



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN
IAA reference: IAA17/02327

Date and time of decision: 5 January 2018 18:24:00
Jessica McLeod, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Hazara Shi'a citizen of Afghanistan. After initially lodging and withdrawing a Temporary Protection visa (TPV) application, he lodged an application for a Safe Haven Enterprise visa (SHEV) [in] March 2017. A delegate of the Minister for Home Affairs (the delegate; formerly a delegate of the Minister for Immigration and Border Protection) refused to grant the visa [in] March 2017.
2. The delegate made no finding on risk in the applicant's home area, but found that due to road insecurity, the applicant would face a real chance of serious harm while attempting to access this home area. However she was not satisfied he would face a real chance of persecution or real risk of significant harm for any reason in Kabul and found that the applicant's relocation to Kabul would be reasonable in the circumstances.

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). This includes inter alia, country information provided with the application and a post-interview submission to the delegate from the applicant's representative.
4. On 20 April 2017 the IAA received a submission on behalf of the applicant from his representative. The submission reiterates claims and references case law, policy and country information which was before the Ministerial delegate and are already before me. It also addresses the delegate's reasoning and findings which may be regarded as argument rather than 'information'.
5. However in this submission, and also in emails the IAA received on 7 June 2017 and 2 August 2017, the applicant's representative has made reference to country information reports which may be relevant and were not before the delegate when the decision was made. It is new information. Broadly, the information relates to the general security situation in Afghanistan, risks to Hazara Shi'as and returnees, the strength of the Taliban and the threat from Islamic State. It is general country information.
6. Most of the reports the representative provided to the IAA post-date the decision, however a few were published before the decision, between August 2016 and mid-March 2017. The applicant's representative has argued that the delegate relied on older country information to make the decision and in this particular case I concur. I note that apart from one report on the use and significance of the Taliban's flag which I do not consider to be particularly relevant to this applicant, and another on retaliatory attacks by the Taliban in parts of Parwan province (although not the applicant's district), the most recent country information the delegate considered was from September 2016 and is now more than one year old. The majority of the information relied upon by the delegate was from July 2016 or prior. While I have some doubts about whether the pre-dated articles truly could not have been provided to the delegate, I am prepared to accept the applicant and his representative were not on notice as to the importance or need to provide province specific information or information post-dating July 2016. The information from 2016 and 2017 provided by the representative contain updated analysis on risks relevant to the applicant. Given the fluidity of the security situation in Afghanistan, I consider it is necessary to give proper consideration to the updated information. I am satisfied

that there are exceptional circumstances to justify considering this new information, being, the country information referenced in the submissions.

7. I have also obtained new information about classes of persons of which the applicant is a member, including information on the situation in Afghanistan for Shi'a Muslims, Hazaras and returnees including those who originate from Surkh-e Parsa in Parwan. Much of this information was published after the date of the delegate's decision and given this, and given that it provides information about these matters with regard to the developing security situation in Afghanistan, I am satisfied that there are exceptional reasons to justify considering this information.¹
8. Some of the information I obtained was available at the time of the delegate's decision. However, as the delegate did not consider the risk of harm to the applicant specifically within his home area, country information specific to the applicant's district and province was not considered. Similarly, while findings were made on the risk of harm while travelling to his home area, the information relied upon by the delegate did not contain specific information on the route/s the applicant would travel to his home in Parwan. For these reasons and because I have I therefore require additional information to assess the applicant's protection claims and I am satisfied that there are exceptional circumstances to justify considering this information.²

Applicant's claims for protection

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

- He is a Hazara Shi'a born in [date] in Surkh-e Parsa, Parwan, Afghanistan.
- He was a [Occupation 1] with his own business located in Dara-e-Ghorband in Parwan Province. The [business] was his only livelihood. It was located in the Pashtun area where most Pashtuns were members or had links with the Taliban. The Taliban ordered him to close his [business] because most of [his business was for] the government.
- A good Pashtun friend informed him that the Taliban's threats were real and he would be killed at the earliest opportunity. They had accused him of working for the government and his Hazara Shi'a identity increased the risk.

1 UNAMA, "Afghanistan- Protection of Civilians in Armed Conflict Midyear Report 2017", 1 July 2017, CISED50AD4852; DFAT, "DFAT Thematic Report - Hazaras in Afghanistan ", 18 September 2017, CISED50AD5681; DFAT, "DFAT Country Information Report - Afghanistan ", 18 September 2017, CISED50AD5680; Afghanistan Analysts Network (AAN), "Bracing for Attacks on Ashura: Extra security measures for Shia mourners ", 30 September 2017, CXC90406614737; UNAMA, "Protection of Civilians in Armed Conflict: Attacks Against Places of Worship, Religious Leaders and Worshipers", 7 November 2017, CISED50AD7427; European Asylum Support Office (EASO), "Key socio-economic indicators, state protection, and mobility in Kabul City, Mazar-e Sharif, and Herat City", 1 August 2017, CISED50AD5465; EASO, "EASO Country of Origin Information Report Afghanistan: Security Situation", December 2017

2 UN OCHA, "Humanitarian Overview – Parwan Province", January 2014, CISEFCB23F7444; EASO, "EASO Country of Origin Information: Afghanistan Security Situation 2016", 20 January 2016, CIS38A8012395; Naval Postgraduate School (NPS)-Program for Culture and Conflict Studies, "Parwan Province Provincial Overview", 1 January 2007, CX247295; United Nations Development Programme(UNDP), "Summary of District Development Plan:Surkh Parsa district, Parwan Province", 1 November 2007, CIS19023; Landinfo, "Afghanistan: Security Report November 2010 - June 2011 (PART II)", 1 September 2011, CIS22603; UNAMA, "UNAMA Protection of Civilians Annual Report 2015", UNAMA, 14 February 2016, CIS38A8012245; Country of Origin Information Section (COIS), "AFG CI160414124914041 – Travel routes between Parwan (Ghorband) and Kabul – Road safety between Parwan and Kabul between 2009 and 2012 – Current road security between Parwan and Kabul", Department of Immigration and Border Protection, 29 April 2016, CROD9DEFA134

- He approached the Surkh-e Parsa district head to complain but he was told they could not protect him. He believes that because they themselves were Pashtuns they acted in favour of the Taliban.
- After discussing the threats with his wife, he decided his family would be at greater risk if he remained so he left Afghanistan.
- The Taliban have an extensive network of spies and informants and he will be located anywhere in Afghanistan.
- He fears being harmed/ and or killed by the Taliban due to his being previously targeted by the Taliban and his Hazara Shi'a identity, and because he would be returning from a western country and the Taliban will be suspicious of how he could influence the local population with western ideas. He also fears that extraordinary levels of discrimination and the dire economic situation and extreme poverty throughout Afghanistan will result in his having a threatened capacity to subsist.

Factual Findings

Identity and driver's licence

10. On the basis of the applicant's oral and written evidence I accept the applicant's claimed identity and nationality. I accept he is a Hazara Shi'a who originates from Surkh-e-Parsa district, Parwan Province in Afghanistan.
11. During the Protection visa (PV) interview the delegate pursued a line of enquiry relating to the issuance of the applicant's driver's licence, in particular, focusing on why the applicant had obtained his Afghan driver's licence just before he left Afghanistan. However I am satisfied this was based on the erroneous conclusion that the applicant obtained his licence in October 2012 and I am satisfied on the material that he in fact obtained the licence [in] February 2012 [which] rather than being just before he left, was around nine months before he left. Having considered the issues I accept the applicant's explanations that these actions had no bearing on the threats he received or his coming to Australia.

Military service

12. I note in his Arrival interview and his written application, the applicant stated he had completed one year of compulsory military service in 1990. He did not know his rank or unit but recalled that he undertook a [role]. I have carefully considered the material before me and I am satisfied the applicant has not raised any claims to fear harm in connection with his former military training or service, and nor do such claims arise on the facts.

Employment and profile with Taliban

13. I accept the applicant was a self-employed [Occupation 1] with his own [business] and that his customers included [government] workers who brought their [goods] to [him].
14. I note that while the applicant states he lived in Surkh-e Parsa³, he mentioned in his written statement of claims that his [business] was located in the Pashtun area of Dara-e-Ghorband.

³ Surkh e-Parsa is also known as 'Lolinge'; Alternative transliterations for Surkh e-Parsa include Surkh Parsa, Shurk Parsa, Surki Parsa, Sorkh Parsa, Sorkh-e Parsa

Given this, I have considered whether the applicant's [business] was located in his home region. I note that the ethnic composition of Parwan province is estimated to be 70% Tajik, 18% Pashtun and 11% Hazara with a smattering of other minority groups including Turkmen, Uzbek, Qizilbash, Kuchi and others.⁴The Hazaras of Parwan reside in Shekhali district and in the applicant's district, Surkh-e Parsa.⁵ The majority of the country information before me does not support that there are Pashtun areas within Surkh-e Parsa. Rather, it indicates that the applicant's district is majority Hazara although some Hazaras in the district are Sunni rather than Shi'a and are regarded by other Hazaras, or even by themselves as Tajiks rather than Hazaras. These sources indicate either a mix of Shi'a Hazara and Tajiks or a mix of Shia and Sunni Hazaras.⁶ However, with these nuances, it is difficult to determine the exact ethnic composition of the district and I note reports by the Naval Post Graduate School have indicated the presence of resident 'Wardak Pashtuns' living across the border from Wardak in Surkh-e Parsa.⁷ Given this, I acknowledge the demographic composition remains unclear and I am prepared to accept the applicant was continuing to live in his home village in Surkh-e Parsa and that his [business] was also located in a Pashtun area of the district.

15. Having regard to the threats the applicant received, I accept his Pashtun friend told him on a number of separate occasions that he was wanted by the Taliban who intended to kill him. I accept the applicant was first warned by his friend around four months before he left the area. I accept the applicant believes the Taliban had been informed upon by local Pashtuns and that he believes the Taliban intended to kill him because in fixing government [assets] they equated him with working for the government. Country information does indicate that in certain circumstances, persons with connection to, or who are perceived as supporting the Afghan government are targeted by Anti-Government Elements (AGEs) including the Taliban. However for the reasons that follow, I am not satisfied that the applicant's circumstances are such that he will be targeted in Afghanistan in relation to this matter upon return.
16. Having regard to the applicant's profile, I note firstly, that the applicant does not claim to have had any other engagement with the Afghan government (nor any engagement with foreign forces or members of the international community) apart from [providing services] and that the government was one customer among others. I am satisfied on the evidence that he accepted the work in the same way he accepted work from other local customers and did not specifically seek out arrangements with government employees. The evidence does not suggest he performed the work as an expression of his political opinion or conscience, or that he prioritised the government [above] [other] [customers]. I am satisfied the applicant worked on government [assets] but that his reasons for doing so were financial, as a matter of business, and not political. Given this and that on the evidence the applicant did not have any other interaction with government, security or international community, I consider his imputed profile as a supporter of the government was low-level.
17. There are also other indicators that the applicant's profile was low-level. He confirmed at the interview that all the threat messages came through his friend and he did not receive any direct

4 EASO, "EASO Country of Origin Information: Afghanistan Security Situation 2016", 20 January 2016, CIS38A8012395; EASO, "EASO Country of Origin Information Report: Afghanistan, Security Situation", 1 November 2016, CIS38A80122597; EASO, "EASO Country of Origin Information Report Afghanistan: Security Situation", December 2017; Naval Postgraduate School (NPS)- Program for Culture and Conflict Studies, "Parwan Province Provincial Overview", 1 January 2007, CX247295

5 EASO, "EASO Country of Origin Information Report Afghanistan: Security Situation", December 2017

6 United Nations Development Programme(UNDP), "Summary of District Development Plan:Surkh Parsa district, Parwan Province", 1 November 2007, CIS19023; Landinfo, "Afghanistan: Security Report November 2010 - June 2011 (PART II)", 01 September 2011, CIS22603; EASO, "EASO Country of Origin Information Report Afghanistan: Security Situation", December 2017

7 Program for Culture and Conflict Studies. Naval Postgraduate School, "Parwan Provincial Overview", 1 November 2017, CISED50AD6111

threats from the Taliban or anyone else. The evidence also does not suggest that any member of the Taliban ever approached the applicant, or that he had any form of personal or direct interaction with the Taliban. I note the applicant continued performing the same work over the next few months and made no moves to move his family out of their home area and on the evidence, he nor any members of his family faced any harm. I am satisfied on the evidence that the situation did not escalate beyond messages from his friend.

18. I note that Surkh-e Parsa has had little insurgency activity in recent years and I have therefore considered that the indirect threats from the Taliban may have resulted from their having had little physical presence in the area at the time. However, even taking this into account, I am satisfied that had the Taliban wanted to harm the applicant, or to have had the applicant harmed, they could and would have done so, either in his residential or employment localities, elsewhere in the local community or in the period that he lived in Kabul in late 2012. While I accept the applicant faced a frightening experience and was fearful that the Taliban would eventually harm him, I find the indirect approach to be indicative of the Taliban not having a significant adverse interest in him.
19. I note the applicant eventually did close the shop and stop working on government [assets] and I have considered that this may have been the aim of the threats and therefore quelled the Taliban's desire to harm him. However even taking this into account, I consider that had their threats been serious and noting that the applicant continued to defy them, that they would have followed-through on the threats or taken steps to harm him had they intended to do so.
20. I note that since the applicant's departure, his wife and children have continued to reside in his home area, and that his siblings have also returned to the area after their own movements away for reasons I am satisfied were unconnected with the applicant's situation. The evidence before me does not suggest that any members of the applicant's family have received threats or faced harm, or have even been questioned by the Taliban in the absence of the applicant. I consider it relevant that the Taliban have not turned their attention to the applicant's other family members in the applicant's absence.
21. Given there were no direct approaches from the Taliban to the applicant or his family and no other apparent steps were taken to act on the threats, I am not satisfied on the evidence that the applicant was at risk of imminent targeted harm in the manner claimed. I am not satisfied on the evidence that the applicant held a profile with the Taliban such that they were intending to harm him. The only evidence that he was of interest to the Taliban was messages from this single friend and this of itself leads me to question whether the Taliban did in fact have knowledge of and interest in, the applicant. However, in any case, I do not accept he was of anything more than low-level interest to the Taliban at the time he departed Afghanistan. Given this and that there has now been a five year passage of time since he departed and there is no indication that the Taliban have shown any interest in the applicant during this time, I am not satisfied that the applicant is still of any interest to the Taliban in relation to his previous work, nor for any other reason.

Refugee assessment

22. 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

23. 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.

24. The applicant claims to fear harm from the Taliban on the basis of his Shi'a Islam religion and Hazara ethnicity, and his profile as a returnee from a western country who was previously threatened by the Taliban because he performed [services] for the Afghan government. He also fears harm from Islamic State, and being harmed in generalised violence. In considering these claims I have had regard to the submissions and information provided by the applicant's representatives at both the primary and review stages, much of which focused on the strengths and objectives of the Taliban, Islamic State and other insurgent groups, about the targeting Hazaras and Shi'as and about the general security situation in Afghanistan.

25. The security situation in the applicant's home province of Parwan, has in recent years, deteriorated steadily due to insurgent activity and clashes between AGEs (including the Taliban, Islamic State, Hezb-e-Islami, Islamic Movement of Uzbekistan and Al Qaeda) and security forces, but equally through the presence of illegal armed groups, often thought to be linked with local powerbrokers, and criminality. Widespread firearms possession, poverty and unemployment are considered to have contributed to these developments. Islamic State has also reportedly infiltrated parts of Parwan province, although they have reportedly met resistance from the numerous local AGEs in those areas.⁸

26. According to EASO, there were 424 documented security incidents in Parwan between January 2015 and 31 May 2017.⁹ A high number of Parwan's security incidents occurred in Bagram district, a strategic location containing Bagram airbase (once housing 40 000 military and civilian contractors) which is still the biggest US military airbase in Afghanistan and home to the government run Bagram detention centre. A large number have also occurred in Chaharikar, where the Parwan provincial capital is located and in the contested Ghorband valley which stretches over Ghorband and Shekhali districts (both of which neighbour with Surkh-e Parsa) and Shinwar district.

27. In the applicant's district, EASO reported that from January to August 2015 there were 154 security incidents in Parwan though only zero to nine were recorded as occurring in Surkh-e Parsa. From September 2015 to May 2016 there were 140 security incidents recorded, three of

⁸ EASO, "EASO Country of Origin Information Report Afghanistan: Security Situation", December 2017

⁹ EASO, "EASO Country of Origin Information: Afghanistan Security Situation 2016", 20 January 2016, CIS38A8012395; EASO, "EASO Country of Origin Information Report: Afghanistan, Security Situation", 1 November 2016, CIS38A80122597; EASO, "EASO Country of Origin Information Report Afghanistan: Security Situation", December 2017

which occurred in Surkh-e Parsa and from 1 September 2016 to 31 May 2017 130 security incidents were recorded throughout the province with just one occurring in Surkh-e Parsa.¹⁰ In summary, of the 424 security incidents which occurred in Parwan between January 2015 and May 2017, around 3 % of these occurred in the applicant's district, which remains under Afghan government control. While this information indicates that Surkh-e Parsa is not devoid of security incidents, I am satisfied that there have been few security incidents in recent years and there is limited insurgent activity.

28. I accept insurgent groups such as the Taliban and Islamic State do have the capability to orchestrate attacks however while the Taliban is active in parts of Parwan including in neighbouring districts, it has specifically condemned the recent mass casualty attacks against Shi'as in Kabul, Herat and Balkh province¹¹ and there is no evidence of them conducting racial or religious targeting against Hazaras and/or Shia's in Parwan province. While Islamic State or their supporters have conducted recent attacks against Hazara Shi'as in Kabul, Herat and Balkh¹² and I accept they have the willingness and capability to conduct further attacks in certain locations, there are no reports of an Islamic State presence in Surkh-e Parsa or of ethnic or religious targeting against Hazaras/ Shi'as in Parwan. Nor is there any recent evidence of such targeting by other insurgents/AGEs in the area.
29. Neither the United Nations Assistance Mission in Afghanistan (UNAMA) nor other credible sources highlight Surkh-e Parsa as being an area of particular concern in relation to conflict-related abductions or racial or religious targeting by insurgents, or anyone else. While Hazaras have been subject to roadside abductions in other parts of Afghanistan, relevantly, there have been no such abductions in any part of Parwan province in in at least the past three years.¹³ There is no recent evidence of the Taliban, Islamic State, other insurgents or any criminal groups conducting racial or religious targeting against Hazaras and/or Shia's in Parwan province. On the evidence I am not satisfied that Islamic State's attempts to stoke sectarian violence with its attacks against Shi'as have influenced a rise in sectarianism against Hazaras/Shi'as amongst other actors in the conflict.¹⁴ I am not satisfied that Islamic State's influence in Afghanistan is such that a violent sectarianism is likely to take hold in Afghanistan in the reasonably foreseeable future. I consider the chance that this would occur in the reasonably foreseeable future upon return in the applicant's home area to be remote.
30. As noted above, in Surkh-e Parsa Hazaras make-up the dominant, or at least one of the dominant groups. There are some reports of inter-ethnic or inter-religious problems in parts of Afghanistan from time to time however I am not satisfied there has been any recent rise in sectarianism and I am not satisfied that clashes between groups or individuals occur with frequency or severity indicating a real chance of harm to Hazara Shi'as through community level

10 EASO, "EASO Country of Origin Information: Afghanistan Security Situation 2016", 20 January 2016, CIS38A8012395; EASO, "EASO Country of Origin Information Report: Afghanistan, Security Situation", 1 November 2016, CIS38A80122597; EASO, "EASO Country of Origin Information Report Afghanistan: Security Situation", December 2017

11 UNAMA, "Afghanistan: Protection of Civilians in Armed Conflict – Annual Report 2016", 6 February 2017, CISED50AD20; AAN, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War", 19 October 2016, CX6A26A6E11358

12 EASO, "EASO Country of Origin Information Report Afghanistan: Security Situation", December 2017; Afghanistan Analysts Network (AAN), "Bracing for Attacks on Ashura: Extra security measures for Shia mourners", 30 September 2017, CXC90406614737; UNAMA, "Protection of Civilians in Armed Conflict: Attacks Against Places of Worship, Religious Leaders and Worshipers", 7 November 2017, CISED50AD7427; UNAMA, "Afghanistan: Protection of Civilians in Armed Conflict – Annual Report 2016", 6 February 2017, CISED50AD20

13 UNAMA, "Afghanistan- Protection of Civilians in Armed Conflict Midyear Report 2017", 1 July 2017, CISED50AD4852; UNAMA, "Afghanistan: Protection of Civilians in Armed Conflict – Annual Report 2016", 6 February 2017, CISED50AD20; UNAMA, "UNAMA Protection of Civilians Annual Report 2015", UNAMA, 14 February 2016, CIS38A8012245

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

ethno or sectarian violence. Although I note the Sunni and Shi'a Hazara communities in the applicant's district share ideological differences, country information does not support that in Surkh-e Parsa, or more broadly in Parwan in recent years, Hazaras or Shi'as are subject to targeting by Pashtuns, Tajiks, Turkmen or other ethnic or religious groups. I am not satisfied applicant would face a real chance of being harmed in community level racial or sectarian violence in Surkh-e Parsa.

31. Country information does not support, and I do not accept that the applicant faces a real chance of harm from the Taliban, Islamic State, other insurgents, or members of the community in Surkh-e Parsa on the basis of his racial and / or religious profile.
32. Having regard to the threats the applicant received on account of working for the government by [providing services], I have not accepted the applicant was of anything more than low-level interest to the Taliban at the time he departed Afghanistan. Given this and that there has now been a five year passage of time since he departed and there is no indication that the Taliban have shown any interest in the applicant during this time, I am not satisfied that the applicant is still of any interest to the Taliban in relation to his previous work, nor for any other reason. On the basis of these factors and the information indicating insurgent activity in the applicant's home area to be limited, I am not satisfied that the applicant faces a real chance of harm from the Taliban or anyone else in relation to his previous work as a [Occupation 1] and the associated threats.
33. Having regard to the applicant's future employment, given that he has consistently worked in [Occupation 1] and [serving] roles since 1997, I find that he would likely continue to work in the industry upon return. While I am not satisfied he would specifically seek out arrangements for the servicing [of] government [assets], I accept that his work may from time to time and as a matter of course, involve some work [for] government employees and contractors. However as with his previous work, I find that any government association with which the applicant may be imputed on account of this work would be low-level only and given the low level of insurgent presence and activity in Surkh-e Parsa and that security incidents in recent years have been rare, I am not satisfied the applicant would face a real chance of harm from the Taliban, other insurgents or any other persons if he resumed [Occupation 1] work or a [Occupation 1] business in his home area upon return.
34. The applicant has lived in Australia and he claims he will be targeted on account of his being a returnee from the west capable of influencing others. I note also that Hazaras are widely perceived to be affiliated with both the government and international community and some individuals perceived as having adopted values and/or appearances associated with western countries have been targeted due to their imputed support for the Government and the international community.¹⁵ DFAT acknowledges that people who have been identified as having international associations face a high risk of being targeted by anti-government elements (AGEs) and that this may possibly include returnees from western countries. DFAT notes there are occasional reports of Hazara returnees from western countries (including two from Australia in 2014)¹⁶ allegedly being targeted for having spent time in a western country.

15 DFAT, "DFAT Thematic Report – Hazaras in Afghanistan", 8 February 2016, CIS38A8012186; UNHCR "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660

16 DFAT, "DFAT Country Information Report - Afghanistan ", 18 September 2015, CISEC96CF13366; UNHCR "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660

35. However there have been no reports of individual returnees from Australia being targeted since the two incidents in 2014 (which I note occurred on roads in Ghazni, removed from the applicant's home area) and other incidents reported by the UNHCR relate to various types of incidents involving mostly young returnees with and in particular circumstances which I do not accept are reflective of the applicant's. The applicant lived his formative years in Afghanistan with his family. He has only spent the last five years of his [life] in Australia/a western country and I note he has maintained contact with his Afghan family during this time. I do not accept he would have lost his knowledge and practise of his Afghan culture in these five years in Australia to any large extent. I am satisfied he would be returning to Afghanistan with knowledge and personal experience of Afghan culture and a familiarity with the country and life in Surkh-e Parsa and more broadly in Parwan. I am satisfied that any foreign or western mannerisms the applicant may have acquired would be minimal and would not put him at risk of harm.
36. Apart from servicing government [assets] (among those of other local customers) and his profile as a Hazara returnee, I am satisfied the applicant does not hold any other actual or imputed affiliation with the government or international community and there is no information to indicate he would upon return. I have not accepted the applicant faces a real chance of harm on account of his previous [Occupation 1] work on government [assets] nor if he resumes that same vocation upon return and country information does not indicate there is systematic targeting of returnees, or Hazara returnees in Afghanistan, including those with western clothing or mannerisms or who are failed asylum seekers from western countries. There have been no reports of people being targeted for returning from a foreign or western country or for being a returnee asylum seeker on that basis in Surkh-e Parsa or elsewhere in Parwan. I am not satisfied that the applicant faces a real chance of harm on account being a returnee who has lived outside Afghanistan including in a western country and is identifiably Hazara/Shi'a.
37. I have considered the applicant's claims to fear discrimination and a threatened capacity to subsist noting the economic situation and poverty levels in Afghanistan. DFAT advises that Hazaras outside the Hazarajat face societal discrimination affecting hiring decisions.¹⁷ I note the applicant's home district is mainly comprised of Hazaras, but noting that some are Sunni and may consider themselves Tajik, I accept the applicant may face such discrimination. However, Hazara Shi'as make up one of dominant groups there and I do not accept discrimination will be such that he will be denied employment in this region on the basis of his Hazara Shi'a profile or because he has lived outside for a significant period including in the west. Nor do I accept there are other reasons he would be denied such opportunities, or would otherwise suffer discrimination. The applicant has relevant [Occupation 1] work skills and skills in running his own successful business. I note his wife still lives in the local area and that his siblings have also returned to the area. I am satisfied that with his work experience, his long term residence in Parwan, through his wife's, his siblings or his own connections in Surkh-e Parsa, the applicant will also be able to find other work in his home area. While I note the pressured economic situation in Afghanistan and that poverty levels are high, the applicant has previously done farming work and has run a successful business and on the evidence has been able to provide and support himself and his family. I do not accept the applicant will suffer discrimination or a threatened capacity to subsist for any reason in the reasonably foreseeable future upon return.
38. I have considered the applicant's claims overall and I am not satisfied the applicant faces a real chance of serious harm in his home region of Surkh-e Parsa in Parwan on account of the previous threats for his work [for the] government, nor if he [provided] such [services] upon

¹⁷ DFAT, "DFAT Country Information Report - Afghanistan ", 18 September 2015, CISEC96CF13366; DFAT, "DFAT Thematic Report - Hazaras in Afghanistan ", 18 September 2017, CISED50AD5681

return, his race, religion, because he has spent a significant time in overseas countries and would be returning having sought asylum in the west - nor for any cumulative profile.

39. Country information indicates that most returnees are returned to Kabul airport. In terms of the applicant's ability to return safely to his home region, I have considered that country information indicates there is insecurity on roads passing through areas contested by insurgents, where the Taliban and other insurgents as well as criminal elements set up unofficial checkpoints, targeting those who appear wealthy or are associated with the government or the international community. I am satisfied that any interest the Taliban previously held in the applicant was low-level and that they do not currently and would not upon return have any adverse interest in the applicant such that they would be looking for him personally. While I note the applicant ran a successful business, as there is nothing in the applicant's evidence, the submissions or referred materials to indicate so, I am not satisfied that the applicant is wealthy or that he would be perceived as such upon return.
40. There are no direct road routes between Kabul and Surkh-e Parsa, seemingly due to large snow-capped mountains making travel difficult in summer and impossible in winter.¹⁸ The most direct road route from Kabul is a highway which runs through areas including Charikar and the Ghorband district which as noted above, have seen higher levels of insecurity. I have considered the reports before me regarding incidents of kidnapping/abduction and other attacks against Hazara Shi'a and returnee road travellers, in particular, on the roads linking Kabul and the Hazarajat. However, all ethnic groups are reported to be vulnerable to attacks and it can be difficult to ascertain the motivation for attacks, and to separate criminal attacks from insurgent activity.¹⁹ Notably, none of these incidents were reported as to have occurred on the roads between Kabul city and the border with Parwan, nor in Parwan province. However, as a result of the insurgency and criminal elements, at times, Surkh-e Parsa and Sheikh Ali districts have been inaccessible by road from Kabul²⁰ and I accept there may be some risks to road travellers on this route.
41. However, country information indicates that humanitarian assistance providers have been accessing Surkh-e Parsa and Sheikh Ali from Bamyan²¹ and this route is also available to the applicant. Country information indicates that the applicant can return to his home area, travelling by air to Bamyan and then onwards by road to his home area. There are regular flights from Kabul to Bamyan²² and estimated flight cost is approximately USD 100.²³ The applicant has not claimed and there is no other evidence before me to indicate that the applicant would not be able to finance this single fare air travel and I note he is currently employed in Australia.
42. From Bamyan, the applicant can travel by road either through Hesa-e-Awal-e-Behsud district in Wardak province to Surkh-e Parsa or through Shibar district of Bamyan, through Sheikh Ali and

18 Google Maps Satellite view of Surkhi Parsa district in Parwan province in Country of Origin Information Section (COIS), "AFG CI160414124914041 – Travel routes between Parwan (Ghorband) and Kabul – Road safety between Parwan and Kabul between 2009 and 2012 – Current road security between Parwan and Kabul", Department of Immigration and Border Protection, 29 April 2016, CR0D9DEFA134

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

20 UN OCHA "Parwan Humanitarian Profile, February 2014", February 2014, CISEFCB23F7444

21 UN OCHA "Parwan Humanitarian Profile, February 2014", February 2014, CISEFCB23F7444

22 European Asylum Support Office (EASO), "Key socio-economic indicators, state protection, and mobility in Kabul City, Mazar-e Sharif, and Herat City", 1 August 2017, CISED50AD5465; DFAT, "DFAT Thematic Report Hazaras in Afghanistan and Pakistan", 26 March 2014, CIS2F827D91264

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

then to Surkh-e Parsa.²⁴ All of these districts are either predominantly or significantly populated by Hazaras. According to DFAT Shibar sees higher levels of violence by armed AGEs than other parts Bamyán, but it is nonetheless also case that Shibar sees few security incidents and very little insurgent activity and when insurgent actions have occurred in Shibar they have tend to be targeted at government officials. DFAT assesses that overall Hazaras are able to travel through Bamyán's areas without facing undue security risks. There is no evidence of ordinary Hazara Shi'as or returnees being targeted on Bamyán roads. Regarding Wardak, there were two incidents of abduction targeting Hazara civilians in 2015 and 34 in 2016. However UNAMA attributes this increase to continuing land disputes in the area between Hazara residents and Kuchi tribal members²⁵ and I am satisfied that these circumstances are distinct from those of the applicant, who would only be briefly travelling through the area. There is no evidence of returnees being targeted on Wardak roads. No such incidents have been reported as to have occurred on the roads in Sheikh Ali or Surkh-e Parsa in Parwan. Nor have there been any reported incidents of attacks on Hazaras, Shi'as and / or any type of returnee in the broader Parwan province for at least the last three years. There is no evidence of the roads through these areas being affected by checkpoints set-up by Taliban or other AGEs searching for persons associated with the Afghan government or the international community as has been the case in other restive Pashtun districts.²⁶

43. I give significant weight to the fact that while there were two attacks on returnees in 2014 and a spike of road incidents involving Hazaras in 2015, this has tapered off in 2016 and 2017 and apart from Wardak, which the applicant would only pass through briefly, there have been no such incidents in the areas the applicant would need to travel through to reach Surkh-e Parsa. Having considered the relevant issues, I consider the possibility of the applicant being harmed in relation to his being Hazara, Shi'a and / or any type of returnee on his single return trip to Surkh-e Parsa to be remote and therefore not real.
44. I have considered the information provided by the representatives as to conflict patterns in Afghanistan and the fluidity of the security situation. I have considered that Surkh-e Parsa neighbours with Pashtun districts like Ghorband and Jalrez and is in proximate distance to the Ghorband valley, areas which have seen a deterioration in their security. However I am satisfied that while there are credible security concerns in parts of Parwan and other areas, but, on the evidence, Surkh-e Parsa a remains relatively secure with very few security incidents in the past few years and there is no sign that the insurgent and criminal activities which have taken place in the other districts will spread to Surkh-e Parsa within the foreseeable future, or to the roads linking Surkh-e Parsa to in this region is more than remote. Bamyán's airport. The applicant's representative has also provided a number of reports referring to claims that the Taliban and Islamic State have established themselves, or are attempting to establish themselves, in various areas of Afghanistan. However, none of these reports refer to such matters affecting the applicant's home district or any of the districts through which the applicant would travel after arriving in Bamyán. I am not satisfied the risk of the applicant being harmed through generalised violence is more than remote.

24 Country of Origin Information Section (COIS), "AFG CI160414124914041 – Travel routes between Parwan (Ghorband) and Kabul – Road safety between Parwan and Kabul between 2009 and 2012 – Current road security between Parwan and Kabul", Department of Immigration and Border Protection, 29 April 2016, CR0D9DEFA134

25 DFAT, "DFAT Thematic Report - Hazaras in Afghanistan ", 18 September 2017, CISED50AD5681

26 DFAT, "DFAT Thematic Report: Hazaras in Afghanistan and Pakistan, 26 March 2014, CIS2F827D91264; DFAT, "DFAT Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366; DFAT, "DFAT Thematic Report: Hazaras in Afghanistan", 8 February 2016, CIS38A8012186; EASO, "EASO COI Report: Afghanistan Security Situation", January 2016, CISEC96CF1191; EASO, "EASO COI Report: Afghanistan, Security Situation", 1 November 2016, CIS38A80122597; EASO, "EASO Country of Origin Information Report Afghanistan: Security Situation", December 2017

45. Before travelling to his home area, the applicant may firstly need to transit through Kabul airport on return or wait briefly in Kabul for his onward flight to Bamyan. As noted above, I accept that in certain circumstances, Hazaras resident in Kabul may face a risk of harm through targeted insurgent attacks. However I am satisfied that any amount of time the applicant would need to spend in Kabul city would be brief, as would any period of time he would need to spend in and around Kabul airport or on the road linking the airport to Kabul city. Having regard to the country information about Kabul which was before the delegate and is before me, I am satisfied that there is a strong military presence in Kabul and there is likely to be so in the reasonably foreseeable future. I am satisfied that the government and security forces maintain effective control over the city and airport and I am satisfied that this will not change in the reasonably foreseeable future.²⁷ I find that the chance of the applicant being harmed through a targeted attack or generalised violence in Kabul before travelling to his home area is remote and not real.
46. As for criminality, I accept that all of Afghanistan is affected by crime and that police capacity to maintain law and order is constrained by a lack of resources, and equipment, poor training, low education levels and corruption.²⁸ Country information does not indicate that persons with the applicant's profile including returnees from the west are systematically targeted for money or any perception of wealth and I am not in any case satisfied the applicant would be perceived as wealthy or that he has any other profile factors that would lead him to be targeted by criminal elements in Surkh-e Parsa nor en route upon return. Furthermore, I am satisfied that the applicant's familiarisation with Afghanistan, with Surkh-e Parsa and Parwan and with travelling the roads in Afghanistan, and his existing family connections will be conducive to his integration and his ability to take reasonable precautions consistent with those taken by other ordinary civilians in Afghanistan which would not amount to precluded modifications of behaviour. Considering all of this, I am not, on the evidence, satisfied that the applicant would face a real chance of harm in Afghanistan as a consequence of criminality.
47. During the PV interview, the applicant mentioned that around twice per year he travelled to Mazar-e-Sharif for [business]. However while I have accepted the applicant used to do this, the evidence suggests this was a reactive requirement dependent on the needs of the [business]. The applicant has neither indicated, nor is it apparent on the material before, I consider it too speculative to conclude that the applicant would travel specifically to Mazar-e-Sharif [for business] or (and noting his brother has moved back to Parwan from Mazar-e-Sharif) for any other reason in the reasonably foreseeable future upon return.
48. I note the applicant's representative has submitted information from travel advice from DFAT issued on 24 February 2017. This travel advice is as an advisory specifically aimed at Australian would-be travellers to Afghanistan, rather than to returning Afghan nationals. In this regard it assesses threats against foreigners whereas DFAT's country information and thematic reports which are prepared for protection status determination purposes consider a range of issues specific to Afghan nationals such as the applicant. I consider that the travel advice is in a context removed from the applicant's personal circumstances and that the purpose specific reporting from this same source is comprehensive and a more relevant source of information on conditions for returning Afghan nationals. Taking this into account, I have given the travel advice little weight.

27 DFAT, "DFAT Thematic Report - Hazaras in Afghanistan ", 18 September 2017, CISED50AD5681

28 DFAT, "DFAT Thematic Report: Conditions in Kabul", 18 September 2015, CISEC96CF13367

Refugee: conclusion

49. Considering all the information before me, I find there is not a real chance of the applicant being harmed on the basis of any imputed political profile. I also find there is not a real chance of the applicant being harmed on the basis of his profile as a Hazara Shi'a returnee from the west who has lived outside of Afghanistan and sought asylum in Australia and who was formerly threatened for [servicing] government [assets]. I also find there is no real chance of the applicant facing discrimination a threatened capacity to subsist or discrimination amounting to serious harm and that he can safely return to his home area, Surkh-e Parsa. I have considered the applicant's claims individually and cumulatively and I am not satisfied the applicant's fear of persecution is well founded.
50. 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

51. 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

52. 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.
53. For reasons given above, I have found there is not a real chance of the applicant being harmed on the basis of any imputed political profile arising from his work on government [assets] and the associated threats from 2012, nor due to his profile as a Hazara Shi'a returnee from the west who has lived in a western country and sought asylum. I have found he can safely return to his home area. I also found there is no real chance of the applicant facing a threatened capacity to subsist. Applying the same reasoning, and because 'real chance' equates to 'real risk', I am also not satisfied that the applicant faces a real risk of suffering significant harm in or in accessing his home area upon return.
54. I have accepted the applicant may face some discrimination upon return. However I am satisfied that it would be low level and would not threaten his capacity to access services, earn a livelihood or otherwise subsist. I am not satisfied the applicant would face any discrimination or other mistreatment arising from any specific circumstances or vulnerabilities that would lead the applicant to be subject to acts or omissions which would constitute significant harm, as defined under s.36(2A) and s.5 of the Act upon return.

55. I have found the applicant will not face a real chance of being harmed through generalised violence or criminality in Afghanistan. For the reasons discussed above and because 'real chance' equates to 'real risk', I am satisfied that the applicant does not face a real risk of suffering significant harm in that manner upon return. Further I am also satisfied these risks are faced by the population of the country generally and are not faced by the applicant personally, and as such under s.36(2B)(c) there would be taken not to be a real risk that the applicant will suffer significant harm in Afghanistan.

56. Given that I have found there is no real risk of the applicant facing significant harm in Surkh-e Parsa, his home area, including when returning to that area, I have not considered whether the applicant could reasonably locate to Kabul.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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