



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA16/01273

Date and time of decision: 22 June 2017 15:25:00

Scott MacKenzie, 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 citizen of Afghanistan. The applicant arrived in Australia as an unauthorised maritime arrival. [In] April 2016 the applicant lodged a valid application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV).
2. A delegate of the Minister of Immigration and Border Protection (the delegate) refused to grant the visa [in] November 2016. The delegate appeared to accept that there was a real chance and real risk that the applicant would suffer serious and significant harm if he was to return to his home district of Jaghori in the province of Ghazni. However, the delegate found that the real chance or risk of harm did not relate to all areas of Afghanistan and that on return it was reasonable for the applicant to relocate to Kabul.

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. On 30 November 2016 the IAA received a submission from the applicant's representative (IAA submission). The IAA submission in part comprises argument on issues before the delegate and refers to claims and evidence that was before the delegate, which I consider does not constitute 'new information' in accordance of s.473DC of the Act.
5. The IAA submission also provides reasons as to why the applicant provided certain (incorrect) information during an interview of [February] 2013 (entry interview), which was inconsistent with information he later provided in the interview with the delegate [in] August 2016 (SHEV interview). These explanations were not provided to the delegate and I consider them to be new information.
6. On 24 November 2016, the IAA received an email from the applicant's representative stating that the applicant 'had serious concerns about the interpretation service performed by [the] accredited interpreter' in the SHEV interview. He states there were 'many occasions' where the interpreter did not interpret his words correctly. These concerns with the interpreter were not raised with the delegate.
7. The IAA must not consider any new information from an applicant unless satisfied exceptional circumstances justify considering the new information and the new information was not and could not have been provided to the Minister, or is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims.
8. The applicant's claim of interpreting errors during the SHEV interview is new information. The email of 24 November 2016 does not specify the nature of the interpreting errors claimed to have occurred in SHEV interview, but does state that an audio copy of the interview had been sought. In a further email of 25 November 2016, the applicant's representative confirmed he had in his possession a copy of the SHEV interview. Neither the subsequent email nor the IAA submission makes reference to any interpreting errors, nor does it explain why this information could not have been provided to the delegate or why it may be considered credible personal information. I have listened to the recording of the SHEV interview and at no time did the applicant, or his representative who was also present, indicate concerns with the

competence of the interpreter. In the circumstances, I am not satisfied that this information could not have been provided before the delegate's decision was made. Nor am I satisfied the new information is credible personal information.

9. The applicant's representative submits that at the time of the entry interview, conducted only a few days after his arrival in Australia, the applicant's memory was affected in relation to times and dates. This was due to the torture and trauma experienced following his abduction by the Taliban, and due to having endured a long journey to Australia that involved passing through several countries. I have listened to the recording of the entry interview and at no time did the applicant raise any concerns with his ability to recall information. I also note this information was not advanced in his SHEV application or at any time prior to the delegate's decision of [November] 2016. I further note that the applicant may have provided inconsistent evidence between the entry interview and the SHEV interview was squarely at issue at the SHEV interview and neither the applicant, nor his representative, advanced this information. Further, the IAA submission does not clearly specify what information was incorrectly provided and does not provide reasons as to why this information could not have been provided to the delegate or why it may be considered credible personal information. In the circumstances, I am not satisfied that this information could not have been provided before the delegate's decision was made. Nor am I satisfied the new information is credible personal information.
10. I have also obtained country information regarding the emergent threat of Islamic State in Afghanistan and the security situation in Balkh Province. This information was not before the delegate and is new information. I am satisfied there are exceptional circumstances for considering this information because it is relevant to the assessment of whether the applicant faces a real chance or real risk of harm in the reasonably foreseeable future, and the viability of relocation within Afghanistan.
11. On 1 May 2017, the IAA invited the applicant to comment on this information and on the reasonableness of relocation within Afghanistan, including Mazar-e-Sharif. On 15 May 2017, the applicant's representative responded with a further submission and country information (second IAA submission). As the information was provided in response to an invitation from the IAA, I am satisfied that the information contained within the second IAA submission was not before the Minister and could not have been provided before the delegate's decision. The information relates to issues that have been raised consequent to the delegate's decision and I am satisfied that there are exceptional circumstances to justify considering it.

Applicant's claims for protection

12. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
 - The applicant is a Shia Hazara male from [Village 1], Jaghori District, Ghazni Province;
 - In late 2012 or early 2013, the applicant was captured by the Taliban while transporting passengers in his [vehicle] between Ghazni and Jaghori. He was blindfolded, taken to a dark shed, and repeatedly beaten with a cable;
 - The applicant was accused of transporting government officials and documents. He managed to escape the Taliban and return to his village, before heading to Kabul the following day to commence his journey to Australia;
 - If returned to Afghanistan, the applicant fears he will be seriously harmed or killed by the Taliban on account of:

- his Hazara ethnicity
- his Shia Muslim religion
- his escape from the Taliban's custody
- his imputed association with the Afghan government and opposition to the Taliban
- his asylum application in Australia.

Refugee assessment

13. 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

14. 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.

15. Since his arrival in Australia, the applicant has consistently claimed to be from [Village 1] in Jaghori District, Ghazni Province. He provided a certified copy of his Taskera (with accompanying NAATI translation), and on the basis of his evidence, I accept the applicant's identity is as claimed, that he is an Afghani citizen from that part of Afghanistan, and that his receiving country is Afghanistan.

16. In support of his SHEV application, signed and dated [in] April 2016, the applicant provided a statutory declaration where he outlined his claims for protection (SHEV statement). In his SHEV statement, the applicant stated that he was captured by the Taliban in 2012 while driving [people] between Ghazni and Jaghori. He said he was accused of transferring files and documents for the government. He was blindfolded, taken to a dark shed, and repeatedly beaten with a cable. The applicant remained in the shed for hours and at midnight he managed to escape through a hole when the guards left for the night prayer. He travelled on foot for about three days back to his village. The following day, the applicant left for Kabul to commence his journey to Australia.

17. As well as the information provided in his SHEV statement, I have also had regard to information provided by the applicant in the SHEV interview of [August] 2016, and information he provided in the entry interview of [February] 2013.
18. The applicant's evidence in his SHEV statement in relation to the claimed abduction and escape, and the events that followed, was not particularly detailed. While his oral evidence in the SHEV interview was broadly consistent with his SHEV statement and information he provided in the entry interview, I found it lacked any real substantive detail, beyond his written claims, that would indicate he was recounting a genuinely lived experience. Although the applicant advanced no claim that he had transported government official or documents, he advised the delegate that the Taliban abducted him under suspicion of doing so. His driver's licence was taken at the time of his abduction. He was taken to a shed, tortured with a cable, and sustained bruising on his back, which is now healed. He was detained from [morning] until he escaped at around [night time].
19. In relation to the events that followed his escape, the applicant initially advised the delegate that he remained in Kabul for 'a few days' prior to leaving Afghanistan. When the delegate put to the applicant that this was inconsistent with information he had provided in the entry interview, he responded that he in fact remained in Kabul for 'a few weeks'. This evidence differed from information provided in the entry interview where he stated on three separate occasions that the abduction had occurred four months prior (approximately November 2012), thereby indicating that he had resided in Kabul for several months prior to departing Afghanistan in January 2013.
20. In the IAA submission, the applicant's representative states that his client refutes that he gave evidence in the entry interview that he remained in Kabul for several months before coming to Australia. He also states that his client instructs that he only remained in Kabul for 'a few days' prior to leaving for Australia.
21. It is also submitted in the IAA submission that his driver's licence was lost while he was taking passengers from Kabul to Ghazni Province. This differed from the applicant's evidence in the SHEV interview where he stated it was taken by the Taliban at the time of his abduction. According to his SHEV statement, he was abducted travelling between Ghazni and Jaghori.
22. I find the applicant's evidence in relation to his claimed abduction and escape from the Taliban to be unconvincing. In particular, the applicant's evidence in relation to when the abduction occurred and how long he remained in Kabul following his escape has changed over time.
23. As noted above, the applicant's repeated evidence in the entry interview was that the abduction occurred four months prior (November 2012). While the applicant's SHEV statement only provides a date of '2012', I note in his SHEV application it is recorded that he was still living and working in [Village 1] in January 2013, thereby indicating that the incident occurred in 2013, not 2012 as claimed in both the entry interview and SHEV statement.
24. In the IAA submission, the applicant submits that he remained in Kabul for 'a few days', thereby indicating that he was abducted in January 2013. However, I find that the abduction occurred in January 2013 to be inconsistent with other information provided in the entry interview where he stated he had spoken to a people smuggler in Kabul one and half to two months prior (approximately December 2012).
25. As noted above, in the entry interview, the applicant advised on three separate occasions that he was abducted four months earlier. His later claim that he left Afghanistan only days (or even

weeks) following the claimed abduction is not supported by his evidence in the entry interview. As outlined above, there were other inconsistencies such as the time of day that he escaped from the Taliban and the circumstances surrounding how he lost his driver's licence.

26. Overall, when I consider the applicant's lack of detail in both his SHEV statement and in the SHEV interview, the above noted inconsistencies, including his conflicting evidence as to when he was abducted and the period of time he spent in Kabul, I am not satisfied the applicant was recalling a genuine personal experience. For these reasons I do not accept that the applicant came to the adverse attention of the Taliban under suspicion of transporting government officials and documents, or for any other reason. I also prefer the applicant's evidence in the entry interview in relation to the time spent in Kabul prior to his travel to Australia. I find that the applicant was in Kabul for at least one and a half months to two months before departing Afghanistan.
27. The applicant originates from the Jaghori District in Ghazni Province. Although administratively part of Ghazni Province, Jaghori District is also a part of the larger Hazara dominated area of central Afghanistan which is known colloquially as the Hazarajat, and which is made up of the Hazara-majority provinces of Bamiyan and Daykundi, as well as the surrounding Hazara majority districts of Ghazni, Ghor, Uruzgan and Wardak provinces.¹ In February 2016 DFAT observed that security for Hazaras in most (but not all) districts in Bamiyan and Daykundi tends to be better in part because Hazaras make up the vast majority of the population in these areas, which has two effects: because of the ethnic homogeneity, there are fewer opportunities for ethnic tension; and because Hazaras are visually distinct, non-Hazaras can find it difficult to infiltrate these areas without detection.² Some parts of the Hazarajat had nevertheless seen a significant deterioration in security. For example, credible sources have reported that the Hazara-dominated Ajristan district (in western Ghazni) is extremely unsafe. However, the security situation in most of the Hazarajat is more favourable. In February 2016 DFAT noted a decline in security more generally across Afghanistan—including in some of the majority Hazara areas such as Jaghori District.³ Nevertheless, credible sources confirm that the security situation in Jaghori remains favourable with few security incidents and little evidence of insurgent activity.⁴ Given the lack of Taliban penetration into Jaghori, I am not satisfied that there is a real chance that the applicant would face harm from the Taliban in Jaghori for reason of his ethnicity, religion, or for any other reason.
28. I am, nevertheless, satisfied that the applicant faces a real chance of serious harm if he attempted to return to his home region in Jaghori District in Afghanistan's Ghazni Province. Country information indicates Ghazni is one of the most volatile provinces in Afghanistan in terms of attacks on defence forces, international forces and civilians due to the activities of the Taliban and other insurgent groups present in Pashtun majority districts, which therefore have high levels of insecurity and are unsafe.⁵ DFAT report that the general security situation in Ghazni Province, including within the majority Hazara Jaghori District, has deteriorated since the beginning of 2014.⁶

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 2.4

² DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 2.19-2.22

³ DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186, 2.19-2.22

⁴ European Asylum Support Office (EASO), "EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p.95

⁵ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.23

⁶ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.23

29. I accept that in order for the applicant to return to Jaghori District, he would be required to travel by road after arriving at an airport in one of Afghanistan's major cities, such as Kabul, Kandahar, Mazar-e-Sharif or Herat. While DFAT indicate that some Hazara dominated districts are relatively safe and secure compared to other parts of the country, there are significant risks for people travelling by road between these areas.⁷ The roads linking the Hazara dominated areas of Ghazni with Kabul suffer from a high level of insecurity and while no ethnic group is immune from kidnappings, DFAT assess that Hazaras travelling by road between Kabul and the Hazarajat face a greater risk than other ethnic groups.⁸ DFAT have also reported numerous incidents in 2015 that involved the kidnapping and/or killing of Hazaras who were travelling through Ghazni Province and to the south in Zabul Province.⁹ In April 2016, the United Nations High Commissioner for Refugees (UNHCR) also reported a significant increase in harassment, intimidation, kidnappings and killings of Hazaras, especially while travelling, at the hands of the Taliban and other anti-government elements (AGEs).¹⁰ On the information before me, I am satisfied that, as a Hazara, the applicant faces a real chance of serious harm if he travels on the roads leading to Jaghori if he were to attempt to return there. I am satisfied that his ethnicity would be an essential and significant reason for the harm.
30. However, pursuant to s.5J(1)(c) of the Act the real chance of persecution must relate to all areas of the receiving country.
31. Given I have found that the applicant does not face a real chance of serious harm in Jaghori District from the Taliban for any reason, including his religion or ethnicity, I do not accept that the Taliban would pursue the applicant personally outside of his home area. Nevertheless, I have considered whether he would otherwise be at risk of serious harm on the basis of ethnicity, religion, imputed political opinion, or other profile elsewhere in Afghanistan. For the reasons given below, I am not satisfied that the applicant faces a well-founded fear of persecution in Mazar-e-Sharif or Kabul.
32. Kabul is the largest city in Afghanistan with an estimated Hazara population of 40 to 50 per cent.¹¹ While no parts of Afghanistan are completely free from violence, Kabul provides relatively good economic opportunities and greater levels of security than other parts of the country, and there are relatively safe areas for Hazaras to reside.¹²
33. The Afghan government retains effective control of Kabul¹³ and the Afghan security forces are generally capable and effective at protecting the major population centres.¹⁴ While insurgents do conduct high-profile attacks in Kabul,¹⁵ DFAT assess that ethnic based violence in Kabul is rare, and that the primary targets for such attacks include government institutions, political

⁷ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 4.4

⁸ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.23, 2.33.

⁹ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.28-2.30.

¹⁰ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3, p. 76

¹¹ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.7

¹² DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 4.3 - 4.4

¹³ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.18

¹⁴ US Department of Defense, "Enhancing Security and Stability in Afghanistan December 2016", 1 December 2016, CIS38A80123497, p. 21

¹⁵ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3, p 15; DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.17

figures, the Afghan security forces, other security services, and international organisations,¹⁶ rather than targeting specific ethnic groups such as Hazaras.¹⁷

34. While there have been no recent reports of the Taliban carrying out mass casualty attacks against the Hazara and/or Shia population in Kabul, there have been attacks by other groups in recent years in that city. In December 2011, Pakistani militant group Lashkar-e-Jhangvi claimed responsibility for a targeted attack against Afghan Shias commemorating Ashura at Kabul's Abu Fazl Mosque that killed more than 80 people.¹⁸ In February 2014, there was an attack on an Ismaili (Shia) cultural centre which killed one security guard. On 9 October 2015, one person was killed in a bomb attack on a Shia prayer hall and the Islamic State in the Khorasan Province (ISKP) claimed responsibility.¹⁹ On 23 July 2016, explosions targeting a demonstration of Hazaras, killed up to 80 people. The Taliban denied involvement and condemned the attack. The ISKP claimed responsibility and stated that it would continue to target Shia groups.²⁰ On 11 October 2016 on the eve of Ashura, a gunman killed some 16 Shia Muslims at the Kabul's Kart-e Sakhi Shia shrine.²¹ On 21 November 2016 a bomb attack on a Shia mosque killed around 30 worshippers. Islamic State claimed responsibility while the Taliban denied involvement.²²
35. In the second IAA submission, the applicant's representative states that Islamic State is capable of orchestrating attacks, is present in Kabul, is not weakened, is not a limited threat, and will frequently attack the Shia population in the future. It is also submitted that the Taliban pose a major threat to the Shia population in Kabul.
36. Country information recognises the emergent threat of Islamic State, but raises questions about whether the group has the capability to orchestrate anything beyond infrequent or occasional high profile attacks in Afghanistan. The first reports of Islamic State appearing in Afghanistan date back to the summer of 2014.²³ It has been estimated that in late 2015 that there were 1,000-3,000 Islamic State fighters in Afghanistan and that US and Afghan military efforts had reduced the group's fighting strength by 15-20% as of October 2016 to roughly 1,000 personnel. Two prominent leaders of Islamic State were killed in July 2016 and February 2017.²⁴ The group's presence in the country is confined mostly to the Pakistan border, in Nangarhar and Zabul. Sources also indicate that the group continues to be weakened, is struggling to control territory and its efforts to establish itself in other parts of Afghanistan have in large part failed.²⁵ A report from the Afghanistan Analysts Network on the 2016 attacks

¹⁶ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.18, 4.7

¹⁷ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.17

¹⁸ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 3.6

¹⁹ EASO, "EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p. 41; Afghanistan Analysts Network, "With an active cell in Kabul, ISKP tries to bring sectarianism to the Afghan war", 19 October 2016, CX6A26A6E11358

²⁰ DFAT, "DFAT Thematic Report on Afghanistan Security Conditions 1 January to 31 August", 5 September 2016, CIS38A80121778, 2.6-2.7; IHS Jane's Intelligence Review, "Assault on Shia shrine in Kabul likely to have been conducted by Islamic State, indicating

resilient attack capability", 12 October 2016, CX6A26A6E11042

²¹ Afghanistan Analysts Network, "With an active cell in Kabul, ISKP tries to bring sectarianism to the Afghan war", 19 October 2016, CX6A26A6E11358

²² CNN International Edition, "Afghanistan mosque attack: 30 dead, ISIS claims responsibility", 21 November 2016

²³ EASO, "EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p. 24

²⁴ United States Congressional Research Service, "The Islamic State and U.S. Policy", 18 January 2017, CISED50AD189; Noor Zahid (Voice of America), "Islamic State Commander Killed by US-Afghan Airstrike", 9 February 2017, CXC9040661576

²⁵ UK Home Office, "Country Policy and Information Note – Afghanistan – Fear of anti-government elements", 1 December 2016, OGD7C848D96, p.17-19, 24-25; IHS Jane's Intelligence Review "Back on the offensive - Wilayat Khorasan reasserts itself in Afghanistan", 13 December 2016, CX6A26A6E16023; EASO, "EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p. 24-26, 113; Islamic State claims

states that while Islamic State seems capable of planning and executing 'occasional' attacks, it remains a limited threat, and that it is unlikely that the group can single-handedly drive the conflict in a sectarian direction.²⁶ Reports from Jane's Intelligence Review forecast that while Islamic State will probably continue to conduct infrequent attacks in urban areas in Afghanistan, Afghan, United States forces and the Taliban are intent on eliminating Islamic State's presence in the country and that this is likely to limit any Islamic State expansion over the next 12 months.²⁷

37. I accept that Islamic State has a presence in Kabul and while it has gained a capability of carrying out occasional fatal attacks in the city, this has not been at a sophisticated level.²⁸ I also accept that further attacks are possible. However, I am not satisfied that the level of risk is such that it 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 Kabul on 23 July 2016. I accept that the applicant is a Shia Muslim and that upon return to Kabul he likely would, like most Afghan Shia Muslims, attend communal worship and religious festivals. Nevertheless, given the nature and extent of the attacks perpetrated against Shia Muslims and Shia Hazaras in Kabul, the size of Kabul's Shia Hazara population (estimates vary between around 1.6 million to two million, or 40-50 per cent of Kabul's population),²⁹ and given that I do not accept that the applicant is a person of adverse interest to Islamic State or the Taliban, I am not satisfied that there is a real chance he will suffer serious harm in Kabul from an insurgent group, like Islamic State or the Taliban, for reason of him being a Shia Hazara, or due to an imputed association to the Afghan government, now or in the foreseeable future.

38. In his SHEV statement, the applicant stated that he could not relocate safely to another part of Afghanistan as the Taliban would eventually find him. In the SHEV interview, the delegate put to the applicant that Kabul may be a place he could reside without facing a real chance of harm. The applicant's response was that he was concerned that the Taliban would find him and harm him in Kabul. Country information indicates that Kabul provides the most viable option for many people for internal relocation and resettlement in Afghanistan as it offers relatively better opportunities for employment, access to services and state protection than rural areas.³⁰ Kabul's economy is based on trade and other service industries and although unemployment is widespread in Kabul, over the last decade, employment growth has been strongest in Kabul's service sectors, including small businesses such as family-owned markets, retail stores, and the construction industry.³¹

suicide attack outside Afghanistan's supreme court", The Long War Journal, 8 February 2017, CXC9040661479; "To Afghanistan Not Syria? Islamic State Diverts Tajik Fighters South", Jamestown Foundation, 15 March 2017

²⁶ Afghanistan Analysts Network, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", 19 October 2016

²⁷ 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

²⁸ Afghanistan Analysts Network, "With an active cell in Kabul, ISKP tries to bring sectarianism to the Afghan war", 19 October 2016, CX6A26A6E11358

²⁹ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.7

³⁰ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 4.3

³¹ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 3.18; DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367, 2.12-2.14

39. Aside from Kabul, Mazar-e-Sharif in the Balkh Province is one of the largest commercial and financial centres in Afghanistan and considered the unofficial capital of northern Afghanistan.³² It has an international airport that accepts flights from Kabul and international locations.³³ Hazaras form one of the majority ethnic groups in Mazar-e-Sharif.³⁴
40. Like Kabul, Mazar-e-Sharif city carries heavy political and economic weight and has a strong military and police presence. In 2014, LandInfo described Mazar-e-Sharif as one of the safest cities in Afghanistan, much more so than Kabul.³⁵ In March 2014, DFAT assessed that the government maintained effective control over the city and there is no indication from subsequent reporting that such control has been lost.³⁶ Nor is there an indication that such control would be lost in the reasonably foreseeable future even taking into account recent security incidents (discussed below), and significant security force deployments are maintained to ensure its ongoing stability and security.³⁷ In January 2016 EASO reported the city had been relatively isolated from the conflict in the preceding decade.³⁸ In its November 2016 report, EASO reported that despite a number of security incidents, Mazar-e-Sharif had one of the lowest numbers of civilian victims in its city centre.³⁹ DFAT also assess that large urban areas in Afghanistan offered greater opportunities for employment, access to services and a greater degree of state protection than many other areas.⁴⁰ Agriculture, wholesale and retail trade, manufacturing and construction are the main sectors of employment in Afghanistan.⁴¹
41. In the second IAA submission, the applicant's representative states that a CNN International Edition report evidenced an attack by Islamic State in Jawzjan Province, to the west of Balkh Province. According to the report, six Red Cross workers were killed by 'unknown armed men' on 8 February 2017.⁴² It is also submitted that Mazar-e-Sharif is at risk because the Taliban are active in the nearby provinces of Konduz, Samangan and Baghlan. Within Balkh Province, the applicant's representative states that the Taliban carried out an attack on an Afghan army base in April 2017 that killed around 140 people. It is further submitted that there has been armed conflict between the Taliban and the government in the Sholgara, Chintal and Charbolak districts of Balkh Province.
42. Information before me indicates that the Taliban and other AGEs are active in Balkh Province and some targeted attacks have been conducted in Mazar-e-Sharif as recently as 2015 and 2016, although the targets were not always clear. Three people were wounded when a bomb placed on a handcart exploded in a fruit market in Mazar-e-Sharif in November 2014. In March

³² EASO, "EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p.149; EASO Country of Origin Information Report: Afghanistan – Security Situation", 20 January 2016, CIS38A8012395, p. 145

³³ Zabihullah Ihsas, "Balkh airport terminal inaugurated", Pajhwok Afghan News, 9 June 2013; <http://www.flightstats.com>

³⁴ EASO "EASO Country of Origin Information Report: Afghanistan – Security Situation", 20 January 2016, CIS38A8012395, p. 145

³⁵ EASO Country of Origin Information Report: Afghanistan – Security Situation", 20 January 2016, CIS38A8012395, p. 145

³⁶ DFAT, "DFAT Thematic Report Hazaras in Afghanistan and Pakistan 26 March 2014", 26 March 2014, CIS2F827D91264, 5.2; US Congressional Research Service, "Afghanistan: Politics, Elections, and Government Performance", 12 January 2015, CISEC96CF1188, p. 16

³⁷ US Department of Defense, "Enhancing Security and Stability in Afghanistan December 2016:", 1 December 2016, CIS38A80123497, p.17,53,59,65,69

³⁸ EASO Country of Origin Information Report: Afghanistan – Security Situation", 20 January 2016, CIS38A8012395, p. 145

³⁹ EASO, "Country of Origin Information Report: Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p. 35

⁴⁰ DFAT, "DFAT Thematic Report Hazaras in Afghanistan and Pakistan 26 March 2014", 26 March 2014, CIS2F827D91264, 5.7

⁴¹ DFAT, "DFAT Thematic Report Hazaras in Afghanistan and Pakistan 26 March 2014", 26 March 2014, CIS2F827D91264, 2.19

⁴² CNN International Edition, "6 Red Cross workers killed in Afghanistan", 8 February 2017

2015, in two separate incidents, unknown gunmen killed two persons in the streets of Mazar-e-Sharif. One was a relative of a provincial council member, the other an official of the ministry of Foreign Affairs, believed to be a close relative to provincial governor Mohammad Atta Noor. In April 2015, four heavily armed men dressed in military clothing attacked a court complex in Mazar-e Sharif. The attack ended when all four attackers were killed by security forces. Depending on the source, 10 to 18 people were killed and more the 60 wounded, almost all of them civilians or civilian personnel of the court.⁴³ In October 2015, a small bomb was thrown in a mobile market located in Tor Bazaar area and at least 9 people were wounded. Two months later a police vehicle was targeted by a magnetic bomb. On 3 January 2016, five civilians were caught in the crossfire between Afghan forces and AGEs who tried, unsuccessfully, to enter the Indian consulate. In August 2016, a suicide attack near a market in Mazar-e-Sharif killed one civilian and injured 14 others, including a child and three women.⁴⁴ On 12 October 2016, approximately 20 kilometres from Mazar-e-Sharif, a bomb exploded outside a mosque where Shias were commemorating Ashura, which appears to have been directed specifically against Shias. Whilst Islamic State claimed responsibility for attacks against Shias in Kabul the previous day, there was no declaration of responsibility by Islamic State or any other group in relation to the Balkh explosion.⁴⁵ While I accept there have a number of incidents in Mazar-e-Sharif since 2014 and that civilians have been harmed in several of these incidents, the incidents have been infrequent and the attacks are almost exclusively directed against national security forces, international and government targets.

43. In March 2016, Balkh's governor indicated there were fighters loyal to Islamic State in the province, consisting of remnants of the Islamic Movement of Uzbekistan, a group that conducts attacks on Afghan security forces.⁴⁶ According to EASO in November 2016 there was evidence of an Islamic State presence in the southern districts of Balkh Province where the governor conducted a clearing operation in March 2016. However, there is no evidence of an Islamic State presence in or near Mazar-e-Sharif.⁴⁷ Given the nature and extent of the attacks perpetrated in Mazar-e-Sharif in the recent past, the country information relating to the reach of insurgent groups, and given that I do not accept that the applicant is a person of adverse interest to Islamic State or the Taliban, I am not satisfied that there is a real chance he will suffer serious harm in Mazar-e-Sharif from an insurgent group, like Islamic State or the Taliban, for reason of him being a Shia Hazara, or due to an imputed association to the Afghan government, now or in the foreseeable future.
44. In the SHEV interview, the applicant advised the delegate that if returned to Afghanistan he would be accused by the Taliban of spying for a western country. DFAT assess that in general returnees from western countries are not specifically targeted on the basis of being failed asylum-seekers, although there have been occasional reports of returnees from western countries alleging they have been kidnapped or otherwise targeted on the basis of having spent time in a western country and refer to a report of a Hazara from Ghazni province who was kidnapped on the road.⁴⁸ UNHCR indicate that returnees from the west may be viewed as

⁴³ EASO Country of Origin Information Report: Afghanistan – Security Situation”, 20 January 2016, CIS38A8012395, p. 147; EASO, "Country of Origin Information Report: Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p. 27

⁴⁴ EASO, "Country of Origin Information Report: Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p. 151

⁴⁵ Afghanistan Analysts Network, "With an active cell in Kabul, ISKP tries to bring sectarianism to the Afghan war", 19 October 2016, CX6A26A6E11358

⁴⁶ EASO, "EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p. 24 and 150

⁴⁷ EASO, "Country of Origin Information Report: Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p. 151 and 22

⁴⁸ DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 5.21-5.22

foreigners or spies and targeted.⁴⁹ However, the reports and incidents cited by the UNHCR and DFAT do not refer to Mazar-e-Sharif or Kabul as areas where returnees are targeted on the basis of being perceived as Western. Although, as noted above, there has been an increase in insurgent attacks within Mazar-e-Sharif, there is no evidence to indicate that the city is an area where returnees are targeted on the basis of being perceived as Western. Country information indicates that Hazara returnees from western countries who, like the applicant, 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.⁵⁰ I find the applicant does not have identifiable affiliations with international organisations or the Afghan government which would raise his profile and lead to him being specifically targeted by insurgents for a pro-Western political opinion. There have been no reports of people being targeted for returning from a western country in Mazar-e-Sharif, nor in Kabul. While Mazar-e-Sharif is not specifically mentioned, DFAT assess that, because of the city's size and diversity, returnees to Kabul are unlikely to be discriminated against or subject to violence on the basis of ethnicity or religion.⁵¹ I am not satisfied on the evidence that returnees like the applicant, who have lived in a western country for a significant period, are targeted in Kabul or Mazar-e-Sharif by insurgents or that he would be targeted on return to either city as a Shia Hazara, due to an imputed association to the Afghan government, or as returnee asylum seeker.

45. DFAT assess that official discrimination on the basis of religion is low and that any religious or ethnic discrimination faced by Shias in Afghanistan, including the Hazara community, is more likely to be societal in nature, at the community level, 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.⁵² Societal 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 a particular group.⁵³ While Hazaras are underrepresented in senior government positions, they are active in the Afghan community, particularly in politics, education and civil society.⁵⁴ Observers report that many Hazaras, including Hazara women, are earning degrees or pursuing training in information technology, medical, and other highly skilled professions and that they are becoming dominant in many of these higher paying sectors of the Afghan economy.⁵⁵ UNHCR cited an October 2015 report from the US Department of State that found that discrimination against the Shia had significantly decreased, with no reported incidents in the capital and major outlying areas, and that Shias were represented in the government, holding major positions, and were free to participate fully in public life.⁵⁶ I accept that as a returnee Shia Hazara, the applicant may be subject to discrimination on return in relation to employment as a consequence of nepotism, particularly as he does not have family links in Kabul or Mazar-e-Sharif where he has not lived before. However, as noted above, Shia Hazaras form a significant minority group in Mazar-e-Sharif and Kabul and I am not satisfied there is a real chance that as a consequence of such discrimination that he would be denied the capacity to earn a livelihood or that he would be subject to economic hardship such that it would threaten his capacity to exist or would otherwise suffer treatment that may be considered serious harm. I am also not satisfied that any other

⁴⁹ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3, p. 41

⁵⁰ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 4.12

⁵¹ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 4.11

⁵² DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 3.4-3.5, 3.10

⁵³ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 3.5

⁵⁴ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 3.10

⁵⁵ US Congressional Research Service, "Afghanistan: Politics, Elections, and Government Performance", 12 January 2015, CISEC96CF1188, p. 3

⁵⁶ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3, p. 51

discrimination against the applicant will manifest itself in such a way that would constitute serious harm.

46. I have found there is no real chance of the applicant being seriously harmed in Kabul or Mazar e Sharif on the basis of his religion, his ethnicity, his imputed association to the Afghan government, or as a returnee asylum seeker. As noted above, Kabul and Mazar e Sharif have not been immune to the insurgency and attacks from the Taliban and other AGEs, however, over the last several years, attacks directed against the Hazara Shia populations in both cities have been infrequent. The major security issues in Kabul and Mazar-e-Sharif relate to the insurgency. The threats from AGEs, principally the Taliban, in these cities have been against high profile targets such as persons and locations associated with the government, the military, and the international community. While certain high profile groups remain at risk in the country, including groups that have a significant presence in Mazar-e-Sharif and Kabul, I am satisfied the applicant has no association or proximity with those other risk profile groups, nor is there any suggestion he would have such an association or proximity when he returns to the country.
47. Accordingly, I am not satisfied that a real chance of persecution relates to all areas of Afghanistan.

Refugee: conclusion

48. 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

49. 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

50. 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.
51. I have found above that the applicant would face a real chance of being seriously harmed in accessing his home region of Jaghori District. 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 Jaghori District.

52. 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.
53. I have concluded that the applicant is not a person of interest to the Taliban, or any other group in Afghanistan, on account of his religion, his ethnicity, or any imputed association to the Afghan government, and does not face a real chance of serious harm on this basis. I have also concluded that the applicant does not face a real chance of harm for any other reason including him being a returning asylum seeker. As the 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear', for the same reasons set out above, I find that the applicant does not have a real risk of suffering significant harm for those reasons if he returned to, and resided in, Kabul or Mazar-e-Sharif.
54. In his SHEV statement, the applicant stated that he could not relocate to another part of Afghanistan because the Taliban would find him there. In the SHEV interview, he advised the delegate that he had a few friends living in Kabul. He also advised that as a [driver] he took passengers from Jaghori to Kabul. In the IAA statement, the applicant's representative reiterated some of the applicant's evidence from the SHEV interview and his SHEV application. Specifically, that the applicant had friends living in Kabul, that he used to take people from Ghazni Province to Kabul in his [vehicle], and that he had never lived in any other area in Afghanistan other than Jaghori District. The applicant's representative refutes the delegate's finding that the applicant likely has tribunal/family connections in Kabul and for this reason, along with the fact he has spent many years in Australia, the applicant would have difficulty integrating into the community and be more prone to being targeted by insurgent groups.
55. In the second IAA submission, in response to the IAA's invitation to comment on the reasonableness of relocation within Afghanistan, the applicant's representative indicated that relocation to Kabul or Mazar-e-Sharif was unreasonable because the applicant had no friends or family in either city. While I accept this may be true in relation to Mazar-e-Sharif, I note the applicant's evidence in the SHEV interview (and reiterated in the IAA statement) that he has friends residing in Kabul.
56. I accept that due to the ongoing insurgency and deteriorating security situation across Afghanistan that the government does not exercise uniformly effective control over all parts of the country, particularly in rural areas. I have also noted the applicant's and his representative's concerns about the security situation in Balkh Province and Kabul. However, the evidence before me does not support that persons with the applicant's profile are targeted in Kabul or Mazar-e-Sharif, including at the airport or in transit from the airport to the city. While country information indicates that sporadic insurgent attacks do occur in Mazar-e-Sharif (and more broadly within Balkh Province) and Kabul, the primary targets for such attacks have been persons and locations associated with the government and the international community. I have found that the applicant does not have any identifiable affiliations with international organisations or the Afghan government which would raise his profile and lead to him being specifically targeted by insurgents. The evidence before me does not support that Afghan government or security forces are losing control of Kabul or Mazar-e-Sharif. Taking into account these factors and the size and diversity of both cities, I find the risk the applicant would be harmed as a bystander, inadvertently caught up in an attack, or otherwise harmed through generalised violence is remote. I am therefore not satisfied that he faces a real risk of

suffering significant harm through generalised violence in Kabul or Mazar-e-Sharif. Further, 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 am not satisfied that there is a real risk that the applicant will face discrimination or mistreatment for any reason in Kabul or Mazar-e-Sharif that would amount to significant harm.

57. I accept that the applicant's immediate and extended family resides within Jaghori District. I have given careful consideration to this in terms of the emotional and practical impact of a continued separation, and because I accept that his wife and children are his dependents and he would need to support them. However, the applicant has already spent years living apart from his family during two significant periods in [Country 1] for employment purposes (1983 - 1987 and 1993 - 1995) and since coming to Australia. There is no evidence before me to indicate the applicant has been previously unable to support his family in the past and I find he could establish himself in Kabul or Mazar-e-Sharif.
58. Country information cited above indicates that large urban areas in Afghanistan, such as Kabul and Mazar-e-Sharif, offered greater opportunities for employment, access to services and a greater degree of state protection than many other areas. As already noted, retail and construction are considered some of the larger sectors of employment in Afghanistan. Although unemployment is widespread in Kabul, the country information cited indicates the city offers better employment opportunities for many. Retail trade and the construction industry are some of Kabul's strongest service sectors and I note the applicant has over 20 years experience as [an occupation] in Afghanistan, plus several years experience working in [an industry] in [Country 1] and Australia. While not the dominant group, there is a large Hazara community in Mazar-e-Sharif and the applicant has demonstrated that he is resourceful and resilient and has successfully lived apart from his family and settled in unfamiliar places. I am also satisfied that the applicant would have the benefit of familiarity with Kabul, a city that he has worked in as a [driver] and spent time in prior to leaving Afghanistan. Although I am not persuaded it is necessary, the applicant also has the benefit of being able to draw on his network of friends in Kabul should he return there. Mazar-e-Sharif is one of the biggest commercial centres and the more stable security and greater economic opportunities will be conducive to the applicant finding employment. I have not identified any vulnerability which would act as a barrier to him obtaining employment to enable him to subsist in Mazar-e-Sharif or Kabul.
59. Rents in Kabul tend to be expensive compared to most other parts of Afghanistan. As a result, many residents of Kabul live in informal settlements.⁵⁷ While informal settlements are not in accordance with the Kabul City Master Plan, it is estimated that 70 to 80 per cent of Kabul is 'informal'.⁵⁸ There is little information on employment and accommodation in Mazar-e-Sharif, but I accept that due to it being a major urban area where IDPs and refugee/returnee populations are likely to settle in, there are likely to be similar pressures in terms of accommodation, employment and basic services.
60. Overall, I accept there are economic and other challenges in relocating to either city. I also accept that the applicant may face difficulties in establishing himself and that he may be

⁵⁷ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.7

⁵⁸ EASO, "EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597, p. 43

affected by employment discrimination through nepotism. However, the applicant is able-bodied, of working age, and I am satisfied he would have some relevant skills and attributes gained through his experience of being gainfully employed which would support his ability to find employment upon return. I am satisfied the applicant would be able to access the necessary infrastructure and essential services to sustain himself and meet the basic necessities of life. I am also satisfied that over time, he will be able to integrate into the local community.

61. I have noted the applicant's and his representative's concerns about the reasonableness of relocation to Kabul and Mazar-e-Sharif. However, in considering the applicant's personal circumstances and the country information relating to Kabul and Mazar-e-Sharif, including the social, economic and security situation, I am satisfied it is reasonable for the applicant to relocate to and remain in Kabul or Mazar-e-Sharif.

Complementary protection: conclusion

62. 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.

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.

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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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