



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN
IAA reference: IAA16/00865

Date and time of decision: 12 April 2017 15:19:00
Jessica McLeod, Reviewer

Decision

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

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

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 Hazara Shi'a citizen of Afghanistan. He lodged an application for a Safe Haven Enterprise visa (the SHEV application) [in] March 2016. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] February 2017.
2. The delegate accepted the applicant's claims as credible. However, the delegate found the applicant could safely reside in Mazar-e-Sharif where he would not face a real chance of persecution or real risk of significant harm in the reasonably foreseeable future, and that his relocation to that city would be reasonable in the circumstances.

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. [In] October 2016 the IAA received a submission and additional statutory declaration from the applicant's representative providing reasons they disagreed with the delegate's decision and inferring that aspects of his claims had been overlooked. To the extent that the submission contains legal and other arguments responding to the delegate's decision, reasserts claims that were before the delegate and refers to policy advice and country information already before the delegate, I am satisfied that this does not constitute new information and have had regard to it.
5. The submission also contains updated information about the applicant's physical and mental health and about an incident regarding a recent returnee from Australia known to the applicant. Further updated information about the applicant's health was also provided to the IAA in 2017. All of this information post-dates the decision and I accept the health update is also credible personal information. Claims regarding the applicant's health were before the delegate however I accept that the applicant's conditions are serious and accept that updates on his situation are relevant to this assessment. In these particular circumstances I am satisfied there are exceptional circumstances to justify consideration of this information.
6. The submission also contains country information which pre-dates the delegate's decision. The delegate raised a limited amount of adverse country information with the applicant throughout the SHEV interview. However, at the end of the interview, when the representative offered to allay doubts as to the application of country information in the applicant's case, the delegate indicated it would not be necessary. I do not consider it was the intention of the delegate to mislead or deny further opportunity to the applicant and I note she later indicated that any further information provided before the decision would be considered. It was therefore open to the representative to provide further submissions and I have some doubt about whether the information could not have been provided. However in this particular circumstance I am prepared to accept the representative was under the impression that an adverse decision would not be made on the basis of country information and was not therefore on notice as to the substance of live issues. I am prepared to accept in this case that the new information provided to the IAA could not have been provided and that there are exceptional circumstances to justify its consideration.

7. On 15 February 2017 the applicant's representative submitted further information to the IAA which post-dated the delegate's decision and which related to attacks in Kabul and Balkh Province and the emergent threat of Islamic State in the country, and specifically how these factors may impact the risk facing the applicant in the reasonably foreseeable future upon return. I also obtained further country information on these issues and the broader security situation. On 28 March 2017, the IAA invited the applicant to comment on this information and on the reasonableness of relocation within Afghanistan. On 11 April 2017, the applicant's representative responded with a submission containing argument and further country information. The information I obtained and which was provided relates to ongoing developments in Afghanistan's fluid security situation and relocation considerations relevant to the applicant's claims. I am satisfied that the information could not have been provided to, and considered by, the delegate and / or is credible personal information and I am satisfied that there are exceptional circumstances to justify considering this new information.
8. The representative relies on several decisions of the Refugee Review Tribunal / Administrative Appeals Tribunal and while I have had regard to those assessments and consider them informative, they were time relevant and specific to the applicant before the particular member. I am not bound by such decisions and I have assessed this case on the specific and individual circumstances of this applicant currently before me.

Applicant's claims for protection

9. The applicant's claims can be summarised as follows:
 - He is a Hazara Shi'a Muslim from [town 1], Jaghori District, Ghazni Province, Afghanistan.
 - His village is close to several Pashtun villages where many Taliban members reside. He faced many problems from local Pashtuns and Kuchis who were both supported by the Taliban. Some of his relatives were seriously injured when the ruling Taliban attempted to kill them.
 - He lived in his village from birth [year of birth] until approximately 1997. From approximately 1997 – 1998 and 1991 – 2001 he resided in [town 2], [country 1]. Between 1998 – 1999 and 2001 – 2012 he resided in [town 3], Kabul.
 - While in [country 1] in 2000/2001, he learned his father had been shot and killed by the Taliban because [of his education related occupation] in the village and the Taliban were against furthering education and because he had confronted Kuchis who entered their land. He also believes he was targeted because he was Hazara and Shi'a. His [Relative 1] was assisting his father in [his work] and he was taken away by the Taliban but his body was never found.
 - After the Taliban was ousted he returned to Afghanistan and joined his family in Kabul where they had relocated. They lived in [town 3], a Hazara majority area close to a Pashtun area where the Taliban are active at night.
 - In 2010 he opened a [business] in [a specified area] town in [town 3] secretly selling [specific product] to Hazara Shi'as he knew personally. He would purchase the [specific product] from Hazara businessmen he knew in [a location] in Kabul city and sell it [on].
 - Approximately five – six months before he left Afghanistan his [Relative 1] took [number of products] from his shop before travelling to Jaghori via [District 1]. He then received a call from someone claiming to be a Taliban member. The caller said they had

captured his [Relative 1] in possession of [specific product] and that they had enforced Shari'a law and killed him in [District 1]. They threatened to also torture and kill him under Sharia law for selling [the specific product].

- He feared the Taliban would come for him so he fled Afghanistan.
- After he left, his family in Kabul were harassed because after the Taliban found [the specific product] in his [Relative 1's] car the news spread about his selling [the specific product]. People scolded them and called them infidels and said it was good his [Relative 1] was killed. His children were also bullied at school. Fearing the children would be abducted, they moved house regularly. They had no community support. No one helped when his [child] collapsed on the street from [a medical condition].
- In 2014 his wife, children and mother moved to [location], Ghazni. They sold their house in Kabul to pay for his [relative's] medical treatment in [country 2] (to treat a [condition]). His family now live in his basement. Their situation is very bad. They have no one to support them financially. His [child] is sick with [a medical condition] and does not have good medication. [They suffer frequently.]. His mother is also unwell. Ghazni is unsafe with Taliban and Daesh and it is too dangerous for his [children] to attend school. It is unsafe to travel in Ghazni.
- He fears being killed by the Taliban and Pashtuns because he is Hazara and Shi'a, because they have specifically threatened him for breaching Sharia law in selling [the specific product], because his father and [Relative 1] were targeted for [their work] and because he would be returning from a western country and would be perceived as an infidel.
- He fears the Taliban will come to power when the foreign forces leave Afghanistan.
- His mental health has deteriorated in Australia. He had been diagnosed with [a condition] and has taken medication. He has been seeing a psychologist on a weekly basis. He has memory problems, particularly with dates. He does not think he would cope in Afghanistan. Mental health issues are not acknowledged – he would be perceived as crazy.
- His physical health is also poor – he is on medication for [several specified conditions].

Refugee assessment

10. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

11. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:

- the person fears persecution and there is a real chance that the person would be persecuted
- the real chance of persecution relates to all areas of the receiving country

- the persecution involves serious harm and systematic and discriminatory conduct
- the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
- the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
- the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

Identity and credibility

12. There were some discrepancies around dates the applicant travelled to [country 1], his birth date and the name recorded on his Taskera however I accept the applicant's explanations for these issues. Overall, on the documentary evidence and consistent oral evidence provided by the applicant I accept his claimed identity and nationality and that Afghanistan is the receiving country for the purpose of this assessment. I accept the applicant is a Hazara Shi'a Muslim and while I accept he resided in Kabul from 2001 – 2012, I find that his home region is in Jaghori, Ghazni Province, Afghanistan. I also accept his family have since relocated from Kabul to Ghazni city.
13. The applicant has been generally consistent in his evidence since he arrived in Australia and at the SHEV interview he appeared to spontaneously recollect with an adequate level of detail the events leading up to his decision to leave Afghanistan, as well as the death and disappearance of his father and [Relative 1] in 2001 which prompted the family to move to Kabul. His claims are also plausible when considered with country information. I accept the applicant has been generally credible and I accept his claims in their entirety.

Risks in home region

14. Jaghori is a Hazara majority district in Ghazni and country information¹ indicates that Hazara Shi'as generally do not face a real chance of serious harm within the district. However, the applicant would need to travel there from Kabul and I have therefore had regard to the (mixed) commentary regarding recent attacks against Hazaras on the roads, particularly on the roads linking Kabul and the Hazarajat (which includes Jaghori) and the apparent motivations for those attacks. While I acknowledge the varied quality and objectivity in the reporting on relevant incidents, I give weight to DFAT's assessment that while ethnicity is rarely the primary motivating factor it can be a contributing factor or influence on the choice of target in road incidents.² In 2015 DFAT assessed that Hazaras travelling by road between Kabul and the Hazarajat do face a risk which is greater than other ethnic groups and that once a group of travellers is stopped, Hazaras are more likely to be selected for kidnapping or violence.³ I have considered more recent information⁴ and I am satisfied that this assessment is still applicable. I accept the applicant's appearance identifies him as a Hazara⁵ and that as a Hazara Shi'a he is at

¹ DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186; EASO, "EASO Country of Origin Information Report: Afghanistan – Security Situation", 20 January 2016, CIS38A8012395 (herein referred to as the 'EASO January 2016 report')

² DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

³ DFAT, "DFAT Country Information Report - Afghanistan September 2015", 18 September 2015, CISEC96CF13366

⁴ UNHCR "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660 (herein referred to as 'UNHCR 2016 Eligibility Guidelines'; DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

⁵ DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

greater risk while travelling to, and around his area. In consideration of all the evidence I find the applicant faces a real chance of serious harm through being kidnapped, subject to physical ill-treatment and/or killed by insurgents on the road in Ghazni for these reasons.

Risks in Mazar-e-Sharif

15. Section 5J(1)(c) of the Act requires that the real chance of persecution must relate to all areas of a receiving country. Notwithstanding the applicant's substantial links to Kabul having lived and worked there for the [number] years before he left Afghanistan and noting its large Hazara population, I have identified another place within Afghanistan with a substantial Hazara population⁶ where the applicant could reside without a real chance of persecution: Mazar-e-Sharif city, the capital of Balkh province.
16. The security situation throughout in Afghanistan is fluid and complex and I am mindful that the situation deteriorated throughout 2015 and 2016.⁷ There are widespread concerns about the Afghan government's capability and effectiveness in ensuring security and stability across Afghanistan. However, Balkh Province has maintained relative security for several years under its Governor Atta Mohammed who holds a monopoly on power, even in the province's most remote regions.⁸ Mazar-e-Sharif, like Kabul, carries heavy political and economic weight and has a strong military and police presence. Mazar-e-Sharif has been described as one of the safest cities in Afghanistan, much more so than Kabul, and has been relatively isolated from the conflict in the preceding decade. While civilian casualty rates have increased, Mazar-e-Sharif and Herat have consistently been the urban centres with the lowest counts of civilian victims.⁹ The government maintains effective control¹⁰ and there is no indication that such control would be lost in the reasonably foreseeable future.
17. Militant attacks have, nonetheless, occurred in Mazar-e-Sharif. Since 2014 there have been several attacks, however I find they have been infrequent and have been aimed at government or international community targets or with no identifiable target.¹¹ In most cases, the perpetrator was also unclear, although I accept they were Anti-Government Elements (AGEs). I note there is no evidence of any targeting against [specific product] sellers, [his father's occupation] workers, Hazaras / Shi'a's or returnees.

Risks arising from father and [Relative 1's] profile in Jaghori

18. I accept as the delegate did, that the applicant's father was killed and [Relative 1] disappeared from Jaghori in 2001 as claimed and that this prompted the family's move to Kabul. These were tragic events for the family and I accept the applicant's explanation as to the reasons they were targeted and that he has been too afraid to return to Jaghori. However, I note the events occurred in 2001, under the Taliban government, and that the applicant was absent from the area in ([country 1]) at the time. There is no evidence to suggest that he or any other members of his family (including those still in Afghanistan) have been threatened in relation to [their

⁶ EASO January 2016 report; EASO, "EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597 (herein referred to as 'EASO November 2016 report'); Lifos, "Hazaras in Afghanistan", 28 August 2015, CISEC96CF14239

⁷ DFAT, "DFAT Thematic Report on Security Conditions in Afghanistan: 1 January – 31 August 2016", 5 September 2016, CIS38A80121778; UNHCR 2016 Eligibility Guidelines; UNAMA, "Afghanistan Annual Report on Protection of Civilians in Armed Conflict: 2016", February 2017 (herein referred to as 'UNAMA February 2017 report')

⁸ EASO January 2016 report

⁹ EASO January 2016 report EASO November 2016 report

¹⁰ DFAT, "DFAT Thematic Report Hazaras in Afghanistan and Pakistan 26 March 2014", 26 March 2014, CIS2F827D91264

¹¹ EASO January 2016 report; EASO November 2016 report; UNAMA February 2017 report

work] or the dispute with the Kuchis, Pashtuns or local Taliban, or for any familial connection or association to their targeted relatives. There has also been a [number] year passage of time since these events occurred and since the family lived in the area and I consider this a significant period in the fluid Afghan security environment. Given these factors, I am not satisfied the applicant has been, or would be imputed with any adverse profile in relation to these matters upon return. I therefore find that he would not face a real chance of harm from Taliban, Kuchis, Pashtuns or others in relation to this upon return to Afghanistan. Accordingly I find he does not face a real chance of harm for these reasons in Mazar-e-Sharif.

Risks arising from the applicant's [specific product] sales

19. The applicant provided a convincing account of the reasons he became involved in selling [the specific product], how he conducted this business, how his [Relative 1] was killed in [District 1] after the Taliban found [this specific product] in his car and of the subsequent threat he received which promoted his immediate departure. His claims have been consistent since his arrival are plausible and consistent with country information about the illegal supply and [use] of [this specific product] in Afghanistan and of the Taliban's response to such breaches of Shari'a law at that time and about insecurity on the roads on the route travelled by his [Relative 1]. I accept as the delegate did, that the applicant's involvement in the sale of [specific product] came to the attention of the Taliban and subsequently to persons in his neighbourhood. I also accept that after he departed Afghanistan his mother, wife and children faced harassment, that his children were bullied by members of their own community and that they have since relocated to Ghazni city where they reside in a [relative's] basement and still experience such issues in the community there.
20. I have accepted the applicant's clandestine [specific product] sales in Kabul were discovered by the Taliban and that he was threatened on account of this in 2012. I accept that implementing Shari'a law is a strategic objective of the Taliban, that [using this specific product] is a serious, hadud crime and that the Taliban operate parallel justice systems.¹² However, country information indicates that although the Taliban have the capability to track persons of a low-profile throughout Afghanistan, its targets are generally of higher profile than the applicant.¹³ Additionally, information indicates that the Taliban's parallel justice is generally conducted in areas under its control, particularly rural areas, as opposed to in major urban centres under government control such as Mazar-e-Sharif. Country information indicates the Taliban's interest in Mazar-e-Sharif is in government and international community institutions/personnel and does not support they target [specific product] sellers.
21. I have accepted that the Taliban made his activities aware to members of the community in Kabul and that his family were subsequently harassed and bullied on account of this, in Kabul and Ghazni city. I note however, that the applicant's [specific product] sales were based in Kabul and that he supplied to people in Jaghori, and that his [Relative 1] was killed on a supply trip in [District 1] of Ghazni. The applicant has stated his business was conducted through word-of-mouth and given his business was located in Kabul and in Ghazni Province, it is not implausible that the applicant's activities became known to people in Ghazni. I find however, that the chance that the applicant would be identified by other Taliban or AGEs, or members of the community in Mazar-e-Sharif, is remote.
22. It has been four a half years since the applicant left Afghanistan, Kabul has grown exponentially in recent years and the situation has developed with respect to attitudes towards [this specific

¹² UNHCR 2016 Eligibility Guidelines

¹³ UK Home Office, "Country Policy and Information Note - Afghanistan - Fear of anti-government elements", 1 December 2016, OGD7C848D96

product] in Afghanistan. [This product] is readily available and [its use] is [rising]. [Details deleted]. A number of people in Kabul and different provinces are involved in [using] and selling the [product]. The sale and purchase of [this specific product] at several shops in [a specified] district of Kabul is openly [evident]. Vendors have been reported to [details deleted]. In one particular neighbourhood of Kabul, [named], it is reported that some [number of] shops were selling [the specific product] and general stores in [town] were reported to sell [the specific product]. Authorities reportedly have yet to take steps to prevent the sale of [specific product].¹⁴

23. I accept that in the immediate aftermath of the incident the applicant would have been of adverse interest to the Taliban and some members of the community due to smuggling [the specific product] and his escape from Afghanistan. However, Mazar-e-Sharif is under government control and country information does not support that the Taliban, or others in the community target [specific product] sellers in the city. There has been a four and a half year passage of time in which he has not engaged in the activity and has been absent from the country and taking these factors into account, as well as the increased size and diversity of not only Kabul, but also Mazar-e-Sharif and the shifting attitudes towards [the specific product], I am not satisfied that the applicant will be identified, or of adverse interest to anyone in another urban centre such as Mazar-e-Sharif or that he will be harmed in relation to this. I note there is no indication that the authorities have been made aware of the applicant's previous illegal activities selling [the specific product] in Kabul. I am not satisfied that the applicant faces a real chance of harm in Mazar-e-Sharif from the Taliban, members of the community, or the authorities on the basis of his previous [specific product] sales.

24. I accept from the applicant's application and his SHEV interview that he feels genuine shame, remorse and guilt about his involvement in selling [the specific product], the role that it played in his [Relative 1's] death and the position it placed his remaining family in, in Kabul. The applicant does not claim to have [used the specific product] and nor has he indicated that he would sell or [use this product] upon return. Even taking into account that I accept he previously did it out of desperation to boost his ability to provide for his family, given his shame at having sold [specific product] in the past I am not satisfied that he would be sell [this product] upon return. Accordingly I do not accept the applicant faces a real chance of harm for selling [this product] upon return.

Risks arising from Hazara Shi'a profile

25. I have considered the submissions made to the applicant's representative in the SHEV interview, the October 2016, January (email), February and April 2017 submissions to the IAA regarding inter alia, the threats posed by Islamic State, the Taliban and other AGEs and from violent sectarianism in the reasonably foreseeable future.

26. I am aware that UNAMA has noted a six-fold increase in civilian casualties from attacks targeting places of worship in 2016 compared with 2015.¹⁵ In Kabul, in 2015, an attack by unidentified perpetrators on a Sufi mosque killed 11 people and there were three attacks (one by Islamic State) on Shi'a sites with one person killed.¹⁶ In 2016, there were three attacks against Shi'as/Hazaras in Kabul city - in July, October and November 2016 and one attack in Khojagholak, near Mazar-e-Sharif city, in October 2016. There were also two recent attacks in Herat city

¹⁴[Deleted.]

¹⁵ UNAMA February 2017 report

¹⁶ Afghan Analysts Network (AAN), "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", 19 October 2016, CX6A26A6E11358

(November 2016, January 2017).¹⁷ Approximately 170 people have been killed and over 620 injured in these attacks.

27. Islamic State claimed responsibility for the four attacks against Shi'a's in Kabul since October 2015 and the July 2016 attack has been described as the most deadly incident in Kabul since the Taliban's fall in 2001, the largest single attack on Hazaras since the Ashura procession attack in Kabul in 2011 and the largest attack carried out in Afghanistan by a group linked to Islamic State.¹⁸ Islamic State has also released anti-Shi'a hate messaging/ propaganda threatening further attacks against Shi'as who it describes as apostates and accuses of fighting against Sunnis with the Syrian regime and being slaves to [country 1].¹⁹
28. Islamic State did not claim responsibility for the attacks in Herat. To date, attacks targeted against Shi'as in Balkh Province have been rare. There was an attack by Lashkar-e-Jangvi (LeJ) in Mazar-e-Sharif in 2011²⁰ and in September 2015, 13 Hazaras were kidnapped in Zari district by unknown gunmen.²¹ The October 2016 attack occurred 20km outside of Mazar-e-Sharif (not in Mazar-e-Sharif itself as some reports on the incident suggested). I note the representative contests that Islamic State was responsible, however of the wide commentary on this attack, most reported that no group had claimed responsibility.²² I am not satisfied that Islamic State was responsible for these attacks.
29. UNAMA has expressed grave concerns about what it describes as an emerging pattern of deliberate sectarian attacks against Shi'as and about Islamic State's increased capacity to strike beyond Eastern Afghanistan to further exacerbate the conflict.²³ Human Rights Watch (HRW) has taken a similar line suggesting that nowhere is safe for Hazaras.²⁴
30. I accept that Islamic State is trying to inject sectarianism into the conflict in Afghanistan. I accept they have a presence in parts of Balkh Province, that there are active cells in Kabul, that they have launched attacks in Kabul city, that they have an operational presence beyond the nascent stage and have potential for future recruitment. However, the Afghanistan Analysts Network (AAN) estimates their current Kabul cell numbers to be in the dozens rather than the hundreds.²⁵ The AAN states that Islamic State as an organisation has struggled to expand beyond the four districts in Nangahar, remaining so far, a limited threat. It assesses that Islamic State has the capability of carrying out fatal attacks on an occasional basis in the capital, although not yet at a sophisticated level and suggests that it is unlikely that Islamic State can single-handedly drive the conflict in a sectarian direction. The AAN identified 'reassuring' factors working against the rise of sectarianism such as that the attacks have been widely condemned by different actors in Afghanistan, including by the Taliban (discussed further below), and that the parties to the main

¹⁷ DFAT, "DFAT Thematic Report on Security Conditions in Afghanistan: 1 January – 31 August 2016", 5 September 2016, CIS38A80121778 ; UNAMA February 2017 report; AAN, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", 19 October 2016, CX6A26A6E11358

¹⁸ DFAT, "DFAT Thematic Report on Security Conditions in Afghanistan: 1 January – 31 August 2016", 5 September 2016, CIS38A80121778 ; UNAMA February 2017 report

¹⁹ UNAMA February 2017 report

²⁰ DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

²¹ Al Jazeera, 'Gunmen kill 13 civilian passengers in north Afghanistan' (6 September 2015)

²² Agence France Presse, "At least 14 dead, 24 injured as blast hits Shi'a mosque in Afghanistan", 12 October 2016, CX6A26A6E10840; The Washington Post, "2nd blast targets defiant Shiite worshipers in Afghanistan amid security fears", 12 October 2016, CX6A26A6E10827; Deutsche Welle, "IS claims responsibility for bomb attack that killed 14 in Afghanistan", 12 October 2016; Reuters, "Islamic State claims responsibility for deadly mosque attack in Afghan capital", 12 October 2016, CX6A26A6E10825; UNAMA February 2017 report

²³ UNAMA February 2017 report

²⁴ Human Rights Watch, "Afghanistan: Shi'a Bombing Spotlights Need to Protect", 21 November 2016, CX6A26A6E13632

²⁵ AAN, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", 19 October 2016, CX6A26A6E11358

conflict, the Afghan security forces and the Taliban, as well as Shi'a and Sunni religious leaders, and the population of the country more generally, remain opposed to sectarianism.²⁶ I accept Islamic State has aspirations for a leadership position in the insurgency above that of the Taliban but it has not achieved this and I am not satisfied that its overall influence is such that the Taliban or other key actors will support its sectarian slant in the reasonably foreseeable future. I am not satisfied that a violent sectarianism is likely to take hold in Afghanistan in the reasonably foreseeable future such that the applicant will be harmed in Mazar-e-Sharif.

31. Previous DFAT advice has indicated that Islamic State has limited capacity and influence in Afghanistan, and that civilians in Afghanistan faced a low risk of violence from the organisation compared to the risks to high profile groups from other AGEs and the threat of violence generally in that country.²⁷ While this advice pre-dates the 2015 and 2016 attacks, other sources also indicate that Islamic State is struggling to control territory and its efforts to establish itself in other parts of Afghanistan have in large part failed.²⁸ By May 2016 its activities were limited to Logar, Nangahar and Kunar Provinces. In September last year EASO reported that Islamic State had only a limited presence outside Nangahar and that its attempts to infiltrate provinces other than Nangahar were short-lived.²⁹
32. The government maintains effective control in Mazar-e-Sharif and the Balkh provincial government has been actively managing clearance operations in the districts of Balkh.³⁰ Even taking into account the ANSF's shortcomings and the further withdrawal of international troops, I am persuaded that the continued efforts of the Afghan government, international community and even the Taliban's efforts to eliminate Islamic State and to counter its influence will likely limit any foothold expansion in the year ahead.³¹ I consider DFAT's assessment about Islamic State having limited capacity and influence is still current. I accept the serious threatening nature of Islamic State propaganda and attacks and while they will probably continue to conduct attacks in urban areas of Afghanistan in consideration of the information before me I am not satisfied that such attacks will occur with such frequency in Mazar-e-Sharif as to lead to a real chance of serious harm for the applicant.
33. I accept the Taliban continue to remain a significant force and present security risks throughout parts of the Hazarajat and other vast tracts of Afghanistan. There are high confidence Taliban support zones and Taliban activity in parts of Balkh province and government forces have been engaged in clearance operations.³² However even noting this, and taking into account that the applicant and his family previously came to the Taliban's adverse attention I am not satisfied the applicant would have requisite proximity as to give rise to a real chance of serious harm, when considered with other country information. The only recent attack claimed by the Taliban in Mazar-e-Sharif was against the German consulate and I am satisfied had no sectarian motivation³³. The Taliban's ideology has shifted. It has specifically condemned recent attacks

²⁶ AAN, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", 19 October 2016, CX6A26A6E11358; DFAT, "DFAT Thematic Report on Afghanistan Security Conditions 1 January to 31 August", 5 September 2016, CIS38A80121778

²⁷ DFAT, "DFAT Country Information Report - Afghanistan September 2015", 18 September 2015, CISEC96CF13366

²⁸ IHS Jane's Intelligence Weekly, "Islamic State-aligned militants likely to struggle for operational foothold in Afghanistan despite first successful attack", 25 July 2016, CX6A26A6E7093

²⁹ EASO in UK Home Office, "Country Policy and Information Note - Afghanistan - Fear of anti-government elements", 1 December 2016, OGD7C848D96

³⁰ EASO January 2016 report; EASO November 2016 report

³¹ IHS Jane's Intelligence Review, "Assault on Shi'a shrine in Kabul likely to have been conducted by Islamic State, indicating resilient attack capability", 12 October 2016, CX6A26A6E11042; IHS Jane's Intelligence Review, "Islamic State-aligned militants likely to struggle for operational foothold in Afghanistan despite first successful attack", 25 July 2016, CX6A26A6E7093;

³² EASO November 2016 report - in reference to a threat assessment from the Institute for the Study of War (ISW)

³³ UNAMA February 2017 report

against Shi'as and spoken out convincingly against sectarianism.³⁴ There is no recent evidence of the Taliban or other AGEs/insurgent groups targeting Shi'as in or around Mazar-e-Sharif.

34. DFAT assesses that Shi'as' formal legal position and interests are largely respected and that official discrimination on the basis of religion – including between Sunni and Shi'a Muslims - is low.³⁵ DFAT also has no evidence of any official policy of discrimination pursued by the Government on the basis of ethnicity,³⁶ nor any information to suggest that Hazaras are significantly less able to avail themselves of state protection than other ethnic groups.³⁷ Ethnic minorities have their own media outlets, political parties and politically active representatives. While it is acknowledged that Hazaras are underrepresented in senior government positions, Hazaras are active in the Afghan community, particularly in politics, education and civil society, including by holding protests without government intervention.³⁸ I am satisfied that Hazara Shi'as are free to participate fully in public life and do not face discrimination from the government or authorities. I do not accept the Afghan government would be unwilling to protect Hazaras and / or Shi'as and considering the information above and below, I consider it too speculative to suggest that AGEs would exercise control or otherwise render the government incapable of control in Mazar-e-Sharif in the reasonably foreseeable future.
35. Since 2011 there have been two mass casualty attacks against Shi'as in and near Mazar-e-Sharif and a serious incident in Zari district of Balkh, and Shi'a's have recently been targeted in Kabul in serious attacks. There have also been attacks in other provinces, particularly, as noted above, on the roads. However there has been no further targeting of Shi'as in Mazar-e-Sharif city by LeJ since 2011. I am not satisfied the October 2016 attack outside Mazar-e-Sharif is attributable to Islamic State, IMU, Al Qaeda, Hezb-e-Islami, Sunni extremists based in Pakistan or the Taliban, or that the incident is indicative of the onset of a sectarian campaign in Balkh by them or any other insurgent or terrorist groups. Recent security incidents in Mazar-e-Sharif have been infrequent and targets of other insurgents have generally been government or international community institutions or without a clear target. Notwithstanding the seriousness and gravity of recent attacks, when having regard to the strong security presence and that the government maintains effective control, the limited capacity of Islamic State and its lack of territorial foothold in Balkh, the size and diversity of the population in the city, and the applicant's lack of other profile or proximity connected to government/international community/those in high profile groups targeted by other insurgents in Mazar-e-Sharif, and the infrequency of security incidents in the city, I find the chance of the applicant being seriously harmed on the basis of his race, religion or for any other reason by Islamic State, Taliban, or other AGEs in Mazar-e-Sharif is remote, and therefore not real.
36. At the societal level, DFAT describes ethnic based violence in Kabul as rare and there is no information to indicate the situation is different in Mazar-e-Sharif. Purely inter-faith violence across Afghanistan is also rare.³⁹ I note there have been clashes and various forms of societal discrimination against Hazaras, I am not satisfied they occur with such frequency and / or severity that it would lead to a real chance of serious harm for the applicant in Mazar-e-Sharif.
37. I am not satisfied the applicant faces a real chance of serious harm from AGEs, other ethnic groups or the government on the basis of his being Hazara and / or Shi'a in Mazar-e-Sharif.

³⁴ AAN, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", 19 October 2016, CX6A26A6E11358

³⁵ DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

³⁶ DFAT, "DFAT Country Information Report - Afghanistan September 2015", 18 September 2015, CISEC96CF13366

³⁷ DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186,

³⁸ DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

³⁹ DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

Other claims

38. I have considered whether the applicant's return to Afghanistan as a failed asylum seeker who has lived several years in Australia (a western country) and his Hazara Shi'a identity may lead others to adversely perceive him as a supporter of the Afghan government or international community/the west and whether this would contribute to a risk of harm.
39. Country information indicates that Hazaras are widely perceived to be affiliated with both the government and international community⁴⁰ and AGEs target 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.⁴¹ DFAT notes there are occasional reports (including two from 2014)⁴² of returnees from western countries including Australia allegedly being targeted for having spent time in a western country. However there have been no reports of individual returnees being targeted since those two sporadic incidents in 2014. I do not accept the incidents indicate systematic targeting of returnees. DFAT assesses that returnees from western countries are not specifically targeted on the basis of their being failed asylum seekers and that Hazara returnees who are not directly associated with the government or the international community currently do not face a higher level of risk upon return than returnees from other ethnic groups.⁴³
40. I am not satisfied he would be identified as having a direct association with the Afghan government or international community in Mazar-e-Sharif and I have not accepted he would be identified as [a specific product] seller there. I am not satisfied that in a major urban area like Mazar-e-Sharif, which has a diverse, ethnic population and has seen growth from returnees and Internally Displaced Persons (IDPs) over the years, that the applicant would face a real chance of being seriously harmed as someone who lived several years in Australia, as a returnee from the west and who previously sold [the specific product], because he sought asylum, is of Hazara race and Shi'a religion.
41. Ethnic, tribal and familial connections still play an important role in daily life such that discrimination tends to occur in the form of nepotism. According to DFAT, ethnic discrimination generally manifests in the form of giving positive preference in favour of one's own particular ethnic and religious groups, rather than in the form of negative discrimination against others.⁴⁴ DFAT also indicates that the risk of discrimination may be significantly higher for returnees from western countries who do not maintain a low profile such as by taking steps to conceal their association with the country from which they have returned.⁴⁵ The applicant has never lived in Mazar-e-Sharif and I accept that upon meeting him, the applicant would be identifiable as an outsider there. I accept the applicant may face societal discrimination on the basis of his Hazara race and that this risk may be increased as a result of his return from a western country.⁴⁶ I also accept the applicant's poor mental and physical health will be a further challenge to integration. However I am not satisfied on the available information that the applicant would suffer ill-treatment of a nature amounting to a threatened capacity to subsist, or other harm amounting to persecution in Mazar-e-Sharif for these reasons.

⁴⁰ DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186

⁴¹ UNHCR 2016 Eligibility Guidelines

⁴² DFAT, "DFAT Country Information Report - Afghanistan September 2015", 18 September 2015, CISEC96CF13366; UNHCR 2016 Eligibility Guidelines

⁴³ DFAT, 'DFAT Thematic Report – Hazaras in Afghanistan', 8 February 2016, CIS38A8012186

⁴⁴ DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186; DFAT, "DFAT Country Information Report - Afghanistan September 2015", 18 September 2015, CISEC96CF13366

⁴⁵ DFAT, "Country Information Report - Afghanistan September 2015", 18 September 2015, CISEC96CF13366

⁴⁶ DFAT, "Country Information Report - Afghanistan September 2015", 18 September 2015, CISEC96CF13366

42. Most returnees are returned to Kabul. I am satisfied the applicant would be able to safely and legally access Mazar-e-Sharif by air after being returned to Kabul.⁴⁷ I note there have been attacks in and around Kabul airport and on the road to the city. I consider that any period of time he would need to spend in and around Kabul city, or the airport in Kabul or in Mazar-e-Sharif, or on the road linking those airports to their respective cities would be brief. Having regard to the country information before me I am satisfied that there is a strong military presence in both cities and there is likely to be so in the reasonably foreseeable future. I am satisfied that such attacks have been infrequent and the government and security forces maintain effective control over both cities, including their airports and I am satisfied that this will not change in the reasonably foreseeable future.⁴⁸ The applicant does not have a high profile and I am satisfied he is not of personal interest to any AGEs. Even taking into account the attacks against Shia's in Kabul in 2016, when having regard to all the factors above, to the significant security and armed presence and government control in the city and airport, and that it would be a transit point or journey only, I do not accept that past attacks preclude the possibility of the applicant being able to safely use the Kabul and Mazar-e-Sharif airports, nor the roads to those cities. I find the chance of the applicant being seriously harmed while in transit to Mazar-e-Sharif is remote. Accordingly, I am satisfied there is not a real chance of him facing serious harm before accessing Mazar-e-Sharif city.
43. Country information does not support that persons with the applicant's profile are targeted in Mazar-e-Sharif. I have noted above that the security situation in Afghanistan remains fluid and I accept it declined nationally in 2015 and 2016. However, while the country information cited above indicates that sporadic insurgent attacks do occur within the city and more broadly within the Balkh Province, there is no indication that the Afghan government or security forces are losing control of Mazar-e-Sharif. Even taking in account the recent security incidents listed above, I am not satisfied that incidents are occurring with such frequency as to indicate that the applicant faces a real chance of violence targeted against him, nor getting caught up in attacks or other violence from insurgents/AGEs, or between such groups and Afghan government/international forces in the city or en route to it. I am not satisfied that he faces a real risk of suffering serious harm in the form of targeted or generalised violence in Mazar-e-Sharif, at its airport or in transit from the airport to the city.
44. On the evidence before me, I am not satisfied that the applicant faces a real chance of being killed, or otherwise suffering serious harm in Mazar-e-Sharif from AGEs, the government or members of the community on the basis of his profile as a previous [specific product] seller and family member of those targeted for a confrontation and for [their work] in 2001, as a Hazara male with poor mental and physical health who has lived outside Afghanistan for several years including in a western country such as Australia from where he would be returning after having sought asylum, or as someone with any actual or imputed connection with or support for the Afghan government, western or international community. I also have not accepted he would face a real chance of serious harm from generalised violence. I am not satisfied that the applicant's circumstances would, individually or cumulatively, lead to a well-founded fear of persecution in Mazar-e-Sharif, or in accessing that city, in the reasonably foreseeable future.

Refugee: conclusion

45. 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).

⁴⁷ Zabihullah Ihsas, "Balkh airport terminal inaugurated", Pajhwok Afghan News, 9 June 2013

⁴⁸ DFAT, "DFAT Thematic Report Conditions in Kabul - September 2015", DFAT, 18 September 2015, CISEC96CF13367; EASO November 2016 report

Complementary protection assessment

46. 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

47. 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.

48. I have found above that the applicant would face a real chance of being seriously harmed on the roads in the Ghazni Hazarajat. For the same reasons, and applying the authority in *MIAC v SZQRB* (2013) 210 FCR 505, I am also satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's removal to Afghanistan, the applicant will face a real risk of significant harm if he returns to and lives in his home area.

49. 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.

50. I found above the applicant would not face a real chance of being killed or otherwise suffering serious harm from AGEs, the government or others in Mazar-e-Sharif on the basis of his profile as a Hazara male whose family members were targeted for their conflict with Kuchis and [their work] in Jaghori, and who was known to the Taliban and members of the community as [a specific product] seller, because he has lived outside Afghanistan for several years including in a western country such as Australia where he also sought asylum, because he would be a returnee from the west, nor for any actual or imputed connection with or support for the Afghan government, western or international community. For the same reasons and because 'real chance' equates to 'real risk', I am also not satisfied that the applicant faces a real risk of suffering significant harm in returning to, and residing in Mazar-e-Sharif.

51. I found that while the applicant may face some societal discrimination, but that even if he is initially recognised as an outsider, and taking into account his mental health, I did not accept he would face discrimination for any reason that would threaten his capacity to subsist. I am not satisfied the applicant would face discrimination or other mistreatment that would manifest in a way that would arbitrarily deprive the applicant of his life or have the death penalty carried out against him. There is also no evidence to indicate that he will be subject to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment intentionally inflicted. I do not therefore accept that he will face discrimination for any reason in Mazar-e-Sharif that would amount to significant harm for the purposes of s.36(2A).

52. I found above that the chance of the applicant suffering serious harm from violence targeted against him or from generalised violence in Kabul (en route to Mazar-e-Sharif) or Mazar-e-Sharif, including on arrival at the airports and in the course of accessing those cities, was remote (and therefore not real). As 'real chance' equates to 'real risk', for the reasons discussed above I am also not satisfied that the applicant faces a real risk of suffering significant harm in returning to, and residing in Mazar-e-Sharif.
53. Having regard to the applicant's personal circumstances, I have considered whether it is reasonable for the applicant to relocate to Mazar-e-Sharif.
54. UNHCR considers that relocation within Afghanistan is reasonable only where the individual has access to shelter, essential services (sanitation, health care, education) and livelihood opportunities, and a traditional support network of members of his or her (extended) family or members of his or her larger ethnic community.⁴⁹ DFAT also notes that in Afghanistan, ethnic, tribal and family affiliations are important factors. Kinship is central to identity and acceptance in the community, including for finding shelter and employment, and therefore Afghans tend to reside in places their ethnic group constitutes the local majority.⁵⁰ Traditional extended family and tribal community structures of Afghan society are the main protection and coping mechanisms for people in Afghanistan, who rely on these networks for their safety and economic survival, including access to accommodation and an adequate level of subsistence.⁵¹
55. UNHCR advises that there are exceptions to the requirement of external support, being, single able bodied men and married couples of working age without identified specific vulnerabilities. UNHCR considers that such persons may, in certain circumstances, be able to subsist without family and community support in urban and semi-urban areas that have the necessary infrastructure and livelihood opportunities to meet the basic necessities of life and that are under effective Government control (as Kabul and Mazar-e-Sharif are).⁵² DFAT also assesses internal relocation is generally more successful for single men of working age - provided they are able to make use of family or tribal networks. DFAT has stated that a lack of financial resources and lack of employment opportunities are the greatest constraints on successful internal relocation⁵³ and that unemployment and underemployment are high across Afghanistan.⁵⁴

While I have not accepted the applicant's poor physical or mental health would contribute to a real chance of persecution or real risk of significant harm I consider they are critical factors when considering whether his relocation to Mazar-e-Sharif would be reasonable. While the applicant has industry relevant experience in [two areas of] work which would be conducive to his employment prospects upon return, I note his health conditions have prevented him from working in Australia and I have doubts that he would be returning as an able bodied man, such as envisaged in the UNHCR's guidance. I also have serious concerns about his ability to adjust in an unfamiliar place without family networks or other support. I have had regard to the psychological reports provided and I note that the applicant has required regular treatment sessions in the past five months and that he has been assessed as having [some conditions] and is described as suffering [a further condition].

⁴⁹ UNHCR 2016 Eligibility Guidelines

⁵⁰ DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186; DFAT, "Country Information Report – Afghanistan", DFAT, 18 September 2015, CISEC96CF13367

⁵¹ DFAT, "DFAT Country Information Report – Hazaras In Afghanistan", 8 February 2016, CIS38A8012186

⁵² UNHCR 2016 Eligibility Guidelines

⁵³ DFAT, "DFAT Country Information Report – Hazaras In Afghanistan", 8 February 2016, CIS38A8012186

⁵⁴ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186

56. Country information that was before the delegate indicates that the Afghan health system has improved since 2001, albeit from a low base and that basic healthcare services are provided for free. However it also indicates that medications can be expensive and / or out of date, excluding the poor from treatment for common illnesses. The applicant has [several specified conditions] for which he has received regular treatment and medication in the past year in particular and I accept that his mental illness has impacted on his essential daily functioning. He has not formed friendships or social connections with others in Australia and while I have had regard to the fact that the culture and ethnic groups would be more familiar in Mazar-e-Sharif, I am not satisfied that he is in a position to make the necessary social connections to obtain shelter, work and to access his required services in the reasonably foreseeable future upon return.
57. The applicant is also the only adult male remaining in his family and therefore responsible for them. I accept that his family are living in difficult conditions in a relative's basement. I also note his [child] is unwell and requires medication and medical treatment and that even in Australia the applicant has been financially supporting [that] treatment. Although he has been living apart from his family already, I accept he is distressed by their circumstances and his separation from them. I am not satisfied he could establish himself in Mazar-e-Sharif to a position that he could make arrangements for them to join him, and I am not satisfied in his particular circumstances that it is reasonable for him to remain in Mazar-e-Sharif, apart from his family.
58. I consider the applicant's physical and mental illnesses are vulnerabilities and I am not satisfied that he would be in a position to obtain and keep work such that he could provide for himself while attending to his health issues which I accept are severe, particularly when he has no other family or other personal links to support him. Overall, I am not satisfied the applicant has the capacity to enable himself to subsist in Mazar-e-Sharif.
59. In addition to Mazar-e-Sharif, I have considered whether it would be reasonable for the applicant to relocate to another area under government control where there are substantial populations of Shi'as such as Kabul or Herat. I note in particular, DFAT reporting that Kabul has better opportunities for employment, education and access to healthcare than in other parts of Afghanistan. However I accepted the applicant and his family have been harassed on account of his [specific product] sales in Kabul and I accept he could not return to his familiar neighbourhood in the Hazara community there. I find he cannot safely travel to join his family in Ghazni city. I find that he would also still face the same challenges in relocating to Kabul, Ghazni city or Herat that would also not be reasonable for the applicant in his circumstances. Taking into account the same reasons discussed above in relation to Mazar-e-Sharif, I am also not satisfied that it is reasonable for the applicant to relocate to another part of Afghanistan.

Complementary protection: conclusion

60. There are substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicants will suffer significant harm.

Decision

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

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm

Applicable law

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.

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

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