteristic which he could not conceal, and that he could not take reasonable steps to modify his behaviour in order to avoid a real chance of harm for this reason. ISKP/Sunni militant attacks have continued to occur despite measures taken by the Taliban and I am not satisfied the applicant could obtain effective protection in Afghanistan. Furthermore, despite attempts from the Taliban leadership to protect Shias there remain credible reports that members of the Taliban have perpetrated attacks on Shias. These attacks are occurring across Afghanistan and I am satisfied the applicant would face a real chance of persecution in all areas of the country.
66. For the above reasons I am satisfied that the applicant has a well-founded fear of persecution.

²⁸ Danish Immigration Service, “Afghanistan: Taliban’s impact on the population”, 1 July 2022, 20220704104853

²⁹ 2022 submission: Amnesty International, 19 April 2022; Vox, “Deadly attacks on Afghan minorities show the Taliban isn’t keeping its promises”, 23 April 2022; BBC, “Kabul blasts kill six and wound 20 at boy’s school”, dated 20 April 2022

³⁰ United Nations Human Rights Council, “Situation of human rights in Afghanistan - Report of the United Nations High Commissioner for Human Rights”, 4 March 2022, 20220310103511; DFAT, “Thematic Report on Political and Security Developments in Afghanistan (August 2021 to January 2022)”, 14 January 2022; EUAA, “Country Guidance: Afghanistan”, 20 April 2022, 20220421101054

³¹ 2022 submission: The Guardian, “Shia mosque bombing kills dozens in Afghan city of Kunduz”, dated 9 October 2022; Aljazeera, “Deadly explosion hits Shia mosque in Afghanistan’s Kandahar”, dated 15 October 2021

Refugee: conclusion

67. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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.