



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN
IAA reference: IAA17/01887

Date and time of decision: 21 September 2017 15:15:00
Denny Hughes, Reviewer

Decision

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

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of 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. He applied for a protection visa [in] July 2016. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] February 2017.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. The applicant's representative has made a number of submissions to the IAA.
4. The first submission was dated 28 February 2017. It contained a number of country reports in support of the applicant's claims. A second email contained a supplementary statement from the applicant and a five page written submission. An updated replacement five page submission was emailed on 3 March 2017.
5. On 7 March 2017, all submissions were sent back to the applicant with an explanation for why the submissions did not comply with the requirements in the Practice Direction for Applicants, Representatives and Authorised Recipients (the Practice Direction) issued by the President of the Administrative Appeals Tribunal.
6. In an email received 12 March 2017, the IAA received a written reference post-dated 13 March 2017 from a third party. On the same date, the representative emailed a revised 5 page submission and the previously submitted supplementary statement from the applicant. On the same date, the representative emailed revised country information that was referred to in the submission.
7. An email dated 26 May 2017 contained a two page submission related to new information, a letter of support from the Afghan community and translations of new documents (a taskera and transport document letter). An email dated 29 May 2017, included a short video from a [event] that pictures the applicant [recording] the event. An email dated 2 August 2017 contains a reference letter, a newsletter article from a local Afghan community association and two photos of the applicant receiving an award.
8. In terms of the documents, references and other information directly referring to the applicant, I accept this is credible personal information that was not previously known. On the basis of the evidence already before me, I accept the applicant is a national of Afghanistan. I am unconcerned with the minor discrepancies in his identification documents. I accept he is of good character and a positive, contributing member in the community. I also consider these submissions have little bearing on whether the applicant would face a chance or risk of harm on return to Afghanistan. I am not satisfied there are exceptional circumstances to justify considering this new information.
9. In terms of the submission and supplementary statement, to the extent that those documents contain information, claims and evidence that was before the delegate, I am satisfied this is not new information and I have had regard to those matters in this assessment. The statement contains minor clarification of his claims and responds to the delegate's concerns detailed in the refusal decision. The submission also refers to those matters and does not introduce new

claims. I consider there are exceptional circumstances to justify consideration of those submissions and clarifications.

10. In terms of the new country information provided in support of the submission, there is no suggestion it contains personal information. The reports predate the delegate's decision, and I am not satisfied that this information was not, and could not have been, provided to the Minister before the delegate made their decision. The reports refer to matters that I consider uncontentious on the country information already before me. In all the circumstances, I am not satisfied there are exceptional circumstances to justify consideration of the new information, and I have not considered the new information pursuant to s.473DD of the Act.
11. In terms of the second submission and the video of the [event], I accept this was credible personal information that was not previously known. I accept the applicant is pictured in the video recording a [event] with [equipment]. It is not clear when the [event] took place, or where it took place. I accept on other evidence already before me that he is a [Occupation 1] and worked in media and other contexts in Afghanistan. I am not satisfied there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

12. The applicant's claims can be summarised as follows:

- He is a Sunni Tajik from Kabul in Afghanistan.
- He fears harm on the basis of his profile as a [Occupation 1] and [Occupation 2].
- In [2011], he was recording an interview with the [Official 1 of Agency 1], for a [program] called [name of the program].
- During the interview, two men rushed into the room. The men were [relatives of high profile political leaders in Afghanistan Mr A and Mr B]. The applicant and his colleague were told to leave the room and turn the [recording equipment] off.
- The applicant [turned off the equipment but recorded the audio of conversation]. [He recorded the confrontation] between the men and [Official 1]. The men were threatening and abusive towards [Official 1], and discussed [a scandal]. The applicant kept a copy of this recording.
- Approximately [a number of] weeks after the [Agency 1 incident], the applicant was working for [Company 1] as a [Occupation 2] and [Occupation 1] at [Government Agency 1]. One day, two of the members of [Government Agency 1], [Mr C and Mr D], started fighting and swearing at each other. [A senior official of Government Agency 1] ordered all media to stop recording and leave the room. The applicant again left his [equipment on to record the conversation].
- The applicant gave his copy of [his work] of [both incidents] to [Mr F] who was the [senior official of Organisation 1].
- A few months later, while the applicant was away in [Town 1] [working at an event], [Number of men] wearing [Government Agency 1 uniforms] and guns went to his [company]. The guards asked his [sibling] about the applicant's whereabouts. They [vandalized the premises]. The guards grabbed his [sibling] and ordered that he take them to the applicant's house.

- The applicant's [sibling] took them to his father's house and their father was then ordered to go to the applicant's house. The applicant's father was told to stay downstairs while the guards went up to the applicant's apartment on the [different floor]. The guards forced themselves into the apartment and searched through his personal belongings for [his work]. They stole [a number of possessions]. They told his wife that they wanted him and asked his [child] when he would be home. They told him that they wanted to kill the applicant because he was destroying their reputation. He claims one of the men was [Mr C's relative, Mr G].
- The applicant's [sibling] contacted him and told him to go to [Country 1] because it was too dangerous for him to return home. The applicant travelled to [Country 1], and subsequently [Town 2].
- When the applicant was in [Town 2] his friends called him to say that [Mr B] had asked his [supervisor] for all of his personal details.
- His family tried to seek help with the police but they refused to intervene because they are intimidated by members of the government.
- The same men also returned to the applicant's [company] [a number of times] times looking for him.
- In 2016, his father was abducted while travelling to visit his children. His father has not been seen since.

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. On the basis of his documentary and consistent oral evidence, I accept the applicant is a national of Afghanistan. I am also satisfied he is a Sunni Tajik from Kabul.
16. The applicant's claims turn principally on the harm he fears from his time working as a [Occupation 1] and [Occupation 2] while living in Kabul, and specifically threats he faced following his secret recording of two incidents involving powerful members of the Afghan elite.
17. The first incident was a confrontation at [Agency 1, involving Official 1] and two men, [relatives of high profile political leaders in Afghanistan, Mr A and Mr B]. The applicant and [another] had attended the [agency] to record an interview with the [Official 1] in relation to a [a scandal]. As they were setting up the recording equipment, [Mr A and Mr B] entered the room where the interview was taking place and ordered the applicant and his partner to turn off the [equipment]. The applicant [turned his equipment off but] kept recording the audio. The recording captured the two men intimidating and threatening the [Official 1] of the [agency] about the [scandal]. They also cursed [Official 1] and made [threats]. Their recording equipment had been damaged and the interview was cancelled by [Official 1].
18. The applicant played the recording to the [manager], who discussed the matter with [Official 1]. He provided another copy to [Mr F], who was [a senior official of Organisation 1].
19. The second incident occurred [a number of] weeks after the events at the [Agency 1]. The applicant was working for [Company 1] recording [the activities of Government Agency 1] for the news. On this occasion, two prominent members of [Government Agency 1], [Mr C] and [Mr H] began to fight and curse at each other. [Government Agency 1] ordered that all recordings be stopped. The applicant again left [his equipment on] and kept it recording. When he played the recording back the next day, he had recorded the men [in a physical and verbal altercation]. The applicant saved the recording, and again sent a copy to [Mr F].
20. The applicant had anticipated that [Mr F] would be impressed and that [his work] would prove that he was a competent and brave [employee]. The applicant claimed in his written statement that he wanted to expose the reality of entrenched corruption, dishonesty and unprofessionalism of business and government officials in Afghanistan. He also hoped he would be rewarded for his efforts. When asked at the interview, he said he knew there was a risk, but he thought his name would not be mentioned and that he would be rewarded.
21. The applicant claimed that a few months later he was [working] in [Town 1]. At the same time, [a number of] men went to [his] company office in Kabul looking for him. They were wearing [Government Agency 1] uniforms and were armed. They threatened his [sibling] and asked about his whereabouts. They took his [sibling] to his father's house. They then threatened his father and took him to the applicant's house. The men entered the house. They intimidated his wife and told her to be quiet. They searched through his belongings and took [a number of personal belongings]. They told his wife they wanted him and asked his [child] when he would be home. He claimed they told his [child] they wanted to kill the applicant because he had destroyed their reputation. The applicant's [sibling] contacted him about what had happened. His [sibling] advised him to go to [Country 1] as it was too dangerous for him to return to Kabul. His family tried to seek help with the police, but they refused to intervene because they were intimidated by members of the government.
22. The applicant confirmed at the visa interview that the men had continued to look for him, visiting his previous home, his [office], as well as the shops near his house. He also claimed that his former colleagues advised him that [Mr B] had contacted his former network supervisor to ask about the applicant and obtain his personal details.

23. The applicant also claimed that in [2016], his father was abducted while on his way to visit the applicant's children. He has not been seen since. The applicant's mother reported the abduction to the police, but the police have still not found his father. At the visa interview, the applicant confirmed that his father is still missing. He does not know if his disappearance is related to his claims or whether it was an act of revenge against the applicant, but he thinks it may have been.
24. The applicant has given credible and broadly consistent evidence about his claims between the arrival and visa interviews and his written application. He has not sought to embellish or exaggerate his involvement or add to his claims or evidence as the matter has progressed. In fact, at the visa interview, when asked whether he feared any other harm in Afghanistan if he had not made these recordings. He stated that he would not. He claimed that he had a good life in Afghanistan. He was married, had a job and children. He had water, food and good company. He did not want to leave the country. I have given the consistency of his evidence considerable weight in assessing his claims.
25. The applicant's evidence is also generally consistent with country information before me about the [Agency 1 scandal], and the persons involved.¹
26. The applicant has provided a range of documents in support of his claims. One of those documents is a police report and translation dated [date removed], apparently filed by the applicant's wife. It is generally consistent with the applicant's claims about the men visiting his [workplace] and home, save for some minor discrepancies – the statement does not refer to the applicant's father being present, or that the men were wearing [uniforms]. However, I consider these matters are not inexplicable. The applicant's evidence was that his father was asked to wait outside his house, and his wife may not have been alive to the clothing worn by the men or its significance. The majority of the details are consistent, as is the timing of the statement. I accept that fraudulent documents are common and easily acquired in Afghanistan,² however I have nothing before me that undermines the provenance of this document and I have given it some weight, in particular as support of the incident, and the applicant's wife's attempts to have the matter addressed by police.
27. The applicant has also provided a letter verifying his employment as [Occupation 1 and Occupation 2] with [Company 1] dated [in] September 2016. It confirms his employment, character, the risks to [individuals working as Occupation 2] in the country, and that he had received threats in the course of his work. The applicant has provided a further letter and translation from a media company dated [in] September 2010, also confirming he worked for [Company 1]. On the basis of that evidence, I accept that the applicant worked as a [Occupation 1] and [Occupation 2] for [Company 1].
28. He provided a medical report dated [in] October 2016 relating to his [mental health] symptoms following reports of the abduction of his father and his first presentation to his doctor in November 2015. The representative notes in her submission to the delegate that this document is at odds with the applicant's timing of his father's abduction (which he initially claimed occurred in January 2016). She claimed that she questioned the applicant about the date quoted in his statement of claim about his father's abduction which differs from the date recalled by his doctor. She advised that the applicant told her the doctor's date would be more reliable as he was being treated for [a mental illness] at the time and although he thought the abduction happened in January 2016, he cannot be sure and the doctor at least has a record of

¹ [Source deleted].

² DFAT, "DFAT Country Information Report - Afghanistan", 18 September 2015, CISEC96CF13366.

treating him during that time. I consider that discrepancy minor and give it no weight. I accept the medical evidence as historic support for his claims, in particular the emotional impact of his father's disappearance. I note that if the medical evidence is correct, the applicant's claims related to his father were raised well in advance of his visa application.

29. The applicant was unable to produce the videos he claims he recorded, but I find this is unsurprising given his chronology of events – i.e. not having an opportunity to return home to Kabul, the provision of copies to other persons, and the claim that the men ransacked his home. In any event, I consider the continued existence of these videos is secondary to other concerns faced by the applicant, which I discuss in more detail below.
30. The delegate accepted that the applicant was a [Occupation 1], and that he secretly [recorded] two incidents of note at [Agency 1] and [Government Agency 1]. She emphasised that the footage did not show any specific people, but sounds of an argument could be heard. She also gave weight to the fact it was not aired and that his [manager] did not take any further action with the footage. She gave weight to the fact that there was nothing in the footage that identified the applicant.
31. In terms of the incident at [Government Agency 1], the delegate accepted the applicant [recorded] an argument after being instructed to shut down all [recording equipment]. She gave weight to the fact that other persons also recorded the incident, and that these types of arguments in [Government Agency 1] appear [online].
32. In terms of the provision of the footage to [Mr F]. She accepted that he provided the footage to [Mr F], however she had concerns about the claimed incidents that followed. She noted that the footage from [Agency 1] and [Government Agency 1] did not have any content that would identify or provide a link to the applicant. The footage, in terms of [Government Agency 1] proceedings, was also not unique. She considered the footage from [Government Agency 1] was not significant enough to warrant revenge. She again gave weight to the fact that neither of the recordings was aired. She accepted the applicant was a [Occupation 1], but was not satisfied he was considered a [Occupation 2].
33. In terms of the incident at his [workplace] and home, she considered his evidence to be speculative about the link between his advice to [Mr F] and these events. She also questioned why despite his claims that they had visited his family several times, they had not done anything to his family.
34. I consider the delegate's interview of the applicant and her analysis of the applicant's claims was thorough and well-reasoned, however I disagree with the assessment in some key respects. I do not consider [the duties of Occupation 2] impacted his profile in this case. I accept that [positions more senior than Occupation 2] have an obvious prominence and are easily recognisable, but I also consider [Occupation 2] can be at just as much risk as [more senior occupations] notwithstanding the fact that they may have less of a public profile or recognition. In terms of his [personal] involvement, I considered his evidence at the interview about his interest in transparency, accountability, and to shine a light on corruption in Afghanistan to be convincing and genuinely held. I accept he regarded himself as a [Occupation 2]. In any event, whatever profile he had as a [occupation 1/Occupation 2], I consider there are factors of more significance in this case: namely his act of secretly recording the incidents at [Agency 1] and [Government Agency 1], and advising [Mr F] of his intention to use those recordings and his decision to provide him and his former manager with copies.

35. Having regard to consistent and credible nature of the applicant's evidence, I accept that he secretly [recorded] a confrontation between [Official 1] of [Agency 1] and two influential men, [Mr A and Mr B]. I accept he passed this information on to [Mr F].
36. I accept that [a number of] weeks later the applicant [recorded] a confrontation at [Government Agency 1]. However, I am inclined to agree with the delegate that the recording of this incident appears less serious than the applicant claims. The applicant indicated that the matter was recorded by several [others] on the day, and the claims of an argument, however heated, sounds unremarkable in the context of what is known to be a turbulent democracy.³ However, I accept that information could have been passed on to [Mr F], and in turn that information could have been passed on to [Mr C] or other connected persons who may have considered the applicant had a profile as an [agitator] who was not acting in their interest.
37. As with the delegate, I accept that in passing the information to [Mr F], the applicant expected support, recognition and possibly reward for doing so. However, I am not satisfied that [Mr F] acted with any intent to implicate the applicant with [Mr and Mr B], or act in a way that would put him at risk. The profile information about [Mr F] submitted by the applicant does not indicate that [Mr F] had an adverse reputation or that he was involved in corrupt activities.⁴ However, it does indicate that he was formerly part of the [government] and well connected to persons in high positions in Afghanistan. If he did advise or communicate the applicant's actions to [Mr A and Mr B], whether deliberately or unintentionally, directly or through other persons, and pass on that their activities had been recorded and that the applicant intended to have those recordings broadcast, I consider it plausible and possible that [Mr A and Mr B] could have taken an adverse interest in the applicant because of those actions. I consider that interest is not borne of his profile as a [Occupation 1] or a [Occupation 2] generally, but rather because he acted in a way that was deliberate and a threat to two powerful and highly connected men. In that context, I consider it would not matter whether the applicant was identifiable as [responsible] for the recordings, nor is it relevant whether the recordings still exist or whether they were ever aired. What is material is that those men considered the applicant's intentions a direct threat. In the context of investigations into these two men because of their activities with [Agency 1], I consider it plausible they determined it would be necessary to prevent the applicant from seeking to broadcast or publish those recordings and harm him for taking those actions.
38. The delegate accepted that the information was passed on to [Mr F], but found that it was not significant enough to warrant a risk to the applicant. The delegate conceded that the family may have been visited by an armed group, but concluded that it was a criminal activity, likely the result of unstable security conditions in the country. She also accepted that his father went missing, but attributed it to other factors unrelated to his past activities, in particular given the passing of time.
39. The evidence before me is that [Mr A and Mr B's] concerns related to their alleged illegal activities with [Agency 1] continued and were reanimated following the change of government.⁵ In that context, I do not accept that the risks to the applicant, if they existed, can said to have ceased because a few years have passed. If those recordings implicated two powerful men, who were connected to members of the then Afghan ministry, then the risks to them from those recordings would be extant. The country information before me highlights

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

⁴ [Source deleted].

⁵ [Source deleted].

serious risks to [Occupation 2], and notes impunity for crimes against [Occupation 2].⁶ It highlights risks not only from the Taliban, but government officials and other powerful individuals angered by their criticism.⁷

40. I accept that there is widespread criminality in Kabul, and Afghanistan more generally.⁸ However, I find it significant that the applicant has no other profile. He has no obvious wealth, he is not an ethnic minority, and he is a Sunni Muslim. Moreover, while the applicant was not present when the armed men went to his [workplace] and home, I consider his family's reporting of what was said was plausible, consistent with the police report, and I give that evidence some weight. Having accepted his other claims, I consider it more likely that his family were confronted by armed men motivated to find and target the applicant for harm or intimidation, rather than in a random criminal act.
41. Similarly, the delegate accepted his father was abducted, but did not accept it was in connection with the events in 2011. The applicant indicated that he was not sure why his father was targeted, or whether it was an act of revenge against him. At the interview he indicated that his father disappeared around ten days after his family was last visited by the armed men. I find the absence of any communication or contact about the disappearance of his father raises some question as to whether he was in fact targeted by [Mr A] and [Mr B]'s men. The men had approached his family on a number of occasions in the past and were not circumspect in doing so, nor about their intentions. In that context, I find the absence of any contact or claim of responsibility from the perpetrators to be significant. Equally, I also find the applicant's father had no other profile which would explain why he would be abducted, other than in a random criminal act. In the circumstances, I am prepared to accept that it is possible that the applicant's father was abducted in connection with these matters and the applicant's profile.
42. Weighing everything before me, I am satisfied the applicant has an adverse profile because of his past activities as a [Occupation 1] and [Occupation 2], in particular as a [Occupation 2] that desires to expose corruption and nepotism in Afghanistan. I accept that armed men have visited his [workplace] and home on a number of occasions and intimidated his [sibling], wife and family, ransacked the property, and threatened that they would harm the applicant when he returns. I do not accept the fact that his family and [sibling] avoided harm in the past indicates the threats are not genuine, or that there are no ongoing risks to the applicant himself. I consider their enmity is towards the applicant, and a desire to target him for his intention to expose their corruption and intimidation of [Agency 1] and [Official 1]. I consider their interest in the applicant is ongoing. I consider the threat is from powerful, influential and connected men in [Mr A and Mr B], their men and the armed groups or guards within the government that these men have influence and control over.
43. Outside of those specific claims, I find the applicant's claims to be a [Occupation 1] and [Occupation 2] to be credible. Based on the letters in support of his past work, he is highly regarded and I consider he would again be able to find similar work on return to the country. I consider his views and desires to expose corruption in the country are genuine and if he returned to [Occupation 2], I am satisfied he would again seek to agitate and push to cover political stories and events which could further elevate his profile. I am satisfied that on return to Afghanistan he would return to work as a [Occupation 2].

⁶ [Source deleted].

⁷ [Source deleted].

⁸ UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

44. In this regard, I am not satisfied he could take reasonable steps to modify his behaviour to avoid being harmed. I consider his background and career as a [Occupation 1] and [Occupation 2], in particular one that has sought to speak out about corruption, is fundamental to his identity and conscience. Moreover, the Act also provides that a person should not be required to take steps to modify their behaviour if it would require the person to alter his or her political beliefs. I consider that his particular profile has been cemented by the actions he sought to take against [Mr A and Mr B], and is effectively immutable. Considered altogether, I am not satisfied he could take reasonable steps to modify his behaviour to avoid a real chance of persecution.
45. On the information before me, I am satisfied that if he returned to Afghanistan, he would continue to face a real chance of being seriously harmed on the basis of his past profile and the actions that he took against [Mr A and Mr B]. I consider the harm he potentially would face could result in abduction, intimidation, beatings, disappearance or death. I also consider that if he continued to work as a [Occupation 2], and continued to seek to expose corruption and impropriety in the government, he would be at further risk of being seriously harmed, whether from other persons within the government or private sector, or armed groups. I am satisfied that the essential and significant reasons for this harm would be his membership of the particular social group of [Occupation 2], or on the basis of his actual political opinion as a [Occupation 2] investigating and exposing corruption. I consider his occupation means that he would be at risk wherever he lived and worked in Afghanistan. Moreover, I consider the profile he has with [Mr A and Mr B], and their influence and control within the national government, means that the chance or risks to him from that profile are present in all areas of the receiving country Afghanistan.
46. In terms of whether the applicant could obtain effective protection from the Afghan authorities, DFAT has assessed that given the ongoing insurgency and deteriorating security situation across Afghanistan, the government does not exercise effective control over all parts of the country.⁹ While policing in Kabul tends to be more effective than in most other urban and rural areas, the capacity of the Afghan National Police to maintain law and order is limited by a lack of resources, poor training, insufficient and outmoded equipment and corruption.¹⁰ Given the limited effectiveness of the ANP, the challenging security environment, the power and influence of those seeking to harm the applicant, I have serious concerns about whether the applicant would be able to access effective protection against the harm he fears in Afghanistan. Considering all the circumstances, I am not satisfied that effective state protection would be available to the applicant in Afghanistan.
47. The information before me indicates that [Mr A and Mr B] continue to come under the scrutiny of the current government. If it were the case in the future that these two men faced conviction or punishment in connection with their involvement in the [Agency 1] scandal, it may be the case that their interest in the applicant, and the future risk to him, would ease. In effect, the question of whether or not he recorded these two men would be surpassed by other independent evidence that implicates the men for their alleged criminal involvement. At that point, the residual question would be whether he would face a real chance or risk of serious or significant harm on the basis of his profile as a [Occupation 2] alone.
48. However, on the evidence currently before me, and having regard to the reasonably foreseeable future, I am satisfied there is a real chance of him being seriously harmed for the

⁹ DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186.

¹⁰ DFAT, "DFAT Thematic Report Conditions in Kabul - September 2015", 18 September 2015, CISEC96CF13367.

reasons he has claimed throughout Afghanistan. I am satisfied he has a well-founded fear of persecution.

Refugee: conclusion

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

Decision

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

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.