



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

**Decision and Reasons**

**Referred application**

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AFGHANISTAN

IAA reference: IAA17/01985

Date and time of decision: 12 October 2017 12:48:00

Karen Dix, Reviewer

**Decision**

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

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Shia Hazara from Afghanistan. [In] August 2016 he lodged an application for a safe haven enterprise visa (SHEV) claiming to fear harm from the Taliban and Islamic State due to his Hazara ethnicity and his Shia religion, due being perceived as anti-Taliban due his family associations and as a returnee from the west.
2. [In] February 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa, finding that even though the applicant feared harm in Uruzgan, the security situation in his home area was one faced by the population generally and he could relocate to Kabul or Herat where he would not face a real chance of persecution or a real risk of significant harm.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 8 March 2017 the IAA received a submission from the applicant's representative which refutes a number of the delegate's findings. These matters may be regarded as argument rather than information.
5. The submission refers to a number of documents which predate the delegate's decision. These include:
  - Citing of five reports which the representative states are indicative of the deteriorating security conditions for Shia Hazaras in Afghanistan. All five reports were published in 2015 and predate the delegate's decision. Three reports regarding the abduction of Hazaras and the targeting of Hazaras by Islamic State were cited by the representative in a submission that was before the delegate, and are not new information and I have therefore considered them. The other two reports which refer to the targeting of Hazaras by Islamic State were not before the delegate and are new information. I note that the representative provided a written submission dated 22 August 2016 which addressed the targeting of Hazara Shias including by Islamic State. I also note that the documents are dated and there was more recent information before the delegate in respect to Islamic State. I am not satisfied the articles could not have been provided to the delegate prior to a decision or that they are credible personal information that may have affected the consideration of the applicant's claims. Nor am I satisfied that there are exceptional circumstances for considering them.
  - List of reports of various attacks between 2015 and January 2017 which the representative submits is evidence of the real risk of harm to the applicant in other parts of Afghanistan to which the delegate found he could relocate. I note that relocation to Kabul was discussed at interview with the applicant and the representative in a submission [August] 2016 addressed the security situation in Afghanistan. I am not satisfied that this information could not have been provided prior to a decision or that it is credible personal information. I am not satisfied that s473DD is met.
  - A Blue Mountains Refugee Support Group report regarding the viability of relocation to Mazar-e-Sharif. Although predating the delegate's decision, this report was not before

the delegate and is new information. The delegate discussed relocation to Kabul at the SHEV interview with the applicant; however Mazar-e-Sharif was not mentioned by the delegate as a possible place of relocation. The delegate subsequently made findings that the applicant could relocate to Mazar-e-Sharif as well as Kabul. I am satisfied that the representative was not put on notice that return to Mazar-e-Sharif was a relocation option and in the circumstances am satisfied that this information could not have been provided prior to the delegate's decision. I am also satisfied that this information is a pertinent consideration to the applicant's ability to safely access Mazar-e-Sharif and I am satisfied that there are exceptional circumstances for considering it.

- An expert opinion from Professor William Maley dated 24 July 2016 which the representative claims highlights the dangers for Hazaras who are returned to Afghanistan. The opinion predates the delegate's decision, was not before the delegate and is new information. The representative in a written submission dated [in] August 2016 addressed the targeting of returnees and cited earlier reports dated 15 October 2014 and 2 November 2014 which refer to the same incidents mentioned in the July 2016 opinion. I am not satisfied that this information could not have been provided prior to a decision or that it is credible personal information. I am not satisfied that s473DD is met.
6. The representative in responding to the delegate's findings regarding the health of the applicant states that the applicant suffered from [an injury] due to an incident where the [vehicle] in which he was travelling triggered the explosion of a land mine. He has provided a referral letter from his local doctor dated [in] February 2017 and an acceptance of a referral to a specialist regarding the applicant's [injury]. The applicant in his visa application stated that following the explosion he had [the injury] and was hurt [elsewhere] but he became better after a few months. Although this information was before the delegate, the diagnosis regarding the applicant's ongoing [problems] and the letters from the doctor were not before the delegate and are new information. I accept the diagnosis and the referral letters postdate the delegate's decision and could not have been provided to the delegate prior to a decision. The representative also states that the explosion had a traumatic impact on him and when he arrived in Australia as a minor he was referred to a psychologist in immigration detention but did not follow up after his release from detention due to high cost of treatment. The representative states that the applicant was recently referred to a psychologist by his doctor and has also provided a copy of a mental health plan dated [in] February 2017 initiated by his doctor which includes a referral to a psychologist for treatment of Post-traumatic stress disorder (PTSD). [In] September 2017 the representative sent further supporting documents which included a letter from the applicant's treating psychologist stating that the applicant had been receiving treatment since [February] 2017 and a letter from the same psychologist indicating referral to a Dari speaking psychologist. Although the issue regarding the applicant's mental health issues, treatment in the detention centre and inability to meet the expense of further treatment after his release from detention were before the delegate, the applicant's referral to a psychologist and his follow-up treatment was not and therefore constitutes new information. I am satisfied that the applicant was aware of the importance of providing all information to the delegate and was given an opportunity to do so during the interview. The applicant made an oral submission at the end of the interview and the legal representative also made some further comments particularly in regard to the applicant's mental health. Given the applicant only obtained the referrals and commenced treatment following the delegate's decision which was made 3 days after the SHEV interview I am satisfied that the applicant could not have provided the referrals to the delegate prior to a decision. I am also satisfied that both the information regarding the treatment for [the injury] and for PTSD are credible personal information which was not previously known to the delegate and had it been known may have affected the consideration of his claims and is pertinent to the consideration of the

reasonableness of the applicant's relocation. I am satisfied that the information could not have been provided prior to a decision and that there are exceptional circumstances for considering it.

7. I have obtained new information on the security situation in Afghanistan and for Hazara Shias including in Kabul as well as information relevant to assessing the applicant's claims in [District 1] and the security situation in [District 1].<sup>1</sup> The delegate considered minimal country information about the security situation in [District 1] which is the applicant's home area and did not make any specific findings regarding his ability to return to [District 1], although the applicant has made specific claims against returning to that area. Additionally the information relied upon by the delegate did not refer to the recent attacks against Shias in 2017 or contain analysis of the security situation for Shias. The situation in relation to Islamic State and other groups in Afghanistan has evolved in recent times, remains fluid and is core to the consideration of the real chance or risk of harm to the applicant in Afghanistan in the reasonably foreseeable future. I am satisfied that there are exceptional circumstances for considering this information.

### **Applicant's claims for protection**

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8. The applicant's claims can be summarised as follows:
  - The applicant is an Afghan citizen of Hazara ethnicity who was born in [Village 1] in [District 1], Uruzgan province in [birth date] and practises Shia Islam.
  - The applicant's mother and [sibling] live in [Country 1]; another married [sibling] recently moved to Herat, and [another sibling] went missing on the road to [a town] in 2010. His father died when the applicant was a baby.
  - In July 2011 the applicant's [Relative 1] travelled from [Country 1] to visit and after visiting the applicant's family travelled to [a location] to visit the applicant's [relative]. The applicant after a few days also went to visit his [relative] and bring his [Relative 1] back to [Village 1]. On the return journey the [vehicle] which was being driven by the applicant's [Relative 2] and contained about [a number of] people including [another relative], triggered a land mine near [Village 2]. The applicant lost consciousness for a while and although injured managed to walk to a nearby village to alert them of the explosion. The villagers put the applicant in a car and went to assist the other passengers, [some] of whom died including the applicant's [Relative 1], [Relative 2] and [another relative]. The applicant and the other injured were flown to an army camp in [City 1] for treatment. After the applicant was discharged from hospital he returned to his home village and left Afghanistan approximately three months later.
  - The applicant's [Relative 2] who was driving was a professional driver and used to travel [between certain locations] occasionally and between [District 1] and [Village 1] on a regular basis. He had been stopped previously by the Taliban and warned not to carry passengers in and out of [District 1]. On one occasion he was kidnapped by the Taliban and his car was used by them for [a number of] days, before he was released and warned. The applicant claims the Taliban suspected his [Relative 2] was spying for the Americans who had a base near [District 1] and believes the land mine was placed on the road which his [Relative 2] was known to frequent.

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<sup>1</sup> [Source deleted.]

- The applicant fears that he will be killed by the Taliban or Islamic State due to his ethnicity and religion, and his family association which is perceived as anti-Taliban. He also fears harm as a returnee from Australia as he will be treated as an infidel or spy for the westerners and will be an easy target.

## Refugee assessment

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9. 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

10. 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.

11. The applicant has consistently maintained since his arrival in Australia that he was born in [a] village, in [District 1], Uruzgan province. He provided a copy of a taskera with a translation as evidence of his identity and at interview demonstrated a familiarity with his home area where he lived for all of his life until his departure from Afghanistan in 2011. The applicant states that he moved to [Country 1] in late 2011 where he lived illegally in [a particular city] for one year before traveling to Australia. I am satisfied that his identity is as claimed and that he is an Afghani national whose receiving country is Afghanistan and he does not have a right to reside in [Country 1].

*[District 1]*

12. The applicant fears harm due to his family association with his [Relative 2] who was perceived to be a spy for the Americans and anti-Taliban. He claims his [Relative 2] was a [driver] who regularly carried passengers between the applicant’s local area and [other locations] and because he was frequently carrying passengers to [District 1] he became a target. He claimed that the Taliban had stopped his [Relative 2] on the roads twice prior to the [incident] and warned him not to carry passengers on that particular road. On the second occasion he was stopped he was kidnapped by the Taliban and held for [a number of] days. The Taliban used his

vehicle and when they released his [Relative 2] warned him not to carry passengers in or out of [District 1] again.

13. The applicant also claimed that the land mine explosion by the [vehicle] which his [Relative 2] was driving and which the applicant was travelling in with other family members deliberately targeted his [Relative 2], who had continued driving after he was kidnapped. The delegate put to the applicant that the land mine would have been planted well before the [vehicle] arrived and the Taliban could not have known that his [Relative 2] was going to be travelling on that particular road or would hit the land mine. However the applicant stated that his [Relative 2] was the only person who was a [driver], he regularly took that route and the Taliban has informers who would tell them who and where people were travelling. As the applicant's [Relative 2] was travelling on the same route regularly the Taliban would have been aware his [Relative 2] was traveling on that road on particular days and at particular times, and targeted him.
14. I accept the applicant's account of the triggering of a land mine which resulted in the death of [a number of] family members including his [Relative 2] who was driving the vehicle and caused injuries to the applicant. I also accept the copy of a statement prepared by his [relative] and endorsed by the local authorities in [a location] as evidence of the explosion of the land mine.
15. However I have concerns regarding the applicant's claim that his [Relative 2] was specifically targeted. As indicated by the delegate if the [Relative 2] was seriously suspected of being a spy by the Taliban he would not have been released by the Taliban. I also note that country information indicates that [District 1] which is reported to be [a mix of Pashtun and Hazara] is reportedly characterised by violent local power struggles between commanders of tribal factions who align themselves with the Taliban or the government in order to engage in local rivalries, and engage in attacks, assassinations and revenge actions against opponents. Hazaras were reported to be both victims and perpetrators of ethnic violence with a local Hazara [official] being responsible for an attack on Pashtun villages in the [area of Village 2] (allegedly in response to the kidnapping of a number of Hazaras) near where the land mine exploded less than a month prior to the explosion. Reports from [an organisation] also found that attacks in [District 1] were dominated by the Taliban using Improvised Explosive Devices (IED) against Afghan military personnel and vehicles – as opposed to direct attacks on military personnel and facilities at that time.<sup>2</sup> I accept that the [Relative 2] was stopped by the Taliban on a couple of occasions and warned not to use the road. However, given the ongoing rivalries between Pashtuns as well as with Hazara local commanders, which would have been exacerbated by tensions in the [area of Village 2] arising from an attack the previous month in the same area in which the [vehicle] was travelling, I am not satisfied that the [vehicle] was specifically targeted by the Taliban.
16. Nor am I satisfied that the applicant would be viewed as anti-Taliban due to his family association on return. The applicant's [Relative 2] died in the explosion over six years ago and although there is evidence of local rivalries including between Hazaras and Pashtuns the applicant did not indicate that his [Relative 2] or his family were involved in such rivalries or were subject to threats or attacks in their home area from the Taliban or other Pashtuns either before or following the explosion. Given the time that has elapsed since the [Relative 2]'s death, and the lack of interest in the applicant and his family, I am satisfied the applicant does not face a real chance of serious harm on return due to his family association.

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<sup>2</sup> [Source deleted.]

17. I have otherwise considered whether the applicant have a well-founded fear of harm in [District 1] on return.
18. The applicant fears harm from the Taliban and Islamic State due to his ethnicity and religion and stated at interview that it is dangerous to live in his village. He stated that there has been increased fighting there in the past year and the government has told the villagers to arm themselves against the Taliban. He also fears being perceived as a spy due to his residence in Australia. Uruzgan province is predominantly Pashtun with Hazaras comprising a minority of 10%. [Details of District 1 removed]. DFAT assessed in 2016 that Hazara minorities living in Pashtun-majority areas are less safe and Hazaras travelling by road between Kabul and Hazarajat face significant risks travelling between these areas.<sup>3</sup> [Details of District 1 removed]. As a result of the Taliban's increased presence in [District 1], Hazara communities were reportedly placed under greater pressure, in an attempt to enlist or enforce their support. There is also insecurity on the roads, leading into and out of Hazarajat as well as in [District 1], and armed insurgent groups are actively operating and carrying out attacks in [District 1] as well as other parts of Uruzgan including the provincial capital.<sup>4</sup>
19. Given that [District 1] is an area where there is a mixed Hazara Pashtun population of which Pashtuns form the majority, where there is a strong Taliban presence, an inadequate government presence beyond the district centre and ongoing tension between the Hazara and Pashtun communities as well as ongoing security issues in Uruzgan more widely I am satisfied there is a more than remote chance of the applicant facing serious harm amounting to persecution as a returnee Shia Hazara in [District 1] if he were to attempt to return there. After consideration of country information I am satisfied there is a real chance that the applicant would be persecuted as a returnee Shia Hazara in [District 1].

*Fear of harm in relation to all of Afghanistan*

20. Section 5J(1)(c) of the Act provides that the real chance of persecution must relate to all areas of the receiving country. For the reasons given below, I am not satisfied that the applicant faces has a well-founded fear of persecution in Kabul.
21. Given that I do not accept the applicant faces a real chance of serious harm in [District 1] due to his family associations, I consider it remote, despite the applicant's claims, that his [Relative 2]'s former work or any imputed pro-government profile or association with the international community arising from this work would come to the notice of the Taliban or other anti-government elements (AGEs) in Kabul or that they would pursue him in Kabul, given it is a large urban area of mixed ethnicity where the applicant's background is unknown and which is remote from [District 1].
22. Country information indicates that Kabul is the largest city in Afghanistan and is estimated to have a population of over four million with Hazaras accounting for 40 to 50% or approximately 1.6 to two million of the population.<sup>5</sup> DFAT has advised that in areas under government control there is no evidence of any official policy of discrimination on the basis of ethnicity or religion, with ethnic and religious minorities having their own media outlets, political parties and politically active representatives. Shia Hazaras are active in the Afghan community, particularly in politics, education and civil society but there is evidence of societal discrimination at a

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<sup>3</sup> [Source deleted.]

<sup>4</sup> [Source deleted.]

<sup>5</sup> DFAT, "Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.7

community level.<sup>6</sup> UNHCR in 2016 also refers to a Minority Rights Group International report which indicates all ethnic groups are represented at all levels of the central government and each group has a large measure of control over how government programs are implemented in their geographic regions. However members of certain ethnic groups have complained of discrimination by the State, including in the form of unequal access to local government jobs in areas where they were in the minority and although Hazaras are reported to have made significant economic and political advances since the fall of the Taliban, they are reported to face continuing societal discrimination.<sup>7</sup>

23. There is evidence of societal discrimination in Afghanistan generally on the basis of ethnicity and religion which DFAT describes as nepotism within particular ethnic and religious groups where ethnic, tribal or family connections will often be more important than merit in employment decisions for both government and private sector positions. However DFAT indicates that although Hazaras face this type of discrimination from other ethnic groups, these other groups can face similar discrimination in Hazara-dominated areas.<sup>8</sup> I am satisfied that there is no official policy of discrimination on the basis of ethnicity or religion and Shia Hazaras are accorded the same rights as other Afghans. I accept there is discrimination in the form of unequal access to local government jobs in areas where ethnic groups are in the minority, however Hazaras form the majority of the population in Kabul.<sup>9</sup> I accept that the applicant may be subject to discrimination on return in relation to employment as a consequence of nepotism, particularly as he does not have family links in Kabul where he has not lived before. Although he would be competing for employment I am not satisfied there is a real chance that as a consequence of such discrimination that he would be denied the capacity to earn a livelihood or that he would be subject to economic hardship such that it would threaten his capacity to exist or would otherwise suffer treatment that may be considered serious harm within the meaning of s.5J of the Act.
24. The applicant otherwise fears harm as a Shia Hazara from the Taliban, Islamic State and other anti-Shia groups and claims there has been an increase in religiously and ethnically motivated killings against Shias in Kabul with anti-Shia groups now operating freely throughout Afghanistan. According to DFAT Kabul have large communities of almost all ethnic, linguistic and religious groups in the city. Although occasional attacks have occurred on religious facilities, sectarian violence on the basis of religion or ethnicity has not generally been a feature of the security situation. In 2011 there was a co-ordinated attack on Shias commemorating Ashura in Kabul which Lashkar-e-Jhangvi all-Almi, a splinter group of Lashkar-e-Jhangvi (LeJ), a Pakistan-based militant group claimed responsibility for and which was reportedly intended to aggravate sectarian tensions.<sup>10</sup> However the 2011 attack was an isolated attack by LeJ which did not escalate into sectarian conflict.
25. In 2016 there were a number of attacks against Shias for which Islamic State claimed responsibility. The first attack in July 2016 specifically targeted a peaceful demonstration of Shia Hazaras and was reported as the largest single attack on Hazaras since the 2011 attack. Further attacks occurred on Shia mosques/shrines in October on the eve of Ashura and in November 2016 when a particularly large congregation of worshippers gathered to observe

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<sup>6</sup> DFAT, "Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 3.1, 3.10-3.11; DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 3.25, 3.5, 3.6 and 3.8

<sup>7</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3, pp. 74-76

<sup>8</sup> DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 3.8; DFAT, "Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 3.11

<sup>9</sup> DFAT, "Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.7, 4.7;

<sup>10</sup> *ibid*, 3.6, 4.7

Arbaeen, a commemoration on the 40th day after Ashura. All three attacks were condemned by the Taliban.<sup>11</sup>

26. Prior to the attacks on Shias in Kabul in 2016 most of the attacks attributed to Islamic State took place in Nangarhar province, Islamic State's main area of operations. United Nations Assistance Mission in Afghanistan (UNAMA) in the first half of 2017 attributed approximately 5% of civilian casualties nationally to Islamic State and documented a 41% decrease in civilian casualties attributed to Islamic State in Nangarhar province during this period compared to the first half of 2016 attributing the decrease to the intensified joint international and Afghan military operations aimed at removing the group. UNAMA also observed that Islamic State claimed responsibility for four attacks in Kabul during this period only one of which targeted Shias. The attack on 15 June 2017 on a Shia mosque where worshippers had gathered for Ramadan was according to the UNAMA thwarted largely by Afghan National Police (ANP) officers although there were 12 casualties. The other Daesh/Islamic State attacks in Kabul were reported as not having a sectarian bent.<sup>12</sup>
27. I accept that Islamic State was responsible for the attacks on Shias in Kabul and despite increased joint international and Afghan military operations aimed at removing the group in Nangarhar where its presence has been largely confined, Islamic State has a small operational presence in Kabul, has demonstrated the capability to undertake occasional high profile attacks and that Shias have been one of their targets.
28. I also accept that Islamic State is attempting to inject sectarian violence into the Afghan conflict. However according to Landinfo the Taliban has not advocated sectarian views, there is no indication that the new Taliban leader has a sectarian agenda, and the Taliban have clearly expressed they do not have any intention of attacking Shias or Hazaras. The Afghanistan Analysts Network (AAN) also suggests that it is unlikely that Islamic State can single-handedly drive the conflict in a sectarian direction, with the Taliban condemning the attacks on Shias in Kabul and moving away from violence which would incite sectarianism in recent years. Additionally the Taliban have been engaged in battles with Islamic State to prevent their geographical expansion and reduce their strength. While I note the concerns regarding Islamic State and other anti-Shia groups, there is no evidence before me to indicate that the Taliban or other foreign groups such as LeJ are aligning themselves with Islamic State, are pursuing a sectarian agenda or attempting to incite sectarian violence more broadly in other parts of Afghanistan. The Afghan security forces, the Afghan population generally and religious leaders from both major sects have traditionally emphasised the value of co-existence and EASO and Landinfo in 2016 also reported that the brutality and extreme ideology of ISKP had alienated the local population.<sup>13</sup> I am not satisfied that the attacks on Shias in Kabul indicate an ongoing wider sectarian campaign in Kabul in the reasonably foreseeable future.
29. I accept that Islamic State is a credible threat in Kabul however its attacks on Shias in Kabul are infrequent and constitute a small amount of the overall number of attacks in Kabul which are

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<sup>11</sup> Landinfo, "Hazaras and Afghan insurgent groups", 3 October 2016, CIS38A80122778; UN News Service, "Afghanistan - UN mission condemns killings of worshippers in two mosque attacks", 12 October 2016, CX6A26A6E10910; Human Rights Watch (HRW), "Afghanistan's Shia Hazara Suffer Latest Atrocity", 13 October 2016, CX6A26A6E11295; Afghanistan Analysts Network (AAN), "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", 19 October 2016, CX6A26A6E11358; Los Angeles Times, "Islamic State claims responsibility for deadly attack inside Shiite mosque in Afghanistan", 21 November 2016, CX6A26A6E13552; New York Times, "Islamic State Again Strikes at Afghan Shiites, Killing at Least 30 in Kabul", 21 November 2016, CX6A26A6E13659

<sup>12</sup> UNAMA, "Afghanistan- Protection of Civilians in Armed Conflict Midyear Report 2017", 1 July 2017, CISED50AD4852

<sup>13</sup> Landinfo, "Hazaras and Afghan insurgent groups", 3 October 2016, CIS38A80122778; AAN, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War ", 19 October 2016, CX6A26A6E11358; EASO, "Country of Origin Information Report: Afghanistan Security Situation ", 1 November 2016, CIS38A80122597

primarily executed by the Taliban who I am satisfied do not seek to target Shia Hazaras due to ethnicity or religion. I accept that Islamic State may occasionally stage further attacks including on Shias, however given Islamic State's limited influence, capacity and the vocal opposition by the Taliban, Afghan security forces, religious leaders as well as the more general population to its attempts to provoke sectarian violence I am not satisfied that the attacks on Shias in Kabul indicate any support for an ongoing wider sectarian campaign in Kabul in the reasonably foreseeable future, such that the applicant will face a real chance of serious harm from other insurgent groups in Kabul.

30. Nor am I satisfied, given Islamic State's limited influence and operational capacity arising from the continued efforts of the Afghan government, international community and the Taliban to eliminate Islamic State, as well as the government's continued effective control of Kabul that Islamic State will be able to conduct further attacks more than occasionally. Kabul remains under government control and I am not satisfied that the attacks against Shias by Islamic State will escalate in frequency or that they indicate the commencement of a wider sectarian campaign in Kabul. There is evidence of increased effective security measures being implemented at Shia mosques in Kabul since the attacks in 2016 and although there have been recent attacks in 2017, reports indicate that although the attacks were not completely prevented, the attackers were repelled and prevented from causing more casualties largely due to the security measures in place.<sup>14</sup> Given the overall strong security presence in Kabul, the ongoing effective government control, the limited influence and operational capacity of Islamic State, the size and diversity of the population of Kabul, the large size of the Shia population, and the applicant's lack of associations with groups primarily targeted by insurgents in Kabul, I find that the applicant's fear of harm by Islamic State, the Taliban or any other insurgents in Kabul as a Shia Hazara is not well founded. I am not satisfied that the applicant faces a real chance of persecution as a Shia Hazara upon return to Kabul in the reasonably foreseeable future.
31. The applicant also fears being harmed due to his perceived western links arising from his residence in Australia and claims that he will be easily identified as a returnee in Kabul and be perceived to be a spy or infidel. Many Afghans travel abroad to Iran, Pakistan, Europe or other western countries to seek employment or educational opportunities,<sup>15</sup> and as Afghanistan's largest urban centre, 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. Returnees from western countries are almost exclusively returned to Kabul where because of Kabul's size and diversity, returnees are unlikely to be discriminated against or subject to violence on the basis of ethnicity or religion. DFAT also assessed that, with the exception of those travelling by road between Kabul and the Hazarajat, low-profile Hazaras who have spent time in western countries face a low risk of violence as a result of those international links.<sup>16</sup> Although UNHCR in April 2016 indicated individuals who are perceived to have adopted values and/or appearances associated with Western countries, may be targeted by anti-government elements<sup>17</sup> the reports and incidents cited by the UNHCR do not refer to Kabul as an area where returnees are targeted on the basis of being perceived as Western.

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<sup>14</sup> Reuters, "Suicide attack on Kabul Shi'ite mosque kills at least 30", 25 August 2017, CXC90406615125; UNAMA, "Afghanistan- Protection of Civilians in Armed Conflict Midyear Report 2017", 1 July 2017, CISED50AD4852

<sup>15</sup> DFAT, "Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 3.30; DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 5.17

<sup>16</sup> DFAT, "Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.18, 3.31, 4.3, 4.11

<sup>17</sup> UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p. 41

32. I am not satisfied on the evidence that returnees like the applicant who have lived in a western country are targeted in Kabul by insurgents or that the applicant would be targeted on return as a Shia Hazara returnee with an imputed pro-Western political opinion. The applicant has no identifiable affiliations with international organisations or with the Afghan government or foreign forces and I am satisfied that he would not be imputed with an adverse political opinion in Kabul as a Hazara Shia who resided in a western country.
33. The representative submits that the general security situation has deteriorated markedly in Afghanistan and in Kabul there has been a significant increase in the frequency of attacks. Country information indicates there was an overall decline in the security situation in Afghanistan in 2015 which continued into 2016 although there was a slight decrease in the overall number of security incidents. However the Afghan government remained in effective but not absolute control of all major urban centres which were considered to be more secure and provided greater protection against insurgent attacks than in rural areas. Country information indicates the Afghan government continues to maintain effective although not absolute control over Kabul which suffers a greater number of high profile attacks due to a high concentration of government buildings, international organisations, diplomatic compounds and international and national security forces. However the Afghan army and international forces have put in place a range of counter-measures to deter, prevent and respond to insurgent attacks which are still carried out mostly against high profile targets.<sup>18</sup>
34. I accept that there have been high-profile suicide and complex attacks in Kabul, the majority of which are undertaken by the Taliban targeting those associated with the government or international community and more recently Daesh/ Islamic State have perpetrated a number of high profile attacks which included attacks against Shias. I also accept that although attacks are often directed at specific targets, the methods of attack can be indiscriminate and result in civilian casualties. Although people associated with the government or the international community are at a significantly higher risk than ordinary Afghans in Kabul,<sup>19</sup> I am satisfied that the applicant does not have such a profile in Kabul. I also note that the majority of attacks resulting in civilian casualties occur in areas of central Kabul where there is a high concentration of government buildings, international organisations, diplomatic compounds and international and Afghan security forces and not in the west of Kabul where the majority of Hazaras reside. I accept that Islamic State have instigated occasional attacks on Shias in Kabul and may attempt to stage further attacks. However given the size and diversity of the population of Kabul, the large size of the Shia Hazara population particularly in western Kabul, the increased security in Shia mosques, the applicant's lack of association with groups primarily targeted by insurgents, the high security presence in Kabul and the applicant's infrequent need to visit areas where the majority of attacks occur, as well as the ongoing effective government control, I am not satisfied that the applicant faces a real chance of harm in the foreseeable future from the Taliban, Islamic State or other insurgent groups due to the general security situation.
35. I find that there is not a real chance of the applicant being seriously harmed in Kabul as a Shia Hazara, due to his family associations, as a returnee from a western country or due to generalised violence. Considering all the circumstances, I am not satisfied that the applicant faces a real chance of harm in the reasonably foreseeable future in Kabul, which country information indicates he can safely access by air.

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<sup>18</sup> DFAT, "Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.18, 2.8; EASO, "Country of Origin Information Report: Afghanistan Security Situation", 1 November 2016, CIS38A80122597, pp. 26, 34, 39-40

<sup>19</sup> DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 3.38

## Refugee: conclusion

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

## Complementary protection assessment

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37. 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

38. 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.

39. I have found that there is a real chance the applicant may be killed or physically harmed by the local Taliban if he returns to [District 1]. I am satisfied that this harm amounts to significant harm. For the same reason, I am satisfied that the applicant faces a real risk of significant harm in [District 1].

## Qualifications to the real risk threshold

40. Section 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 the real risk is one faced by the population of the country generally and is not faced by the person personally. In 2016 DFAT assessed that Hazara minorities living in Pashtun-majority areas are less safe and Hazaras travelling by road between Kabul and Hazarajat face significant risks travelling between these areas.<sup>20</sup> [Details of District 1 removed]. As a result of the Taliban's increased presence in [District 1], Hazara communities were reportedly placed under greater pressure, in an attempt to enlist or enforce their support. There is also insecurity on the roads, leading into and out of Hazarajat as well as in [District 1], and armed insurgent groups are actively operating and carrying out attacks in [District 1] as well as other parts of Uruzgan including the provincial capital.<sup>21</sup> I am satisfied that the risk faced by the applicant in [District 1] is not a risk faced by the general Afghan population but is one faced by the applicant personally as a Shia Hazara returnee.

41. I have considered whether the applicant could obtain the protection of the Afghan government in returning to [District 1] and have had particular regard to country information pertaining to

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<sup>20</sup> DFAT, "DFAT Thematic Report Hazaras in Afghanistan ", 8 February 2016, CIS38A8012186, 2.24, 2.33 and 4.4

<sup>21</sup> [Source deleted.]

Taliban activity on the roads between Kabul and [District 1] noting that there is a significant Taliban [presence]. [An organisation] in 2016 indicated that Uruzgan is a volatile province in which armed insurgent groups are actively operating and often carry out attacks. [Details of District 1 deleted].<sup>22</sup> Given the ongoing insecurity in [District 1], the [unreliability] of the ALP and support for the Taliban in the Pashtun community, and lack of effective Afghan government control in the district and in other parts of Uruzgan, I am not satisfied that the applicant could obtain protection from an authority of Afghanistan such that there would not be a real risk that he will suffer significant harm on his return to [District 1].

42. Section 36(2B) of the Act also 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.
43. For the following reasons I am not satisfied that the applicant faces a real risk of significant harm in Kabul which he can safely access by air.
44. Country information indicates that although there is no evidence of any official policy of discrimination on the basis of ethnicity or religion there is societal discrimination against ethnic minorities which is in the form of nepotism where particular ethnic or religious groups are favoured. This discrimination is primarily as a result of the important role of played by ethnic, tribal and familial networks in Afghan society. DFAT indicates that ethnic, tribal or family connections will often be more important than merit in employment decisions for both government and private sector positions.<sup>23</sup>
45. I accept that as a Shia Hazara the applicant may be subject to discrimination in the form of nepotism on return, particularly as he does not have any family links in Kabul. However on the evidence I am not satisfied that such discrimination in Kabul would result in the applicant being arbitrarily deprived of his life, or would constitute the death penalty, or torture. Nor am I satisfied that such discrimination is at a level that would amount to cruel or inhuman treatment or punishment or degrading treatment or punishment. I do not accept that such treatment constitutes significant harm as defined in s.36(2A) of the Act. I have also found that there is not a real chance that he would face other forms of harm in Kabul as a Shia Hazara and as the 'real risk' test imposes the same standard as the 'real chance' test, I am also not satisfied that there is a real risk of the applicant suffering such harm on the return to Kabul as a Shia Hazara.
46. I have otherwise found that there is not a real chance that the applicant will face harm in Kabul as a returnee, or due to an imputed anti-Taliban profile arising from his family associations. As the 'real risk' test imposes the same standard as the 'real chance' test, for the reasons stated above I am also not satisfied that there is a real risk of the applicant suffering significant harm on the return to Kabul for those reasons.
47. In regard to the general security situation in Kabul, DFAT indicates that the security situation is better in areas where government forces maintain strong control, such as major urban areas like Kabul, but attacks remain a common occurrence even in these areas.<sup>24</sup> However the primary targets are government institutions, political figures, the Afghan National Defence and Security forces (ANDSF), personnel associated with NATO's Resolute Support Mission and other coalition forces, other security services, international organisations and foreign missions of

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<sup>22</sup> [Source deleted.]

<sup>23</sup> DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 3.25, 3.6 and 3.8

<sup>24</sup> DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 2.33

some countries, although mosques, schools, hospitals and other civilian targets are also vulnerable. Although attacks are often directed at specific targets, the methods of attack can be indiscriminate and often result in civilian casualties. The Afghan government maintains effective but not absolute control in major urban centres, particularly Kabul. Although people associated with the government or the international community are at a significantly higher risk than ordinary Afghans in Kabul,<sup>25</sup> I am satisfied that the applicant does not have such a profile in Kabul. There are more high profile attacks in Kabul than in other parts of Afghanistan; however this is due to the high concentration of government buildings, international organisations, diplomatic compounds and international and national security forces which are the primary target of insurgents. Given the higher level of government control and greater level of security including at Shia mosques, together with a lack of evidence indicating any loss of control by government forces, I am satisfied that the government and security forces continue to maintain effective control in Kabul. Considering all of the above, I am not satisfied that there is a real risk of the applicant facing significant harm on the basis of the general security situation in Kabul for any reason.

48. I am not satisfied that there is a real risk of the applicant suffering significant harm on return to Kabul but for the following reasons I am satisfied it is not reasonable for him to relocate there.
49. The applicant and his representative claim that he has no social, community or family networks in other parts of Afghanistan other than a [sibling] who had just moved to Herat but was moving to [Country 1] shortly to join other family members. The applicant's mother who was previously in his home area also moved to [Country 1] in 2016. The representative refers to the UNHCR report which indicates that extended family and tribal community structures are fundamentally important to successful relocation as Afghans are reliant on these networks for economic survival including access to accommodation. It is submitted that the applicant was a [minor] when he left Afghanistan in 2011, does not have any formal education, and has only worked on the family land in Afghanistan. As he has no support network in Kabul, limited financial means and employment skills it would be difficult for him to find employment to subsist in Kabul. Given the general lack of security and well as widespread unemployment, the high cost of living and poor living conditions he would be returning to, relocation is not reasonable. Additionally the trauma the applicant has endured due to the explosion and the loss of his relatives has impacted on his mental health which will make him more vulnerable in Kabul where he does not have support mechanisms. The representative provided a mental health care plan and a letter from a psychologist which state that the applicant is suffering from post-traumatic stress disorder (PTSD) arising from a history of trauma in Afghanistan, and has been attending counselling since February 2017. The mental health plan indicates the applicant has also been prescribed anti-depressants to improve his functioning and reduce the symptoms. The applicant indicated at the SHEV interview that he was receiving treatment for PTSD while he was in detention but could not afford the cost after he was released into the community and hoped that he would get better on his own but that his mental health had not improved.
50. With limited exceptions, in UNHCR's view the reasonableness of relocation is dependent on the effective availability of traditional support mechanisms, provided by members of the applicant's extended family or ethnic group, and advises that the only exceptions for the requirement of external support are single able bodied men and married couples of working age without identified specific vulnerabilities. Such persons may in certain circumstances be able to subsist without family and community support in urban and semi-urban areas that have the necessary infrastructure and livelihood opportunities to meet the basic necessities of life

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<sup>25</sup> *ibid*, 2.35, 5.1, 3.38

and that are under effective Government control. DFAT has also advised that traditional extended family and tribal community structures are the main protection and coping mechanisms for people in Afghanistan, however in practice, lack of financial resources and employment opportunities are the greatest constraints to successful internal relocation which is generally more successful for single men of working age although lack of family or tribal networks for single men can impact on their ability to reintegrate into the Afghan community.<sup>26</sup>

51. The applicant presents as a young single able bodied male of working age who has presented with mental health issues in Australia since his arrival for which he has received support. He has no formal education in Afghanistan and since his arrival in Australia as a [minor] has not undertaken any further education in Australia. He is not literate and is only able to speak Hazaragi. Although he is now approximately [age] years of age, he has limited previous employment experience other than assisting his mother [in] [District 1] and he recently commenced [similar] work in Australia. Although the applicant is currently employed in Australia he has only been working for a short time and there is no evidence before me to indicate that he has acquired skills in Australia which would be beneficial to him on return.
52. Country information indicates that Kabul is under the effective control of the Afghan government. Although DFAT reports unemployment and underemployment are high across Afghanistan large urban areas are home to mixed ethnic and religious communities, and offer relatively greater opportunities for employment and access to services.<sup>27</sup> Agriculture, wholesale and retail trade, manufacturing and construction are the main sectors of employment and those who have foreign language and computer skills tend to be best placed to find well-paid employment in Kabul. Employment growth has been strongest in Kabul's service sector, including small businesses such as family-owned markets, and in the construction industry.<sup>28</sup> I accept that despite there being relatively more employment opportunities in Kabul there is unemployment and underemployment and given that the applicant has no education and very limited employment skills to enable him to compete with other unemployed residents in a deteriorating economic environment, I consider it highly unlikely that the applicant will be able to obtain employment to meet cost of living expenses in Kabul.
53. I also note that although the applicant lived in [Country 1] for approximately a year, his travel there was arranged by his mother with whom he lived until his departure from Afghanistan and while in [Country 1] he was supported by other family members who arranged his travel to Australia. The applicant has also relied on familial support in Australia through his [relative] with whom he currently resides and until he recently managed to obtain work he relied on Centrelink payments to support himself. The applicant also indicated that his mother sold the family land to pay for the applicant's travel to Australia and the applicant when he was financially able had to repay the loans his mother made in order to survive after she sold the land. Given the applicant's circumstances and that of his family, I therefore accept that it is highly unlikely the applicant would have access to any financial support if he were to return to Kabul.
54. The applicant has demonstrated some resilience in travelling from Afghanistan to Australia; however he has had the support of his [relative] in Australia and has only become recently

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<sup>26</sup> UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p. 86; DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 5.20

<sup>27</sup> *ibid*, 2.19 5.15 5.20

<sup>28</sup> *ibid*, 2.19

employed in Australia. He has never lived in Kabul and although he has lived in [Country 1] as well as [District 1], he lived there with family. His mother and [sibling], as well as an [Relative 2] are in [District 1], and he does not have any family members in Kabul to assist him on return. He would be arriving in Kabul without dependants as a single young man of working age but who is unfamiliar with establishing himself in new locations, including obtaining accommodation and employment without such social and familial support. I accept that life in Kabul would be considerably different to that in [Country 1] or Australia with living standards being substantially lower, despite Kabul offering greater opportunities for employment and access to services than rural areas. However I note that UNHCR indicates that relocation may not be reasonable for those who present with significant health problems or other specified vulnerabilities identified by UNHCR as requiring durable support. Although the applicant has demonstrated a degree of resilience previously, given the applicant's ongoing mental health issues, I am not satisfied that the applicant would be able to obtain accommodation or employment or has the necessary skills and the capacity to subsist in Kabul without established networks particularly as he has never lived in Kabul and his mother and [sibling] are located in [Country 1] and other extended family members are in [another country]. On the evidence, I am not satisfied that he has demonstrated the ability and capability to establish himself in new locations despite a lack of family and other connections.

55. Country information indicates that health care availability in Afghanistan has improved significantly with approximately 85% of the population having access to free basic health services. Although health care is freely available in Kabul, and basic medical facilities tend to be better there than in other parts of Afghanistan, medicines are often expensive or expired, which can exclude the poor from treatment for common illnesses or provide sub-standard or ineffective treatments. Private practices tend to provide higher quality care and the Hazara community operates a number of relatively high quality private medical facilities in Kabul however the overall quality of health services remains poor.<sup>29</sup> Given that I consider the applicant would not have any financial support and would have difficulty in obtaining work to enable him to subsist I consider that the applicant would only have access to basic health care on return to Afghanistan. I also note that the diagnosis of PTSD and the current mental health plan indicate that the applicant is on anti-depressant medication to improve his functioning and reduce his symptoms. The applicant at the SHEV interview in February 2017 stated that he had received assistance while in detention but given the cost of continued treatment following his release did not seek further assistance and although he had hoped he would become better, his mental health had not improved. The applicant has since provided a letter from his psychologist who states that the applicant has been assessed as suffering PTSD at an extreme level and has been in receipt of counselling since February 2017 however his improvement has been impeded by limited availability of speakers in his language to assist. On the information before me the applicant presents as vulnerable and given the availability of only basic and often inadequate treatment in Kabul and other parts of Afghanistan for a person such as the applicant, I am not satisfied that it would be reasonable for the applicant to relocate to an area where he has no familial or other durable support, and where without such support his mental health may deteriorate further and significantly impede his ability to establish himself.
56. Having regard to the applicant's circumstances, and in particular his youth, his mental health issues, lack of family networks to provide durable support, as well as his limited employment skills, lack of education or financial support on return to Kabul, I am not satisfied that it is reasonable for the applicant to relocate to Kabul.

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<sup>29</sup> DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 2.16; DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 3.22

57. I have considered whether it is reasonable for the applicant to relocate to another part of Afghanistan including urban areas such as Herat or Mazar-e-Sharif which are under government control and where there are significant numbers of Hazara Shias. I am satisfied that the applicant would present with similar vulnerabilities arising from his medical condition, and his inability to access other than basic and ineffective treatment. The applicant does not have any familial connections in Herat or Mazar-e-Sharif. He would be returning as someone who has lived outside of Afghanistan for a significant period of time with no education and limited employment skills. Taking into account the reasons discussed above in relation to Kabul, I am also not satisfied that it is reasonable for the applicant to relocate to any other part of Afghanistan.

#### **Complementary protection: conclusion**

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

#### **Decision**

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

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

## Applicable law

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

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

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

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

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

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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