



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA18/04676

Date and time of decision: 15 November 2018 12:28:00

S MacKenzie, 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 a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a citizen of Afghanistan. The applicant arrived in Australia [in] July 2013 as an unauthorised maritime arrival. On 19 September 2017 he lodged a valid application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV).
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 27 March 2018, on the basis that the applicant did not face a real chance of serious harm or a real risk of significant harm upon return to Afghanistan.

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 17 May 2018, the IAA received a written submission from the applicant's representative (IAA submission). The IAA submission in part comprises argument on issues before the delegate and also refers to claims and evidence that were before the delegate, and are part of the review material. I have had regard to these aspects of the submission.
5. In the IAA submission, the applicant's representative refers to several sources of country information¹ not before the delegate that post-date the delegate's decision. It is new information. As the new information was published after the delegate made her decision I am satisfied it could not have been provided to the Minister. The representative submits that there are exceptional circumstances which justify the IAA considering the new information, specifically, because it is credible and highly relevant to the applicant's claims for protection. The new information reports on civilian casualties in Afghanistan in the first quarter of 2018, and on insurgent attacks on Hazaras or in Hazara areas in Kabul in the past 24 months, including on 22 April 2018 (after the delegate made her decision). Having had regard to the new information and the nature of the applicant's claims for protection, I am satisfied that there are exceptional circumstances to justify its consideration. I agree with the representative that the information is from credible reports that relate to events that post-date the delegate's decision and that are material to the issues under consideration.

Applicant's claims for protection

6. In support of his SHEV application, the applicant provided a statutory declaration, dated 12 August 2017 (SHEV statement). The claims outlined in his SHEV statement can be summarised as follows:
 - The applicant is a Hazara male from Kabul, Afghanistan. His family originate from Bamyán Province;
 - In around 1998, the applicant's father joined the Hezb-e Wahdat Party in Bamyán Province but was killed when conflict broke out between warring factions of the party. The applicant's father's cousin was the local Hezb-e Wahdat [Position 1];

¹ The Conversation, "Eyewitness: a deadly bombing in Kabul", 24 April 2018; United Nations Assistance Mission in Afghanistan (UNAMA), "Quarterly Report on the Protection of Civilians In Armed Conflict: 1 January to 31 March 2018", 12 April 2018; Human Rights Watch, ""No Safe Place" Insurgent Attacks on Civilians in Afghanistan", 8 May 2018

- Following the conflict in Bamyan, the applicant's uncle ([Mr A]), who was not involved in the conflict, occupied the applicant's father's home and farm land because he was next of kin. He threatened the applicant's family not to return to Bamyan Province because he did not want another conflict;
- The applicant lived outside of Kabul between 1999 and 2003 (Pakistan), 2005 and 2007 ([Country 1]), and 2008 and 2010 ([Country 1]);
- In the years prior to him leaving Afghanistan, the applicant felt the security situation had deteriorated and the insurgencies were occurring regularly. Hazaras were frequently being targeted by the Taliban, Islamic State, and their supporters;
- [In] March 2013, the applicant left Afghanistan with the assistance of a people smuggler;
- Since arriving in Australia, the applicant has completely abandoned the Shia faith and identifies as agnostic;
- If returned to Afghanistan, the applicant fears harm from his uncle in Bamyan Province. His uncle will think that he has returned to Bamyan to reclaim family land;
- If returned to Afghanistan, the applicant also fears he will be harmed or mistreated due to:
 - his Hazara ethnicity
 - his imputed Shia faith
 - him being an apostate and abandoning his Islamic upbringing
 - his agnostic beliefs
 - his imputed anti-Taliban / Islamic State political opinion
 - his imputed pro-western political opinion
 - his profile as a failed asylum seeker.

7. On 23 January 2018, the delegate interviewed the applicant (SHEV interview). In the interview, the applicant or his representative provided the following additional information and/or claims:

- The applicant's father held the rank of [Position 1] in the Hezb-e Wahdat Party;
- The applicant still identifies as a Shia Muslim and, consistent with his time in Afghanistan, does not practise his faith;
- The applicant does not know the name of any of his uncles and is unsure if his father ever owned property in Bamyan Province.

8. Following the SHEV interview, the applicant's representative provided a written submission dated 31 January 2018 (post-SHEV interview submission), which provided further information about some of the applicant's claims. Specifically, the representative submitted that the applicant faced harm in Afghanistan due to 'his abandonment of the practices of the Islamic faith he held prior to his arrival in Australia', and that he faced harm in Kabul due to his ethnicity and imputed religious beliefs.

Refugee assessment

9. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

10. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

Identity and home area

11. Since his arrival in Australia, the applicant has consistently claimed to be a Hazara born in Kabul [and] a national of Afghanistan. He has also consistently claimed that, while he spent periods outside of Afghanistan from 1999 – 2003, 2005 – 2007, and 2008 – 2010 for employment, he has only ever resided in Kabul when living in Afghanistan, prior to his departure for Australia in March 2013.
12. In support of his identity the applicant provided a copy of his Taskera (with accompanying NAATI translation) issued in February 2013. The Taskera records the applicant’s ‘Home Village’ as being [in] Bamyan Province. However, the applicant’s evidence in the SHEV interview, which I accept, is that while his family originate from Bamyan Province he has never been there, or any other part of Afghanistan. I also accept the applicant’s consistent evidence that he has significant family who remain in Kabul, including his mother, step-mother, and some siblings. In the SHEV interview, he advised the delegate that he sends money to his brother to give to his mother in Afghanistan. He also advised that his mother and step-mother cohabitate in a house in Kabul that is still owned by the applicant’s father and his father’s brothers.
13. I accept that the applicant is a national of Afghanistan. In the post-SHEV interview submission, the applicant’s representative referred to Kabul as the applicant’s ‘hometown’ and expressed the applicant’s fear in terms of the harm he may face there on account of his ethnicity and imputed religious beliefs. When I consider the applicant’s previous ties to Kabul, and his

substantial family network remaining there, I am satisfied that if returned to Afghanistan this is the area to which he would return.

Events in Afghanistan

14. I accept the applicant's consistent evidence that, in around 1998, his father joined the Hezb-e Wahdat Party in Bamyan Province and was killed in a local conflict, and that prior to his death he bought and sold weapons. I also accept his consistent evidence that his father's cousin was a [Position 1] in Hezb-e Wahdat. However, I found the applicant's claim that his paternal uncle named [Mr A] now occupied the applicant's father's home in Bamyan and that he threatened the applicant's family following his father's death unconvincing. In particular, I consider the applicant's consistent evidence throughout the SHEV interview that he did not know the names of his father's brothers or whether his father ever owned property in Bamyan not supportive of this claim. Further, the applicant also advised the delegate that, of his father's two brothers, one was deceased and he did not know where the other was. When specifically asked about his uncle named [Mr A], the applicant said he thought he was a 'half uncle' and indicated that his father and [Mr A] were half-brothers born of the same father. He also stated that his father's half-brothers died prior to him (the applicant) being born.
15. Towards the end of the SHEV interview, following a 'natural justice break', which is an opportunity for the applicant to consult privately with his representative, the applicant was asked why he could not return to Afghanistan. In response, he stated that he could not return, in part, due to "the blood feud". When asked for details, the applicant raised a new claim that his father was also a [Position 1] in the Hezb-e Wahdat Party. He said that he did not know what his father and his father's cousins did during the war, and that they had "some kind of issues" with people in Bamyan and that those people "may have been harmed". He stated that while he had not been threatened personally, his family were threatened by people in Bamyan and that he is at risk because he is the son of his father. He also stated that he does not know who it is that may attempt to harm him. The applicant made no mention of having received threats from his uncle [Mr A] or that he had an intention to travel to Bamyan if returned to Afghanistan. Overall, I considered the applicant's evidence in the SHEV interview in respect of a "blood feud" or that he or his family have been threatened by persons in Bamyan vague.
16. On the evidence before me, I am not satisfied that the applicant was threatened by a family member, or any other person or group, in Bamyan in respect of his father's involvement in the Hezb-e Wahdat Party in around 1998, or for any other reason. I also consider that if the applicant's father was a [Position 1] in Hezb-e Wahdat, or if the applicant had been threatened by people in Bamyan, that he would have mentioned these claims in his SHEV statement which was prepared with the assistance of a legal practitioner. I do not accept these claims. Further, I am not satisfied that the applicant faces harm from an uncle in connection with family land in Bamyan.
17. While I have accepted that the applicant's father and other family members were involved in conflict involving the Hezb-e Wahdat in Bamyan in around 1998, on the evidence before me, I am not satisfied that, in 2018, the applicant faces a real chance harm on return to Afghanistan on this basis. In coming to this conclusion, I have considered that the applicant has lived in his home area Kabul for a significant part of his life and has not faced any difficulty in relation to his familial links to the Hezb-e Wahdat Party in Bamyan some 20 years ago now. I have also considered that, on return to Afghanistan, the applicant will reside in Kabul, not Bamyan. I find the chance that the applicant will face harm for these reasons to be remote.

Shia faith

18. I found the applicant's claim in his SHEV statement that since arriving in Australia he has 'abandoned [his] Islamic upbringing', 'completely abandoned all religion', 'adopted agnostic beliefs', and that he fears harm for 'being an apostate' unconvincing.
19. When asked in the SHEV interview if he had abandoned his Shia faith, the applicant advised the delegate that he still identified as a Muslim but did not practise his faith in Australia, and nor had he ever practised his faith in Afghanistan. I also note the applicant's evidence in an earlier interview with the Department of Immigration on 30 July 2013 (arrival interview) that he identified as a Shia Muslim.
20. In the post-SHEV interview submission, the applicant's representative claimed that the applicant faced harm on return to Afghanistan because of 'his abandonment of the practices of the Islamic faith he held prior to his arrival in Australia'. It was also submitted that the applicant had 'provided credible evidence that he no longer practises the Islamic religion like he once did'.
21. Having considered all of the evidence before me, I prefer the applicant's oral evidence in the arrival and SHEV interviews that he continues to identify as a Shia Muslim. I also accept his evidence in the SHEV interview that he did not practise his Shia faith in Afghanistan, and that he continues to not practise his Shia faith in Australia. I do not accept that the applicant no longer believes in Islam, that he has abandoned his Shia faith, or adopted agnostic beliefs. I am satisfied that if returned to Afghanistan the applicant would do so as a non-practising Shia Muslim.

Return to Kabul

22. In his SHEV statement, the applicant stated that he feared harm from anti-Hazara and anti-Shia groups such as the Taliban and Islamic state, and their supporters, if returned to Afghanistan. He claimed that he would be imputed with an anti-Taliban, anti-Islamic state, and/or pro-western political opinion. He also claimed he would face harm because of his profile as a failed asylum seeker. I have also considered whether the applicant would face harm as a non-practising Shia Muslim.
23. Kabul is Afghanistan's capital and largest city. Country information before me indicates that Kabul's Hazara population is estimated at around 1.2 million to 1.5 million (or 40-50 per cent of Kabul's population), making Hazaras the largest ethnic group in the city.²
24. There are no recent reports before me of the Taliban carrying out mass casualty attacks against the Hazara and/or Shia population in Kabul, although there have been attacks by other groups, in particular Islamic State, in recent years in that city.³ Country information indicates that other recent attacks carried out by the Taliban and other anti-government elements (AGEs) in Kabul have been primarily against government and security personnel, and the international community.⁴ In October 2016, Afghanistan Analysts Network (AAN) reported that the Taliban

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Afghanistan", 18 September 2017, CISED50AD5680, 2.8; DFAT, "DFAT Thematic Report - Hazaras in Afghanistan", 18 September 2017, CISED50AD5681, 2.4

³ DFAT, "DFAT Country Information Report Afghanistan", 18 September 2017, CISED50AD5680; DFAT, "DFAT Thematic Report - Hazaras in Afghanistan", 18 September 2017, CISED50AD5681; Human Rights Watch, "'No Safe Place' Insurgent Attacks on Civilians in Afghanistan", 8 May 2018

⁴ DFAT, "DFAT Country Information Report Afghanistan", 18 September 2017, CISED50AD5680; Human Rights Watch, "'No Safe Place' Insurgent Attacks on Civilians in Afghanistan", 8 May 2018

had convincingly spoken out against sectarianism and stayed away from violence that could stir sectarian hatred.⁵

25. In 2017, DFAT assessed that the number of attacks in 2016 and 2017 in Afghanistan raised concerns that Shias may now be vulnerable to being targeted based on their religious identity by Afghanistan-based groups.⁶ DFAT assessed that those attacks demonstrated that Shias (Hazara and non-Hazara) are at risk of being attacked by Islamic State based on their religion, and that Shias are particularly vulnerable to attacks when assembling in large and identifiable groups, such as during demonstrations or when attending mosques during major Shia festivals.⁷ DFAT also assess that the Afghan government lacks the ability to adequately protect vulnerable groups in some areas of the country, particularly outside major urban areas and provincial capitals.⁸ DFAT does not indicate a level of risk specifically for Shias living in Kabul.
26. In the IAA submission, the applicant's representative highlighted three recent attacks against Shias in Kabul in late 2017 and early 2018. The attacks by Islamic State were targeted at those attending Shia mosques, shrines or cultural centres.⁹ A fourth attack, on 22 April 2018, targeted a voter registration centre in a Hazara populated area of Kabul.¹⁰
27. I accept that the majority of the attacks that targeted the Shia community in Kabul between 2016 and 2018 were carried out by Islamic State and directed at Shias or Hazaras attending political demonstrations, mosques, religious commemorations, or cultural centres. I also accept that practising Shia Muslims who attend communal worship and religious festivals in Kabul are vulnerable to attacks by certain groups. However, in the applicant's circumstances, his evidence, which I have accepted, is that he is a non-practising Shia Muslim who has never practised or applied his religion and, given this, I find he will not practise his faith if returned to Kabul. Further, the applicant has not claimed to have ever been involved in politics and nor has he expressed a desire to do so if returned to Afghanistan. I consider the applicant is not politically active and a low-level adherent of the Shia faith. I do not accept the applicant's representative's post-SHEV interview submission that the applicant would be 'forced to participate in Shia religious gatherings' on return to Afghanistan, which is inconsistent with the applicant's evidence in the SHEV interview that as a Shia Muslim he did not practise his faith when he lived in Kabul.
28. I have also considered the post-SHEV interview submission that the applicant will be perceived in Afghanistan as an atheist or an apostate. The submissions and country information cited are primarily based on an assumption that the applicant has 'abandoned' his Shia faith, or converted from, or been critical of, Islam, which I have not accepted. In September 2017, DFAT reported that persons accused of blasphemy or apostasy are particularly vulnerable to societal discrimination, which may take the form of extreme violence.¹¹ However, in the applicant's circumstances, I am not satisfied he will be perceived as an apostate, or any other related profile, on account of his failure to attend mosque or non-participation in Shia religious rituals or commemorations. There is nothing to suggest that the applicant's past and current non practise of Shia rituals or traditions is known by anyone in Afghanistan who the applicant fears. The applicant left Afghanistan at the age of around [age] years and he has not claimed to have

⁵ AAN, "With an active cell in Kabul, ISKP tries to bring sectarianism to the Afghan war", 19 October 2016, CX6A26A6E11358

⁶ DFAT, "DFAT Thematic Report - Hazaras in Afghanistan", 18 September 2017, CISED50AD5681, 3.6

⁷ Ibid, 3.9

⁸ Ibid, 4.1

⁹ Human Rights Watch, ""No Safe Place" Insurgent Attacks on Civilians in Afghanistan", 8 May 2018

¹⁰ Human Rights Watch, ""No Safe Place" Insurgent Attacks on Civilians in Afghanistan", 8 May 2018; The Conversation, "Eyewitness: a deadly bombing in Kabul", 24 April 2018

¹¹ DFAT, "DFAT Country Information Report Afghanistan", 18 September 2017, CISED50AD5680, 3.13

faced harm or difficulty in the past on account of his profile as a non-practising Shia Muslim. There is no credible evidence to suggest that the applicant's actions or inactions in Australia have, or that there is a real chance that they will, come to the attention of the Afghan authorities or to any AGEs or anyone on his return to Afghanistan. The applicant does not claim he would publicly or actively denounce or speak out against Islam, its teaching and traditions, that he would denounce or speak out against Afghan institutions (which I note are predicated on Islamic principles), nor encourage others to cease practising Islam, or that he would commit any sort of blasphemy. I am not satisfied that the applicant would seek to publicise that he has not been actively practising Islam or that he would be outspoken about religion or that he would act in a manner that would attract adverse attention should he return to Afghanistan. I do not accept that if returned to Afghanistan, the applicant would face a real chance of harm arising from accusations of apostasy or blasphemy, or that he would be imputed as an atheist.

29. In the SHEV interview, the applicant advised the delegate that when living in Afghanistan he was never harmed, mistreated, or discriminated against due to his Hazara ethnicity. DFAT assess those ethnic groups who are in the minority in the area in which they reside face a risk of societal discrimination which may include the denial of access to employment or housing.¹² However, as noted above, Hazaras form the largest ethnic group in Kabul. The applicant previously worked in Kabul and his family remain there in the family home. On the information before me, I find that the applicant is able-bodied, of working age, who does not present with any health problems or other vulnerabilities that would impact his ability to seek and obtain employment in an area that he is familiar with. On the evidence before me, I am not satisfied that the applicant faces a real chance of suffering discriminatory treatment relating to housing, employment and access to services on return to Kabul.
30. I have accepted there have been occasional attacks by Islamic State against Shias in Kabul. However, country information indicates that despite a number of security incidents the Afghan government retains effective control of Kabul and the Afghan security forces are generally capable and effective at protecting the major population centres.¹³ Having regard to the information above and considering the security presence in Kabul, the size and population of city, the frequency and size of the attacks against Shias and Hazaras there, and the applicant's lack of other profile or proximity connected to those in high profile or other vulnerable groups, I find the chance that he would be seriously harmed in Kabul due to his ethnicity or religion, or as a Shia Hazara, to not rise to a real chance. Further, I am not satisfied that the applicant will be imputed with a political opinion of being anti-Taliban and/or anti-Islamic State, arising from his ethnicity and religion, or for any other reason.
31. DFAT assesses that in general, returnees from western countries are not specifically targeted on the basis of being failed asylum-seekers, although there were some reports in 2014 of returnees from western countries alleging they had been kidnapped or otherwise targeted on the basis of having spent time in a western country.¹⁴ Some reports indicate that simply being identified as a returnee has put persons at risk as returnees face a general assumption that they have adopted values and/or appearances associated with western countries while abroad and are reportedly at risk of being mistaken for collaborators with the government and the international community. Other reports indicate that returnees from the west may be viewed

¹² DFAT, "DFAT Country Information Report Afghanistan", 18 September 2017, CISED50AD5680, 3.5

¹³ UK Home Office, "Country Policy and Information Note Afghanistan: Security and humanitarian situation", 1 August 2017, OG6E7028853, p.8, 10

¹⁴ DFAT, "DFAT Country Information Report Afghanistan", 18 September 2017, CISED50AD5680, 5.20; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3, p.41

as foreigners or spies and targeted.¹⁵ However, the reports and incidents cited by UNHCR and DFAT do not refer to Kabul as an area where returnees are targeted on the basis of being perceived as western. Further, there have been no reports of individual returnees from Australia being targeted since two incidents in 2014 involving returnees of Hazara ethnicity¹⁶ (both in Ghazni, removed from Kabul).

32. In relation to Afghanistan more generally, DFAT and UNHCR assess that returnees who are identified as having associations with the government or the international community face a high risk of being targeted by AGEs.¹⁷ In December 2017, European Asylum Support Office (EASO) reported that documented instances of individual targeting of returning Afghans on the basis of 'westernisation' following time spent outside Afghanistan were scarce.¹⁸ Apart from being a Shia Hazara returnee, I am satisfied the applicant does not hold any other such profile affiliated with the government or international community, nor any proximity to persons who are so affiliated and there is no information to indicate he would upon return.
33. Overall, the country information before me does not indicate that in Kabul there is systematic targeting of returnees, or Shia Hazara returnees, including those who return from Australia, or who are failed asylum seekers. Even accepting that the applicant may be identified as a former asylum seeker from Australia, I am not satisfied that the applicant has any identifiable affiliations with international organisations or the Afghan government which would raise his profile and lead to a real chance of him being targeted by the Taliban or other insurgents in Kabul.
34. On the evidence before me, I am not satisfied that returnees like the applicant, who have lived in a western country like Australia for several years and have sought asylum, are targeted by the Taliban, Islamic State, or other groups due to an imputed pro-western opinion, or as a returnee asylum seeker, in Kabul. I am not satisfied that the applicant faces a real chance of harm in Kabul due to his asylum application in Australia, due to his background, due to his time spent in Australia, due to any perceived westernisation, or a combination of these factors. I am not otherwise satisfied that, in Kabul, the applicant will be imputed with a political opinion of being anti-Taliban and/or anti-Islamic State due to his time spent in Australia/the west.
35. Although not specifically raised by the applicant, the delegate considered whether the applicant faced harm in Kabul due to the general security situation. Country information before me indicates that the population in Afghanistan are exposed to generalised and indiscriminate violence relating to conflict in the country.¹⁹ In terms of the general security situation in Afghanistan, I accept that the government does not exercise uniformly effective control over all parts of the country, particularly in rural areas. Kabul is a large urban centre under effective government control. In 2017, the UK Home Office reported that civilian casualties in Afghanistan remained low with around 0.03% (or 0.02% in Kabul) of the population injured or

¹⁵ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3, p.41

¹⁶ UNHCR "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3

¹⁷ DFAT, "DFAT Country Information Report Afghanistan", 18 September 2017, CISED50AD5680, 5.22; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", 19 April 2016, UN6C8EFBB3

¹⁸ EASO, "EASO Country of Origin Information Report. Afghanistan. Individuals targeted under societal and legal norms", 12 December 2017, CISED50AD8181, p.92

¹⁹ UNAMA, "Quarterly Report on the Protection of Civilians In Armed Conflict: 1 January to 31 March 2018", 12 April 2018; Human Rights Watch, "'No Safe Place' Insurgent Attacks on Civilians in Afghanistan", 8 May 2018

killed each year.²⁰ The evidence before me does not support that the Afghan government or security forces are losing control of Kabul. While I accept that civilians have been victims of attacks from time to time, taking into account the general security situation, and the size and diversity of the city, I find the chance that the applicant would be harmed as a bystander, or inadvertently caught up in an attack, or otherwise harmed through generalised violence is remote. I am also satisfied that any harm the applicant may possibly face in relation to generalised violence would not be for the essential and significant reason or reasons of his race, religion, nationality, membership of a particular social group or political opinion, but rather a consequence of any ongoing insurgency or insecurity present in the country overall. Accordingly, s.5J(1)(a) and 5J(4)(a) of the Act would also not be satisfied.

36. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

37. 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

38. 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

39. Under s.36(2A), a person will suffer 'significant harm' if:

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

40. I have concluded that the applicant is not a person of interest to the Taliban, Islamic State, or any other person or group in Afghanistan, on account his religion or ethnicity, due to an imputed opposition to the Taliban or Islamic State, or as a Shia Hazara, and does not face a real chance of harm on this basis. I have also concluded that the applicant does not face a real chance of harm in connection with his familial links to the Hezb-e Wahdat Party in Bamyan. I have further concluded that the applicant does not face a real chance of harm for any other reason including from generalised violence, the general security situation in Kabul, his time spent in Australia, due to any perceived westernisation, or due to him being a returning asylum

²⁰ UK Home Office, "Country Policy and Information Note Afghanistan: Security and humanitarian situation", 1 August 2017, OG6E7028853, p.8

seeker who has resided in a western country. Based on the same information, I find that the applicant does not have a real risk of suffering significant harm in Kabul.

41. After having regard to the applicant's circumstances, I find that he does not face a real risk of suffering significant harm.

Complementary protection: conclusion

42. 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

In this Act, unless the contrary intention appears:

...

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.