



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN
IAA reference: IAA17/03423

Date and time of decision: 31 May 2018 12:48:00
K Dix, Reviewer

Decision

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

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tajik from Afghanistan. On 11 October 2016 he lodged an application for a safe haven enterprise visa (SHEV) claiming to fear harm due to his refusal to assist the Taliban and his escape from them, and as a returnee from a western country who will be perceived to have become a sinner, apostate and supporter of the west. He will also be perceived as wealthy and targeted for ransom.
2. On 21 August 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa.

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 15 September 2017 the IAA received a submission from the applicant's representative which refutes the delegate's credibility findings. I do not consider that these aspects of the submission amount to 'new information' within the meaning of s.473DC.
5. The submission refers to a number of documents which predate the delegate's decision, were not before the delegate and are new information. These are:
 - Two articles on poisoning attacks – a June 2012 article by The Independent and a February 2013 report by Al Jazeera - which the representative submits is demonstrative that the Taliban have used poison in some of their attacks and consequently the applicant's claim about the Taliban's offer is therefore plausible. The delegate discussed the applicant's issues with the Taliban during the SHEV interview and indicated there was an absence of country information supporting the applicant's claim that [they] were used by the Taliban to incapacitate police officers. The representative made a brief oral submission at the end of the SHEV interview in which he reiterated the applicant's claims and submitted that it cannot be assumed that an incident was fabricated because it was not publicly documented. Approximately 10 days after the SHEV interview the delegate made the decision finding that the applicant was not targeted by the Taliban and told to put a substance in the [product] to incapacitate the police, and also found the applicant's claim was not supported by country information. I am satisfied the applicant and the representative were on notice of the delegate's concerns, and were aware they could provide further information. However the delegate indicated that he did not require any post interview submissions and given the short timeframe between the SHEV interview and when the decision was made, I am satisfied in the circumstances, the documents could not have been provided prior to the delegate's decision. However I note that the delegate considered specific country information relating to the poisoning of police officers in a number of southern provinces and the Al Jazeera report submitted by the representative reports on the same incident in Ghazni which was in country information already before the delegate. Given the attack is in other sources before me and its limited probative value I am not satisfied there are exceptional circumstances for considering it. The other article by the Independent reports on alleged poisoning attacks on girls schools in Takhar and Balkh provinces and on a boys' school in Khost province. Although it is supportive of the

representative's submission regarding the use of poison by the Taliban for some attacks, this was not at issue with the delegate who although accepting there were poison attacks, did not accept the applicant's account of being approached to put poison in [product] was credible or consistent with the reported incidents. The article also reports on incidents in areas of Afghanistan not related to the applicant's claims. Given the document's limited corroborative value, other than in regard to matters which were not at issue, I am not satisfied there are exceptional circumstances to justify considering it.

- A September 2014 Greenleft article which discusses the dangers for failed asylum seekers and in particular Hazaras who have been returned to Afghanistan. The (Refugee Council of Australia) RCA also comments on the deterioration in the security situation and advocates for preventing Afghanis' deportation from Australia. The representative has not provided any explanation why this document could not have been provided prior to the delegate's decision although the applicant consistently claimed to fear harm as a returnee, had representation at his interview and in the preparation of his visa application; the applicant and his representative had an opportunity to discuss his fear as a returnee during the interview but did not raise it; and the applicant was aware that any additional information or submissions provided after the interview would be considered. I am not satisfied that the document could not have been provided prior to the delegate's decision. Nor is the document personal information. It provides general commentary on returnees and in particular Hazara returnees (the applicant is not Hazara) and the delegate had particular regard to a number of other sources which addressed issues of returnees on return to Afghanistan including a returnee from Australia. I am not satisfied the document is credible personal information which may have affected the consideration of the applicant's claims. I am not satisfied that s.473DD(b) is met.
 - A June 2017 New York Times article regarding Afghanistan's deteriorating security situation. The representative submits that parts of Afghanistan are still under Taliban control despite the efforts of the US to stop the Taliban and Islamic State insurgency. The article refers to a large bombing in Kabul in late May 2017 as well as other attacks including in Mazar-e-Sharif. I note that although the delegate raised relocation briefly and the applicant referred to the lack of safety as one of the reasons he could not relocate to any part of Afghanistan the current security situation in Kabul or other parts of Afghanistan including in his home province was not otherwise explored by the delegate during the interview. Nor was any country information raised with the applicant for comment during the interview in respect to this matter. Additionally the delegate in the decision did not refer to the security situation in Afghanistan including in Kabul or Logar which he found the applicant could return to or have regard to more recent information regarding the security situation. Although the document predates the delegate's decision, I accept in the circumstances that the applicant may have been unaware until after the decision was made of the lack of more recent country information and could therefore not have provided the information prior to the delegate's decision. The article also reports on more recent security events which were not before the delegate and are pertinent to the consideration of the threat of harm and the reasonableness of the applicant's relocation to Kabul. Given the fluidity of the security situation and the absence of more recent information I am satisfied there are exceptional circumstances to justify considering the information.
6. On 16 April 2018 the representative submitted that the applicant was recently diagnosed with advanced cancer [and] is currently undergoing chemotherapy and other treatment. The representative submits that there are exceptional circumstances to justify consideration of the

applicant's medical condition due to the impact, effects and implications arising from the condition should he be forced to return to Afghanistan. A letter dated [in] February 2018 from the applicant's treating specialist confirms that the applicant was initially referred to a [medical] clinic in late December 2017 but after further investigation was diagnosed in in mid-February 2018 to be suffering from stage 3 (advanced stage) [cancer]. He is undergoing chemotherapy and will undertake 6 cycles of standard treatment.

7. The information regarding the applicant's medical condition and treatment and the supporting letter from the specialist is all new information which I am satisfied could not have been provided prior to the delegate's decision. The subsequent claim regarding the applicant's vulnerability should he return to Afghanistan is also new information which I am satisfied could not have been provided prior to the delegate's decision. The information and letter are potentially significant to the consideration of the applicant's relocation. I am satisfied they could not have been provided prior to the delegate's decision and that there are exceptional circumstances to justify considering them.
8. Since the delegate's decision the Department of Foreign Affairs and Trade (DFAT) issued a report on 18 September 2017, which provides updated country information on the situation for persons returning from the west and for Sunni Tajiks. I have also obtained information relevant to assessing the applicant's claims in Logar and the security situation in Logar.¹ This information was not before the delegate and is new information. The delegate's decision was reliant on a previous DFAT reports dated September 2015 and September 2016 which the latest report, prepared specifically for protection assessments, updates. The delegate also did not consider any country information about Logar which is the applicant's home area including the security situation in Logar or Kabul or consider the applicant's claims arising from his recently diagnosed medical condition. I am satisfied that there are exceptional circumstances for considering this information.

Applicant's claims for protection

9. The applicant's claims can be summarised as follows:
 - The applicant is an Afghani citizen of Tajik ethnicity who was born in Pakistan in approximately [year] and practises Sunni Islam. The applicant's father fled to Pakistan in the late 1970s/early 1980s due to the Soviet invasion of Afghanistan. The applicant and his younger siblings were all born in Pakistan and lived there until 2009 when the family returned to [Village 1], [District 1] in Logar province. His family continue to live in the same area in Logar district.
 - His father operated a [business] in Pakistan for approximately 16 years until the building was demolished in approximately 2006 for redevelopment. The applicant in order to help his father support the family opened a small [Business 2] with a friend which did [device] repairs and [other services]. The family decided to return to Afghanistan in 2009 due to problems with the police despite holding refugee cards.

¹ DFAT, "Country Information Report Afghanistan", 18 September 2017, CISED50AD5680; Danish Immigration Service, "Country of Origin Information (COI) for Use in the Asylum Determination Process: Report from the Danish Immigration Service's Fact Finding Mission to Kabul, Afghanistan", 1 May 2012, CIS23406; EASO, "Country of Origin Information Report: Afghanistan Security Situation", January 2016, CIS38A8012395; EASO "Country of Origin Information Report: Afghanistan Security Situation", 1 November 2016, CIS38A80122597; Special Inspector General for Afghanistan Reconstruction (SIGAR), "Afghanistan's Health Care Sector: USAID's use of unreliable data presents challenges in assessing program performance and the extent of progress", January 2017, <https://www.sigar.mil/pdf/audits/SIGAR-17-22-AR.pdf>

- Upon the family's return to [District 1] in Logar province which was his parents' home area before they fled to Pakistan, the applicant set up a similar business in Logar city (Pul-e-Alam) the capital of Logar province. The applicant ran the shop for approximately a year but began to feel insecure due to the Taliban and closed the shop. His father during this time set up a traditional Afghan [business 1] also in Logar city. The applicant worked with his father for approximately two years before his father retired and only came in occasionally to ensure the [business 1] was running smoothly. The applicant travelled daily from his village to work by car.
- In addition to other customers there were many customers from the police and various checkpoints that would regularly come in and buy [product] from [Business 1]. Shortly before leaving Afghanistan the applicant was returning from work when the vehicle he was travelling in was stopped by the Taliban in [particular location] approximately 15 kilometres from his village. He was taken by the Taliban who wanted him to mix chemicals in the [product] sold to the police but he refused to do so. He was held by the Taliban overnight and when the Taliban left the following night he escaped.
- The applicant fears being seriously harmed or killed by the Taliban as he escaped from them after refusing to do what they asked. Additionally he fears being killed by the Taliban due to his residence in a western country as he will be considered to be an apostate and infidel. He also fears being kidnapped for ransom on return as he will be perceived to be wealthy.

Factual findings

Identity and Receiving Country

10. The applicant has consistently maintained since his arrival that he is an Afghan national who was born in a refugee camp in Peshawar, Pakistan and lived in Pakistan with his family until approximately 2009 when the family returned to [Village 1] in [District 1], of Logar province. He remained in Afghanistan until 2013 when he travelled to Pakistan where he made arrangements to travel to Australia. At interview he provided an original taskera and a copy of an Afghan driver's licence with English translations. The taskera states that he was [age] years of age in [year] ([Year] in the Gregorian calendar) and the driver's licence is consistent with his taskera. I am satisfied that his identity is as claimed, that he does not have an existing right to reside in Pakistan and he is an Afghan national whose receiving country is Afghanistan.

Employment and Taliban issues

11. The applicant claims that after he left school he opened [business 2] with a friend in Pakistan which did [device] repairs and [other services]. After the applicant and his family returned to Afghanistan around 2009 he set up a similar [business 2] in Logar city (Pul-e-Alam) which also sold [device] accessories. He travelled daily between his village in [District 1] and the [business 2] in Pul-e-Alam and operated the business for approximately a year. When questioned at the interview about the reasons for closing [business 2], he stated that one day someone came into the shop and asked him [about] a particular [item] which was a Taliban [item]. When the applicant told him he did not have the [item] the person questioned him as to the reason for not having the [item]. Although he did not have any problems following the incident he became fearful as he had to travel daily through [a particular location] which was a Taliban area and he did not know if the person who had come to his [business 2] was a Taliban supporter or agent. He feared being pulled over by the Taliban and being wrongfully accused of

selling inappropriate [items] including [certain material] and killed by the Taliban so he decided to close the [business 2].

12. The delegate did not accept the applicant's reason for closing his [business 2] and considered it a new claim which was only raised at interview. However as indicated by the representative the applicant responded to the delegate's questions regarding [business 2] and did not claim to fear harm on return to Afghanistan due to his previous work at the [business 2]. Nevertheless given the country information regarding the Taliban influence and presence in Logar including in Pul-e-Alam which the applicant travelled to daily, I am satisfied that the applicant who had only been living in Afghanistan for a short time when he opened the shop may have been unaware until the incident with the person who wanted a Taliban [item], of how innocent actions may be perceived adversely. I am also satisfied that although the applicant was not approached, threatened or harmed while he had the [business 2], the applicant became fearful for his safety following the incident as he did not know who the person was that questioned him or whether he had any Taliban affiliation. I accept that he closed [business 2] for this reason.
13. The applicant claims that after he closed his [business 2] in 2010 he began working for his father at [business 1] in Pul-e-Alam which his father had set up. The applicant at interview stated he did not know anything about the business and had to be trained in and familiarise himself with the various aspects of the business. He stated that there were 5 to 6 workers who performed various functions. The applicant learned how to [handle] the [product] [when] it was ready and did other work for his father who ran the counter. He provided details of the amount of [product] daily. After approximately two years he took over the daily running of the [business 1] as his father was ill and old, and his father only came in occasionally to ensure the business was running smoothly. Given the consistency of the applicant's claims and consideration of his account at interview, I am satisfied that the applicant worked with his father at [business 1] in Pul-e-Alam and took over the day to day running of the business from his father after a couple of years.
14. The applicant claims that members of the police from the governor's office and the various checkpoints regularly purchased [product] from his [business 1]. In 2013 he was in a passenger vehicle with approximately [number of] other people travelling from Pul-e-Alam to [District 1] when the vehicle he was in was stopped by two Taliban on a motorcycle in [particular location] which was approximately 15 kilometres from his village in [District 1]. The Taliban asked for the applicant by name and when he identified himself and confirmed that he ran [business 1] they told him to leave the vehicle, and took him to a deserted house approximately 500 metres away from the main road. The Taliban were angry with him for selling [product] to the members of the police and government people and he was taunted and they hit him with their fists. The applicant was told that he should help them by putting a substance/chemical in the [product] [which] should only be sold to the police at the checkpoints who would be made unconscious thus enabling the Taliban to attack them. The applicant refused to do what they asked and they hit and punched him with their fists and threatened to kill him. He was kept at the house that night and the following day. In the evening of the following day the Taliban received a phone call and urgently left leaving the applicant in the house alone. As he was not tied up and the door was not locked he made his escape to the main road where he managed to flag down a vehicle which took him to his home village. The applicant left the area the next day.
15. The applicant's claim that he was stopped at a Taliban checkpoint while travelling to his village is supported by country information which indicates that the situation in Logar began to deteriorate in 2011 with Pul-e-Alam which the applicant travelled to daily reportedly being one

of the areas worst affected by the insurgency. Mobile or permanent checkpoints were used by insurgents in areas in which they operate or control, to stop vehicles, interrogate passengers, confiscate property, impose taxes and search for evidence of links with the government or the international forces. The European Asylum Support Office (EASO) and the Danish Immigration Service also stated in 2012 that insurgents targeted civilians who were perceived to be cooperating with the Afghan Government; and regularly travelling into administrative centres or provincial capitals could be a reason for insurgents to become suspicious about collaboration with the government. It was also noted that in August 2012 the Taliban's control of the province of Logar was so complete that their justice system practically completely replaced the state courts: even government officials turned to Taliban courts for dispute settlement.² Given the regularity with which the applicant travelled between Pul-e-Alam and [District 1] over an extended period and the strong Taliban presence in his home area and in Pul-e-Alam, I accept that the vehicle in which the applicant was travelling was stopped by the Taliban at a checkpoint. I also accept that they searched the vehicle and questioned the passengers including the applicant.

16. However I have concerns regarding the applicant's claim that he was specifically targeted by the Taliban on this occasion and told to add chemicals to the [product] he sold to the police. The Afghan security forces and particularly the Afghan National police (ANP) and Afghan Local Police (ALP) were reported during 2013 to have been primary targets of anti-government elements (AGEs) with the majority of incidents aimed at bases, convoys, checkpoints and personnel.³ Although there were a number of incidents between 2011 and 2013 where police officers were either drugged or poisoned and killed at security checkpoints, these incidents were perpetrated by other police officers who were Taliban infiltrators or in one case a police cook who delivered food to the checkpoint, and all of the incidents occurred in southern Afghanistan and Ghazni.⁴ As indicated in the country information the police were particular targets of AGEs including in Logar, however there is no evidence before me indicating that poisoning was used against the police in Logar. Additionally the perpetrators of poisoning attacks were Taliban supporters or infiltrators within the checkpoints and not those such as the applicant who sold [product] to a wide range of customers which also included the police. Nor has the applicant ever indicated that he had any formal arrangement with the police or other government officials to supply [product], or that he delivered [product] to the police checkpoints, which may lead the Taliban to perceive him to be a government supporter or collaborator and take an adverse interest in him. After consideration of the country information and the applicant's account which was lacking in detail and implausible particularly in relation to his imprisonment and escape from the Taliban, I accept that the applicant was stopped on the road when travelling between Pul-e-Alam and [District 1]. I also accept that he and others were questioned to determine whether they had government links. However I am not satisfied that the Taliban had prior knowledge of the applicant's employment at [business 1] or knew that the applicant sold [product] to the police at [business 1]. Nor am I satisfied that the Taliban stopped the vehicle specifically looking for the applicant because he sold [product]

² EASO, "Country of Origin Information Report: Afghanistan Security Situation", January 2016, CIS38A8012395, p. 57-58; EASO, "Afghanistan: Insurgent Strategies – intimidation and targeted violence against Afghans", CIS24804, December 2012, pp.25, 27, 54, 60, 85; 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, p. 19, 23-25

³ UK Home Office, "Afghanistan: Persons Supporting or Perceived to Support the Government and/or International Forces", 1 February 2015, CISEC96CF1387, pp. 23-24

⁴ Radio Free Europe / Radio Liberty (RFE/RL), "Afghan policeman poisons, shoots dead seven fellow officers", 19 July 2011, CX269077; British Broadcasting Corporation (BBC), "Afghan police 'poisoned and shot' in Kandahar", 7 February 2012, CX281249; Pajhwok Afghan News -Afghanistan, "Taliban poison six policemen in Kandahar", 1 November 2012, CX298294; The New York Times, "20 Afghan Police Officers Killed in 2 Attacks, Including a Mass Poisoning", 27 February 2013, CX320489

to the police with the intention of coercing the applicant to poison the [product]; or that he was imprisoned and escaped as claimed.

17. I accept that the applicant was frightened after being stopped and questioned on the road. I also accept that he closed the [business 1] and left [District 1] due to a fear of being killed. However I am not satisfied that the applicant was of adverse interest to the Taliban in Logar due to the sale of [product] to the police and targeted for this reason.

Refugee assessment

18. 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

19. 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.

20. The applicant fears being killed by the Taliban on return to Logar due to his refusal to assist them by poisoning the [product] and also due to his escape from them afterwards.

21. I have not accepted that the Taliban or other insurgents were aware of the applicant’s work at [business 1] or that they knew the applicant sold [product] to the police and specifically targeted him on the road for this reason. I am also not satisfied the applicant was imprisoned by the Taliban; that they attempted to coerce him to poison [product] or that he escaped from the Taliban. Nor am I satisfied that the applicant would be of interest on return to Logar for this reason. Although country information indicates the Taliban openly target those who are working for, supporting or associated with the government and/or the international community,⁵ the applicant closed [business 1] over [a number] years ago and there is no evidence the applicant has any other association with the government or the international community. Even if the Taliban have subsequently become aware of the applicant’s former

⁵ DFAT, “Country Information Report Afghanistan”, 18 September 2015, CISEC96CF13366, 3.34 and 3.38

employment and the sale of [product] to the police, country information indicates that low profile people who quit their employment or stop their activities are generally not further targeted by the Taliban.⁶ His work in Pul-e-Alam ceased over [number] years ago and I am not satisfied he would be targeted for this reason.

22. The applicant fears that he will be targeted by the Taliban who would learn of his return from a western country through the local people and believe that he has become an infidel. Logar is 70% Pashtun and in Khoshi district Tajiks constitute approximately 50% of the population. According to EASO, Logar is reputed to be one of the most volatile provinces in the region and constitutes an 'insurgents highway' from Pakistan to Kabul which results in a higher than average ratio of foreign fighters. The Taliban aim to rule the districts of Mohammad Agha, Azra, Khoshi and Baraki Barak which border neighbouring provinces with high insurgent activity and opens up easy supply and backup routes.⁷ EASO in November 2016 reported that the number of violent incidents and assassinations of locals by the Taliban increased starkly in 2014 and this trend continued throughout 2015. In early 2016 it was reported that large parts of the southern districts of Logar were under Taliban control and most of the rest of the province is considered to be high Taliban support zones. There was also evidence of activity by Islamic State in some districts of Logar which were composed mainly of local fighters and Taliban fighters.⁸ EASO has referred to an article by the Institute for War and Peace Reporting (IWPR), which indicates that the Taliban's control of Logar was so complete by 2013 that their justice system practically completely replaced the state courts, with even government officials turning to the Taliban court for dispute resolution.⁹
23. In 2015 DFAT stated that it was aware of occasional reports of returnees from western countries alleging they have been kidnapped or otherwise targeted on the basis of having spent time in a western country but assessed that in general returnees are not targeted on this basis. However it noted that those who are identifiable as being associated with foreign (particularly western) countries may be targeted by insurgent groups such as the Taliban and assessed that returnees from western countries who maintain a low profile including taking measures to conceal their association with the country from which they have returned such as not travelling with documents or symbols that may link them to the Afghan government, the international community based in Afghanistan or western countries did not face a significantly higher risk of violence or discrimination. DFAT refers to a reported incident in 2014 of an Afghani Hazara who was abducted on the road.¹⁰
24. The applicant lived most of his life including his formative years in Pakistan. He lived in [District 1] for approximately four years and has only been in a western country for approximately five years. Nevertheless I accept that the applicant's departure and return to [Village 1] would be known to the local community, his relatives and his friends and that the applicant would be returning after a period of residence in a western country to a small village and district where although Tajiks form [part] of the population and he has family support mechanisms there is a high Taliban presence, a minimal police and security presence and where the Taliban exercise rule of law. While the country information before me, including that discussed later in these reasons, does not indicate that Afghans returning after a period of residence in a western country necessarily face a real chance of harm in all areas of Afghanistan, given the applicant

⁶ UK Home Office, "Afghanistan: Persons Supporting or Perceived to Support the Government and/or International Forces", 1 February 2015, CISEC96CF1387, pp. 44-45

⁷ EASO, "Country of Origin Report: Afghanistan Security Situation", 20 January 2016, CIS38A8012395, p. 57 and. 61

⁸ EASO "Country of Origin Information Report: Afghanistan Security Situation", 1 November 2016, CIS38A80122597, pp. 62-65

⁹ EASO, "Country of Origin Report: Afghanistan Security Situation", 20 January 2016, CIS38A8012395, p. 61

¹⁰ DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 5.21-5.22

would be returning after a significant absence to a conservative rural area he lived in for a relatively short time where there is a significant Taliban presence, and a broad level of support for the Taliban in the Pashtun community around his area, I am satisfied that despite taking precautions to conceal his association with Australia, the knowledge that the applicant has lived in a western country may become known to local community and subsequently come to the adverse attention of the local Taliban through their networks. I am satisfied that there is more than a remote chance he will be imputed with a pro-Western political opinion and targeted for serious harm by the local Taliban if he returned to [Village 1] in [District 1]. I am also satisfied that his imputed political opinion would be an essential and significant reason for the harm.

Fear of harm in relation to all of Afghanistan

25. Section 5J(1)(c) of the Act provides that the real chance of persecution must relate to all areas of the receiving country. For the reasons given below, I am not satisfied that the applicant faces a well-founded fear of persecution in Kabul which the applicant can access by air.
26. The applicant claims that he would be unable to relocate to Kabul as the Taliban have a wide network of sympathisers and supporters and when the Taliban find out where he is they will make an example of him because he disobeyed their demands to poison the [product]. I do not accept the applicant's former employment and the sale of [product] to the police was known to the Taliban; or that the Taliban imprisoned the applicant to force him to poison [the product] sold to the police or that the applicant escaped from the Taliban. Nor am I satisfied that there is a real chance of the applicant being harmed by the Taliban in [District 1] due to his former employment and the sale of [the product] to the police. Given I do not accept the applicant faces a real chance of any harm in [District 1] from the Taliban or anyone else for these reasons, I consider it remote that the applicant would be targeted in Kabul for the same reasons.
27. I am also not satisfied that there is a real chance the applicant would be harmed in Kabul as a returnee/failed asylum seeker from Australia. 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. DFAT in 2017 noted 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, and in 2015 referred to a report of a Hazara from Ghazni province being kidnapped on the road in 2014, but otherwise the circumstances or locations of other incidents are not detailed. People who are identified as having international associations face a high risk of being targeted by anti-government elements and this may possibly include returnees from western countries. 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.¹¹ UNHCR also indicates that some individuals, who are perceived to have adopted values and/or appearances associated with Western countries, may be at risk due to their imputed support for the Government and the international community.¹² Although DFAT and UNHCR referred to Hazara individuals who returned from Australia being targeted whilst traveling between Ghazni

¹¹ DFAT, "Country Information Report Afghanistan", 18 September 2017, CISED50AD5680, 5.18-5.22; DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 5.2, 3.34, 5.21-5.22

¹² UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p. 41

and Kabul in 2014 and listed various attacks targeting those working for, or associated with the government or international community, Kabul is not referred to as an area where returnees are being targeted due to a pro-western political opinion arising from their residence in a western country.

28. I accept that there is a real chance the applicant will be imputed with a pro-Western political opinion and targeted for serious harm by the local Taliban if he returned to [District 1]. However I do not accept the applicant would be of interest to the Taliban outside of [District 1]. Although those who are identified as having associations with the government or the international community face a high risk of being targeted, the applicant left his employment in Logar over five years ago and has not held any identifiable affiliations with international organisations or the Afghan government which would raise his profile in Kabul and lead to him being targeted by insurgents for a pro-Western political opinion. Unlike his home area in [Village 1] which is a small village, he would be returning to Kabul which is a large urban area with a diverse population and large numbers of returnees from Pakistan, Iran and Europe, and would not be easily recognisable as having lived in a western country. I am not satisfied that he would be imputed with an adverse political opinion by the Taliban or other anti-government elements (AGEs) in Kabul as a Sunni Tajik who resided in a western country. I am also not satisfied that the applicant faces a real chance of any harm in Kabul as a western returnee who is perceived to be an infidel or an apostate.
29. The applicant claims to fear being kidnapped for ransom on return as he will be perceived to be wealthy due to his residence in Australia. There is evidence of crime in Afghanistan, which includes kidnapping for ransom. However country information before me does not indicate that people with a similar profile to the applicant including as a western returnee are targeted for kidnapping in Kabul due to a perception that they are wealthy. The applicant would be returning to Kabul city where there are increasingly large numbers of returnees and displaced people. Although he resided in Pakistan for most of his life and only in Afghanistan for approximately four years, he is familiar with the culture and the language and I do not accept he would be readily identifiable as having lived in a western country. Considering all this, I am not satisfied that he would face a real chance of harm in Kabul as a returnee from a western country who is perceived to be wealthy.
30. Country information indicates that Tajiks account for approximately 27% of Afghanistan's population and Islam is the national religion with approximately 99% identifying as Muslim of which approximately 85% identify as Sunnis nationally. In Kabul which is the largest city in Afghanistan, there is a diverse mix of almost all ethnicities with no group clearly dominating. As the vast majority of the population is Muslim, official discrimination of Muslims on the basis of religion is low in Afghanistan.¹³ There is no evidence of any official policy of discrimination on the basis of ethnicity, with ethnic minorities having their own media outlets, political parties and politically active representatives, but there is evidence of societal discrimination at a community level.¹⁴ The information before me does not indicate that Sunni Tajiks in Kabul are targeted on the basis of their ethnicity or religion. The applicant other than through his former employment in Logar which he ceased more than five years ago, has also not been directly associated with any of the groups who are targets for insurgents in Kabul and there is no evidence to indicate that as a Sunni Tajik returning to Kabul he would come to the adverse attention of insurgents.

¹³ DFAT, "Country Information Report Afghanistan", 18 September 2017, CISED50AD5680, 2.6 and 3.6-3.7; EASO, "Country of Origin Information Report: Afghanistan Security Situation", 1 November 2016, CIS38A80122597

¹⁴ DFAT, "Country Information Report Afghanistan", 18 September 2017, CISED50AD5680, 3.1-3.3

31. There is evidence of nepotism within particular ethnic and religious groups which manifests most commonly as favour of ethnic, or tribal or family connections in making employment decisions for both government and private sector positions.¹⁵ I accept that the applicant may be subject to nepotism on return in relation to employment, particularly as he does not have family links in Kabul. However Tajiks form a significant minority in Kabul and the applicant has completed his education up to year 12, is literate in Pashtu and Dari both of which are the official languages of Afghanistan, and is familiar with the culture. Despite the applicant's lack of family connections in Kabul, I am not satisfied there is a real chance that as a consequence of any nepotism he would be denied the capacity to earn a livelihood or that he would be subject to economic hardship such that it would threaten his capacity to exist or would otherwise suffer treatment that may be considered serious harm within the meaning of s.5J of the Act.
32. The applicant claims that the security situation has deteriorated, and it is not safe for him anywhere. A June 2017 article provided by the representative refers to a major bombing in Kabul in May 2017 which was reported as one of the deadliest attacks in Afghanistan since 2001. The representative submits that despite the US and its allies being in Afghanistan for 13 years they have failed to stop the Taliban insurgency and there is now evidence of support for Islamic State.¹⁶ There have been high-profile suicide and complex attacks, particularly in Kabul, with most attacks being carried out by the Taliban against targets linked to the Afghanistan government or international security forces. The Taliban was reported as being responsible for the majority of attacks in Kabul which also specifically targeted civilian groups such as human rights defenders, journalists, lawyers and judges, aid workers and civil servants as well as government institutions, political figures, the Afghan National Defence and Security forces (ANDSF), personnel associated with NATO's Resolute Support Mission and other coalition forces, other security services, international organisations and foreign missions of some countries. Although attacks are often directed at specific targets, the methods of attack can be indiscriminate and often result in civilian casualties.¹⁷ EASO indicates that the Afghan National Security Forces (ANSF) are generally adept in defending major urban centres including Kabul but Kabul still regularly experiences attacks which have targeted high-profile international institutions, both military and civil – including diplomatic personnel and western NGOs, in addition to Afghan authorities and security forces.¹⁸ Although people associated with the government or the international community are at risk of harm in Kabul from the Taliban and Islamic State, I am satisfied that the applicant does not have such a profile in Kabul. There are more high profile attacks in Kabul than in other parts of Afghanistan; however this is due to the high concentration of government buildings, international organisations, diplomatic compounds and international and national security forces which are the primary target of insurgents. Although there are incidents of violence in Kabul against particular civilian groups the applicant has not been associated with these groups. I am satisfied that the government and security forces continue to maintain effective although not absolute control and that the chance of the applicant being harmed inadvertently in an attack or otherwise harmed in general violence is remote in the circumstances. I am not satisfied that the applicant faces a real chance of harm in the foreseeable future from the Taliban or other insurgent groups due to the general security situation in Kabul.
33. The applicant claims that he was recently diagnosed with stage 3 (advanced stage) [cancer] [and] is currently on a treatment plan for his condition which includes undertaking

¹⁵ DFAT, "Country Information Report Afghanistan", 18 September 2017, CISED50AD5680, 3.3

¹⁶ The New York Times, "The Taliban still control large parts of Afghanistan and ISIS has established a foothold", 6 June 2017, <https://www.nytimes.com/interactive/2017/06/06/world/middleeast/afghanistan-isis-taliban-attacks.html?mcubz=1>

¹⁷ DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 2.35, 5.1, 5.5; DFAT, "Afghanistan Security Conditions 1 Jan-31 Aug 2016", 5 September 2016, CIS38A80121778

¹⁸ EASO, "Country of Origin Information Report: Afghanistan Security Situation", 1 November 2016, CIS38A80122597

chemotherapy treatment over an extensive period as well as regular medical follow-up to ensure the effectiveness of the treatment and the normal functioning of other organs. The representative has indicated that if the applicant returned to Afghanistan this will have a serious implications for the management of his condition and his health. DFAT indicates that the Afghan health care system has improved significantly since 2001 with around 85% of the population now having access to basic health services. Despite improvements in some areas the health sector has been severely impacted by the ongoing conflict. While basic medical treatment is free, medicines are often expensive and/or out of date and the poor are often unable to afford them even for common illnesses. Additionally Afghanistan struggles to provide higher-level care beyond the basic functions provided by local health clinics and there is a shortage of trained doctors and health care workers which is further exacerbated by chronic inadequacies in both public infrastructure and lack of training capacities. The Afghan healthcare sector remains heavily dependent on foreign funding.¹⁹

34. I accept that there is a lack of facilities, qualified staff and medication to deal with serious illnesses in Afghanistan. I also accept that the applicant may have difficulty in obtaining treatment and if he were to be unable to obtain or undertake employment this may also impact on his ability to obtain appropriate treatment and suitable medication on return. However I do not accept that he would be denied access to basic services such as would amount to serious harm under s.5J(5) or that he would be differentially denied treatment for one of the essential and significant reasons identified under s.5J(1).
35. Considering all the circumstances, I am not satisfied that there is a real chance of the applicant being harmed in Kabul as a Sunni Tajik returnee from a western country who is perceived to be an infidel, an apostate or wealthy, due to any profile arising from his former employment in Logar, or due to general security situation, his medical condition or for any other reason.

Refugee: conclusion

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

Complementary protection assessment

37. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

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

¹⁹ DFAT, "Country Information Report Afghanistan", 18 September 2017, CISED50AD5680; SIGAR, "Afghanistan's Health Care Sector: USAID's use of unreliable data presents challenges in assessing program performance and the extent of progress", January 2017, <https://www.sigar.mil/pdf/audits/SIGAR-17-22-AR.pdf>

- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

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

Qualifications to the real risk threshold

40. Section 36(2B) of the Act provides that there is taken not to be a real risk that a person will suffer significant harm in a country if the real risk is one faced by the population of the country generally and is not faced by the person personally. I am satisfied that the risk faced by the applicant in [District 1] is not a risk faced by the general Afghan population but is one faced by the applicant personally as a Tajik with an imputed political profile as a western returnee.
41. I have considered whether the applicant could obtain the protection of the Afghan government in returning to [District 1] and have had particular regard to country information pertaining to Taliban activity on the roads between Kabul and Logar noting that there is a significant Taliban presence in and around [District 1] with some districts of Logar being almost entirely under Taliban control. EASO indicated that Logar is one of the most volatile and kinetic provinces in the region and there is limited government accessibility due to security issues. Insecurity in Logar has also restricted freedom of movement and access to education.²⁰ Given the ongoing insecurity in [District 1], the limited government presence including police and Afghan security forces, the strong Taliban presence, and lack of effective Afghan government control in the district and in other parts of Logar, I am not satisfied that the applicant could obtain protection from an authority of Afghanistan such that there would not be a real risk that he will suffer significant harm on his return to [District 1].
42. Section 36(2B) of the Act also provides that there is taken not to be a real risk that a person will suffer significant harm in a country if it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm. For the following reasons I am not satisfied that the applicant faces a real risk of significant harm in Kabul which he can safely access by air.
43. I accept that the applicant has recently commenced treatment for advanced [cancer] in Australia and may have difficulty in obtaining treatment and appropriate medication on return. However I am not satisfied that the inability to obtain treatment would result in the applicant being arbitrarily deprived of his life, or would constitute the death penalty, or torture. Nor am I satisfied that it amounts to cruel or inhuman treatment or punishment or degrading treatment or punishment. I do not accept that the inability to access medical treatment constitutes significant harm as defined in s.36(2A) of the Act.
44. As noted earlier in these reasons, I accept that as a Sunni Tajik the applicant may be subject to nepotism on return, particularly as he does not have any family links in Kabul. However on the evidence I am not satisfied that such discrimination would result in the applicant being

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

arbitrarily deprived of his life, or would constitute the death penalty, or torture. Nor am I satisfied that it amounts to cruel or inhuman treatment or punishment or degrading treatment or punishment. I do not accept that such treatment constitutes significant harm as defined in s.36(2A) of the Act. I have also found that there is not a real chance that he would face other forms of harm in Kabul as a Sunni Tajik and as the 'real risk' test imposes the same standard as the 'real chance' test, I am also not satisfied that there is a real risk of the applicant suffering such harm on the return to Kabul for this reason.

45. I have otherwise found that there is not a real chance that the applicant will face harm in Kabul as a returnee from a western country who is perceived to be an infidel, apostate or wealthy, due to any profile arising from his former employment in Logar, on the basis of the general security situation 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 the return to Kabul for those reasons.
46. I am not satisfied that there is a real risk of the applicant suffering significant harm on return to Kabul but for the following reasons I am satisfied it is not reasonable for him to relocate there.
47. The applicant claims that he has never worked or lived in Kabul which is only safe to return to if you have friends or family networks, employment and accommodation, which the applicant does not have in Kabul. Additionally the applicant has now been diagnosed with advanced cancer [for] which he is undergoing chemotherapy treatment and his return to Afghanistan will seriously impact on his medical condition and his ability to obtain treatment.
48. With limited exceptions, in UNHCR's view the reasonableness of relocation is dependent on the effective availability of traditional support mechanisms, provided by members of the applicant's extended family or ethnic group, and advises that the only exceptions for the requirement of external support are single able bodied men and married couples of working age without identified specific vulnerabilities. Such persons may in certain circumstances be able to subsist without family and community support in urban and semi-urban areas that have the necessary infrastructure and livelihood opportunities to meet the basic necessities of life and that are under effective Government control.²¹
49. Country information indicates that Kabul is under the effective control of the Afghan government. Although DFAT reports unemployment and underemployment are high across Afghanistan large urban areas are home to mixed ethnic and religious communities, and offer relatively greater opportunities for employment and access to services. Due to the city's size and growth, Kabul offers a greater range of employment opportunities than other areas of Afghanistan.²² Agriculture, wholesale and retail trade, manufacturing and construction are the main sectors of employment and those who have foreign language and computer skills tend to be best placed to find well-paid employment in Kabul. Employment growth has been strongest in Kabul's service sector, including small businesses such as family-owned markets, and in the construction industry.²³ In assessing the applicant's ability to relocate to Kabul I have considered that the applicant is a single able bodied male of working age who has completed his high school education and who has experience running a small business in Pakistan and Afghanistan. In Australia he has undertaken work as [different jobs] until he was diagnosed with cancer for which he is currently receiving treatment.

²¹ UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 19 April 2016, CIS38A8012660, p. 86

²² DFAT, "Country Information Report Afghanistan", 18 September 2015, CISEC96CF13366, 2.19 5.15 5.20

²³ *ibid*, 2.19

50. The applicant has demonstrated resilience in travelling from Afghanistan to Australia and has been able to obtain employment in Australia. He has never lived in Kabul and although he lived in Pakistan for over 20 years as well as [District 1], he lived there with family. His parents and substantially younger siblings who are still at school and living in Logar are reliant on him financially, and he does not have any family members in Kabul to assist him on return. I note that the applicant has previously demonstrated resilience and the ability to live without family support having lived in Australia for over five years. I accept that life in Kabul would be considerably different to that in Pakistan or Australia with living standards being substantially lower, despite Kabul having a diversity of ethnic and religious influences and offering greater opportunities for employment and access to services than rural areas. However I note that UNHCR indicates that relocation may not be reasonable for those who present with significant health problems or other specified vulnerabilities identified by UNHCR as requiring durable support. Although the applicant has demonstrated resilience previously, given the change in the applicant's circumstances with the onset of the applicant's serious health issues, I am not satisfied that the applicant in view of his medical condition would be able to obtain accommodation or employment or has the necessary skills and the capacity to subsist in Kabul without established networks or that he will be able to afford access to appropriate medical treatment.
51. Although the applicant would be returning to Kabul where there is access to free basic health services, medicines are often expensive or expired, which can exclude the poor from treatment for common illnesses or provide sub-standard or ineffective treatments. The overall quality of health services remains poor and there is a severe shortage of qualified personnel to provide effective health care service delivery.²⁴ Given that I consider the applicant would not have any financial support and would have difficulty in obtaining work to enable him to subsist I consider that the applicant would only have access to basic health care on return to Afghanistan. I note that the letter from the treating specialist indicates that the applicant is undergoing extensive chemotherapy treatment for his medical condition which over time it is anticipated will reduce his symptoms. He is also being regularly monitored by a range of medical professionals. On the information before me the applicant presents as vulnerable and given his inability to access required medication and the availability of only basic treatment in Kabul and other parts of Afghanistan, I am not satisfied that it would be reasonable for the applicant to relocate to an area where he has no familial or other durable support, and where without financial support his health may deteriorate further and significantly impede his ability to subsist.
52. Having regard to the applicant's circumstances, and in particular his serious and life threatening health issues, lack of family networks, as well as his limited employment options, and lack of financial support, I am not satisfied it is reasonable for the applicant to relocate to Kabul.
53. I have considered whether it is reasonable for the applicant to relocate to other areas of Afghanistan which are under government control including Herat or Mazar-e-Sharif where there are significant numbers of Sunni Tajiks. I am satisfied that the applicant would present with similar vulnerabilities arising from his health issues, lack of durable family support and his inability to access appropriate medication and other than basic and ineffective treatment. I am not satisfied that it is reasonable for the applicant to relocate to any other part of Afghanistan.

²⁴ DFAT, "Country Information Report Afghanistan", 18 September 2017, CISED50AD5680; SIGAR, "Afghanistan's Health Care Sector: USAID's use of unreliable data presents challenges in assessing program performance and the extent of progress", January 2017, <https://www.sigar.mil/pdf/audits/SIGAR-17-22-AR.pdf>

Complementary protection: conclusion

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

Decision

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

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

Applicable law

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.