



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN
IAA reference: IAA17/02890

Date and time of decision: 5 April 2018 10:35:00
Karen Dix, 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 Shia Hazara from Afghanistan. [In] June 2016 he lodged an application for a safe haven enterprise visa (SHEV) claiming to fear harm from the Taliban and other anti-Shia groups due to his religion, Hazara ethnicity, his criminal conviction by the Taliban for selling [illicit goods] and escape from them, and as a failed asylum seeker who lived in the west.
2. [In] June 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa, finding that the applicant could reasonably relocate to Mazar-e-Sharif where he would not face a real chance of persecution or a real risk of significant harm.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 4 July 2017 the IAA received a submission from the applicant's representative which refutes a number of the delegate's findings. These matters may be regarded as argument rather than information.
5. The representative states that due to the seriousness of the applicant's offence – selling [illicit goods] - the applicant following his arrest by the Taliban was taken from Bamiyan to Kabul which is 175 kilometres away by road and has attached a copy of a distance calculator as evidence of the distance between the places. The information regarding the applicant's arrest and travel to Kabul was before the delegate but the distance was not and is new information. The delegate raised concerns at the SHEV interview regarding the applicant's claim to have been detained and sentenced to death by the Taliban because he was selling [illicit goods] and the applicant had an opportunity to make oral submissions regarding these matters. The representative also provided a post interview submission and was not prevented from providing this information prior to the delegate's decision. The information is also not specifically about the applicant and is not credible personal information. Additionally the delegate in the decision accepted that the applicant was detained and taken to Kabul where he was imprisoned but did not accept that he was imprisoned for selling [illicit goods]. The representative has not satisfied me that this new information could not have been provided prior to the delegate's decision or that it is personal credible information which if known may have affected the consideration of the applicant's claims. I am not satisfied that s.473DD(b) is met. Nor given its limited probative value, am I satisfied that there are exceptional circumstances for considering it.
6. The applicant forwarded copies of his [siblings'] Australian citizenship certificates which state his [siblings] were granted citizenship in [2007] and [2014]. The applicant since his arrival in Australia has declared that his [siblings] were Australian citizens/residents. Although this information was before the delegate the certificates were not and are new information. The applicant has not given any reason for not providing them earlier although they significantly predate the delegate's decision and I am not satisfied that they could not have been provided to the delegate prior to the decision. The documents are credible personal information which is corroborative of his [siblings'] immigration status in Australia and was not in dispute. However it is not otherwise evident how the documents relate to his case or how, had the

documents been known to the Minister, they may have affected the consideration of his claims. The applicant has not satisfied me that the documents could not have been provided prior to the delegate's decision or that they are credible personal information, which had they been known may have affected the consideration of the applicant's claims. I am not satisfied that s.473DD(b) is met.

7. I have obtained new information, specifically information about the security situation in Ghor for Shia Hazaras and updated country information on the situation for persons returning from the west.¹ The delegate did not consider any country information about Lal Wa Sarjantal district in Ghor which is the applicant's home area or make any specific findings regarding Lal Wa Sarjantal, although the applicant has made specific claims against returning to that area. The delegate's decision was also reliant on previous Department of Foreign Affairs and Trade (DFAT) reports dated September 2015 and September 2016 which the latest reports issued on 18 September 2017, prepared specifically for protection assessments, update. I am I satisfied that there are exceptional circumstances for considering this information.

Applicant's claims for protection

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

- The applicant is an Afghani national of Hazara ethnicity who was born in [Village 1], [in] Lal Wa Sarjantal district, Ghor province and is a Shia Muslim.
- His father is deceased and [his family is] residing in [Country 1]; and his remaining [siblings] are Australian citizens living in Australia.
- The applicant lived in [Village 1] and did not receive any formal education although he attended the local mosque for religious education for [a number of] years between [certain years]. After this time he helped his father with farm work growing [crops]. In 1994 he set up a [business] with his father's help in Lal district. His father died in 1995 from natural causes and the applicant ran the [business] on his own. He also stocked [various goods] and [illicit goods] to a few customers.
- When the Taliban initially occupied the area they were calm and the applicant did not think they would come and check [his goods]. However one day they came to the [business] and searched everything. When they [checked some of the goods] and found it was [illicit goods], they immediately arrested him, [vandalised] the [business] and took him to Bamiyan where he was publicly paraded and his crime was publicly announced. After [a number of] days he was taken to Kabul where he was also publicly humiliated, imprisoned for a month and taken before a court which gave him a death sentence. [A family friend] bribed a [particular individual] to let the applicant escape and the applicant fled to [Country 1] with his family.
- The applicant fears being killed by the Taliban on return because he committed a crime against Sunni Muslims and escaped from them. He also fears harm from the Taliban and other Sunni insurgent groups due to his Hazara ethnicity, Shia religion and as a failed asylum seeker who has lived in the west.

¹ UNHCR, "Lal Wa Sarjantal district Profile (Ghor Province)", May 2003, CIS13800; Afghanistan Research and Evaluation Unit (AREU), "Informal Credit Practices in Rural Afghanistan, Case Study 3: Ghor", 1 February 2007, CIS22428; Country of Origin Information Section (COIS), "Background Paper Afghanistan: Political Parties and Insurgent Groups 1978-2001", 6 March 2013, CR801F5B613; UNAMA, "Afghanistan- Protection of Civilians in Armed Conflict Midyear Report 2017", 1 July 2017, CISED50AD4852; DFAT, "Country Information Report Afghanistan", 18 September 2017, CISED50AD5680; DFAT, "Thematic Report Hazaras in Afghanistan", 18 September 2017, CISED50AD5681

Factual findings

Identity and receiving country

9. The applicant has consistently maintained since his arrival that he is an Afghan national who was born in [Village 1], [in] Lal Wa Sarjantal district, of Ghor province where he lived until 1999 when he and his family travelled illegally to [Country 1]. He claims to have lived as an unregistered refugee in [Country 1] until 2011 and also lived in [Country 2] for approximately 23 months during which he was detained on [number of] occasions while attempting to travel to Australia. At interview he provided an original taskera with an English translation which states that he was [a particular age] in 1996. He claims that his previous taskera was taken from him in 1999 when he was arrested. I am satisfied that his identity is as claimed, that he does not have an existing right to reside in [Country 1] and he is an Afghan national whose receiving country is Afghanistan.

Issues with Taliban

10. The applicant at the SHEV interview claimed to have set up a [business] with the assistance of his father in Lal district in 1994. He mainly [sold certain goods] but also [other goods]. The applicant also began to sell [illicit goods] on the side to particular customers. He claimed to have sourced the [illicit goods] in Kabul where he purchased them in a hidden way from the shops there and then sold them to his own customers. The sale of the items was good business as young people and [business] owners would come to buy. There were [removed]. The applicant at the end of the interview stated that he was selling the [illicit goods] even when his father was alive and would buy them along with the [other goods]. He would sell them to particular customers specifically from [particular businesses].
11. The applicant's account of his detention by the Taliban at the SHEV interview was similar to his visa application. He also stated that when his crime was publicly announced in Bamiyan and Kabul the religious people were in agreement that what he had done was unforgiveable. The applicant when asked why he would sell [illicit goods] while the Taliban were in power if it was illegal, stated that at the time there was no telephone or television in his area and he did not know it would result in him being arrested and imprisoned although he was aware the Taliban had taken over a lot of places. He stated that if he was aware that selling [these goods] would bring him to the adverse attention of the Taliban he would not have done it as he follows the rules and the law. He also stated at the end of the interview that the area he lived in was one of the last places which the Taliban came to.
12. The delegate asked the applicant to comment on the apparent inconsistency arising from his claim to have been unaware that it was illegal to sell [the illicit goods] and his claim to have purchased and sold the [illicit goods] in a secret way. The applicant responded that he knew it was against the law and society, but as he did not have access to televisions or mobile phones he did not know the Taliban law. The delegate also stated that his claim to have been arrested by the Taliban and sentenced to death for selling [illicit goods] was not consistent with his testimony at the entry interview where he claimed to have been arrested by the Taliban at his [business] after they accused him of being a Hezb e Wahdat member and because he was a Hazara Shia. The applicant responded that he only had a [relatively short] interview and he had a [interpreter] from [another country]. He did say that he had a [business] and sold [particular goods] but was told to answer only in a few words why he was arrested. He stated that the interviewer was more focused on the route the applicant took to travel to Australia. The delegate stated that being sentenced to death was a more serious reason for leaving

Afghanistan and the applicant's failure to mention this rather than being arrested raised concerns. The applicant stated at the end of the SHEV interview that he had told the interviewer he was arrested because of the [goods] he had in his [business] but was not given an opportunity to explain further.

13. The representative contends that the applicant was only asked why he left [Country 1] at the entry interview and was not given a chance to explain why he left Afghanistan. The applicant when asked if he had ever been arrested was only then able to explain that he was arrested by the Taliban and volunteered the reasons for his arrest and detention including the length of detention. I accept that the applicant was not specifically asked why he left Afghanistan during the entry interview and the information he provided to the interviewer about the Taliban was in response to a question asking if he had been arrested. The response was broadly consistent with his claim in his visa application to have been arrested by the Taliban and imprisoned for a month in Kabul. However I have concerns regarding the applicant's claimed reason for being arrested and imprisoned which he volunteered at the entry interview was for reasons of his ethnicity, religion and his assumed membership of Hezb-e-Wahdat and not because of the sale of [illicit goods] as he now claims.
14. During the period the applicant had his [business] (1994-1999) in Lal district he claims to have travelled to Kabul to source goods for the [business] including [illicit goods] and [other goods]. However Kabul was under Taliban control by 1996, had declared the 'Islamic Emirate of Afghanistan' and during the following years until November 2001, consolidated its power and imposed an extreme interpretation of Islam in the areas it controlled including in Kabul.² The applicant was aware that the Taliban were in control of many parts of Afghanistan but claims he had no knowledge of their laws because of lack of access to phones or televisions. Given Kabul was under Taliban control from 1996 and the imposition of strict Islamic laws in Kabul by the Taliban, I do not accept that the applicant if he was travelling to Kabul for goods during this period, would have been able to source [illicit goods] in Kabul or [sold] them as claimed. Nor do I accept given the security situation and the imposition of Taliban laws, that he would have been unaware of the consequences of possessing [these illicit goods] or that he would have risked travelling back to his home area with such items particularly as he would have had to travel through areas under Taliban control or where there was ongoing conflict. I am not satisfied that the applicant sourced [illicit goods] in Kabul which he sold in his home area or that he was arrested, imprisoned and sentenced to death for possessing these items.
15. The applicant at the entry interview claimed that the Taliban arrested him at his [business] after accusing him of being a member of Hezb-e-Wahdat, although everyone knew the applicant had no involvement with political organisations. He also surmised that he may have been arrested because he was a Shia Hazara, and claimed to have been taken to Bamiyan and then to Kabul where he was imprisoned for a month. At the SHEV interview the applicant stated that he told the interviewer during the entry interview that he was arrested because of the [goods] he had in his [business] but never claimed to be part of Hezb-e-Wahdat although the Taliban may have assumed he was part of Hezb-e-Wahdat. Country information indicates that the Hazara majority provinces of Bamiyan, Daykundi as well as parts of Ghazni, Ghor, Uruzgan and Wardak provinces, are referred to collectively as the 'Hazarajat'. Lal Wa Sarjantal district from which the applicant originates is 100% Hazara, is adjacent to Bamiyan and is considered to be part of Hazarajat. During the 1990s when the applicant claims to have had his [business] different Hazara Hezb-e-Wahdat factions fought against each other and later against the Taliban in the Lal district and this continued until 2001. Hezb-e-Wahdat which was centralised in Bamiyan province split into two rival factions in 1994, one of which was led by

² DFAT, "Country Information Report - Afghanistan", 18 September 2015, CISEC96CF13366, 2.2

Mohammed Akbari. Mohammed Akbari allied with the Taliban in late 1998 in Bamiyan province and was responsible for maintaining order in the Hazarajat which was under Taliban control.³ Given the applicant was living in a Shia Hazara district where at least one faction of Hezb-e-Wahdat was fighting against the Taliban, I accept as plausible the applicant may have been suspected of being affiliated with the Hezb-e-Wahdat faction which was fighting against the Taliban although he had no involvement with either faction. However I do not accept that the applicant would have otherwise been of interest to the Taliban due to his ethnicity or religion. Nor do I accept the applicant's claim that he stated at the entry interview he was arrested for selling [goods] which is not mentioned in the entry interview recording or the written record of the interview and was only raised at the SHEV interview. After consideration of the country information I am prepared to accept that the applicant may have been arrested and imprisoned for a short period in Bamiyan. However I am not satisfied that the applicant escaped from prison as claimed but was released after it was ascertained he was not affiliated with Hezb-e-Wahdat. I am not satisfied the applicant was of any interest to the Taliban or to any factions of Hezb e Wahdat when he departed Afghanistan.

Refugee assessment

16. 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

17. 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.

18. The applicant states that he has not lived in Lal Wa Sarjantal since 1999. He left the area with his family when he was [a particular age] and moved to [Country 1]. He claims to have no

³ Department of Foreign Affairs and Trade (DFAT), "Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.4; UNHCR, "Lal Wa Sarjantal district Profile (Ghor Province)", May 2003, CIS13800; Afghanistan Research and Evaluation Unit (AREU), "Informal Credit Practices in Rural Afghanistan, Case Study 3: Ghor", 1 February 2007, CIS22428, pp. 6 & 8; Country of Origin Information Section (COIS), "Background Paper Afghanistan: Political Parties and Insurgent Groups 1978-2001", 6 March 2013, CR801F5B613

connections in Lal Wa Sarjangal or Afghanistan as most of his family are residing in [Country 1] and [a number of siblings] are Australian citizens living in Australia. The applicant resided in [Country 1] from 1999 until his departure in 2011. Although he has no family in Ghor, he still identifies Lal Wa Sarjangal district as his home area, and has made claims in respect to Lal Wa Sarjangal, indicating this as an area where he may be expected to return. In light of the applicant's claimed identification of Lal Wa Sarjangal as his ancestral area, I consider despite an absence of approximately 19 years and claimed absence of family, that Lal Wa Sarjangal is the area to which he would return.

19. The applicant fears being killed by the Taliban on return because he committed a crime against Sunni Muslims and escaped from them. I accept that the applicant may have been detained in Lal Wa Sarjangal and imprisoned for a short period in 1999 because he was suspected of links to Hezb-e-Wahdat. However I do not accept that the applicant was arrested and sentenced to death for possessing [illicit goods] or that he escaped from a Taliban prison. Nor do I accept he would be targeted on return to Lal Wa Sarjangal district by the Taliban. The applicant and his family left the area in 1999, the Taliban has not been in power since 2001 and given that the applicant has never been involved in any political groups or parties in Afghanistan and would be returning to an area from which he has been absent for approximately 19 years, I do not accept he would be of interest to local political groups or that he would be imputed with an adverse political profile within the local community. I am not satisfied there is a real chance of the applicant being targeted by the Taliban or the local community or facing any harm in Lal Wa Sarjangal due to possessing [illicit goods], his imprisonment or escape from the Taliban or for any reason.
20. The applicant fears harm as a failed asylum seeker who has lived in the west. DFAT advises that many Afghans travel abroad to seek employment and there have been large scale migration movements in and out of Afghanistan in recent years including to Pakistan, Iran and other countries. DFAT also assesses that in general returnees from western countries are not specifically targeted on the basis of being failed asylum-seekers. Hazaras and other ethnicities that have international connections including those who have spent time in western countries face only a low risk of violence provided they do not openly highlight their links. DFAT notes there have been occasional reports alleging returnees from western countries have been kidnapped or otherwise targeted on the basis of having spent time in a western country, but the circumstances or locations of these incidents are not detailed.⁴ UNHCR in April 2016 indicated there were reports of individuals who returned from western countries being targeted by anti-government elements (AGEs) on the grounds that they had become "foreigners" or that they were spies for a Western country, indicating that young people with western connections and mannerisms may be mistaken as government or international community collaborators.⁵ The reports and incidents cited by the UNHCR refer to individuals who returned from Australia being targeted whilst traveling between Ghazni and Kabul in 2014. There is no evidence of more recent incidents on the roads or of western returnees being targeted in Lal Wa Sarjangal itself.
21. Apart from his residence in Australia for approximately five years, the applicant was born in Lal Wa Sarjangal, and lived there for a significant period of his [life]. Although he has been absent from Ghor for approximately 19 years, he lived in [Country 1] for approximately 12 years and his family continue to reside in [Country 1]. I am not satisfied on the evidence that returnees like the applicant are targeted in Lal Wa Sarjangal by insurgents or that the applicant would be

⁴ DFAT, "Country Information Report Afghanistan", 18 September 2017, CISED50AD5680, 5.18-5.22; DFAT, "Thematic Report Hazaras in Afghanistan", 18 September 2017, CISED50AD5681, 3.18, 4.4 and 4.7

⁵ UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p. 41

targeted on return because he is perceived to be pro-western due to his residence in a western country. The applicant has not held any identifiable affiliations with international organisations or the Afghan government, and would be returning to a Hazara dominated area which is under government control. I am not satisfied that he would be imputed with a pro-government political opinion by the Taliban or other insurgents in Lal Wa Sarjangal as a Shia Hazara who resided in a western country. I am not satisfied there is a real chance of the applicant being harmed in Lal Wa Sarjangal for this reason.

22. The applicant also fears harm as a Shia Hazara from the Taliban and other Sunni insurgent groups. Country information indicates that Hazarajat of which Lal Wa Sarjangal is a part, is considered to be relatively secure and Hazaras are generally able to move about freely in these areas without facing undue security risks. Lal Wa Sarjangal is in western Hazarajat, and borders Bamiyan which is considered to be more secure for Hazaras than most other parts of Afghanistan. However the Taliban and other insurgent forces have a significant presence in many areas bordering the Hazarajat including the western districts of Ghor province some of which are reported to be under Taliban control. Roads linking Hazara-dominated areas with Kabul particularly in areas contested by insurgents have also suffered from a high level of insecurity in the past with DFAT reporting on the kidnapping and of Shia Hazaras in areas of mixed Hazara and non-Hazara communities particularly during 2015.⁶ UNHCR also stated that there had been a significant increase in harassment, intimidation, kidnappings and killing of Hazaras by the Taliban and other AGEs in 2015, with the majority of incidents referred to occurring on the roads.⁷ DFAT indicated that most kidnappings targeted those believed to have connections to the government or security forces, or were carried out for financial gain.⁸ EASO in November 2016 indicated that there had been two security incidents in Lal Wa Sarjangal.⁹ Recent UNAMA and DFAT reports also did not highlight Lal Wa Sarjangal as an area where Shia Hazaras are being targeted. Although there were no reported abductions of Hazaras in Ghor during 2015, there were three incidents involving nine Hazara civilians being kidnapped on the roads in western Ghor in 2016, however they were reportedly released unharmed. UNAMA in 2017 reported that self-identified Islamic State (ISKP) fighters with no formal links to Islamic State carried out 2 abductions in Ghor in the first half of 2017, however these were motivated by personal/tribal disputes, occurred in Chagcharan and Dawlat Yar districts, all those abducted were released and there is no indication that those abducted were Hazaras.¹⁰ The country information before me does not indicate that Lal Wa Sarjangal is an area where Shia Hazaras have been targeted.

23. I am satisfied that the applicant could reside in Lal Wa Sarjangal safely and would not face a real chance of harm as a Shia Hazara. There were a number of incidents during 2015 where Shia Hazaras were targeted on the roads in other areas of Afghanistan but no evidence of any Hazaras being targeted on the roads in Ghor during 2015 and although there were a number of incidents in 2016 where Hazaras were targeted on the roads in western Ghor and subsequently released there is no evidence of Shia Hazaras being targeted in Lal Wa Sarjangal itself due to their ethnicity or religion or in other parts of Ghor more recently. There have been security concerns in some parts of Ghor particularly in western Ghor, however there have been a low number of security incidents and insurgent activity within Hazara dominated Lal Wa Sarjangal

⁶ DFAT, "Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 2.12, 2.23, 2.28, 2.30, 2.33; DFAT, "Thematic Report Hazaras in Afghanistan", 18 September 2017, CISED50AD5681, 3.18, 2.18-2.22 and 2.27

⁷ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3, p 76

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

⁹ EASO, "Country of Origin Information Report: Afghanistan Security Situation", 1 November 2016, CIS38A80122597

¹⁰ UNAMA, "Afghanistan- Protection of Civilians in Armed Conflict Midyear Report 2017", 1 July 2017, CISED50AD4852; DFAT, "Thematic Report Hazaras in Afghanistan", 18 September 2017, CISED50AD5681, 2.30-2.31

and other Hazarajat areas. Unlike Kabul where there were attacks against Shias in 2016 and 2017 by ISKP, there is no evidence confirming the presence of ISKP in Ghor or of Shia Hazaras being targeted by ISKP or other insurgents in Lal Wa Sarjangal due their religion or ethnicity. I am not satisfied that there is a real chance of the applicant being harmed in Lal Wa Sarjangal as a Shia Hazara.

24. Considering the applicant's history and profile, including his ethnicity and religion, and his residence in Australia, I am not satisfied there is a real chance he will be harmed in Lal Wa Sarjangal in the reasonably foreseeable future.
25. I note that returnees from western countries are usually returned to Kabul and have considered whether the applicant would be able to safely access Lal Wa Sarjangal. As noted above, country information indicates that Hazaras were targeted on the roads between Kabul and Hazarajat during 2015 and there were a number of incidents in 2016 in areas bordering Hazarajat, however all those abducted were released. There were reports in 2014 of two returnees from Australia being targeted on the roads when returning to Ghazni. However there is no recent evidence of Hazaras being targeted on these roads in 2016 or more recently due to their ethnicity or religion. Nor have there been any further reports of the targeting of returnees on the roads since 2014.
26. Given the absence of evidence regarding the targeting of returnees since 2014 or of Shia Hazaras on the roads from Kabul to Lal Wa Sarjangal in 2016 or more recently, and the applicant's lack of profile arising from events that occurred in 1999, or as a returnee/failed asylum seeker who resided in the west, I am satisfied that the applicant does not face a real chance of harm on the roads when returning to Lal Wa Sarjangal.
27. I also note that there is a regular flight connection between Kabul and Bamiyan.¹¹ The applicant is therefore not restricted to road travel when accessing Hazarajat, and would be able if he so chose to return to Lal Wa Sarjangal from Bamiyan airport on roads through adjoining Hazarajat areas including Yakawlang and/or Panjab districts in Bamiyan which are considered safe to reach Lal Wa Sarjangal. There have been no reports in these areas of Hazara abductions or the targeting of failed asylum seekers/returnees from the west.
28. On the evidence, I am not satisfied that the applicant would face a real chance of harm in Lal Wa Sarjangal or in travelling to his home area either on the road from Kabul or via Bamiyan airport and on roads through adjoining Hazarajat areas which are considered safe, as a returnee Shia Hazara, or due to any profile arising from his imprisonment by the Taliban in 1999, other associations or for any other reason. I am not satisfied there is a real chance the applicant will be harmed in Lal Wa Sarjangal or when travelling on the roads to return to his home area.
29. Although the applicant no longer has family links in Lal Wa Sarjangal, I am satisfied that he would return and be able to re-establish himself there. The family had land which the applicant farmed and there is no indication this land has been relinquished. Additionally the applicant previously ran a [business] in Lal district as well as in [Country 1] and has acquired skills in [a particular] industry in Australia. Given the applicant only travelled to Kabul to obtain goods to sell in his [business] and was not reliant on travel to Kabul for employment, I do not accept that he would travel there for employment on return. Although he may be required to

¹¹ EASO, "Country of Origin Information Report: Afghanistan Security Situation", January 2016, CIS38A8012395, p. 63; EASO, "Country of Origin Information Report: Afghanistan Security Situation", 1 November 2016, CIS38A80122597, p. 66

undertake occasional travel to Kabul on return I am not satisfied he would face a real chance of harm while travelling on the roads to Kabul.

30. The applicant indicated at the SHEV interview that he has been taking medication for depression but is not undertaking any other treatment. There are no medical reports before me, although the applicant stated he would provide them to the delegate. Whilst I accept that the applicant may have been taking medication, it has not prevented him from obtaining employment including undertaking [work] as [a particular occupation] in Australia. Country information indicates that health care availability in Afghanistan has improved significantly with approximately 85% of the population having access to free basic health services, although the overall quality of health services remains poor. There are approximately 60 health facilities in Bamiyan and Daykundi that offer basic healthcare and the availability of care has improved significantly in Hazarajat since 2001 although specialist care is not available in the central highlands.¹² Although there is limited health care available, I consider he would be able to safely access health care in neighbouring districts in Bamiyan which are considered to be secure areas.
31. Although there are limited employment opportunities in Lal Wa Sarjangan and in Hazarajat the applicant has a range of employment experience and although he claims to no longer have family in Lal Wa Sarjangan, I am not persuaded that he could not find work there or in adjoining areas of Hazarajat or that he would be prevented from undertaking employment to enable him to subsist there. I consider that in the applicant's circumstances, he would be able to make a sufficient living in Lal Wa Sarjangan or nearby areas of Hazarajat to subsist.
32. Moreover given the applicant has no family in other parts of Afghanistan and the employment and services he requires are available in Hazarajat and Lal Wa Sarjangan, I consider that he would not be required to travel in contested areas outside Hazarajat or Lal Wa Sarjangan on a regular basis. I am satisfied that he would be able to safely access services through travel in adjacent safe areas. I am not satisfied the applicant has a well-founded fear of persecution.

Refugee: conclusion

33. 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

34. 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

35. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life

¹² DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 2.16; DFAT, "DFAT Thematic Report Hazaras in Afghanistan 2015-16 update", 8 February 2016, CIS38A8012186, 3.22

- 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.

36. I have found there is not a real chance that the applicant will face harm in Lal Wa Sarjangan, on the roads around Lal Wa Sarjangan or in Hazarajat as a Shia Hazara returnee/ returning asylum seeker from the west or due to the possession and sale of [illicit goods], his imprisonment by the Taliban in 1999, or from insurgents or criminal elements when accessing his home area, or any combination of these matters or for any other reason. As the 'real risk' test imposes the same standard as the 'real chance' test, for the reasons stated above I am also not satisfied that there is a real risk of the applicant suffering significant harm on return to Lal Wa Sarjangan, on the roads around Lal Wa Sarjangan or in Hazarajat for those reasons.

37. Given that I have found there is no real risk of the applicant facing significant harm in his home area or when returning to his home area, I have found it unnecessary to consider whether the applicant could reasonably relocate to Kabul or Mazar-e-Sharif.

Complementary protection: conclusion

38. 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.