



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN
IAA reference: IAA17/02555

Date and time of decision: 12 February 2018 17:05:00
Denny Hughes, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a citizen of Afghanistan. He applied for a protection visa [in] September 2016. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] April 2017.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. The applicant made two separate submissions to the IAA. The first submission contains two documents. The first is a general submission that contains a breakdown of security developments in the country to 13 April 2017, including excerpts from a paper by Professor William Maley from March 2017 providing a summary analysis of the security situation in Afghanistan, in particular as it relates to Shias and Hazaras, challenges for returnees to the country, and the rise and impact of Islamic State in the country. The second written part of the first submission pertains to the applicant's claims more specifically, while citing a range of relevant new country information.
4. To the extent those submissions contain arguments responding to the delegate's decision and reassert claims and country information already before the delegate, I am satisfied this is not new information and I have had regard to those matters. Both written submissions contain a range of new country information that was not before the delegate. No submissions were made on the application of s.473DD.
5. As general country information, I am satisfied it is not credible personal information. As the country information was published before the delegate's decision, I am not satisfied that this information was not, and could not have been, provided to the Minister before the delegate made their decision. I note the applicant was represented throughout this process and post-interview submissions were made. As discussed below, I have had regard to new country reports below which accounts for the current security situation in Afghanistan and provides analysis of those developments, including as relevant to the submissions. I consider this new information addresses the representative's concerns. Weighing all the circumstances, I am not satisfied there are exceptional circumstances to justify consideration of the new information in the submissions, and I have not considered the information pursuant to s.473DD of the Act.
6. The first submission also includes a new document, in the form of an original and translation of a death certificate purportedly for the applicant's brother. It states that the applicant's brother was killed by the Taliban [in] March 2017 while travelling the route between Ghazni and Kabul. The document itself is dated [May] 2017. Extraordinarily, beyond the document/translation and the brief reference to it in an otherwise detailed submission, no elaboration is made on the context of his death, or its relevance or implication for the applicant. It does not indicate whether the killing is related to the applicant's claims or not.
7. The evidence before me is that multiple independent agencies have confirmed it is possible to obtain all types of forged documents in Afghanistan, or from Pakistan.¹ I consider the failure to

¹ Danish Immigration Service, "Country of Origin Information for Use in the Asylum Determination Process: Report from the Danish Immigration Service's Fact Finding Mission to Kabul, Afghanistan", 01 May 2012, CIS23406

provide any additional context about the killing of his brother also undermines the credibility of this claim and the related document. Weighing everything before me, I am not satisfied it is credible personal information. I am also not satisfied there are exceptional circumstances to justify consideration of the new information, and I have not considered the information pursuant to s.473DD of the Act.

8. The second submission contains a brief medical opinion dated [November] 2017, and discussed the implications for the applicant's review. The report is recent, and goes towards the applicant's health and ability to return safely to his home country. I am satisfied it is credible personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claims. However, it contains no diagnosis of any conditions, advice about medications or any treatment plans. It states that the applicant presented on the date of the report ([November] 2017) as feeling depressed and having issues going to sleep. It notes his stressors including that he has not seen his wife and family for a number of years. It states he works full time as [occupation] and that he has a condition which has adversely affected his [health]. It states he is repeatedly seeing [a medical practitioner], but does not state or indicate for what treatment or in relation to what medical condition, if any. The applicant's health is a relevant consideration in assessing his ability to return to his home country, particularly where the issue of relocation is determinative, as it was in the delegate's decision. However, the content of this medical opinion is limited, and provides no clear indication about the applicant's health outlook. Looking to all the circumstances, I am satisfied there are exceptional circumstances to justify consideration of the new information, and I have considered the information pursuant to s.473DD of the Act. However, I consider the medical evidence confirms only that the applicant has some minor medical issues, and does not indicate he has any condition that would obviously preclude him from returning to Afghanistan. Nevertheless, I have weighed it in my assessment.
9. In undertaking this review, I have obtained new country information. As noted by the representative in the submissions, there have been a number of recent developments in the security situation in Afghanistan relevant to the applicant's claims. In recent months, the Australian Department of Foreign Affairs and Trade (DFAT) released two new updated country information reports on Afghanistan. The European Asylum Support Office (EASO) also released an updated security assessment for Afghanistan, including detailed analysis of the applicant's home region in Ghazni Province. The delegate's decision turns in large part on reference to earlier versions of these DFAT and EASO reports from 2014 to 2016. I consider the updated reports take into account relevant security developments in the country in the second half of 2016 and through 2017. These include attacks against the Shia Hazara population, security on the roads for Hazaras, and the risks to returnees to the country. Significantly, these reports also provide an analysis of those developments and the implications for these groups. Weighing all the information before me, I consider there are exceptional circumstances to justify consideration of these reports.²

Applicant's claims for protection

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

- He was born in [Village 1], which is located in Jaghori District, Ghazni Province, Afghanistan.

² DFAT, "DFAT Thematic Report - Hazaras in Afghanistan 18 September 2017", 18 September 2017, CISED50AD5681; DFAT, "DFAT Country Information Report Afghanistan 18 September 2017", 18 September 2017, CISED50AD5680; EASO, "Afghanistan: Security Situation December 2017", 1 December 2017, CISED50AD8102.

- He has travelled between Afghanistan and [Country 1] a number of times since 1991 for work and other reasons.
- The applicant left [Country 1] for the last time in 2009. During his transit back to his home village, the Taliban exploded a bomb on the side of the road between Herat and Kandahar, which killed some army personnel in a truck near the [vehicle] he was travelling in. Later during the same journey back to Jaghori, he saw [a number of] people [with] guns. [He] turned back and [went] to [Town 1] and stayed there.
- After one year working with his father, he and his brother bought a [vehicle] and began transporting goods [to] shops in Ghazni. He did this job for two years.
- In [2012], whilst transporting [goods] from Ghazni City to Jaghori, he was stopped by the Taliban at Qarabagh.
- He claims informants had reported to the Taliban that he was supplying [goods] to an American non-government organisation (NGO) and supporting the infidels.
- He was put into a car and taken to a place where he was kept all night and beaten. The next day his hands were tied and he was being [transported], when the Taliban encountered the National Army. Whilst the fight was going on, he managed to get out of the [vehicle] and escape.
- He walked a long way until he reached an asphalt road, where he got a lift with a [driver] to Kandahar. He was scared to go home, and instead went to [Country 2] where he remained for one month before commencing his journey to Australia.
- He fears that if he returns to Afghanistan he will be harmed and/or killed by the Taliban because they perceive him as someone who contravened their restrictions by helping an American NGO and because he escaped their captivity.
- He fears that he will be harmed by the Taliban if he returns to Afghanistan because of his Shia religion and his Hazara ethnicity. He would be at risk for having spent time in a western country, which would add to his profile.
- He is unable to relocate to another area because the risk of harm extends throughout the country.

Refugee assessment

11. 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

12. 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.
13. Based on the oral and documentary evidence of the applicant, I accept his background as claimed and note it was not in contention. Throughout the visa interview, the applicant spoke through an interpreter in the Hazaragi language. He was able to describe his home area, and speak with confidence about his faith and religion. I find that he is a Shia Hazara from a village in Jaghori District in Ghazni Province, Afghanistan. I accept his age and familial status as claimed.
14. The applicant has given a broadly consistent account of his work and travel history. At times during the visa interview the applicant's dates did shift, however I am unconcerned about his movements between [Country 1], [Country 2] and Afghanistan.
15. The applicant provided further specific detail about his movements between [Country 1] and [Country 2] in his statement attached to his visa application, including reasons for his various travels, his legal status, his documentation, and the detentions he experienced. He also discussed his voluntary return from [Country 1] in September 2009, including the fact that he was detained for a day and then deported. He explained that on the [journey] from Herat to Kandahar, there were [details removed]. As an Afghan National Army convoy approached, a roadside bomb exploded. A nearby [vehicle] was damaged, and some of the ANA men were killed. The claimed attack is consistent with country information before me about the use of IEDs and clashes between armed and insurgent groups,³ and I accept it occurred. However, I am also satisfied the applicant was not directly targeted in this attack and attribute it only to general insecurity and the insurgency, a claim I consider separately below.
16. After Kandahar, his written statement indicates he travelled on to Jaghori. The applicant claimed the area in [Town 1], [District 1] is controlled by the Taliban. The information before me does not indicate the Taliban controls [Town 1] or [District 1],⁴ but I accept there is insurgent activity in these areas. The applicant said that they saw [a number of] people [with] guns. The applicant and the other passenger(s) [turned] back and they spent the night in [Town 1]. They started the journey again the next day and reached Jaghori.
17. In the visa interview, the applicant claimed that the car he was in was shot at by the men on the [road]. He claimed the [men] were blocking the road and asked them to pull over and stop, but the driver did not comply with the request. He claimed the driver drove off road and they escaped. He claimed they believed they may have been shot at, but the car was not damaged.
18. The claim represents a departure from his claims as put forward in his written statement. Had the applicant actually been stopped on the roads by armed men, forced to turn around and escape off road, and possibly also shot at, I do not accept he would have failed to detail that in

³ EASO, "EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597.

⁴ EASO, "EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597.

his statement. I find the inconsistency of his evidence too significant to accept. I do not find his later version of this claim to be credible. I have considered his submission to the IAA about why he did not mention it – specifically that it did not happen immediately prior to his departure, but that does not overcome my concerns about the inconsistency in his evidence. Given country information before me about insecurity and insurgent activities on the roads, I accept that they exercised caution when returning to Jaghori and decided not to continue their journey when they saw armed [men] near [Town 1] – that is entirely plausible, particularly if they had just witnessed an IED attack on an ANA convoy. I accept that they stayed overnight in [District 1] before returning safely to Jaghori the next day. In rejecting his later claim, I also consider this embellishment detracts from the overall credibility of his claims.

19. The applicant claims that on returning to Jaghori, he and his brother purchased a [vehicle] and started transporting [goods] between Ghazni (City) and Jaghori for various shops and businesses operating in the area. He claimed that in [2012], while travelling from Ghazni to Jaghori he was stopped by the Taliban at Qarabagh. He was carrying [goods]. He claimed informants told the Taliban he was working for agencies (which I take to mean government, the army and/or international agencies) and that he was transporting goods for them. They asked him why he was carrying loads for American NGOs and supporting the *kafirs* (infidels).
20. The applicant claimed he was taken to a place where he was kept all night. He was beaten. The next day he was tied up and put in the back of a [vehicle]. As the vehicle approached the main road he heard the Taliban fighters say ‘national army’. The vehicle he was in left the main road and a fight broke out between the Taliban and the ANA. While the fight was going on, the applicant got out of the [vehicle] and hid behind a wall, before escaping in another direction. He hid until the evening. He walked very far through [farms] and he took shelter in one of them. He was there all night, and he managed to free his hands. The next morning he started walking and was picked up by a passing driver who took him to Kandahar. He stayed there for one night, but he was fearful of returning home out of fear he would be found by the Taliban.
21. The applicant’s account at the visa interview was general, but broadly consistent with his written claims. However, I have a number of concerns about these claims. The first relates to the applicant’s actions on escaping. The applicant claims he travelled to Kandahar, before travelling to [Country 2]. The applicant had no documents, no money or any other resources (water or other clothing, for example), and yet he was able to travel a significant distance from Qarabagh to Kandahar and stayed there overnight, and then was able to arrange his travels to [Country 2] the next day. It is plausible that he could have hitchhiked between Qarabagh and Kandahar, but I do not consider it plausible that he could have obtained accommodation or transport through to [Country 2] without documentation or money. I consider the applicant’s evidence about the aftermath of this incident was vague and I do not consider he has provided a plausible or otherwise satisfactory account for how he was able to get to [Country 2]. If the applicant had been abducted, I consider it would have been far more plausible that his first step would have been to contact his family and find a way to return safely to his home area in Jaghori – an area he conceded at the interview would be difficult for the Taliban to enter. I consider he would have sought to obtain money and his IDs, and see his family before leaving the country overall.
22. The second relates to his actual profile. It is uncontroversial that persons fitting the profile of assisting or working with the ANA, the government or international agencies face a high risk of harm, and this can include [drivers] transporting for these agencies. As a question of fact, it is clear from the applicant’s evidence that he was not working for the army or any other government or international agency. The applicant protested as much to the Taliban during the claimed incident. The applicant was carrying [certain types of goods], which I consider not to

be an obvious indicator that he was transporting goods for governmental or international agencies. As the applicant was not transporting goods for any such agency, I also consider he would not have been carrying anything in his vehicle, such as ID cards or documentation, which would have indicated otherwise. I consider his profile further below, but the information before me indicates there should have been no indications that he was working for a government or international agency, such as documentation, nor should there have been any intelligence (from spies or informants) to suggest he had such links. The information before me indicates that the Taliban will stop [vehicles] at checkpoints and search people and vehicles for indications that they have connections to the ANA, or government and international agencies. That information also highlights risks to drivers on the roads from criminality more generally (i.e. not targeting because of any specific profile).⁵ I accept it is plausible he may have wrongly been imputed with such a profile, for example through incorrect intelligence, but in the context of my other concerns about his evidence it leads me to doubt that he was considered to have such a profile by the Taliban in this incident, or that he was subjected to further mistreatment by the Taliban when he was stopped.

23. The applicant also claimed that he was travelling with the owner of the supplies. Yet, when asked what happened to this man, he said he did not know what happened to him because he (the applicant) was taken away. He claimed the man told the Taliban he was just a passenger, but that is all he knew. It is not clear to me why the Taliban would only take an interest in abducting the applicant if the owner of the supplies was also in the vehicle. It is plausible the owner claimed to be a passenger, but the applicant also claimed to be innocent of the allegation that he was transporting goods for government or international agencies – and yet, the Taliban was unsympathetic to those protests and that did not stop his own abduction.
24. A related concern here is that the applicant did not know what happened to his [vehicle] after his abduction. I accept he would not have known what happened to the vehicle during the abduction itself, but I find it significant that he or someone else in his family did not find out (or seek to find out) what happened to the vehicle in the aftermath – whether it was lost/stolen, destroyed or retrieved. The applicant and his brother must have spent a considerable amount of money on the [vehicle], and I consider he or his brother would have been highly motivated to find out what had happened to it. The applicant claimed to be in regular contact with his family in his home village, as such I find it concerning that he claimed not to know what happened to his vehicle, or to know what happened to the owner of the supplies that was travelling with him. Those gaps in his claims lead me to further doubt the credibility of the claimed abduction and what occurred subsequently.
25. Lastly, in terms of the claimed profile, the applicant claimed the Taliban have his licence and other photos and documents and they would be motivated to find him and harm him if he returned to Afghanistan. The applicant has provided a copy of his licence. It is not clear how or why he has a copy of his licence given he claims it was taken in 2012, but it is possible he took a photo of this for his own records. I note the licence itself does not indicate his address or where he lives (it only refers to Ghazni), but I accept his address or home village may have been on other documentation relating to the deliveries or may have otherwise been known.
26. The applicant claimed the Taliban know his whereabouts and they would find him, but he confirmed at the interview that nothing else had happened in Afghanistan, nor had anything happened to his family. When asked whether the Taliban had gone to his house to find him, the applicant said that the Taliban are unable go to Jaghori district because of the government

⁵ Danish Immigration Service, "Country of Origin Information for Use in the Asylum Determination Process: Report from the Danish Immigration Service's Fact Finding Mission to Kabul, Afghanistan", 1 May 2012, CIS23406.

control there. I accept that the security situation makes it difficult for the Taliban and Pashtuns to access Jaghori as a Hazara-dominated area, but as noted by the delegate in his decision, even Jaghori faces some level of insecurity.⁶ In my view, the absence of any contact, continued interest, search or threat from the Taliban confirms to me that the group has not sought to find the applicant and indicates to me that he does not have an ongoing profile with the group.

27. Weighing everything before me, I consider the initial aspects of this claim were plausible, consistently claimed, and supported by the country information before me. That information indicates that abductions of [drivers] does occur – sometimes due to an adverse profile (work with the government), but also for leverage in negotiations between insurgent and anti-insurgent groups, and between ethnic groups (such as between Kuchi and Hazara farmers).⁷ I accept the applicant was stopped by an armed group, likely the Taliban, while driving his [vehicle] through Qarabagh in 2012. I accept he was searched, interrogated, mistreated and possibly beaten. However, I do not find the account of the subsequent abduction, beating and detention, and most crucially his escape and immediate departure from the country to be plausible or credible. I consider it plausible that he was interrogated, possibly beaten or mistreated before it was determined that he was not associated with the ANA, the government or any international agency, that he was not seen as going against Taliban restrictions, and therefore that he had no other adverse profile. I conclude that he had and has no adverse profile other than as a [driver] that was stopped by an insurgent group while travelling on the roads through insecure areas in Qarabagh.
28. In terms of the risk to the applicant on return, I am satisfied he was not detained, or that he escaped, and I find he has no profile with the Taliban or any other armed group in Qarabagh or his home area. Even if it were the case that he was abducted and escaped from the Taliban in 2012, which I am not satisfied occurred, a key concern for me would be why or how the Taliban would continue to have an ongoing interest in him. The incident occurred in 2012. The applicant was stopped on a road, either randomly or based on inaccurate information from informants. Even if the Taliban continued to possess his documents, it is not clear to me why there would be any active interest in the applicant, given his low profile, the time that has passed, and the constantly evolving security situation in the country.
29. While confirming that [drivers] are a risk profile group in Ghazni, advice before me indicates that although drivers may be in danger while working, they generally are not individually targeted by the Taliban when they are not working. Nevertheless, a driver who worked for an international agency would potentially be at a higher risk of being targeted for harm, particularly if the Taliban knew that the driver had supplied the Americans. In that context, the country information indicates it would be possible that the Taliban would track a person down at home if they were in areas easily accessible for the group.⁸ Other information before me indicates that while the Taliban has no databases or systematic way of sharing information, it potentially has the resources and skills to track down people, particularly if those people are not in hiding. However, the country information makes a distinction between high profile

⁶ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A801218.

⁷ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186; DFAT, "DFAT Thematic Report - Hazaras in Afghanistan 18 September 2017", 18 September 2017, CISED50AD5681.

⁸ EASO, "EASO Country of Origin report Afghanistan: Insurgent strategies - intimidation and targeted violence against Afghans", 1 December 2012, CIS24804.

targets (for example government officials) and low profile targets who no longer collaborate with the government. The latter are assessed as being a low priority target for the Taliban.⁹

30. The applicant's claims presuppose the Taliban maintain a database or copy of his identification documents, that they consider him a high profile target and continue to seek to target or identify him. The applicant's profile was low level, misinformed and apparently discontinued on his claimed escape and departure from the country (given no further approaches by the Taliban were made). His interaction with the Taliban was singular and brief. Even if I were to accept the totality of his claims, the information before me does not indicate that the Taliban has any ongoing interest in the applicant. I consider the targeting of the applicant was opportunistic. I consider the chance that he would be identified or harmed in connection with his past profile as a [driver], even in the context of this incident, to be very remote. I find there is no real chance of him being harmed for these reasons if he returned to Afghanistan.
31. While I am unsatisfied of his specific claims, if the applicant were to return to his home area and return to his past occupation of [driving], I accept that he may encounter security concerns on the roads. The country information before me continues to indicate risks for [drivers].¹⁰ It also highlights the risks for Hazaras travelling into and out of the Hazarajat, which would be the case if he continued to drive the route from Ghazni City to Jaghori. In its 2017 report, DFAT stated that people from all ethnic groups were vulnerable to attacks (on the roads) and it concurred with the assessment of UNAMA and other international sources that the primary motivations for these abductions include taking hostages for ransom or prisoner exchange, or to target those with connections to the government or international community. DFAT reiterated that ethnicity is rarely the primary motivating factor in these incidents, however it assessed that ethnic targeting can play a role in the selection of victims once an abduction was in progress. DFAT assessed that abduction while travelling by road is a risk for Afghans of all ethnicities. Notwithstanding the decline in the number of incidents of abduction affecting Hazaras in 2016 compared to 2015, DFAT assessed that Hazaras remain likely to be selected for abduction or violence if a vehicle carrying a mix of ethnic groups is stopped. Noting that all the abductions in 2016 occurred in provinces bordering the Hazarajat, as did a January 2017 incident, DFAT assessed that Hazaras travelling in and out of the Hazarajat are particularly at risk in this regard.¹¹
32. Given his cumulative profile as a driver and ethnic Hazara, if the applicant were to return to his occupation as a [driver], I accept he would have a risk profile. Given the frequency with which he would drive into and out of the Hazarajat, I accept there would be a more than remote chance that he would be stopped by insurgent or armed groups, and singled out for abduction, serious harm or other mistreatment.
33. While I accept there is a more than remote chance of him being seriously harmed if he returned to this work, I am not satisfied the applicant would in fact return to this occupation or seek to continue to work the same routes. The applicant's evidence is that he does not know where his [vehicle] is. As noted above, it is not clear to me whether that is the case, however I accept that he ceased driving in 2012 when he left the country and that he no longer has a vehicle. The applicant worked as a [driver] for a short period (around two years). Given the deterioration in the security situation in the country and on the roads, I consider it likely the

⁹ Landinfo, "Afghanistan: Human Rights and Security Situation", 1 September 2011, CIS21658; Danish Immigration Service, "Country of Origin Information for Use in the Asylum Determination Process: Report from the Danish Immigration Service's Fact Finding Mission to Kabul, Afghanistan", 1 May 2012, CIS23406.

¹⁰ UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660.

¹¹ DFAT, "DFAT Thematic Report - Hazaras in Afghanistan 18 September 2017", 18 September 2017, CISED50AD5681.

applicant would be both unable and unwilling to purchase a [vehicle] and return to driving. In that context, I consider there would not be a real chance of the applicant being seriously harmed on the basis of his past or future profile as a [driver], including any profile from the claimed abduction.

34. However, in the event that I am wrong in that assessment, I am satisfied he could take reasonable steps to modify his conduct to avoid any future chance or risk of harm, for example through modifying his routes as a [driver], or in finding different employment in and around the more districts in Ghazni, including his home area of Jaghori District.
35. I consider the applicant could either cease driving a [vehicle] altogether and find different work in his home area in Jaghori. I note the applicant has a range of work skills and experiences. He has worked in [various occupations], and since living in Australia, he has worked as a [occupation]. During the periods when he lived in [Village 1], he worked as a [occupation], including for a year between September 2009 and 2010 before he purchased the [vehicle]. His family continue to live there, so he would have access to accommodation on return. He would also have the tribal and ethnic links necessary to find work and accommodation.¹² I accept that he has some low level medical issues and the economic situation is challenging, but I do not consider the information indicates these factors would prevent him from working or remaining in his home area.
36. Alternatively, he could continue to [drive] in his home area and within the Hazarajat (i.e. driving, but not travelling into areas outside of the Hazarajat with Taliban and Pashtun-majority populations). This would enable the applicant to continue to [drive] between the secure Hazara-dominated towns and districts in Ghazni, Bamyan and Daikundi.¹³ I consider driving in these areas would not expose him to the risks on the roads that the country information indicates are present in other areas bordering the Hazarajat. For clarity, I find there would not be a real chance that he would be stopped by the Taliban or any armed group in these areas, or that he would be at risk of abduction or other serious harm as a [driver], or due to his ethnic, religious or any other actual or imputed profile.
37. I find that taking such steps would be reasonable. I am satisfied there is nothing in his evidence that suggests he would be unable to, or could not or would not want to take such steps. The applicant briefly worked as a [driver] and this appears to have solely been an economic decision. There is no suggestion there was any more significant aspect to that choice of occupation. He has worked in a range of different contexts prior to purchasing the [vehicle], as well as subsequently while living in Australia. I do not consider he has any ongoing profile or characteristic from his past work as a driver. Given this, I am satisfied that if the applicant took these steps to modify his behaviour, it would not conflict with a characteristic that is fundamental to his identity or conscience, or require him to conceal an innate or immutable characteristic, or require him to act in any way or do any of the things contemplated by s.5J(3)(c)(i–vi) of the Act. Accordingly, I am satisfied he could take reasonable steps to modify his behaviour to avoid a real chance of persecution for these reasons.
38. Looking to all the circumstances, I find there is no real chance of the applicant facing serious harm for his past or future profile as a [driver], as a Hazara [driver], in connection with the past incident with the Taliban in Qarabagh, on the basis of any actual or imputed profile connected to the ANA, the government or international agencies, any actual or imputed political opinion, or any related profile.

¹² UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660.

¹³ EASO, "Afghanistan: Security Situation December 2017", 1 December 2017, CISED50AD8102.

Claims related to Shia Hazara profile

39. The applicant also claimed to fear harm on the basis of his religion and ethnicity from the Taliban, Islamic State, and other armed groups from Afghanistan and [Country 2]. Other than the claims above, the applicant did not detail other claims of him being targeted on the basis of his religious and ethnic profile.
40. With limited exception, the country information before me does not indicate that Shia Hazaras are facing systematic serious harm or other persecutory conduct in Afghanistan, whether by the Taliban or other armed groups as claimed. Outside of insecurity on the roads, the information before me does not indicate risks of targeted attacks against the Shia Hazara population in or around the applicant's home area of Jaghori, or in the neighbouring Hazara-dominated districts in Ghazni, Daykundi and Bamyan provinces.¹⁴
41. A recent exception to the overall risk assessment for Shia Hazaras in Afghanistan has been the rise of Islamic State (Islamic State Khorasan Province, or ISKP), which the country information before me indicates is responsible for a range of recent attacks in Kabul, Herat and in the east of Afghanistan along the border with Pakistan (Nangarhar). A number of these attacks have directly targeted the Shia community.¹⁵ In 2017, DFAT assessed that the number and scale of the attacks in late 2016 and early 2017 demonstrated that Shia, both Hazara and non-Hazara, now faced a risk of being attacked by ISKP based on their religious affiliation. DFAT assessed that Shias are particularly vulnerable when assembling in large and identifiable groups, such as during demonstrations or when attending mosques during major Shia religious festivals.¹⁶
42. I give weight to DFAT's latest assessment acknowledging the credible risks to Shias in major urban areas like Kabul. However, the information before me indicates that ISKP has focussed principally on protests and religious attendances in the major urban areas of Kabul and Herat, its stronghold in Nangarhar, as well as targeting non-Shia high profile targets in the major cities. The information before me does not indicate that ISKP has any significant presence in Ghazni Province, that it has orchestrated attacks in these areas,¹⁷ or that it presently has potential or intention to undertake attacks in these areas.¹⁸
43. I accept that ISKP is a credible threat in major centres like Kabul, and the risks to Shias in these areas must be seen as elevated. While I accept ISKP has been able to orchestrate serious attacks in these areas, and I do not diminish the severity of those attacks, when having regard to the absence of country information which suggests the risks from ISKP extend to the applicant's home area in Jaghori District and Ghazni Province, the lack of confirmed attacks from ISKP in this area, the overall security assessment for Jaghori District, and the applicant's

¹⁴ DFAT, "DFAT Thematic Report - Hazaras in Afghanistan 18 September 2017", 18 September 2017, CISED50AD5681; DFAT, "DFAT Country Information Report Afghanistan 18 September 2017", 18 September 2017, CISED50AD5680; EASO, "Afghanistan: Security Situation December 2017", 1 December 2017, CISED50AD8102; EASO, "EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597.

¹⁵ DFAT, "DFAT Thematic Report - Hazaras in Afghanistan 18 September 2017", 18 September 2017, CISED50AD5681; DFAT, "DFAT Country Information Report Afghanistan 18 September 2017", 18 September 2017, CISED50AD5680; Borhan Osman, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War ", Afghanistan Analysts Network, 19 October 2016, CX6A26A6E11358.

¹⁶ DFAT, "DFAT Thematic Report - Hazaras in Afghanistan", 18 September 2017, CISED50AD5681.

¹⁷ A blast from an improvised explosive device (IED) at the entrance to a Shi'a mosque in Balkh province on 12 October 2016 killed 18 and injured 67 others, including 36 children, however no group had claimed responsibility for the attack in Balkh province: DFAT, "DFAT Thematic Report - Hazaras in Afghanistan", 18 September 2017, CISED50AD5681.

¹⁸ EASO, "EASO COI Afghanistan Security Situation 2016", 20 January 2016, CIS38A8012395; CIS38A80122597; EASO, "Afghanistan: Security Situation December 2017", 1 December 2017, CISED50AD8102; DFAT, "DFAT Thematic Report - Hazaras in Afghanistan", 18 September 2017, CISED50AD5681; Borhan Osman, "With an Active Cell in Kabul, ISKP Tries to Bring Sectarianism to the Afghan War ", Afghanistan Analysts Network, 19 October 2016, CX6A26A6E11358.

otherwise low profile, I find there is not a real chance of the applicant being seriously harmed in Ghazni province, on the basis of his ethnic, religious or any related profile, whether by ISKP, the Taliban, or any other person or armed group.

44. Outside of the risk from insurgent and armed groups, the information before me does not indicate that religious or ethnic violence between Shia Hazaras and other persons or groups, such as Sunni Pashtuns, is a feature of the security environment in Afghanistan. DFAT assesses that discrimination – including between Sunni and Shia Muslims – is low.¹⁹ In terms of discrimination between ethnic groups, I accept some division between certain groups continues to exist, but I note the country information indicates that discrimination in Afghanistan most commonly manifests in the form of nepotism and/or positive discrimination in favour of family, tribal or ethnic group members. DFAT assesses that Hazaras are subject to a moderate risk of societal discrimination in practice, as they are generally less likely than other groups to be in a position to benefit from ethnically based positive discrimination.²⁰
45. On the basis of the country information before me, while I accept the applicant may face some societal or official discrimination in areas where Hazaras are not in the majority, I find it would be moderate and infrequent. I accept that Hazaras may be underrepresented in senior government, but I do not consider this impacts on the applicant in any material way. I accept some division between groups continues to exist, but I am not satisfied it would threaten his capacity to subsist, or otherwise constitute serious harm. I consider the discrimination he may face would not prevent him from finding work or accommodation, and I have found the applicant would have the support of his family and tribe in his home area. Perhaps more crucially, though, I find the applicant would be returning to the Hazara-dominated areas in Ghazni Province, which include his home district of Jaghori. In that context, the chance or risk of discrimination or other harm for reasons of his ethnicity, religion or related profile is likely to be remote.
46. The one qualification in this context is the risks to Hazaras on the roads. I have found above that the applicant would not face a real chance of being seriously harmed in the roads in his home area of Jaghori and the other Hazara-dominated districts in Ghazni Province, and neighbouring provinces. I have also found he could take reasonable steps to modify his behaviour to avoid a real chance of serious harm he may face as Hazara (and [driver]) regularly driving in and out of the Hazarajat. I adopt those findings here. The remaining question is whether he can safely access his home area.
47. I accept the applicant would likely be returned to Kabul first. I accept the security situation in Kabul is serious, and there have been high casualty attacks on the Shia Hazara population in the city, perpetrated by ISKP. While I accept there are elevated risks for Shia Hazaras in Kabul, I consider the applicant's stay in Kabul would be very brief, likely less than a few days, in order to facilitate his travel to Jaghori. Given the serious, but occasional nature of the attacks in Kabul, I consider there to be no real chance or risk of the applicant being seriously harmed for any reason during his brief stay in Kabul prior to travelling to his home area.
48. In returning to Jaghori via Kabul, I accept the applicant would need to travel on roads where there have been security issues in recent years. I again accept DFAT's assessment that Hazaras remain likely to be selected for abduction or violence if a vehicle carrying a mix of ethnic groups is stopped, however even that targetting is contingent on the vehicle being stopped in the first instance. In weighing the chance of the applicant being a victim in such an attack, I

¹⁹ DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186; DFAT, "DFAT Thematic Report - Hazaras in Afghanistan", 18 September 2017, CISED50AD5681.

²⁰ DFAT, "DFAT Thematic Report - Hazaras in Afghanistan", 18 September 2017, CISED50AD5681.

give weight to the decline in number of incidents on the roads in and around the Hazarajat,²¹ the applicant's lack of adverse profile, his familiarity travelling on the roads, and the infrequency with which the applicant would need to travel the route between Kabul and Jaghori. Other than the return trip from Kabul to his home area in Jaghori, I consider he would have few reasons to travel outside of his home area. His evidence is that the majority of his family live in his home area, and he has been able to find work and accommodation in the area without difficulty in the past. I am not satisfied he has any other reasons to travel into and out of Jaghori, to Kabul or in and outside the Hazarajat. I consider this further decreases the potential for him to be involved in any incident on the roads. For clarity, I consider his limited travels on the roads outside of Jaghori would be due to the lack of any pull factors outside his home area, and would not involve any additional modification of his behaviour.

49. Weighing all the information before me, I find there is not a real chance of the applicant being seriously harmed by the Taliban, ISKP or any other person or group, whether in relation to the claimed abduction in 2012, or for reasons relating to his religion, ethnicity, any actual or imputed political opinion (e.g. anti-Taliban), or any related profile.
50. In view of all the information before me, I find there is not a real chance of the applicant being seriously harmed on the roads while returning to his home area of Jaghori, whether related to his past employment as a [driver], his ethnic or religious background, the incident with the Taliban in Qarabagh in 2012, or any other related actual or imputed opinion or profile. I accept there are credible risks to Shia Hazaras travelling on the roads between Kabul and the Hazarajat, but weighing all the information above, I consider there is only a remote chance, and therefore not a real chance, of the applicant being abducted or otherwise seriously harmed on the basis of his ethnic, religious or related profile, in returning to his home area from Kabul. For clarity, I am satisfied he would be able to safely access his home area.

Claims related to time in the west (Australia)

51. The applicant also claimed to fear persecution related to his time in Australia. The representative has made submissions about this profile and the potential risks for the applicant on return.
52. Both the UNHCR and DFAT refer to occasional reports of returnees from western countries alleging they have been kidnapped or otherwise targeted as a result of their time in a western country.²² Both reports refer two abductions from 2014/15 also referred to the representative in her submissions to the delegate. However, there is little in the way of recent and specific information, examples or advice before me that indicates that persons with a profile of having spent time in the west, or who sought asylum overseas, have been targeted for harm for those reasons. In 2017, DFAT indicated this profile was linked to the risks for persons associated with the government or international community. DFAT stated that most returnees to the country take measures to conceal their association with the country from which they have returned, and keep a low profile on return. DFAT assessed that people in this situation do not face a significantly higher risk of violence or discrimination than other Afghans with a similar ethnic and religious profile.²³ As above, I have found the applicant has no links to the government or international community, nor do I consider there is anything in his evidence

²¹ DFAT, "DFAT Thematic Report - Hazaras in Afghanistan 18 September 2017", 18 September 2017, CISED50AD5681.

²² DFAT, "DFAT Country Information Report - Afghanistan", 18 September 2015, CISEC96CF13366; UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660.

²³ DFAT, "DFAT Country Information Report Afghanistan 18 September 2017", 18 September 2017, CISED50AD5680; DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 08 February 2016, CIS38A8012186.

that would suggest he would have such links on return to the country. I have also found he would not face a real chance of serious harm on the basis of his religious or ethnic profile.

53. The UNHCR does reference reports of the potential risks for young persons with western connections or mannerisms returning to Afghanistan from the west.²⁴ I note the applicant did not detail any western culture, connections or mannerisms he considered would put him at risk on return to Afghanistan. The applicant is [age], having spent his formative years living and working in between [Country 1] and Afghanistan, and I am not satisfied he would have developed any significant traits or behaviours during his time in Australia that would link him to the west or indicate that he has lived outside of the country, or that he shares the same vulnerabilities of those identified by the UNHCR, who return to Afghanistan for the first time as adults and are inexperienced in the ways of living in the country. On the contrary, the applicant has a long history, experience and familiarity in living and travelling within Afghanistan. Through those experiences, I consider he is able to live, travel, work and communicate effectively and safely in Afghanistan.
54. Weighing the information before me, I am not satisfied there is a real chance of him being seriously harmed on the basis that he sought asylum in a western country, or spent time in the west, or through any other related association, actual or imputed political opinion (pro-Australia, anti-Taliban), or profile. I have found that he has no ongoing profile with the Taliban, and do not consider this factor increases the risks to him in any sense.
55. On a separate basis, as noted above DFAT does acknowledge that people who have been identified as having international associations face a high risk of being targeted by insurgent groups and assesses this may potentially include returnees from western countries. However, again, DFAT advises that most returnees take measures to conceal their association with the country from which they have returned, and keep a low profile on return. DFAT assesses that people in this situation do not face a significantly higher risk of violence or discrimination than other Afghans with a similar ethnic and religious profile.
56. In contrast to persons who have actual and overt links or opinions supportive of the west or the international community in Afghanistan, such as persons who work for the military or NGOs, I consider the potential risk profile identified by DFAT is one imputed to a person only because of their time in a western country, and factors that link them to that past experience. It must be the case that this type of imputed profile is far lower than the risk profile of those who actually have links or work with the military, the international community, NGOs, the government or in other related contexts within the country. I consider this type of profile would be high risk and ongoing, particularly where a person continues to engage in such activities or work within the country. I am satisfied the applicant has no such actual profile or political opinion, nor do I consider he would have such a profile on return to the country.
57. In terms of aspects of his profile that do link him to his time in the west /Australia (for example any western clothing, work or travel history, the details of his asylum claims, and/or related documentation), I am satisfied he could take reasonable steps to modify his conduct to avoid any future chance or risk of harm, for example through not openly discussing his time in Australia, by taking steps to protect or conceal any documentation or history that may link him to the country, or in dressing and acting in a way that is consistent with other Afghans living in his home area in Afghanistan. In terms of the latter, I am satisfied he would have significant

²⁴ UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, CIS38A8012660.

familiarity with these cultural factors as a result of his time living in Afghanistan, and he would be comfortable doing so.

58. I find that taking such steps would be reasonable and relatively minor inconveniences. I am satisfied there is nothing in his evidence that suggests he would be unable to, or could not or would not want to take such steps. I am not satisfied that any factors that link him to Australia are anything more than by-products of his time spent in the country. Accordingly, I am satisfied that if the applicant took these steps to modify his behaviour, it would not conflict with a characteristic that is fundamental to his identity or conscience, or require him to conceal an innate or immutable characteristic, or require him to act in any way or do any of the things contemplated by s.5J(3)(c)(i–vi) of the Act. Accordingly, I am satisfied he could take reasonable steps to modify his behaviour to avoid what I consider to be an already remote chance of persecution for reasons of his time in the west (Australia), his claims for asylum, or on the basis of any related profile or political opinion – such as a person who has links or associations with the international community, or who holds anti-Taliban or pro-Australia (pro-western) political opinions or views.
59. For clarity, the applicant's family [are] all in Jaghori, and I am satisfied he could find work there. I am not satisfied he has any medical condition or other reason that would require him to travel outside of the area. I consider it is reasonable for the applicant to remain in Jaghori, and the neighbouring Hazara-dominated areas, to avoid any harm he fears elsewhere in the country.
60. Looking to all the circumstances, I find there is no real chance of him being seriously harmed for any of these reasons.

Generalised violence and insecurity

61. In relation to generalised and insurgent violence, I accept the situation in Afghanistan is serious and there has been a deterioration in the security situation throughout the country,²⁵ and this is concerning for both Afghan nationals, and those returning from the west and elsewhere. In November 2016, EASO identified insecurity in neighbouring Qarabagh and Muqur Districts in Ghazni Province, recording 113 and 54 security incidents over the period. In contrast, the number of security incidents in the Hazara-dominated Jaghori (1), and the districts that neighbour it, Malistan (1) and Nawur (3).²⁶ The 2017 report saw a slight increase to (6) security incidents in Jaghori, but EASO continued to assess Nawur, Malistan, Jaghori as districts with a better security situation.²⁷
62. While I accept there are security risks in and around Jaghori, I disagree with the delegate's conclusion based on the February 2016 DFAT report that this means there is a real chance of the applicant being harmed in his home area. When having regard to the applicant's lack of any profile or proximity to those with a risk profile, the lack of advice to suggest that a person with the applicant's profile would be at a real chance or real risk of harm, even in a cumulative sense, and the comparatively favourable security assessment within Jaghori and the neighbouring Hazara-dominated districts and provinces, I find the chance or risk of the

²⁵ DFAT, "DFAT Thematic Report - Hazaras in Afghanistan 18 September 2017", 18 September 2017, CISED50AD5681; DFAT, "DFAT Country Information Report Afghanistan 18 September 2017", 18 September 2017, CISED50AD5680; EASO, "Afghanistan: Security Situation December 2017", 1 December 2017, CISED50AD8102.

²⁶ EASO, "EASO Country of Origin Information Report Afghanistan Security Situation November 2016", 1 November 2016, CIS38A80122597.

²⁷ EASO, "Afghanistan: Security Situation December 2017", 1 December 2017, CISED50AD8102.

applicant being seriously harmed in generalised or insurgent violence within his home area is credible, but remote.

63. On a separate and independent basis, in terms of generalised and insurgent violence, I accept that low profile civilians have been victims in attacks. However, on the basis of the information before me, I consider those risks are remote, and I am satisfied that any remote chance of harm the applicant may face in relation to generalised or insurgent violence would also not be for the essential and significant reasons of his race, religion, nationality, membership of a particular social group or political opinion, but rather a consequence of the ongoing insurgency as it impacts Daykundi, and the country overall. Accordingly, in terms of the remote chance of the applicant being harmed in generalised violence, I find that s.5J(1)(a) and 5J(4)(a) would also not be satisfied.

Refugee: conclusion

64. 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

65. 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

66. 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.

67. I have accepted the applicant may face some societal discrimination in Afghanistan due to his religious and ethnic background, however I am satisfied that the impact on the applicant would be moderate, and that there is no real chance he would be prevented from finding work or accommodation on return to the country. While I accept that if the applicant were exposed to societal discrimination it would be challenging and frustrating for him, I do not accept it would amount to the death penalty, or result in an arbitrary deprivation of life, or torture. I also do not accept that such discrimination would involve pain or suffering that is cruel or inhuman in nature, or severe pain or suffering or would be intended to cause extreme humiliation, even when considered in a cumulative sense.

68. I have found above there is no real chance of the applicant being seriously harmed for reasons related to his profile as a [driver], the incident with the Taliban in 2012, his religion, his

ethnicity, any imputed political opinion or profile, as a result of returning from or seeking asylum in the west (Australia), in generalised violence, or on the basis of any other related political opinion or profile. I have also found there is no real chance of the applicant facing discrimination in his home area of Jaghori for reasons of his religious, ethnic or related profile. For the same reasons, and applying the authority in *MIAC v SZQRB* (2013) 210 FCR 505, I am also satisfied there are not substantial grounds for believing that the applicant will face a real risk of significant harm for these reasons if he returns to and lives in his home area in Jaghori District in Ghazni Province. I have found he could safely access Jaghori, and it is reasonable for him to remain there.

69. I have also found that there is not a real chance of the applicant facing serious harm in generalised and insurgent violence within Jaghori District and the surrounding Hazara-dominated districts and provinces. For the same reasons, I am satisfied there is no real risk of the applicant facing significant harm in the context of generalised and insurgent violence in the country.
70. While not necessary to conclude upon given my other findings, in terms of generalised and insurgent violence in the country, and having regard to his lack of any other adverse profile, I am satisfied these risks are faced by all nationals of Afghanistan. While I am conscious of the representative's submissions in terms of the individual risks faced by the applicant in the context of generalised violence, I consider the risks are not as widespread or as severe as he claims, particularly in his home area. I am 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 also be taken not to be a real risk that the applicant will suffer significant harm in Afghanistan for these reasons.
71. As I have reached a different conclusion from the delegate in terms of the chances or risks of harm in his home area, it is not necessary to go on and consider the issues of relocation. Nevertheless, I have considered those submissions and country information as far as they are relevant to the above assessment.

Complementary protection: conclusion

72. 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.