



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA16/00945

Date and time of decision: 30 March 2017 12:32:00

Matthew Tubridy, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a national of Afghanistan. [In] December 2015 the applicant lodged an application for a Safe Haven Enterprise visa (SHEV). A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] September 2015.

Information before the IAA

2. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. I have obtained new information, specifically reports addressing the security situation in Afghanistan for Shia Hazaras.¹ These reports contain information not specifically about the applicant but about Shia Hazaras, a class of persons of which the applicant is a member. Given that these reports address the developed situation for such persons in the context of attacks which occurred after the date of the delegate's decision [in] September 2016, I am satisfied that there are exceptional circumstances to justify considering this information.
4. [In]October 2016 the applicant's representative provided the IAA with a submission. For the most part the submission engaged in argument with the delegate's decision with reference to the evidence that was before the delegate, including a quote from US Department of State travel advice of 22 June 2016 which was also quoted in a William Maley letter of support for Afghan Shia Hazaras which was before the delegate. I have had regard the representative's arguments. The submission also refers to several reports regarding attacks upon Shias and/or Hazaras in Afghanistan which were not before the delegate and which may be relevant, and which therefore amount to new information.² As all of these reports were published after the date of the delegate's decision, and as all of them address the developed situation for Shia Hazaras in Afghanistan, I am satisfied that this is information which could not have been provided to the delegate before the date of the delegate's decision and that there are exceptional circumstances to justify considering this information.

Applicant's claims for protection

5. The applicant's claims are contained in the information referred and subsequently given to the IAA. They can be summarised as follows:
 - He is a national of Afghanistan, and ethnic Hazara and a Shia Muslim. He originates from the [Town 1] area of Jaghori District in Afghanistan's Ghazni province.

¹ Landinfo, "Hazaras and Afghan insurgent groups", 3 October 2016, CIS38A80122778; "Assault on Shia shrine in Kabul likely to have been conducted by Islamic State, indicating resilient attack capability", Jane's Intelligence Review, 12 October 2016, CX6A26A6E11042; Human Rights Watch (HRW), "Afghanistan's Shia Hazara Suffer Latest Atrocity", 13 October 2016, CX6A26A6E11295; "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", Afghan Analysts Network (AAN), 19 October 2016, CX6A26A6E11358; "Death Toll Rises To 30 In Kabul Mosque Bombing", Tolo News, 21 November 2016, CX6A26A6E13647; "Afghanistan Kabul mosque suicide attack kills dozens", BBC News, 22 November 2016, CX6A26A6E13651; UN Assistance Mission in Afghanistan (UNAMA), "Afghanistan: Protection of Civilians in Armed Conflict – Annual Report 2016", 6 February 2017, CISED50AD201; US Department of State, "Afghanistan 2016 Human Rights Report", 3 March 2017, OGD95BE926858.

² "Kabul shrine attack kills Shia Muslims during Ashura", BBC News, 11 October 2016, CX6A26A6E15049; "Powerful mosque explosion kills 14 Shias in Afghanistan", Press TV, 12 October 2016, DU170327090718142.

- In 1997 the Taliban were in control of Afghanistan and the situation for Shia Hazaras was very dangerous. He went to [country 1]. He remained in [country 1] four years before returning to Afghanistan to get married. He then returned to [country 1] where he lived for almost seven years. He was regularly deported to Afghanistan, especially in the last three years, but had to return to [country 1] as the situation in Afghanistan was not stable for Shia Hazaras and the Taliban were controlling the roads.
- Around 2009 two girls in his village became pregnant. The applicant was falsely accused of raping these girls by Mr M, who was the father of one of the girls and the father-in-law of the other. The applicant's family had a history of disputes with Mr M and his family over land. Mr M is Hazara, however, he is against Hazaras and paid by the Taliban to assist them. He has a strong power base and is connected with the government. Mr M was powerful and had said that he wanted to kill the applicant. In order to avoid harm the applicant moved with his family to Ghazni where he worked in a [trade business]. One day he was attacked by three men in the [work place]. He was badly beaten and was attacked with a sharp object and still has a scar from this. People from the surrounding area intervened and he managed to escape as the [work place] became busy. He knew the men were sent by his enemy in the village. The next day he travelled to Khandahar and then to Quetta. While in Khandahar he received a call from Mr M saying that the applicant would not be able to escape forever and that Mr M would kill him.
- The situation in Quetta was dangerous for Shia Hazaras and he kept moving between [country 1] and Pakistan. His life was very difficult in both countries and he had no legal right to reside in either Pakistan or [country 1]. He returned to Kabul for a short period of time and obtained a passport to travel abroad. While in Kabul he witnessed very poor security and he took precautions to avoid serious harm. He would move between hotels to avoid detection. There is no way he could reside in Kabul on a permanent basis. He has no property or support network in Afghanistan. He would be at risk of exploitation and serious harm.
- The applicant fears that Mr M will hunt him down and kill him no matter where he resides. He also fears harm from the community and the authorities because of Mr M's accusations. He also fears being harmed by the Taliban and other extremists groups like Daesh (Islamic State) for reason of his Hazara race and his Shia faith. He also fears harm from the Taliban because he would be perceived as an affiliate of the west because he has sought asylum in, and spent time in, a western country, and would be a returnee from the west and a failed asylum seeker.

Refugee assessment

6. 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

7. 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.
8. The applicant claims to be a national of Afghanistan, an ethnic Hazara and a Shia Muslim who originates from a village in the [Town 1] area of Jaghori District in Afghanistan's Ghazni Province and this is not in dispute. I accept that the applicant is a national of Afghanistan and I find that Afghanistan is the applicant's receiving country for the purpose of this review. I also accept that the applicant is a Shia Hazara who originates from the [Town 1] area of Jaghori District. The applicant claims that his father has disappeared in unknown circumstances after travelling from Quetta, in Pakistan, to [country 1] following the death of the applicant's mother from [illness] in 2011. There is no issue to this claim and I accept that this is the case.
9. At the SHEV interview the applicant was asked to explain the dispute which his family had with Mr M over land. The applicant said that he did not have any problem with Mr M but his father had before because Mr had a lot of power with the government and the Taliban and the applicant's family did not have any power and Mr M wanted to occupy their lands, and this was the problem. The applicant was asked if he personally dealt with the land dispute or whether it was just the applicant's father who did this. The applicant replied that when the fighting started he was there with his father, when they came and started beating his father, and he was very young maybe 10 but under 16 years of age, and could not do anything. Asked if the dispute was resolved before the applicant went to [country 1], the applicant said that it was not resolved and they still had the problem. It was put to the applicant that he had previously indicated at his arrival interview that he had sold his land to pay the smugglers. The applicant responded that the land he had sold his own land in the [District 1] (and that he had purchased this land at the time of his marriage to build a home on). He said the dispute was over his father's land which was farming land. While I am prepared to accept the applicant was referring to land he had purchased in [District 1] as the land he sold to pay the smuggler, I nonetheless find the applicant's evidence regarding a dispute over farm land owned by his father with Mr M to be unconvincing. While the applicant may have been young when the matter commenced, the applicant was certainly an adult at the time when he claims this matter was of central importance to his own security. Given that the lack of detail in the applicant's evidence concerning the specifics of how the dispute began, or even of the particulars of the land in question, I have not found the applicant's evidence in this regard to be convincing.
10. Further to this, in his written statement the applicant submitted that in around 2009 two girls in his village became pregnant. The applicant was falsely accused of raping these girls by Mr M, who had said he wanted to kill the applicant. In order to avoid harm the applicant moved with his family to Ghazni where he worked in a [trade] shop. One day he was attacked by three men in the shop. He was badly beaten and was attacked with a sharp object and still has a scar from this. People from the surrounding area intervened and he managed to escape as the shop became busy. He knew the men were sent by his enemy, Mr M. However, at the SHEV

interview the applicant stated that Mr M was one of the three men who attacked him in the [trade] shop. Moreover, whereas in the written statement the applicant's move to Ghazni occurred after Mr M accused the applicant of raping the girls and had threatened to kill him, at the SHEV interview the applicant these accusations were made after the applicant had moved to Ghazni.

11. Following the defeat of the Taliban in 2001, and up to the present, the district of Jaghori has effectively been under the governance of Hezb-i Wahdat militia aligned with the Afghan government, and that these commanders have subjected the population to various abuses including extortion.³ UNHCR has observed that, in Afghanistan, land ownership is in many cases difficult to establish and, as a result, land disputes are common and frequently turn violent. Land grabbing is reportedly widespread, reportedly often involving powerful actors with connections to the Government, as well as public officials.⁴ It is not implausible that a powerful actor of this kind might act against an ordinary member of the population in a rural locality like Jaghori District. However, the applicant's claim is that Mr M is a Hazara who is also against Hazaras and who is paid by the Taliban to assist them. Moreover, at the SHEV interview the applicant stated that Mr M had formerly been a part of Hezb-i Wahdat but had left to join with the Taliban when the Taliban took power in Jaghori. During the period in which the Taliban controlled Jaghori between 1998 and 2001 it is true that the Hazara population of Jaghori collaborated with the Taliban insofar as was necessary to avoid persecution, and that following the 2001 defeat of the Taliban and return of Hezb-i Wahdat to Jaghori there was little retribution against those who collaborated with the Taliban in this way. However, in cases where some high profile individuals or political groups collaborated in order to enlist the help of the Taliban against their political opponents, there have been some incidents of the revenge killing of such individuals.⁵ I find it implausible that a powerful figure who had actually left Hezb-i Wahdat to join the Taliban could have avoided retribution of this kind following the return of Hezb-i Wahdat to Jaghori in 2001. Moreover, and given the absence of Taliban activity in Jaghori itself and the antipathy of the local ruling Hezb-i Wahdat commanders and the broader population towards the return of the Taliban, I find it implausible that Jaghori's ruling figures would tolerate the presence of a Hazara who is against Hazaras and a Taliban collaborator.
12. Given the unconvincing evidence provided by the applicant in the above regards, and the implausible claim that Mr M was a powerful Jaghori figure formerly connected to Hezb-i Wahdat and now closely connected to the Taliban and the Afghan government, I do not accept that the applicant has ever been accused of rape, or that his family has had a land dispute with Mr M, as he claims. Given this, I am not satisfied that the applicant would face a real chance of harm from Mr M, the Taliban, or anyone else, for any reasons associated with a land dispute or allegations that the applicant raped two women.
13. I am, nevertheless, satisfied that the applicant would face a real chance of being abducted and killed if he attempted to return to his home area in the [Town 1] area of Jaghori District in Afghanistan's Ghazni Province. In order to reach his home area the applicant would be required to travel overland from an airport in one of Afghanistan's major cities, and in February 2016 DFAT advised that most areas of Afghanistan outside of Kabul and the Hazarajat generally have high levels of insecurity, and are considered dangerous for people of all

³ DIBP Country of Origin Information Section (COIS), "Background Paper: Afghanistan - Jaghori District", August 2014, CR1211AE730, p.17.

⁵ DIBP Country of Origin Information Section (COIS), "Background Paper: Afghanistan - Jaghori District", August 2014, CR1211AE730, p.17.

ethnicities, including Hazaras, in terms of travel.⁶ There were several incidents of Hazaras being kidnapped in Ghazni Province in the second half of 2015, including a group of seven Hazaras who were kidnapped in Ghazni Province in October and later murdered. There was speculation that the killings were carried out by Daesh, and local Taliban leaders claimed to have tried and immediately hanged the perpetrators. However, authorities from the Afghan National Directorate of Security (NDS) were reported in the media as suggesting that the Taliban were responsible—it is unclear which faction may have been involved. DFAT assesses that while no ethnic group is immune from kidnappings, Hazaras travelling by road between Kabul and the Hazarajat face a greater risk than other ethnic groups. It is unclear whether this is due to ethnic targeting or is a result of the high numbers of Hazaras travelling on this route. On the basis of consultations in Kabul with government authorities, international agencies and civil society organisations, DFAT assesses that, if a bus with a mixture of ethnic groups on board is stopped in these areas, ethnic Hazaras (and other non-Pashtuns) are more likely to be selected for kidnapping or violence than are Pashtun passengers. The motivations for the abductions reportedly included financial gain, intimidation and extracting concessions from other parties to the conflict such as a hostage exchange. DFAT has assessed that while ethnicity may not be a primary motivation for an abduction incident, it may have an influence on the selection of victims.⁷

14. In February 2017 UNAMA's most recent annual report documented a decline in the number of Hazara civilians abducted in 2016. In 2016, UNAMA documented the abduction of Hazara civilians in Baghlan, Uruzgan, Sari Pul, Daikundi, Maidan Wardak and Ghor provinces. AGEs released most Hazara abductees unharmed, while five were killed including three in Sari Pul, one in Ghor, and one in Baghlan. In contrast to 2015, UNAMA documented no incidents of the abduction of Hazara civilians in Ghazni province, with sources reporting that abductions in previously affected areas may have been deterred by the establishment of security check-posts by Afghan national security forces.⁸ Nevertheless, given the fluid nature of road security in areas outside of Afghanistan's government controlled urban centres, and given DFAT's assessment of the level of risk faced by travellers and the manner in which Hazaras may face a higher level of risk than others, I am satisfied that the applicant would face a real chance being abducted and/or killed by an insurgent, and/or a criminal, group for reason of his being a Shia Hazara while travelling the roads through rural areas under the influence of such groups in the course of returning his home area. Although, as has been noted above, most Shia Hazaras who are abducted in such circumstances are released unharmed,⁹ such persons have been deprived of their liberty for many months while the terms of their release has been negotiated. I consider that such abduction and captivity amounts to serious harm.
15. However, pursuant to s.5J of the Act the real chance of persecution must relate to all areas of the receiving country. At the TPV interview it was put to the applicant that Kabul may be a place where he could reside without facing a real chance of harm. The applicant said that Mr M would find him and kill him in Kabul. In his written statement the applicant submitted that during the short period of time he spent in Kabul prior to his departure from Afghanistan by air in January 2012, he would move between hotels to avoid detection. As has been noted above, I do not accept that applicant ever has had a land dispute with, or been threatened by, Mr M and I am not satisfied that the applicant would face a real chance of harm on this basis from Mr M, or any other actor, in Kabul or anywhere else. Moreover, given that I do not accept that

⁶ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 2.24.

⁷ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 2.25-2.33

⁸ UNAMA, "Afghanistan: Protection of Civilians in Armed Conflict – Annual Report 2016", 6 February 2017, CISEDB50AD201, p.68.

⁹ UNAMA, "Afghanistan: Protection of Civilians in Armed Conflict – Annual Report 2016", 6 February 2017, CISEDB50AD201, p.68;

the applicant had any fear of being detected by Mr M at this time, and given that credible contemporaneous sources indicate that low profile Shia Hazaras like the applicant were not being targeted as individuals in Kabul during this period,¹⁰ I do not accept that the applicant was moving between hotels during this time as he claims. At the SHEV interview the applicant stated that had not arrived in Australia with his taskera and that he had left this document, along with other valuables, in the care of his paternal [relative] who resides in Kabul (with his [relative] sending the applicant's valuables on to him once he had reached Australia). Given the manner in which the applicant received assistance from his [relative] in Kabul, and given the manner in which Afghans typically and where possible are accommodated with relatives when arriving in new localities,¹¹ I am not satisfied that the applicant was moving between hotels during his period in Kabul and I find that he resided with the paternal [relative] who took care of the applicant's valuables.

16. The applicant claims he would face a real chance of serious harm in Kabul from the Taliban or Islamic State or some other extremist group, and from the Pashtun and Sunni community more generally, for reason of his being a Shia Hazara, and also because he will be perceived as an affiliate of the west because he has sought asylum in, and spent time in, a western country, and because he would be a returnee from the west and a failed asylum seeker. He claims that given the prevalence of atrocities committed throughout the country against young men, ethnic and religious minorities, he cannot relocate to avoid harm.
17. While members of local Taliban networks have been accused of abducting or otherwise attacking Shia Hazaras travelling roads through insecure rural areas, credible sources do not suspect the Taliban of having perpetrated attacks against the Shia Hazara community in major cities like Kabul in recent years.¹² Afghanistan's major cities have, however, seen occasional mass casualty attacks perpetrated against Shia Muslim and/or Hazara gatherings by other groups. Prior to 2016, the most significant attack of this kind was the December 2011 bomb attack upon Kabul's Abu Fazl Mosque during Shia Muslim Ashura commemorations perpetrated by the Pakistani militant group Lashkar-e-Jhangvi (LeJ).¹³ In February 2014 there was an attack on an Ismaili (Shia) cultural centre in Kabul which killed one security guard.¹⁴ In March 2015 gunmen entered a Sufi mosque in the Kabul suburb of Company and killed 11 worshippers. In the preceding year there had been reports of men distributing Islamic State propaganda in the same locality.¹⁵ In October 2015, in the lead up to Ashura, one person was killed and several wounded at a Shia place of worship in Chandawal.¹⁶ On 23 July 2016 two explosions occurred in central Kabul targeting a peaceful demonstration of Hazaras, killing at least 85 people and wounding over 400 others. The attack was the single most deadly incident in Kabul since the fall of the Taliban in 2001, and the largest single attack on Hazaras since the Ashura Day attack in 2011. The Taliban was quick to deny any involvement and to condemn the attack. The Islamic State in the Khorasan Province (ISKP) claimed responsibility, identifying the intended targets as "Shia" (of which most Hazara are adherents)¹⁷ and stating that it would

¹⁰ Landinfo, "Hazaras and Afghan insurgent groups", 3 October 2016, CIS38A80122778.

¹¹ OSI, "Sanctuary in the City? Urban Displacement and Vulnerability in Kabul", 1 June 2012, CIS23499, p.9.

¹² Landinfo, "Hazaras and Afghan insurgent groups", 3 October 2016, CIS38A80122778; "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", Afghanistan Analysts Network, 19 October 2016.

¹³ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 3.6.

¹⁴ DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 2.25.

¹⁵ "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", Afghanistan Analysts Network, 19 October 2016, CX6A26A6E11358.

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

¹⁷ DFAT, "DFAT Thematic Report on Afghanistan Security Conditions 1 January to 31 August", 5 September 2016, CIS38A80121778, 2.6-2.7.

continue to target Shia groups.¹⁸ Some two months later, on 11 October 2016 on the eve of the Shia holy day of Ashura, a gunman killed some 18 Shia Muslims and wounded over 50 at the Kabul's Kart-e Sakhi Shia shrine.¹⁹ A month later, on 21 November 2016 on the Shia holy day of Arbaeen, a bomb attack on a Shia Mosque in the west Kabul suburb of Char Qala, in the in the Darulaman area, killed some 30 worshippers and wounded more than 80.²⁰ Islamic State again claimed responsibility while the Taliban condemned the attacks.

18. Following the major attack of 23 July 2016, DFAT observed that it was too early to say if this was an isolated incident, or if it represented a change in the modus operandi of insurgents by introducing a sectarian dimension to attacks; or if it heralded the beginning of a targeted and sustained campaign in Afghanistan by groups pledging allegiance to Islamic State.²¹ On 24 July 2016 Professor William Maley wrote, in support of the asylum claims of Afghan Shia Hazaras in Australia, that given the fluidity of the situation in Afghanistan it is a serious mistake to conclude that Afghanistan is safe for Hazaras, and that the disposition of extremists to strike at them has not disappeared, and that the simplistic and superficial conclusion that Kabul offers a safe or meaningful relocation option for Hazaras should be avoided.²² As has been noted above, two further attacks of this kind subsequently did occur in Kabul on the eve of Ashura on 11 October 2016 and on Arbaeen on 21 November 2016. In the aftermath of the 11 October 2016 attack, Human Rights Watch (HRW) expressed the view that these targeted attacks on Shia Hazaras have yet to reach the frequency and severity of those faced by the community in Pakistan, but do underscore their increasing vulnerability, even in big cities under firm government control.²³ The Afghan Analysts Group observed that the attacks perpetrated in 2015 and 2016 indicated that Islamic State had gained the capability of carrying out fatal attacks against Shias on an occasional basis in the capital.²⁴ In February 2017 the UN Assistance Mission in Afghanistan (UNAMA) reported that it was extremely concerned by the 2016 expansion in Afghanistan of groups pledging allegiance to Islamic State (or Daesh), notably the Islamic State Khorasan Province (ISKP), and the increased ability of Daesh/ISKP to conduct large, deadly attacks against civilian targets in Kabul city, a trend that emerged in July 2016, prior to which all Daesh/ISKP civilian casualties had occurred in Nangarhar province.²⁵

19. I consider that the emergence in Afghanistan of groups pledging support to Islamic State and conducting occasional mass casualty attacks against the Shia Hazaras in Kabul and elsewhere²⁶ has raised the overall level of risk faced by Shia Hazaras in Afghanistan. Within the foreseeable future there may be further occasional mass casualty attacks in Kabul like those which

¹⁸ "Assault on Shia shrine in Kabul likely to have been conducted by Islamic State, indicating resilient attack capability", Jane's Intelligence Review, 12 October 2016, CX6A26A6E11042.

¹⁹ HRW, "Afghanistan's Shia Hazara Suffer Latest Atrocity. Insurgents' Increasing Threat to Embattled Minority", 13 October 2016, CX6A26A6E11758; "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", Afghanistan Analysts Network, 19 October 2016, CX6A26A6E11358; "Kabul shrine attack kills Shia Muslims during Ashura", BBC News, 11 October 2016, CX6A26A6E15049.

²⁰ "Death Toll Rises To 30 In Kabul Mosque Bombing", Tolo News, 21 November 2016, CX6A26A6E13647; "Afghanistan Kabul mosque suicide attack kills dozens", BBC News, 22 November 2016, CX6A26A6E13651.

²¹ DFAT, "DFAT Thematic Report on Afghanistan Security Conditions 1 January to 31 August", 5 September 2016, CIS38A80121778, p.4.

²² Maley, W. "On the Return of Hazaras to Afghanistan", 24 July 2016, CIS38A80121731.

²³ HRW, "Afghanistan's Shia Hazara Suffer Latest Atrocity", 13 October 2016, CX6A26A6E11295.

²⁴ "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War ", AAN, 19 October 2016, CX6A26A6E11358.

²⁵ UN Assistance Mission in Afghanistan (UNAMA), "Afghanistan: Protection of Civilians in Armed Conflict – Annual Report 2016", 6 February 2017, CISED50AD201, p.79.

²⁶ UN Assistance Mission in Afghanistan (UNAMA), "Afghanistan: Protection of Civilians in Armed Conflict – Annual Report 2016", 6 February 2017, CISED50AD201, p.79; "Powerful mosque explosion kills 14 Shias in Afghanistan", Press TV, 12 October 2016, DU170327090718142; "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War ", AAN, 19 October 2016, CX6A26A6E11358.

occurred on 11 October and 21 November 2016 at Kabul Shia mosques, and at the Kabul Shia Hazara demonstration of 23 July 2016. However, I am not satisfied that the overall increased level of risk will mean that the applicant will face a real chance of harm within the foreseeable future for reason of his being a Shia Hazara. The applicant does not claim to have ever been politically active and there is no evidence before me to indicate that upon return to Afghanistan he would, in the future, have any interest in attending a public demonstration like that which was attacked in central Kabul on 23 July 2016. I accept that the applicant is a Shia Muslim, and although the applicant indicated at his SHEV interview that he does not regularly attend mosque he did state that he attends Muharram (which includes the commemoration of Ashura). I accept that where attacks have been staged against the Shia Hazara population in Kabul they have most often been staged during Muharram. Nevertheless, given the current and foreseeable extent of the attacks perpetrated against Shia Muslims and Shia Hazaras in Kabul, given the size of Kabul's Shia Hazara population (estimates of the Hazara population in Kabul vary between around 1.6 million to two million, or 40-50 per cent of Kabul's population),²⁷ and the dispersal of this community and its places of worship across many suburbs in western and south-western Kabul,²⁸ and given that I do not accept that the applicant is currently of specific interest to Islamic State or any other insurgent group as an individual, I am not satisfied on the evidence that, for the foreseeable future, the prospect of the applicant suffering harm in Kabul from an insurgent group, like Islamic State or the Taliban, for reason of his being a Shia Hazara, reaches that of a real chance.

20. Nor does the evidence indicate that the applicant would face a real chance of suffering serious harm from any other actor in Kabul for reason of his being a Shia Muslim and/or a Hazara. Notwithstanding the attacks noted above, Shia Hazaras in Kabul are able to freely practise their Shia faith and to go about their daily lives alongside significant numbers of Tajiks, Pashtuns and minority ethnic groups.²⁹ Instances of inter-ethnic or sectarian violence between Kabul's various communities have proven to be rare in recent years. A rare outbreak of such violence did occur in November 2012 when a group of Sunni students at Kabul University attempted to prevent (predominantly Hazara) Shia students from observing Ashura. The confrontation led to violence, leaving at least one student dead and at least eight more wounded.³⁰ Another occurred in August 2010 in the Hazara dominated suburb of Dasht-e Barchi (District 13) when clashes between Hazara and Kuchi groups were triggered after a Hazara politician attempted to allow more Hazara families access to land in an area which was already inhabited by a Kuchi community, and who attempted to stop the plan through a violent confrontation resulting in several deaths.³¹ Nevertheless, DFAT has commented that, although ethnicity may also be a factor in tension over land issues in Kabul, ethnic-based violence in Kabul is rare,³² and recent years have not seen a repeat of such communal clashes. I am not satisfied that there is a real chance that the applicant would suffer harm as a consequence of such communal violence in Kabul for reason of his being a Shia and/or a Hazara.

²⁷ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 2.7; Ali Karimi, M. "The West Side Story": Urban Communication and the Social Exclusion of the Hazara People in West Kabul", University of Ottawa, 1 January 2011, CIS28523.

²⁸ Ali Karimi, M. "The West Side Story": Urban Communication and the Social Exclusion of the Hazara People in West Kabul", University of Ottawa, 1 January 2011, CIS28523..

²⁹ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 2.7; EASO, "EASO COI Afghanistan Security Situation", 20 January 2016, CIS38A8012395, p.34.

³⁰ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186.

³¹ Overseas Development Institute (OSI), "Sanctuary in the City? Urban Displacement and Vulnerability in Kabul", 1 June 2012, CIS23499, pp.9, 15; Maley, W. "On the Return of Hazaras to Afghanistan", Australian National University: Asia-Pacific College of Diplomacy, 24 July 2016, CIS38A80121731.

³² DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 2.28.

21. The US Department of State has commented of the situation in Afghanistan more generally that societal discrimination against Shia Hazaras has continued along class, race, and religious lines in the form of extortion of money through illegal taxation, forced recruitment and forced labour, physical abuse, and detention.³³ However, while Shia Hazaras in less secure areas of Afghanistan in recent years have been affected by harm of this kind (instances of the mistreatment of Hazaras travelling roads through Zabul Province have been notable in this regard, and in rural areas Afghan police are known for extorting money through illegal taxation),³⁴ and while instances of the forced recruitment of young men of fighting age have been reported from contested areas (notably in a number of districts in provinces like Kunduz, Kandahar and Paktika),³⁵ the available reporting does not indicate that Shia Hazaras in Kabul have been affected by illegal taxation, forced recruitment and forced labour, physical abuse, or detention. Nor does the evidence suggest that Shia Hazaras who are young men are at risk in any such regard in Kabul. DFAT assesses that, because of Kabul's size and diversity, returnees are unlikely to be discriminated against or subjected to violence on the basis of ethnicity or religion.³⁶ I am not satisfied that there is real chance that the applicant would face a real chance of harm of this kind for reason of being a Shia Hazara and/or for reason being a young man in Kabul.
22. Minority Rights Group International has observed that there are large numbers of Hazara currently residing in Kabul, with many concentrated in one overcrowded area, Dasht-e-Barchi, and that although life in Kabul has relatively improved for Hazara since 2001, they have continued to occupy lower-status jobs and have faced harsh discrimination, including in access to facilities and provision of services.³⁷ DFAT also acknowledges that Hazaras have not progressed in certain regards, and that they are notably underrepresented in senior levels of government bureaucracy notwithstanding the high level of education achieved by many Hazaras. DFAT assesses that any discrimination faced by Shias in Afghanistan, including the Hazara community, is more likely to be societal in nature, primarily as a result of the important role played by ethnic, tribal and familial networks in Afghan society and the dominance in many areas of the Sunni majority, and that discrimination generally occurs as a result of a positive preference for members of one's own family/tribal/ethnic/religious group, rather than negative discrimination against others.³⁸ DFAT has also observed that in Kabul returnees generally have lower household incomes and higher rates of unemployment than established community members.³⁹ However, again, the implication is that Kabul returnees have lower household incomes and higher rates of unemployment not because they are returnees from western countries but because they are new to the city and are, in many cases, without the connections that established Kabul residents generally have.
23. In January 2012 Professor Alessandro Monsutti advised that a Hazara who does not have family support in in Kabul will be vulnerable as the Afghan government does not provide services and a social network a Hazara may become the victim of violence.⁴⁰ In July 2016 Professor Maley expressed the view that any Hazara with no social connections in Kabul would

³³ US Department of State, "Afghanistan 2016 Human Rights Report", 3 March 2017, OGD95BE926858, p.47.

³⁴ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p.76, n.492, p.81,

³⁵ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p.44, n.277, p.45, n.278.

³⁶ DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 3.15.

³⁷ Minority Rights Group (MRG), "State of the World's Minorities and Indigenous Peoples 2015 – Afghanistan", 2 July 2015, NG5A1E6BC400.

³⁸ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 3.5.

³⁹ DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 3.16.

⁴⁰ Monsutti, A. "Comments by Professor Alessandro Monsutti on Hazaras in Afghanistan provided to the Independent Protection Assessment Office (IPAO) on January 2012", 1 January 2012, CIS28579.

likely be rendered destitute or vulnerable to gross exploitation by discrimination of this kind.⁴¹ However, the view that there is a real chance of this occurring is not supported by the most recent assessments of UNHCR and DFAT where relocation to urban centres like Kabul is considered viable for single able-bodied men in some circumstances, even when without social connections.⁴² Further to this, the IOM has observed that young men arriving in Kabul will usually find their own ethnic community when they come to the city, and that the ethnic community tends to integrate the newcomers within the group and provide protection for them.⁴³

24. The applicant's family are currently residing unlawfully in Pakistan, where they have resided unlawfully since mid-2009 and where they have remained while the applicant travelled to [country 1] between January 2009 and December 2011, at which time he returned to Pakistan before departing that same month for Kabul from where he travelled onwards (spending some eight months in [country 2] before arriving in Australia in September 2012. At the SHEV interview the applicant stated that his family are upset by his absence and wish to see him and that he has told them he intends to return to them as soon as he is accepted by the Australian authorities and given documents. While I accept that the applicant genuinely wishes to see his family, it is nonetheless the case that the applicant's family have remained in Pakistan while the applicant has worked in [country 1] and sought asylum in Australia. Recent years have seen occasional drives by Pakistan authorities to compel some Afghans to return to Afghanistan,⁴⁴ but there is no evidence to indicate that the applicant's family have been identified by the Pakistan authorities for return in this way, or that they are suffering any harassment in Pakistan to compel their return to Afghanistan, and more than a million Afghans continue to reside in Pakistan. On the evidence, I consider that if the applicant were to return to Afghanistan his family would remain in Pakistan.
25. The applicant would, therefore, be arriving in Kabul as a single able-bodied man without vulnerabilities. The applicant is not without family connections in Kabul. He has a paternal [relative] residing in the capital and this relative has previously provided the applicant with assistance in Kabul. There is no evidence to indicate that he would not assist the applicant again in the future. Moreover, even in the absence of assistance from such a relative I am not satisfied that the weight of evidence indicates that the applicant would face a real chance of being rendered destitute or that he would suffer gross exploitation as a result of discrimination. At the SHEV interview the applicant indicated that, although he had no family living [country 1] when he travelled there with and later without his father, he had found accommodation and employment by forming connections with other Afghan Hazaras who he had not previously known. The applicant has thus demonstrated his capacity to overcome the challenges of arriving in a new locale, even when living unlawfully in a country like [country 1]. On the evidence, I accept that in Kabul the applicant may face a real chance of experiencing some discrimination in the employment market for reason of being a Shia Hazara and/or as a consequence of not being a member of a particular family or tribal group. However, on the evidence, I am not satisfied that in Kabul the applicant would, on this basis, face a real chance of suffering discrimination of a level that would result in his becoming destitute or that would

⁴¹ Maley, W. "On the Return of Hazaras to Afghanistan", Australian National University: Asia-Pacific College of Diplomacy, 24 July 2016, CIS38A80121731.

⁴² UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p.86; DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 3.6-3.11.

⁴³ IOM, "Information request from RRT to IOM", 22 January 2013, CIS36DE0BB1987, p.10.

⁴⁴ UK Home Office, "COI and Guidance - Afghanistan: Security and humanitarian situation", 15 August 2015, OGF59D8D40, p.29; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p.31

threaten his capacity to subsist (such as through a denial of a capacity to earn a livelihood of any kind or to access basic services). Nor does the evidence suggest that, for reason of being a Shia Hazara, the applicant would face a real chance in Kabul of being harmed in any other way by either an insurgent group like the Taliban or Daesh, or by Pashtuns or other non-Hazaras, or from the Sunni majority community, or any other actor.

26. It has also been submitted that the applicant fears harm because he will be perceived as an affiliate of the west because he has sought asylum in, and spent time in, a western country, and because he would be a returnee from the west and a failed asylum seeker. Following the April 2016 SHEV interview the applicant's representative provided a July 2016 submission in which it was claimed that there are various characteristics and attributes possessed by the applicant, which when look at cumulatively may identify him as a westerner, or will be considered westernised, for example: his appearance, clothing, demeanour, conversations and so forth may all indicate that he has spent time in the west. The July 2016 submission provides no specific information about what it is about the applicant's appearance, clothing, demeanour, and conversation that would identify him as a westerner. Although the written claims submitted in the applicant's SHEV application submitted that the applicant feared harm because of the time he had spent in a western country, nothing was said about the applicant having acquired various characteristics and attributes of this kind. At the SHEV interview the applicant was invited to speak about any concerns he might have other than those which had been discussed. He said nothing about his appearance, clothing, demeanour and conversation, as being characteristics and attributes which would identify him as a westerner. Upon return to Afghanistan the applicant may converse with others about his time in Australia and this would, obviously, identify him as someone who had spent time in a western country. I am also willing to accept that the applicant has learned some English while in Australia and that he may have acquired some western forms of expression. Like many Afghans in Kabul, he may choose to affect a more western style of dress upon return to Afghanistan rather than traditional Afghan attire. However, beyond these, I do not accept that the applicant has any characteristics or attributes that would be perceived as western in Afghanistan.

27. UNHCR has noted that there are reports of individuals who have returned from western countries having been tortured or killed by AGEs on the grounds that they had become "foreigners" or that they were spies for a western country, and that AGEs reportedly 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.⁴⁵ UNHCR has noted the September 2014 incident in which an Afghan Australian national was killed while travelling between Ghazni province and Kabul; and also that an asylum seeker deported from Australia claimed to have been captured by the Taliban in August 2014 while travelling to Jaghori after pictures from Australia were found on his phone. UNHCR has noted that some studies, produced by groups like the Refugee Support Network, have reported that simply being identified as a returnee has put persons at risk, and that that returnees with western connections and mannerisms are reportedly at risk of being mistaken for collaborators with the government, or for having lapsed in their practice of Islam.⁴⁶ For its own part, UNHCR assesses that depending on the individual circumstances of the case individuals perceived as "westernized" may be in need of international protection.⁴⁷

⁴⁵ UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p.41, n.255-256, p.55, n.348.

⁴⁶ UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p.41, n.255-256, p.55, n.348.

⁴⁷ UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p.42.

28. DFAT 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.⁴⁸ As has been noted above, Kabul returnees generally have lower household incomes and higher rates of unemployment than established community members, but the evidence indicates that this occurs not because they are returnees from western countries but because they are new to the city and are, in many cases, without the connections that established Kabul residents generally have. DFAT's assessments are based on DFAT's on-the-ground knowledge and discussions with a range of sources in Kabul, including the Afghan government, human rights organisations, civil society activists, refugee advocacy groups, UN agencies, and representatives of the international community, and I give DFAT's reporting significant weight. I note also, that DFAT's assessment is consistent with the reporting of credible security monitors which have reported that AGEs have staged high profile complex attacks in Kabul upon western run governments, organisations and workers, and also the Islamic State mass casualty attacks upon Kabul's Shia Muslim and Hazara community,⁴⁹ but which have not reported that any attacks have been perpetrated in Kabul by AGEs or any other actors against Shia Hazaras (or any other Afghan nationals), for reason of their having returned from, spent time in, or sought asylum in, a western country like Australia. Given this, and given the applicant's accepted characteristics or attributes, I am not satisfied that there is a real chance that the applicant would suffer harm of any kind in Kabul because he would be perceived as an affiliate of the west because he has sought asylum in, and spent time in, a western country, and would be a returnee from the west and a failed asylum seeker. Further, I am not satisfied that the applicant would face a real chance of discrimination in Kabul on the basis of being a returnee from the west who has spent time in, and sought asylum in, a western country.
29. I have also considered whether the applicant would face a real chance of harm as a consequence of generalised violence such as being killed or injured as a bystander to an attack perpetrated by an insurgent group against another target or as a victim of a criminal act.
30. DFAT assesses that security conditions in Afghanistan continued to decline nationwide in the first eight months of 2016. Civilian casualties as a result of ground engagements between pro-government forces and AGEs increased, with fighting occurring in and around several major provincial population centres. 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. Afghanistan's decline in security during 2015 showed no evidence of reversal during the first half of 2016, and civilians continued to suffer unprecedented harm during this period. Ground engagements between pro-government forces and AGEs caused the highest number of civilian casualties in the first half of 2016. Suicide and complex attacks carried out by AGEs, primarily the Taliban, were the second leading cause of civilian casualties by mid-2016 (precluding the 23 July attack on Hazara protesters in Kabul). Nearly two-thirds of casualties from such attacks took place in Kabul. Consistent with historical trends, militant attacks were concentrated in the western, central and eastern sections of the city where the international presence is most visible and where key highways link the city to the international airport and outlying provinces. The attacks targeted

⁴⁸ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, 3.31.

⁴⁹ UNAMA, "Afghanistan: Protection of Civilians in Armed Conflict – Annual Report 2016", 6 February 2017, CISED50AD201; EASO, "EASO COI Afghanistan Security Situation", 20 January 2016, CIS38A8012395, pp.35-38; UNAMA, "Afghanistan: Midyear Report 2015, Protection of Civilians in Armed Conflict", 5 August 2015, CISEC96CF13007.

journalists, judicial workers, government employees, police, and Afghan and international security force personnel, and also caused extensive civilian casualties.⁵⁰

31. DFAT's reporting acknowledges that Kabul remains one of the most dangerous cities in the world.⁵¹ Nevertheless, and although civilian casualties have risen in Kabul in recent years, DFAT assesses that Kabul has a higher level of government control and a greater level of security than other parts of Afghanistan. While high-profile attacks, including those that target civilians, are common in Kabul, the city has a large population compared to other areas of the country, so there are fewer civilian casualties per head of population.⁵² Significantly, DFAT and other credible sources have reported that militant attacks are concentrated in the western, central and eastern sections of the city where the international presence is most visible and where key highways link the city to the international airport and outlying provinces.⁵³ The Hazara community is concentrated in suburbs scattered across the western and south-western part of Kabul. Most are located in outlying suburbs such as Dasht-e Barchi, Afshaar and Qalai Shada, and even those closer to the centre of the city, such Kart-e Sakhi and Chandawal, are spaced around the city centre⁵⁴ rather than in the heart of the city where the government and security institutions are located which have been the main target of insurgent attacks in Kabul. As has been noted above, there have been occasional attacks in Kabul's Hazara suburbs which have specifically targeted Hazara places of worship; such as the October 2015 attack in Chandawal, the October 2016 attack in Kart-e Sakhi, and the November 2016 attack in Char Qala. However, the reporting of DFAT and other credible sources on security indicate that the overwhelming majority of attacks perpetrated by insurgent groups, and the overwhelming number of civilian casualties resulting from these attacks, have occurred and will likely continue to occur, in those central areas of the city where Afghan and international government and security personnel work, reside and frequent.⁵⁵
32. More generally, it has been observed that Kabul, like all of Afghanistan, is affected by a level of serious crime, including some violent crime, and that while policing in Kabul tends to be more effective than in most other urban and rural areas, police capacity to maintain law and order is nonetheless limited by a lack of resources, poor training, insufficient and outmoded equipment and corruption.⁵⁶ Nevertheless, DFAT does not report that violent crime levels are such a problem in Kabul as to be a significant concern for Afghan nationals returning from western countries like Australia, or that Kabul's Shia Hazara population face any significant risks in this regard. Professor Maley has expressed the view that any Hazara with no social connections in Kabul would likely be exposed to criminal predation.⁵⁷ However, the view that there is a real chance of this occurring, is not supported by the most recent assessments of UNHCR and DFAT where relocation to urban centres like Kabul is considered viable for single able-bodied men in

⁵⁰ DFAT, "Thematic Report on Security Conditions in Afghanistan: 1 January - 31 August 2016", 5 September 2016, CIS38A80121778, 2.5.

⁵¹ DFAT, "DFAT Country Information Report: Afghanistan", 18 September 2015, CISEC96CF13366, 5.15.

⁵² DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 3.1.

⁵³ DFAT, "Thematic Report on Security Conditions in Afghanistan: 1 January - 31 August 2016", 5 September 2016, CIS38A80121778, 2.5; EASO, "EASO COI Afghanistan Security Situation", 20 January 2016, CIS38A8012395, pp.36-37.

⁵⁴ Ali Karimi, M. "The West Side Story": Urban Communication and the Social Exclusion of the Hazara People in West Kabul", University of Ottawa, 1 January 2011, CIS28523; OSI, "Sanctuary in the City? Urban Displacement and Vulnerability in Kabul", 1 June 2012, CIS23499, Monsutti, A. "Comments by Professor Alessandro Monsutti on Hazaras in Afghanistan provided to the Independent Protection Assessment Office (IPAO) on January 2012", 1 January 2012, CIS28579.

⁵⁵ DFAT, "Thematic Report on Security Conditions in Afghanistan: 1 January - 31 August 2016", 5 September 2016, CIS38A80121778, 2.5; EASO, "EASO COI Afghanistan Security Situation", 20 January 2016, CIS38A8012395, pp.34-37.

⁵⁶ DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 3.2.

⁵⁷ Maley, W. "On the Return of Hazaras to Afghanistan", Australian National University: Asia-Pacific College of Diplomacy, 24 July 2016, CIS38A80121731.

some circumstances, even when without social connections.⁵⁸ Further to this the IOM has observed that young men arriving in Kabul will usually find their own ethnic community when they come to the city, and that the ethnic community tends to integrate the newcomers within the group and provide protection for them.⁵⁹ As has been noted above, the applicant is not without family connections in Kabul. He has a paternal [relative] residing in the capital and this relative has previously provided the applicant with assistance in Kabul. There is no evidence to indicate that he would not assist the applicant again in the future. Moreover, even in the absence of assistance from such a relative I am not satisfied that weight of evidence indicates that the applicant would face a real chance of suffering criminal predation or some other form of criminal harm. The applicant has extensive experience in establishing himself in new localities even without the advantage of having a relative living in the locality in question. Nevertheless, considering the risks that would be faced by the applicant in their entirety, including his return via Kabul airport (which is affected by occasional security incidents),⁶⁰ I am not satisfied that the applicant would face a real chance of harm in Kabul as a consequence of generalised violence.

33. The applicant's representative has referred to a number of reports⁶¹ in which concern has been expressed as to the possible adverse effect upon security in Afghanistan of the 2014 drawdown of international troop levels and the transfer of responsibility for overall security to the Afghan government and its security forces. However, in order to provide support to the Afghan security forces a number of countries, including Australia and the United States, continue to maintain troops in Afghanistan. The number of NATO forces peaked at about 140,000 in 2011, but decreased in subsequent years as NATO countries wound down combat operations, handing over control to local security forces. Due to a growing Taliban threat, US President Barack Obama announced that he would maintain troop numbers at 9,800 for most of 2016.⁶² It is expected that in addition to the US forces, thousands of additional foreign troops under the NATO mission in Afghanistan are expected to remain beyond 2016.⁶³ The applicant's representative has also submitted that assessments of the situation provided by the United States and Australian governments must be assessed in light of the fact the Governments want to justify their withdrawal. I am not persuaded that DFAT's reporting has in any way misrepresented the situation in Afghanistan. DFAT's reporting is frank about the deterioration of the security situation in Afghanistan since the 2014 drawdown and transition, and about the problems faced by the Afghan government and its security forces. In September 2016 DFAT assessed that Afghanistan's decline in security during 2015 showed no evidence of reversal during the first half of 2016.⁶⁴ Nevertheless, given the manner in which Afghan security forces have proven able to maintain effective control of major urban areas, and given the ongoing support provided by international forces, I am not satisfied that the prospect of the applicant

⁵⁸ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p.86; DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 3.6-3.11.

⁵⁹ IOM, "Information request from RRT to IOM", 22 January 2013, CIS36DE0BB1987, p.10.

⁶⁰ DFAT, "Thematic Report on Security Conditions in Afghanistan: 1 January - 31 August 2016", 5 September 2016, CIS38A80121778, 2.5; EASO, "EASO COI Afghanistan Security Situation", 20 January 2016, CIS38A8012395, pp.36; DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 2.30.

⁶¹ HRW, "Human Rights Watch World Report 2014 - Afghanistan", 21 January 2014, CX317228; UK Home Office, "Operational Guidance Note Afghanistan V12", 01 September 2014, OG180885B4; UNAMA, "Afghanistan Midyear Report 2014 Protection of Civilians in Armed Conflict", 9 July 2014, CIS2F827D91311; HRW, "Today We Shall All Die": Afghanistan's Strongmen and the Legacy of Impunity", 3 March 2015, CISEC96CF1289.

⁶² "How many foreign troops are in Afghanistan?", BBC News, 15 October 2015, CXBD6A0DE16014.

⁶³ "Obama troop plan just enough to prop up Afghan army: experts", Yahoo News, 15 October 2015, CXBD6A0DE15350.

⁶⁴ DFAT, "DFAT Thematic Report on Afghanistan Security Conditions 1 January to 31 August", 5 September 2016, CIS38A80121778.

suffering harm in Kabul from generalised violence, reaches that of a real chance for the foreseeable future.

34. I accept that in Kabul the applicant may face a real chance of experiencing some discrimination in the employment market for reason of being a Shia Hazara and/or as a consequence of not being a member of a particular family or tribal group. However, on the evidence, I am not satisfied that in Kabul the applicant would, on this basis, face a real chance of being denied the capacity to subsist or of suffering serious harm of any kind. Other than experiencing discrimination in the employment market, and having regard to the totality of the circumstances, I am not satisfied that the applicant would face a real chance of suffering harm of any other kind in Kabul. I am therefore not satisfied that the applicant would face a real chance of serious harm in Kabul.

Refugee: conclusion

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

Complementary protection assessment

36. A criterion for a protection visa is that the applicant is a non citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

37. Under s.36(2A), a person will suffer 'significant harm' if:

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

38. I accept that the applicant would face a real chance, and therefore a real risk, of being abducted and/or killed on the roads if he were to attempt, within the foreseeable future, to return to his home area. I consider that such harm would amount to significant harm.

39. However, pursuant to s.36(2B) of the Act there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if 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. As has been noted above, I accept that the applicant may face a real risk in Kabul of experiencing some discrimination in the employment market for reason of being a Shia Hazara and/or as a consequence of not being a member of a particular family or tribal group. However, on the evidence, I am not satisfied he would face a real risk of suffering discrimination of a level that would result in his becoming destitute or that he would be unable to subsist or that would otherwise arbitrarily deprive him of his life. Nor am I satisfied that such

treatment would result in the kind of intentionally inflicted severe pain or suffering that would amount to cruel or inhuman treatment or punishment, or treatment intended to cause extreme humiliation, or that it would amount to torture or result in his being subject to the death penalty. I am therefore not satisfied that such harm would amount to significant harm.

40. Other than experiencing discrimination in the employment market, and for the reasons already given above, I am not satisfied that the applicant would face a real risk of suffering harm of any other kind in Kabul. I am therefore not satisfied that the applicant would face a real risk of suffering significant harm in Kabul.
41. As for the question of whether it is reasonable for the applicant to relocate to Kabul, I note that DFAT has advised that Kabul provides the most viable option for many people for internal relocation and resettlement in Afghanistan – with greater access to livelihood opportunities and essential services than most other locations in Afghanistan.⁶⁵ The applicant's representative has noted the July 2015 comment of a UK sociologist that in Kabul unemployment is currently at about 48% and levels of destitution are very high.⁶⁶ No information is provided by the UK sociologist as to the original source of this unemployment statistic. DFAT has commented that, although there are no reliable statistics, unemployment is widespread in Kabul and underemployment is also common. The influx of internally displaced persons (IDPs) and returnees in the city has put pressure on the local labour market.⁶⁷ DFAT has observed that new arrivals who lack a network of family contacts may find themselves in a situation where employment is irregular and often insecure, and that many such persons work as relatively poorly paid day labourers who seek occasional work as it becomes available, while others are required to beg or work as street-sellers.⁶⁸ Given DFAT's engagement with a number of credible stakeholders in forming its assessment I give it significant weight.
42. With regard to infrastructure, the situation in Kabul is better than almost anywhere else in Afghanistan, a country with one of the lowest rates of electrification in the world. By contrast to rural Afghanistan, most parts of Kabul have 24-hour power, although power outages are common.⁶⁹ In September 2015 DFAT, reported that the recent rapid growth of Kabul has put pressure on its infrastructure; including roads, water, sanitation and electricity supply. Access to such infrastructure is unreliable in Kabul's informal settlements and non-existent in illegal settlements, and in illegal settlements there is often no provision of sanitation and other basic services. Access to electricity is highly variable, even in formal areas of the city, and although most established residents have access to some electricity, up to 84 per cent of internally displaced persons lack access to any electricity. Most informal and illegal areas do not have reliable access to municipal water supply, relying instead on wells and water deliveries. Sanitation in these areas is poor. Waste collection is better in informal areas than illegal areas. Many communities burn their waste which contributes to high levels of air pollution.⁷⁰ The cost of living is relatively high in Kabul. As a result, many who live in Kabul may have no other option than to live in informal settlements. Many poorer residents are forced to borrow money to survive, entering a cycle of poverty and indebtedness.⁷¹ Medical facilities in the public system, while still basic, tend to be better in Kabul than in other areas of Afghanistan,

⁶⁵ DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 3.6-3.11.

⁶⁶ Schuster, L. "Dear Chris", 22 July 2015, in comments below: Schuster, L. "Child asylum seekers and a culture of disbelief", The Justice Gap, July 2015, available at: <http://thejusticegap.com/2015/07/child-asylum-seekers-and-a-culture-of-disbelief/>

⁶⁷ DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 2.13.

⁶⁸ DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 2.14.

⁶⁹ Special Inspector General for Afghanistan Reconstruction (SIGAR), "SIGAR Quarterly Report 30 January 2016", 30 January 2016, CIS38A8012334, p.152.

⁷⁰ DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 2.20-2.23.

⁷¹ ⁷¹ DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 2.10.

particularly remote rural areas. Better quality services are provided by private practices, but many residents cannot access these services because of their high cost.⁷²

43. All sources affirm that social connections are a significant factor when considering relocation in Afghanistan, although there is significant variation in the views of different commentators on the question of when such connections are not just an advantage but a necessity. A UK sociologist (who works with Afghan returnees in Kabul), has expressed the view that whatever skills a young man may have gained in Europe, without connections and a network, he stands little or no chance of finding even the most menial job in Kabul.⁷³ In July 2016 Professor Maley expressed the view that a Hazara who is returned to a region in which he lacks social connections is likely to end up destitute, or be exposed to gross exploitation or criminal predation.⁷⁴ UNHCR has advised that relocation may be a reasonable alternative only where the individual can expect to benefit from the meaningful support of his or her own (extended) family, community or tribe in the area of prospective relocation. However, UNHCR has also advised that the only exception to this requirement of external support is the case of single able-bodied men and married couples of working age without identified vulnerabilities.⁷⁵ DFAT advises that, in Kabul, returnees generally have lower household incomes and higher rates of unemployment than established community members.⁷⁶ DFAT also advises that while men of working age are more likely to be able to return and reintegrate successfully than unaccompanied women and children, the lack of family networks for single men can also impact on their ability to reintegrate into Afghan community,⁷⁷ and that relocation is more likely to be successful where the individual has established networks that can assist with the provision of basic necessities.⁷⁸ In 2012 the IOM commented that in Kabul young men will usually find their own ethnic community when they come to the city. The ethnic community tends to integrate the newcomers within the group and provide protection for them.⁷⁹ Given that the views of UNHCR and DFAT are reached through consultation with a range of credible stakeholders, I give them greater weight and am satisfied that while connections are a significant advantage (and a necessity where family groups are involved), it is possible for a single able bodied man to relocate in Afghanistan, even without social connections, though this may not always be the case and must be determined based on the specific circumstances of the individual and the proposed area of relocation.
44. The applicant's family are currently living in Pakistan and the applicant would be arriving in Kabul as a single able-bodied man without vulnerabilities. It is submitted that the applicant is not educated and will not be able to subsist in Kabul given his circumstances and the high level of unemployment there. However, and although the applicant had only three years of religious education, he indicated at the SHEV interview that he can read and write in Hazaragi and the associated Afghan national language of Dari. In the past he has successfully found work in [country 1] (which is itself experiencing high levels of unemployment)⁸⁰ notwithstanding his being disadvantaged by being in [country 1] unlawfully. He is sufficiently skilled as a tiler that

⁷² DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 2.20.

⁷³ Schuster, L. "Dear Chris", 22 July 2015, in comments below: Schuster, L. "Child asylum seekers and a culture of disbelief", The Justice Gap, July 2015, available at: <http://thejusticegap.com/2015/07/child-asylum-seekers-and-a-culture-of-disbelief/>

⁷⁴ Maley, W. "On the Return of Hazaras to Afghanistan", Australian National University: Asia-Pacific College of Diplomacy, 24 July 2016, CIS38A80121731.

⁷⁵ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p.86.

⁷⁶ DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 3.16.

⁷⁷ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 4.11.

⁷⁸ DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 3.6-3.11.

⁷⁹ IOM, "Information request from RRT to IOM", 22 January 2013, CIS36DE0BB1987, p.10.

⁸⁰ "Afghan Workers are Scapegoats For Iran's Poor Economy", IranWire, 20 May 2015, CXBD6A0DE6776.

he has obtained work of this kind even in Australia, and he also has experience working in Afghanistan as a welder. It is submitted that the applicant's support networks in Afghanistan are limited, that he has no family support network in Kabul nor does he have any property in Kabul to allow him to attempt to subsist there, and that he was only previously able to obtain work through family ties. However, and as has already been discussed, the applicant has a paternal [relative] in Kabul who has provided him with assistance in Kabul in the past, and there is no evidence to indicate that he would not do so in the future. Further, even in the absence of assistance from such a relative I consider that the applicant has the ability to overcome the challenges of relocating to Kabul. At the SHEV interview the applicant indicated that, although he had no family living [country 1] when he travelled there with and later without his father, he had found accommodation and employment by forming connections with other Afghan Hazaras who he had not previously known. He likewise indicated that here in Australia he is currently residing with men who he had met in Malaysia, and who were not previously known to him, but who were travelling to Australia like him.

45. It has also been submitted that the applicant has a large family which he needs to support. I note, however, that the applicant has previously proven willing and able to support his wife and three children by living and working apart from his family and that he has done this from [country 1] and from Australia. Given the applicant's demonstrated ability to find accommodation and employment in places like [country 1] where he worked unlawfully, and to nonetheless provide the necessary support to his family in Pakistan, I consider that the applicant will similarly prove able to provide support of this kind to his family from Kabul and that it would be reasonable for him to do so. In his SHEV application the applicant has stated that he finds it difficult to speak with his family by telephone as they are upset by the time he has been living apart from them. At the SHEV interview he said they are always asking him when he will come back and he has told them that it is in the hands of the Australian authorities and that when the Australian authorities accept him or whenever they give him some documents he will return. Even so, by travelling to Australia alone and then by applying for temporary protection in Australia, the applicant has demonstrated that he is willing and able to continue to live apart from his family for extended periods of time. This is also something he has done in the past by travelling to [country 1] and remaining there from January 2009 to December 2011, before returning to Pakistan in December 2011, when he also departed for Kabul before travelling onwards (spending some eight months in [country 2]), arriving in Australia in September 2012.
46. Having regard to the applicant's overall circumstances and the livelihood and security situation in Kabul more broadly (including the overall situation regarding generalised violence in Kabul), I am satisfied that it would be reasonable for the applicant to relocate to, and remain in, Kabul, an area of the country where there would not be a real risk that the applicant will suffer significant harm.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.