



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

**Decision and Reasons**

**Referred application**

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AFGHANISTAN

IAA reference: IAA16/00808

Date and time of decision: 14 February 2017 14:53:00

Karen Dix, Reviewer

**Decision**

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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 an referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Hazara Shia from Afghanistan who was born in [District 1], Ghazni province and lived in Iran for approximately [number] years between [specified year] and 2010. [In] December 2015 he lodged an application for a safe haven enterprise visa (SHEV) claiming to fear harm from the Taliban due to his Hazara ethnicity, his Shia religion, and as a failed asylum seeker whose photograph was published in a local newspaper and website.
2. [In] September 2016 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa.

### Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. Just prior to the delegate's decision there were a number of reports of a suicide bombing targeting Hazaras in Kabul on 23 July 2016 which were not referred to by the delegate in the decision. Following the decision there have been further reports since the delegate's decision of attacks on Shias on 12 October 2016 in Kabul and Mazar-e-Sharif<sup>1</sup> and in Kabul on 21 November 2016 which I have obtained.<sup>2</sup> I have also obtained updated country information on the security situation dated January 2016 and 1 November 2016 and the presence of Hazaras in Mazar-e-Sharif.<sup>3</sup> The reports present new information which impact on the consideration of the applicant's claims and particularly in relation to the assessment of whether the applicant will face harm in the reasonably foreseeable future and the viability of relocation to Mazar-e-Sharif. I am satisfied that there are exceptional circumstances for considering this information.
5. On 25 October 2016 and 2 December 2016 the IAA invited the applicant to comment on information in respect to the Kabul suicide bombing of 23 July 2016, subsequent attacks on Shias and provide information relating to reasonableness of relocation to places within Afghanistan, including Mazar-e-Sharif. On 15 November 2016 and 16 December 2016 the applicant's representative provided responses. As the information was provided in response to an invitation from the IAA, I am satisfied that the information contained within the responses was not before the Minister and could not have been provided before the delegate's decision. The information relates to issues that have been raised consequently to the delegate's decision. I am satisfied that there are exceptional circumstances to justify considering it.

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<sup>1</sup> Reuters, "Islamic State claims responsibility for deadly mosque attack in Afghan capital", 12 October 2016, CX6A26A6E10825; Aljazeera, "Afghanistan: New Attack kills 14 worshippers at mosque", 13 October 2016, CX6A26A6E10839; Agence France Presse (AFP) - France, "At least 14 dead, 24 injured as blast hits Shia mosque in Afghanistan", 12 October 2016, CX6A26A6E10840; Afghanistan Analysts Network, "With an active cell in Kabul, ISKP tries to bring sectarianism to the Afghan war", 19 October 2016, CX6A26A6E11358

<sup>2</sup> BBC News, "Afghanistan Kabul mosque suicide attack kills dozens", 21 November 2016, CX6A26A6E13651; Long War Journal, "Islamic State suicide bomber kills dozens at Kabul mosque", 21 November 2016, CX6A26A6E13789

<sup>3</sup> DFAT, "Thematic Report on Afghanistan Security Conditions, 1 January to 31 August, 5 September 2016, CIS38A80121778; European Asylum Support Office (EASO), "Country of Origin Information Report: Afghanistan Security Situation", January 2016, CIS38A8012395; EASO, "Country of Origin Information Report: Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597; Agence France Presse (AFP) – France, "At least 10 people killed in Taliban siege at Afghan courthouse", 10 April 2015, CXBD6A0DE4258; Lifos, "Hazaras in Afghanistan", Lifos, 28 August 2015, CISEC96CF14239

## Applicant's claims for protection

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6. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:

- The applicant is an Afghani citizen of Hazara ethnicity who was born in [his home] village, in [District 1], Ghazni province and practises Shia Islam. In approximately 2008 the family moved to [Town 1] near Ghazni city. His spouse and [number] children, his mother and [other family members] all continue to reside in [Town 1]. However his father is deceased.
- The applicant resided in [his home village in], [District 1] until approximately [year range] when he travelled to Iran for work to help his family financially. During that time the Taliban had commenced occupation in the applicant's village and declared sharia law and the applicant feared for his safety. The local Kuchi Pashtuns also commenced grazing their cattle on the family land and destroyed crops which the family required to sustain their livelihood. The family also had a small [store] from which the Taliban would take supplies without paying. The family did not dispute these actions due to fear of retribution and as a result the applicant travelled to Iran illegally to seek employment to provide for the family. He stayed there until 2002 before returning to Afghanistan.
- The applicant claims to have illegally returned to Iran on three further occasions for work – from [year ranges specified]. The applicant claims to have returned to Iran in [two specified years] after a stay of a few months in his village due to continuing issues with the Taliban and Kuchis, and following his return in 2007, he and his family relocated from [District 1] to [Town 1] in early 2008 which they believed was safer and opened a [store].
- The Taliban were also in control of [Town 1] and the family changed their behaviour and religious routine out of fear. As the Taliban occupation of the area intensified it became increasingly dangerous for Shia Hazaras. In 2009 Hazaras who had voted in the presidential election were detained and killed by the Taliban. The applicant on the day of the election was travelling to Ghazni city when he was stopped on the road by three Taliban who searched him to see if he had a voting card and checked for evidence of his finger being marked by the polling station. While the applicant was detained a government police patrol passed by and when the Taliban hid from them the applicant ran away from them.
- The Taliban stopped the supply of goods to [Town 1] and even though the applicant could go to work at the [shop] there were no goods to sell. The applicant needed to find work but feared being harmed on the roads in or around Ghazni as a Shia Hazara. He therefore returned to Iran where he remained until 2010 when he was deported to Afghanistan. In July 2012 he fled to Pakistan where he made arrangements to come to Australia.
- In May 2014 the applicant travelled to a town in regional NSW where he participated in a refugee [program]. The applicant's photo and information about the program were published in the local newspaper as well as on the newspaper's website.
- The applicant fears harm from the Taliban and other extremist Sunni groups and the Pashtun population as a Shia Hazara; due to his imputed political opinion arising from his opposition to the Taliban's ideology and as a failed asylum seeker who left his village without the Taliban's permission, and is considered to be a supporter of the west. The publishing of his photo in an Australian local newspaper and on a local website

heightens his risk of harm. The applicant also fears harm on the roads due to the poor security situation.

## **Refugee assessment**

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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. The applicant has consistently claimed to be an Afghani citizen who was born in [his home] village, [in District 1] in Ghazni province and relocated to [Town 1] near Ghazni city in 2008 with his family. He has provided a copy of a taskera evidencing his nationality and identity and at interview demonstrated a familiarity with [Town 1], Ghazni. I accept his identity is as claimed and that he is an Afghani national.
10. The applicant claims to have travelled illegally between Afghanistan and Iran for work on four occasions commencing in approximately [year range] and resided there for an approximate total period of 10 to 12 years before returning to Afghanistan in 2010 after he was deported from Iran. After consideration of country information<sup>4</sup> and the applicant’s account at interview, I accept that the applicant does not have an existing right of return to Iran and that his receiving country is Afghanistan.

### *Ghazni*

11. The applicant claims that during the Taliban rule the Taliban occupied his village in [District 1] and imposed sharia law, encouraged the local Kuchi Pashtuns to graze their cattle on the family land and also took supplies from the family [store]. He claims that due to these problems he

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<sup>4</sup> Department of Foreign Affairs and Trade (DFAT), “Country Information Report – Afghanistan”, 18 September 2015, CISEC96CF13366, 5.17

went to Iran in [year range] to work and did not return until [year]. When he returned in [year] to his village his family still had financial difficulties arising from the Taliban and Pashtun occupation and the applicant returned to Iran within a few months to work. The applicant returned in [year] but only stayed for four or five months as there continued to be conflict with the Kuchi, and as a consequence of the Taliban presence around the area, he and his family feared traveling in the region. In late 2007 the applicant again returned to his village so that he could relocate with his family to [Town 1] where they believed that they would be safe from the Taliban and Kuchis.

12. I accept that the applicant is from [District 1] which is almost entirely populated by Hazaras. I also accept that during the period the Taliban were in power the applicant and his family as Shia Hazaras would have been subject to the Taliban rule of law and following the end of Taliban rule in 2001 the family continued to experience difficulties financially. I also accept the applicant's claims in respect to his family's livelihood issues arising from the Kuchi Pashtuns continuing to graze their stock on the family land after 2001 which is consistent with country information indicating that there are seasonal clashes over land rights and access to natural resources between nomadic Pashtun Kuchi tribes and Hazaras.<sup>5</sup>
13. Although I have concerns about the applicant's claims of a continued Taliban presence in the area around [District 1] after they ceased rule, I note that the security situation in [District 1] continued to be poor following the Taliban withdrawal. I also accept that the Taliban remained active in Ghazni province and that the applicant and his family moved in early 2008 to [Town 1] which is in close proximity to Ghazni city, for financial and security reasons.
14. The applicant claims that the Taliban were in control of [Town 1] and on the presidential election day in 2009 he was stopped by three Taliban on foot who searched him for a voting card and checked his fingers for signs of an imprint from the polling booth. At the interview the delegate raised concerns about discrepancies between the applicant's statement in his SHEV application and SHEV interview where he claims to have run away from the Taliban when they hid from a passing police patrol, and a previous written statement made in July 2013 where he claimed to have been released by the Taliban despite being a Hazara. Despite the discrepancy I accept that the applicant was stopped by the Taliban on this occasion, however I do not accept that he was of further interest to the Taliban following the incident despite the claimed presence of the Taliban in [Town 1]. Although the applicant again travelled to Iran in [year], he returned to [Town 1] in [year] where he resided with his family for approximately a further [time] without incident until his departure for Australia. I am satisfied that the applicant was the subject of a random incident and would not be of further interest to the Taliban on return for reasons of that incident.
15. Country information also indicates Ghazni is one of the most volatile provinces in Afghanistan in terms of attacks on defence forces, international forces and civilians due to the activities of the Taliban and other insurgent groups present in Pashtun majority districts, which therefore have high levels of insecurity and are unsafe.<sup>6</sup> Roads linking Hazara-dominated areas in Ghazni with Kabul also suffer from a high level of insecurity.<sup>7</sup> DFAT also referred to a United Nations Assistance Mission in Afghanistan (UNAMA) report which indicated that anti-government elements (AGEs) abducted at least 97 members of the Hazara community in the first half of 2015 and all but one incident took place in areas of mixed Hazara and non-Hazara communities

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<sup>5</sup> Department of Foreign Affairs and Trade (DFAT), "Thematic Report Hazaras in Afghanistan 2015-16 update", CIS38A8012186, 8 February 2016, 3.12; DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 3.4

<sup>6</sup> DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.12, 2.23

<sup>7</sup> ibid

including in Ghazni province. Motives for the abductions varied, and included financial gain, intimidation, hostage exchange, suspicion of being members of Afghan national security forces, and in some cases motives were unknown.<sup>8</sup> DFAT also cites the kidnapping of 31 people in February 2015 who were almost all Hazaras travelling on buses through Zabul province<sup>9</sup> and reports several incidents of Hazaras being kidnapped in Ghazni province in the second half of 2015 including a group of 7 Hazaras who were kidnapped and killed.<sup>10</sup> While DFAT assesses that ethnicity is rarely the primary motivating factor in these incidents, it can be a contributing factor, in some circumstances.<sup>11</sup> DFAT also assesses that Hazaras travelling by road between Kabul and the Hazarajat face a greater risk than other ethnic groups and if a bus is stopped in these areas with a mixture of ethnic groups on board, ethnic Hazaras are more likely to be selected for kidnapping or violence.<sup>12</sup>

16. Although Hazara areas of Ghazni are considered safe, I accept that the applicant would not be returning to [District 1] which is in Hazarajat but to [Town 1] which is only a short distance (approximately [number] kilometres) from Ghazni city, an area where there is a Tajik majority and substantial Hazara and Pashtun minorities.<sup>13</sup> EASO in November 2016 reported that in September 2015 the Taliban conducted a series of major operations in Ghazni city and cited further attacks during 2016, but also reported that in May 2016 large areas of Ghazni city and districts were recaptured from militants by the Afghan security forces.<sup>14</sup> Other country information indicates that in March 2016 the Afghan security forces in response to Taliban activity near Ghazni city conducted a series of clearance operations on the roads around Ghazni city and in June 2016 Ghazni officials claimed that security had improved in Ghazni city.<sup>15</sup>
17. I note that to return to Ghazni city the applicant would be required to travel by road from Kabul which DFAT has described as being of greater risk for Hazaras. I also note that the applicant is from [the region around] Ghazni city, a city of mixed ethnicity where there is a strong Taliban presence. Although there is evidence that the Afghan security forces have been conducting operations in Ghazni city and nearby districts against the Taliban, EASO in November 2016 indicated that security in Ghazni is fragile and anti-government elements (AGEs) continue to pose a major challenge, with AGEs blocking the main roads of the province several times, especially on the strategically significant Kabul-Kandahar highway, in order to conduct attacks in different parts of the province.<sup>16</sup> Given the fragility and fluidity of the security situation in Ghazni, and DFAT reports of the Taliban, other anti-government groups and criminal elements targeting the national highway and secondary roads, as well as roads linking Hazara-dominated areas in Ghazni with Kabul also suffering from a high level of insecurity, I am that there is a real chance that the applicant would suffer serious harm as a Shia Hazara on surrounding roads leading to Ghazni city if he were to attempt to return there.

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<sup>8</sup> Ibid, 2.28

<sup>9</sup> Ibid, 2.28

<sup>10</sup> Ibid, 2.30

<sup>11</sup> Ibid, 2.31

<sup>12</sup> Ibid, 2.33

<sup>13</sup> Country of Information Section (COIS), "Afghanistan: Road Security Update - 1 January to 30 June 2016", CR943F68516, p. 26

<sup>14</sup> EASO, "Country of Origin Information Report: Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p. 95-96

<sup>15</sup> Country of Information Section (COIS), "Afghanistan: Road Security Update - 1 January to 30 June 2016", CR943F68516, p. 41 and p. 43

<sup>16</sup> EASO, "Country of Origin Information Report: Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p. 94

*Fear of Harm in relation to all of Afghanistan*

18. Section 5J(1)(c) of the Act provides that the real chance of persecution must relate to all areas of the receiving country. The applicant claims that he cannot safely relocate to another area of Afghanistan as the security situation is poor in all areas of Afghanistan and the roads are subject to constant attack and would be too dangerous for the applicant to travel on to relocate.
19. I have considered whether the applicant faces a well-founded fear of persecution in relation other areas of Afghanistan. For the reasons given below, I am not satisfied that the applicant faces has a well-founded fear of persecution in Mazar-e-Sharif.
20. EASO indicates that Mazar-e-Sharif, the capital of Balkh province is one of the biggest commercial and financial centres in Afghanistan and is regarded as one of the safest cities in Afghanistan, and much safer than Kabul, with the relative security of the province being attributed to a monopoly on power, even in the province's most remote regions, held by ethnic-Tajik governor and former warlord Atta Mohammed.<sup>17</sup> While armed attacks occur in Balkh province, attacks are relatively rare in the city although sporadic attacks still occur.<sup>18</sup> Lifos have advised that although Hazaras are concentrated in Hazarajat in central Afghanistan, there are significant populations of Shia Hazaras residing in cities including Mazar-e-Sharif.<sup>19</sup> The city is known as a melting pot of diverse cultures and religious influences where liberal attitudes coexist with conservative traditions.<sup>20</sup>
21. DFAT has advised that in areas under government control there is no evidence of any official policy of discrimination on the basis of ethnicity or religion, with ethnic and religious minorities having their own media outlets, political parties and politically active representatives.<sup>21</sup> DFAT has advised that Shia Hazaras are active in the Afghan community, particularly in politics, education and civil society but there is evidence of societal discrimination at a community level.<sup>22</sup> DFAT also indicated that people from all ethnic groups are at risk of violence from anti-government elements, but no particular group is systematically targeted solely on the basis of ethnicity.<sup>23</sup> DFAT in its September 2016 report indicated that high-profile suicide and complex attacks continued, particularly in Kabul, with most attacks carried out by the Taliban against targets linked to the Afghanistan government or international security forces. The Taliban specifically targeted civilian groups such as human rights defenders, journalists, lawyers and judges, aid workers and civil servants, and used indiscriminate tactics.<sup>24</sup>
22. According to EASO there was a reported increase in insurgent attacks within Mazar-e-Sharif but these attacks remain almost exclusively directed against the national security forces, with sporadic bombings in Balkh's major cities extending to civilian targets and posing an indirect threat to the multitude of international and non-governmental agencies which operate from the city.<sup>25</sup> The applicant's representative submits that although Mazar-e-Sharif was once

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<sup>17</sup> EASO, "Country of Origin Information Report: Afghanistan Security Situation", January 2016, CIS38A8012395, p. 145

<sup>18</sup> Ibid; AFP, "At least 10 people killed in Taliban siege at Afghan courthouse" 10 April 2015, CXBD6A0DE4258

<sup>19</sup> Lifos, "Hazaras in Afghanistan", 28 August 2015, CISEC96CF14239

<sup>20</sup> AFP, "At least 10 people killed in Taliban siege at Afghan courthouse" 10 April 2015, CXBD6A0DE4258

<sup>21</sup> DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 3.6 and 3.8; DFAT, "DFAT Thematic Report Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 3.1

<sup>22</sup> DFAT, "DFAT Thematic Report - Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 3.10-3.11;

DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 3.25

<sup>23</sup> DFAT, "DFAT Thematic Report - Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 2.17

<sup>24</sup> DFAT, "Thematic Report on Afghanistan Security Conditions, 1 January to 31 August, 5 September 2016, CIS38A80121778, 2.2

<sup>25</sup> EASO, "Country of Origin Information Report: Afghanistan Security Situation", January 2016, CIS38A8012395, p. 146

considered a relatively safe city this has changed in the past 5 years, as the Tajik governor's influence no longer guarantees security especially in areas beyond the city. The representative refers to a 2015 UN Habitat report and claims that in terms of the rate of increase in civilian casualties in the first four months of 2015, Mazar-e-Sharif ranked second. The applicant's representative places considerable reliance on a paper from the Blue Mountains Refugee Support Group which refers to 2 targeted attacks on government officials in March 2015, an attack on a provincial prosecutor's office in April 2015 and an attack on the German consulate in November 2016 all of which occurred in Mazar-e-Sharif, as well as the attack on Shias outside of Mazar-e-Sharif in October 2016 and the shooting of 13 Hazaras travelling on the road in the Zari district of Balkh province in September 2015 as demonstrative of intensification of attacks by insurgents in areas which are allegedly safe. I acknowledge that there has been an increase in attacks in Mazar-e-Sharif, however the applicant as a Hazara has not been directly associated with any of the groups who are targets for insurgents and does not have an imputed profile as a government affiliate which would be likely to bring him to adverse attention. I note the killing of the Hazaras which occurred in the Zari district of Balkh province in September 2015, however the evidence does not indicate that the applicant's return to Mazar-e-Sharif itself would bring him to the adverse attention of insurgents or that there is a real chance he would face serious harm from insurgents in Mazar-e-Sharif due to his ethnicity.

23. The representative claims that out of a population of approximately 400,000 people in Mazar-e-Sharif it is estimated that 60% are of Tajik ethnicity whilst Shia Hazaras form only 10% of the population and most other ethnic groups are Sunni Muslims. As a result Shia Hazaras continue to be treated as second class citizens who have little or no influence. The representative refers to the paper from the Blue Mountains Refugee Support Group which cites an interview with a Hazara graduate from Mazar-e-Sharif University who indicated that there was discrimination in public service appointments by the governor who overlooked well qualified Hazaras in favour of Tajiks.
24. There is evidence of societal discrimination in Afghanistan generally on the basis of ethnicity and religion which DFAT describes as nepotism within particular ethnic and religious groups where ethnic, tribal or family connections will often be more important than merit in employment decisions for both government and private sector positions.<sup>26</sup> Although Hazaras are active in politics, education and civil society, they are still under-represented in senior government positions.<sup>27</sup> I accept that the applicant may be subject to discrimination on return in relation to employment as a consequence of nepotism, particularly as he does not have family links in Mazar-e-Sharif where he has not lived before. However Hazaras still form a significant minority group in Mazar-e-Sharif and I am not satisfied there is a real chance that as a consequence of such discrimination that he would be denied the capacity to earn a livelihood or that he would be subject to economic hardship such that it would threaten his capacity to exist or would otherwise suffer treatment that may be considered serious harm within the meaning of s.5J of the Act.
25. DFAT advised that purely inter-faith violence is rare in Afghanistan, although attacks against Shias do occur, particularly during rituals or significant dates that are observed by Shias but not Sunnis. It reports on a suicide bombing among Shia worshippers celebrating Ashura in December 2011, which killed more than 80 people in Kabul, most of whom were Hazaras and was one of three co-ordinated attacks aimed at Ashura commemorations, with smaller scale attacks occurring in Mazar-e-Sharif and Kandahar. Lashkar-e-Jhangvi all-Almi, a splinter group

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<sup>26</sup> DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 3.8

<sup>27</sup> DFAT, "DFAT Thematic Report - Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 3.10-3.11

of Lashkar-e-Jhangvi (LeJ), a Pakistan-based militant group claimed responsibility for the attacks which were reportedly intended to aggravate sectarian tensions.<sup>28</sup>

26. An attack occurred on 12 October 2016 approximately 20 kilometres from Mazar-e-Sharif when a bomb exploded outside a mosque where Shias were commemorating Ashura.<sup>29</sup>
27. I accept that there was a targeted attack on Shias in Mazar-e-Sharif in 2011 and the attack outside of Mazar-e-Sharif in October 2016 appears to have been directed specifically against Shias. However the information before me still raises the question of whether the attack in October 2016 is indicative of a real chance of serious harm for Shia Hazaras, such as the applicant, living in Mazar-e-Sharif itself. Whilst ISIS claimed responsibility for recent attacks against Shias in Kabul in July, October and November 2016,<sup>30</sup> which according to the Afghanistan Analysts Network is a sign that ISIS is attempting to inject sectarian violence into the Afghan conflict,<sup>31</sup> there was no declaration of responsibility by ISIS or any other group in relation to the 2016 attack near Mazar-e-Sharif.<sup>32</sup> EASO in early 2016 indicated that the Taliban and Islamic Movement of Uzbekistan (IMU) are active in parts of Balkh province where the IMU has links to the Taliban, and in March 2015 the IMU pledged allegiance to ISIS but was only involved in attacks on Afghan forces.<sup>33</sup> In March 2016, Balkh's governor stated there were fighters loyal to Islamic State in the province, consisting of remnants of the Islamic Movement of Uzbekistan (IMU).<sup>34</sup> According to EASO in November 2016 there was evidence of an ISIS presence in the southern districts of Balkh province where the governor conducted a clearing operation in March 2016<sup>35</sup> however there is no evidence of an ISIS presence in or near Mazar-e-Sharif. Additionally the Taliban according to Afghanistan Analysts Network has convincingly spoken out against sectarianism and stayed away from violence that could stir sectarian hatred.<sup>36</sup> The representative has indicated that regardless of the groups involved there is evidence of Shia Hazaras being persecuted and the attack on Shias in the centre of Mazar-e-Sharif in 2011 is evidence of the vulnerability of Hazaras if ISIS or the Taliban were able to enter Mazar-e-Sharif. I accept that the October attack near Mazar-e-Sharif targeted Shia worshippers, however I am not satisfied that the evidence indicates that ISIS, IMU or the Taliban were involved or that the incident is indicative of the onset of a sectarian campaign in Balkh. Nor am I satisfied that it is indicative of a risk to Shia Hazaras living in Mazar-e-Sharif

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<sup>28</sup> DFAT, "DFAT Thematic Report Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 3.6

<sup>29</sup> Aljazeera, "Afghanistan: New Attack kills 14 worshippers at mosque", 13 October 2016, CX6A26A6E10839; Agence France Presse (AFP) - France, "At least 14 dead, 24 injured as blast hits Shia mosque in Afghanistan", 12 October 2016, CX6A26A6E10840

<sup>30</sup> Reuters, "Islamic State claims responsibility for deadly mosque attack in Afghan capital", 12 October 2016, CX6A26A6E10825; BBC News, "Afghanistan Kabul mosque suicide attack kills dozens", 21 November 2016, CX6A26A6E1365; Long War Journal, "Islamic State suicide bomber kills dozens at Kabul mosque", 21 November 2016, CX6A26A6E13789; Afghanistan Analysts Network, "With an active cell in Kabul, ISKP tries to bring sectarianism to the Afghan war", 19 October 2016, CX6A26A6E11358

<sup>31</sup> Afghanistan Analysts Network, "With an active cell in Kabul, ISKP tries to bring sectarianism to the Afghan war", 19 October 2016, CX6A26A6E11358

<sup>32</sup> Aljazeera, "Afghanistan: New Attack kills 14 worshippers at mosque", 13 October 2016, CX6A26A6E10839; Agence France Presse (AFP) - France, "At least 14 dead, 24 injured as blast hits Shia mosque in Afghanistan", 12 October 2016, CX6A26A6E10840; Afghanistan Analysts Network, "With an active cell in Kabul, ISKP tries to bring sectarianism to the Afghan war", 19 October 2016, CX6A26A6E11358

<sup>33</sup> EASO, "Country of Origin Information Report: Afghanistan Security Situation", January 2016, CIS38A8012395; EASO, "Country of Origin Information Report: Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p. 24

<sup>34</sup> EASO, "Country of Origin Information Report: Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p. 150

<sup>35</sup> EASO, "Country of Origin Information Report: Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p. 151

<sup>36</sup> Afghanistan Analysts Network, "With an active cell in Kabul, ISKP tries to bring sectarianism to the Afghan war", 19 October 2016

itself. I am not satisfied that the isolated incidents in or near Mazar-e-Sharif in 2011 and 2016 indicate that the applicant faces a real chance of persecution as a Shia Hazara upon return to Mazar-e-Sharif in the reasonably foreseeable future.

28. DFAT advises that many Afghans travel abroad to Iran, Pakistan, Europe or other western countries to seek employment or educational opportunities,<sup>37</sup> and that between 2002 and 2013 an estimated 5.8 million refugees returned to Afghanistan from Iran, Pakistan, as well as western countries.<sup>38</sup> Although returnees from western countries are almost exclusively returned to Kabul<sup>39</sup> country information indicates that there is an international airport in Mazar-e-Sharif accepting flights from Kabul and international locations.<sup>40</sup> DFAT also assesses that, with the exception of those travelling by road between Kabul and the Hazarajat, low-profile Hazaras who have spent time in western countries face a low risk of violence as a result of those international links.<sup>41</sup> UNHCR in April 2016 indicated individuals who are perceived to have adopted values and/or appearances associated with Western countries, due to their imputed support for the Government and the international community are reportedly targeted by anti-government elements on the grounds that they had become “foreigners” or that they were spies for a Western country.<sup>42</sup> However the reports and incidents cited by the UNHCR do not refer to Mazar-e-Sharif as an area where returnees are targeted on the basis of being perceived as Western.
29. I am not satisfied that he would be imputed with an adverse political opinion in Mazar-e-Sharif, or as a Hazara Shia who resided in a western country.
30. In May 2014 the applicant travelled to a town in regional NSW where he participated in a refugee [program]. An article about the program which included the applicant’s photo, first name as well as information about the program was published in the local regional newspaper as well as on their website. This article did not include any contact information or information in respect to the applicant’s protection claims; however it did identify the applicant as an asylum seeker. The applicant fears that if the Taliban became aware of the article this would endanger the applicant or his family. He claims that the newspaper article places him at a higher risk of harm on return.
31. I accept that the applicant’s photo and first name was published and identified him as an asylum seeker who is living in Australia. However there is no credible evidence to indicate, apart from the applicant’s conjecture, that the Taliban would become aware of the article and be able to identify and target the applicant on return to Mazar-e-Sharif. The applicant would be returning to Mazar-e-Sharif where he has not been directly associated with any of the groups who are targets for insurgents and on the evidence returnees are not targeted by insurgents simply for being a returnee or failed asylum seeker with an imputed pro-western political opinion.
32. I am not satisfied that the applicant as a Shia Hazara or as a returnee/failed asylum seeker from the west, whose personal information was printed in a regional Australian newspaper faces a real chance of persecution upon return to Mazar-e-Sharif in the reasonably foreseeable future.

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<sup>37</sup> DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 3.30

<sup>38</sup> DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 5.17

<sup>39</sup> DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 5.20

<sup>40</sup> [www.world-airport-codes.com](http://www.world-airport-codes.com)

<sup>41</sup> DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 3.31

<sup>42</sup> UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p. 41

## Refugee: conclusion

33. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

## Complementary protection assessment

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34. 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

35. 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.

36. I have found that there is a real chance the applicant may be killed or physically harmed by the local Taliban as a Shia Hazara on the roads if he returns to Ghazni. I am satisfied that this harm amounts to significant harm. For the same reason, I am satisfied that the applicant faces a real risk of significant harm on the roads to Ghazni.

37. However, s.36(2B) of the Act provides that there is taken not to be a real risk that a person will suffer significant harm in a country if it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm.

38. For the following reasons I am not satisfied that the applicant faces a real risk of significant harm in Mazar-e-Sharif.

39. The applicant's representative claims that the applicant will be treated as a second class citizen in Mazar-e-Sharif as Hazaras are a minority group (10% of the city's population) who have little or no influence and Tajiks which form approximately 60% of the population are being given public service positions by the governor and overlooks or removes well qualified Hazaras from these appointments.

40. Country information indicates that Mazar-e-Sharif is known as a melting pot of diverse cultures and religious influences where liberal attitudes coexist with conservative traditions.<sup>43</sup> Despite this DFAT indicates that there is societal discrimination at a community level usually in the form of nepotism<sup>44</sup> which is primarily as a result of the important role of played by ethnic,

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<sup>43</sup> AFP, "At least 10 people killed in Taliban siege at Afghan courthouse" 10 April 2015, CXBD6A0DE4258

<sup>44</sup> DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 3.25 and 3.8

tribal and familial networks in Afghan society.<sup>45</sup> DFAT indicates that ethnic, tribal or family connections will often be more important than merit in employment decisions for both government and private sector positions.<sup>46</sup> Given that he does not have family links to support him, I accept that there is a real risk that the applicant may be subject to nepotism on return to Mazar-e-Sharif. However on the evidence I am not satisfied that there is a real risk that such nepotism/discrimination would result in the applicant being denied the capacity to subsist or that it would result in him being arbitrarily deprived of his life, or would constitute the death penalty, or torture. Nor am I satisfied that there is a real risk that such nepotism or discrimination would intentionally inflict pain or suffering, or severe pain or cause extreme humiliation which is unreasonable such that it amounts to degrading treatment or punishment. I do not accept that such treatment constitutes significant harm as defined in s.36(2A) of the Act. I have also found that there is not a real chance that he would face other forms of harm in Mazar-e-Sharif as a Shia Hazara and as the 'real risk' test imposes the same standard as the 'real chance' test, I am also not satisfied that there is a real risk of the applicant suffering such harm on the return to Mazar-e-Sharif as a Shia Hazara.

41. I have otherwise found that there is not a real chance that the applicant will face serious harm in Mazar-e-Sharif due to his imputed political opinion as a returnee/failed asylum seeker from the West, or due to publishing of his personal information in a regional Australian newspaper. As the 'real risk' test imposes the same standard as the 'real chance' test, for the reasons stated above I am also not satisfied that there is a real risk of the applicant suffering significant harm on the return to Mazar-e-Sharif for those reasons.
42. Given the current security situation in Afghanistan, I have given consideration to whether there is a real risk of significant harm due to generalised violence in Mazar-e-Sharif.<sup>47</sup> Mazar-e-Sharif has been relatively isolated from the conflict in the last decade, is one of the biggest commercial and financial centres in Afghanistan and is regarded as one of the safest cities in Afghanistan, with the relative security of the province being attributed to a monopoly on power, even in the province's most remote regions, held by ethnic-Tajik governor and former warlord Atta Mohammed.<sup>48</sup> While armed attacks occur in Balkh province, attacks are relatively rare in the city although sporadic attacks still occur and the Afghan government remains in control.<sup>49</sup> In Balkh province, the decline in insurgent activity was attributed to Afghan National Security Forces (ANSF) effectiveness and specifically to the new district police chief.<sup>50</sup> I note that the applicant's representative submits that although Mazar-e-Sharif was once considered a relatively safe city this has changed in the past 5 years, as the Tajik governor's influence no longer guarantees security especially in areas beyond the city. The representative refers to a number of attacks in 2015 and 2016 including 2 targeted attacks on government officials in March 2015, an attack on a provincial prosecutor's office in April 2015, and an attack on the German consulate in November 2016 all of which occurred in Mazar-e-Sharif as demonstrative of intensification of attacks by insurgents in areas which are allegedly safe, and indicates that there is evidence that the Taliban is being supported by other Sunni extremist groups in formerly peaceful areas like Mazar-e-Sharif. I accept that there have been some attacks in Mazar-e-Sharif however the applicant does not have a profile or association with those identified as targets of the Taliban or IMU in Mazar-e-Sharif and I am not satisfied that there is a real risk of significant harm. Although there is evidence of sporadic attacks as indicated by EASO, and despite the representative's claim of the fragility of Tajik governor's influence which

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<sup>45</sup> Ibid, 3.25

<sup>46</sup> DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 3.8

<sup>47</sup> Ibid, 2.35

<sup>48</sup> EASO, "Country of Origin Information Report: Afghanistan Security Situation", January 2016, CIS38A8012395, p.146-147

<sup>49</sup> Ibid; AFP, "At least 10 people killed in Taliban siege at Afghan courthouse" 10 April 2015, CXBD6A0DE4258

<sup>50</sup> EASO, "Country of Origin Information Report: Afghanistan Security Situation", January 2016, CIS38A8012395

no longer guarantees security especially in areas beyond the city, generalised violence in Mazar-e-Sharif is rare. On this basis I am not satisfied that there is a real risk of the applicant facing significant harm on the basis of the general security situation in Mazar-e-Sharif for any reason.

43. I am not satisfied that there is a real risk of the applicant suffering significant harm on the return to Mazar-e-Sharif and for the following reasons I am satisfied it is reasonable for him to relocate there.
44. The applicant's former representative states that the applicant is financially responsible for his wife and children, [and other family members] and has no formal education and limited employment experience as [several occupations] and shop keeper. Due to his limited skills and work experience he will be unable to re-establish himself and find employment to financially support himself and his family. He also lacks familial and social support networks in other parts of Afghanistan as his entire family resides in Ghazni and would not be accepted into the Hazara community. The applicant's current representative, apart from stating that Mazar-e-Sharif is not a durably safe place for relocation, indicates that the city has not been exempt from the effects of the economic slowdown with 69% of households reporting deterioration in their economic situation. The representative also refers to comments from the Blue Mountains Refugee Support Group indicating that although there is a functioning airport about 20km from the Mazar-e-Sharif city centre no one can guarantee that either the airport or the connecting road will remain free of insurgency control.
45. I have had regard to the applicant's circumstances and the UNHCR recommendations in considering the reasonableness of relocation raised by the representative. With limited exceptions, in UNHCR's view the reasonableness of relocation is dependent on the effective availability of traditional support mechanisms, provided by members of the applicant's extended family or ethnic group, and advises that the only exceptions for the requirement of external support are single able bodied men and married couples of working age without identified specific vulnerabilities. Such persons may in certain circumstances be able to subsist without family and community support in urban and semi-urban areas that have the necessary infrastructure and livelihood opportunities to meet the basic necessities of life and that are under effective Government control.<sup>51</sup> DFAT has also advised that traditional extended family and tribal community structures are the main protection and coping mechanisms for people in Afghanistan, however in practice, lack of financial resources and employment opportunities are the greatest constraints to successful internal relocation which is generally more successful for single men of working age although lack of family or tribal networks for single men can impact on their ability to reintegrate into the Afghan community.<sup>52</sup>
46. In assessing the applicant's ability to relocate to Mazar-e-Sharif I have considered that the applicant presents as an able bodied male of working age with no health problems or other specified vulnerabilities identified by UNHCR as requiring durable support including family or community support. Although he does not have family or tribal support in Mazar-e-Sharif and his family continue to reside in Ghazni, I am satisfied that the applicant has the necessary skills and capacity to subsist in Mazar-e-Sharif.
47. Country information indicates that Mazar-e-Sharif is under the effective control of the Afghan government. Although DFAT reports unemployment and underemployment are high across

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<sup>51</sup> UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p. 86

<sup>52</sup> DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 5.20

Afghanistan<sup>53</sup> large urban areas offer greater opportunities for employment and access to services,<sup>54</sup> with Mazar-e-Sharif being reported as one of the biggest commercial and financial centres of Afghanistan, and its political and economic weight is big and getting bigger.<sup>55</sup> Agriculture, wholesale and retail trade, manufacturing and construction are the main sectors of employment.<sup>56</sup> I accept that despite there being relatively more employment opportunities in Mazar-e-Sharif there is unemployment and underemployment. However the applicant despite having no formal education has farming experience and worked in the family [store] in [District 1], set up and operated a family [store] in [Town 1], Afghanistan, and over a period of approximately 12 years travelled to Iran where he acquired skills as [an occupation] in various [related businesses]; and since November 2015 he has worked as a [different occupation] in the [related] industry in Australia. This indicates the applicant is resilient and resourceful and I am satisfied that the applicant will be able to obtain employment to enable him to subsist in Mazar-e-Sharif as well as provide for his family in Ghazni.

48. I accept that the applicant's wife and children, [and other family members] are residing in Ghazni, and the applicant does not have any family members in Mazar-e-Sharif to assist him on return. He would therefore be arriving in Mazar-e-Sharif without dependants as a single man of working age. Although the applicant may send money to assist them financially, he would not be required to find accommodation or meet other needs for his family in Mazar-e-Sharif. Whilst I acknowledge the lack of familial support may initially present challenges in the applicant establishing himself in Mazar-e-Sharif, he does not present with any vulnerabilities, has previously travelled to Iran on [number] occasions where he lived for an extended period of time and worked for approximately 10 years with different employers and since his arrival in Australia he has obtained accommodation and employment without familial support. The applicant is therefore familiar with establishing himself in new locations. On the evidence, I am satisfied that he has demonstrated the ability and capability to establish himself in new locations despite a lack of family and other connections. Although the applicant's representative claims that the economic slowdown in conjunction with the applicant's lack of connections will impact on his ability to establish himself in Mazar-e-Sharif, I am satisfied that the applicant has the skills, life experience and resilience to relocate and establish himself in an area of Mazar-e-Sharif where employment, accommodation and other services would be available to him.

49. I accept that the applicant since his departure from Afghanistan in 2012 has lived apart from his family, who continue to reside in [Town 1], Ghazni. I also accept that the applicant's relocation to Mazar-e-Sharif would require him to continue to be separated from his family in the reasonably foreseeable future. However the applicant has demonstrated a capacity and willingness to live apart from his family for an extended period whilst he is in Australia; and lived apart from his family for over 10 years whilst working in Iran and country information indicates that Hazaras from across Afghanistan regularly travel for employment opportunities.<sup>57</sup> Although I accept that the continued separation from his family may be difficult, considering the applicant's demonstrated resilience and life experience I am satisfied that it is reasonable in the circumstances for the applicant to relocate to Mazar-e-Sharif despite the separation from his family.

50. Whilst the representative has suggested that there is no guarantee that either the Mazar-e-Sharif airport or the connecting road will remain free of insurgency control, I am satisfied on

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<sup>53</sup> DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 3.14

<sup>54</sup> Ibid, 4.3

<sup>55</sup> EASO, "Country of Origin Information Report: Afghanistan Security Situation", January 2016, CIS38A8012395, p. 145

<sup>56</sup> DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 2.19

<sup>57</sup> DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 3.14

the evidence before me that the airport continues to accept flights from Kabul and other international locations. As has been noted above, general violence in Mazar-e-Sharif is rare. Taking into account this and the applicant's personal circumstances, I find it reasonable for the applicant to relocate to Mazar-e-Sharif where he does not face a real risk of significant harm.

**Complementary protection: conclusion**

51. 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**

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

## Applicable law

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

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

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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