



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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AFGHANISTAN

IAA reference: IAA21/09472

Date and time of decision: 17 August 2021 16:59:00

D Hughes, Reviewer

**Decision**

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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 a referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a citizen of Afghanistan. He applied for a protection visa on 28 April 2017. A delegate of the Minister for Immigration refused to grant the visa on 7 July 2021. The delegate did not accept the applicant was a citizen of Afghanistan, finding instead that he was a national of Pakistan.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. The applicant made one submission to the IAA.
4. The submission contains new documents relating to the applicant's identity, including a copy of the applicant's Taskera (an Afghan national identity document) and translation; and an extract from the website of the Afghan Embassy in Canberra. There are also several supporting documents relating to the applicant's family circumstances in Australia, including birth certificates and maternal discharge documents relating to the applicant's children; an additional statement from the applicant; a statement from the applicant's partner [Ms A]; and a reference from the applicant's father-in-law, [Mr A].
5. I am satisfied this is credible personal information, which was not previously known and, had it been known, may have affected the consideration of the applicant's claims. The evidence substantiates aspects of the applicant's profile and background. While it is for the applicant to make his own case, I accept his submission that he was not asked many questions at the visa interview about his life in Afghanistan, or the relevance of his family in Australia to his profile on return to Afghanistan. The applicant's Taskera is of significance as he did not provide this evidence to the Department prior to the decision was made. I consider this would have been significant to the delegate's assessment. In terms of the new information in the submission, I am satisfied there are exceptional circumstances to justify considering the new information.
6. The applicant has provided copies of new country information relating to the evolving security situation in Afghanistan from Reuters, the Long War Journal, UNAMA and other sources. Each of the reports postdate the delegate's decision. Given the dates of this information, I am satisfied the information was not, and could not have been, provided to the Minister before the Minister's delegate made the decision. The security situation in Afghanistan has sharpened acutely since the delegate's decision was made, in ways material to the applicant's risk profile. I am satisfied there are exceptional circumstances to justify considering the new information.
7. The representative's written submission contains new country information relating to the applicant's 'family status risk' and a claim that he faces a real risk of significant harm if returned to Afghanistan by reason of his time in the west and having a marriage with an Australian, non-Hijab wearing, non-Muslim woman, and having Australian children.
8. The information provided does predate the delegate's decision. The delegate did not consider this as a risk profile, however that was reasonable given his assessment of the applicant as a national of Pakistan and the country advice regarding persons with western

links as they relate to Pakistan.<sup>1</sup> It appears the applicant has not appreciated this risk profile and in the submission he emphasises his lack of representation at the time. I do not consider that alone explains his failure to raise this as a claim at an earlier time. I note it is the applicant's responsibility to make his case. However, I also accept this is a risk profile arising on the evidence he did advance (relating to his family and time in Australia) and that the focus of the decision with respect to Pakistan meant that relevant country analysis was not considered. In those circumstances, I am satisfied this information was not, and could not have been, provided to the Minister before the delegate made the decision. Having regard to the same matters above, I am also satisfied that there are exceptional circumstances to justify considering the new information.

9. Given the unprecedented deterioration in the security situation in Afghanistan, I have obtained new country information regarding the security and humanitarian situation in Afghanistan. I am satisfied there are exceptional circumstances to justify considering the new information.<sup>2</sup>

### **Applicant's claims for protection**

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10. The applicant's claims can be summarised from the visa application as follows:

- He is a Sunni Pashtun from Kandahar Province in Afghanistan.
- His brother was killed by the Taliban. His father was kidnapped by the group and his whereabouts are unknown. The Taliban also beat the applicant with a gun, [inflicting specified injuries].
- If he returns to Afghanistan, he will be killed by the Taliban. There is no government. The Taliban rules the country and can do anything.
- He could not seek help as everyone is scared of the Taliban. No one can protect him. There is no law and order. Every day there are killings and bombings by the Taliban.
- He cannot relocate because the system is in the hands of the Taliban. He could not move to another part of Afghanistan, as the country is ruled by the Taliban.

11. With respect to Pakistan, the applicant claimed as follows:

- He cannot stay in Pakistan, because there are so many terrorist groups, such as Lashkar-e-Jhangvi, Lashkar-e-Taiba, Sipah-e-Sahaba. These groups would come to his place and ask him why he was not going to Afghanistan for jihad. They would also ask for money which made life in Pakistan difficult for him.
- He lived in Pakistan illegally. He did not have any papers to stay in Pakistan, so he cannot do anything there. Even the police are involved with these groups.

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<sup>1</sup> DFAT, 'Country Information Report - Pakistan', 20 February 2019, 20190220093409.

<sup>2</sup> UN Office for the Coordination of Humanitarian Affairs, 'Afghanistan: Internal Displacement in Kabul - Flash Update No. 4',

[https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/flash\\_update\\_4\\_-\\_internal\\_displacement\\_-\\_kabul\\_15\\_aug\\_2021.pdf](https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/flash_update_4_-_internal_displacement_-_kabul_15_aug_2021.pdf), 15 August 2021; The New York Times, 'Afghanistan Live Updates: 20-Year U.S. War Ending as It Began, With Taliban Ruling Afghanistan', 16 August 2021, 20210816095115; The Economist, 'The Taliban's terrifying triumph in Afghanistan', 15 August 2021, 20210816081613; T Akhgar, R Faiez & J Gambrell, 'Taliban take Kandahar, Herat in major Afghanistan offensive', Associated Press, 13 August 2021, 20210813074704.

- When he was in Pakistan, they killed a store owner in [a named location]. He was riding his motorbike at the time, and a bullet hit his bike. This is the type of targeted killing going on in this region.
12. In the submission to the IAA, the applicant states that he is also at risk of harm by reason of his time in the west and having married an Australian, non-Hijab wearing, non-Muslim woman, and also having Australian children.

### **Factual findings**

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13. I have had the benefit of assessing substantially more evidence regarding the applicant's identity and background than was before the delegate.
14. In terms of the applicant's evidence regarding his identity and citizenship, the delegate placed considerable weight on the applicant's failure to provide a taskera or seek to obtain an 'absentee taskera' from the Afghan embassy in Canberra.
15. It is evident that the applicant had a considerable window (around four years) in which to provide a copy of his taskera, yet he failed to do so. Given that failure, I consider it reasonable for the delegate to have concluded the applicant was not a citizen of Afghanistan, given the lack of any identity documents and other evidence that linked him to Pakistan.
16. In his submissions to the IAA, the applicant provided a copy of a taskera and translation that is consistent with his claimed background. I am very conscious of the prevalence of fraud in Pakistan and Afghanistan and the vulnerability of the taskera to such fraud,<sup>3</sup> however the document is consistent with his narrative, has several verification stamps, and there is nothing before me that obviously undermines its provenance.
17. In addition to the taskera, the applicant provided some generic information that appears to be an informal translation from the Afghan embassy in Canberra, regarding the process for obtaining absentee taskeras and time required to obtain such documentation through the embassy. While that tells me nothing about his specific circumstances or whether he initiated this process, I do consider it provides some additional context to the delegate's concerns about the applicant's apparent failure to engage with this process.
18. In terms of Pakistan, the applicant claimed he had no documentation. He claimed that they were refugees and not issued documents. He said they were looked down upon. At the interview, the delegate asked if they registered as refugees with the Pakistani authorities or the UNHCR. He said he did not register with the Pakistani government. He said if they did register, they would be asked to provide income or money to the authorities. The applicant ran a [product] store while he was in Pakistan. He has made numerous transactions to Pakistan while he has been in Australia, a number of which have been receipted by his brothers in Pakistan, through the *hawala* system. While the applicant did not have documentation, he left Pakistan on a passport arranged by the people smuggler.
19. DFAT indicates there are about 1.4 million registered Afghan refugees, and an estimated one million unregistered Afghans in Pakistan. There is a range of documentation available to Afghan refugees including Proof of Registration cards and Afghan Citizenship Cards.<sup>4</sup>

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<sup>3</sup> COISS (DHA), 'Afghanistan: 20210415145526 - Afghan identity documents (Tazkira Taskira Taskera)', 27 April 2021, 20210427100901; DFAT, 'Country Information Report - Pakistan', 20 February 2019, 20190220093409.

<sup>4</sup> DFAT, 'Country Information Report - Pakistan', 20 February 2019, 20190220093409.

20. I have weighed the applicant's submissions, and I accept that history could suggest the applicant is registered/documented or even is recognised as a citizen of Pakistan. However, I also do not consider any of those factors are implausible or contradict his claims to be undocumented in Pakistan. I consider it equally plausible his life in Pakistan was informal and assisted by others as he contends and the proceeds from his late father. I consider it plausible the payments made to his family were through hawala and are also not determinative of their own statuses in Pakistan. I also consider DFAT advice indicates that corruption is common, and passports can be obtained through fraudulent primary documents.<sup>5</sup>
21. Beyond those considerations, the applicant has provided additional evidence to support his contention to be a citizen of Afghanistan, including the belated provision of his taskera and his explanation for how it was obtained and the reason for the delay in doing so. I have also given some weight to the evidence of his wife [Ms A] and his father-in-law [Mr A], who both contend that the applicant has identified as a national of Afghanistan, with family that live in Pakistan.
22. Assessing the evidence of those that claim to be undocumented is challenging. By definition, there is a lack of corroborative documentation. It typically requires consideration of whatever other evidence is available. I consider the delegate's concerns about the applicant's status in Pakistan to be reasonable. As noted above, I have benefitted from additional evidence provided by the applicant which I consider greatly assists in this assessment.
23. In all the circumstances, I accept the applicant's account of his life in Pakistan and that he was undocumented or, at least, that he had and has no formal right to return or reside in Pakistan. I accept the applicant is a citizen of Afghanistan and that he left the country in or about 2008 and lived informally in Pakistan prior to coming to Australia. The applicant's ties are to Kandahar, and I consider this is the area he would return to live in Afghanistan.

#### **Claims related to Afghanistan**

24. The applicant's claims regarding his past experiences in Afghanistan were not particularly detailed in the visa application, and only expanded on in a supplementary document. At the visa interview, the delegate did not question the applicant about these claims, asking instead whether the applicant had other reasons for leaving Afghanistan (i.e. beyond his claims related to his father and brother).
25. In the IAA submission, the applicant provided an additional statement in which he expanded on these claims. He claimed his father worked as a businessman selling [products] in their home area. The Taliban was active in the area they were living, and would ask vendors for goods, favours or rewards to further their cause. His father refused to give them any money or support them because he believed what they were doing was wrong.
26. Two or three days after this happened, the Taliban came to his house. His brother was killed, and his father was kidnapped. The applicant, who was only [age range], tried to grab his father and was hit in the mouth with a gun, [inflicting injuries]. He claims they buried his brother and made arrangements to leave Afghanistan.
27. The applicant's account is limited, but what has been put forward has been consistently advanced. The applicant has not sought to embellish his account or profile. He has provided a

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<sup>5</sup> DFAT, 'Country Information Report - Pakistan', 20 February 2019, 20190220093409.

plausible account of the motivation for the killing of his brother, the abduction and likely death of his father, and the serious physical attack he experienced.

28. Based on the evidence before me, I accept that account.
29. The applicant has [number] Australian born children. His wife is an Australian citizen and a non-practising Christian.
30. The applicant and [Ms A] contend she and the children would return to Afghanistan with him. I do not at all doubt the genuineness of their sentiments, however given the insecurity in Afghanistan, and their status here as citizens, I am not satisfied they would return to Afghanistan. I do accept that this is an aspect of the applicant's own profile on return to Afghanistan, and I have weighed that below.

### **Refugee assessment**

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31. 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**

32. 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.
33. The applicant is from the Sunni Pashtun religious and ethnic majority. While I consider there are religious and ethnic minorities that have elevated risk profiles in Afghanistan, I am not satisfied this is a risk profile the applicant holds.
34. The applicant's profile relates to his family's past profile and enmity from the Taliban, and his profile linked to his time and family in the west.
35. I have accepted the applicant would return to live in Kandahar.
36. Having accepted the applicant's father was abducted, his brother killed and the applicant himself suffered a violent attack, I accept the applicant's family profile with the Taliban was

significant. Given the severity of the attack, and the applicant's age at the time, I consider that profile may have been even more significant than he appreciates or recalls.

37. In the country advice put forward by the applicant, the UNHCR highlights the risk profiles of civilians perceived as supporting the government or the international community. There are reports of civilians being killed or abducted to punish them for supporting or being perceived to support the government, with the killings intended to serve as a warning to others. Groups such as the Taliban have also been reported to have targeted family members.<sup>6</sup>
38. As the applicant's family had no other apparent profile at the time, I consider this was the reason the applicant, his father, his brother and family were targeted in or around 2008, principally because of his father's refusal to yield and support Taliban demands.
39. Over ten years have passed since these incidents. However, a concern here is whether the applicant would be recognised by local Taliban and linked to that perceived profile of persons supportive of the government (or anti-Taliban).
40. In terms of the applicant's profile, an additional consideration is the applicant's profile from Australia, in particular his time in the west and his marriage to a Christian-born, non-Muslim Australian woman.
41. UNHCR highlights the risks to persons who have spent time in the west and are 'westernised', particularly young people who have not spent time in Afghanistan, have embraced secularism, are overtly westernised in appearance or mannerisms, and who may have accents and struggle with the language.<sup>7</sup> These vulnerabilities appear to be particularly acute for those who have spent their formative years in the west, and Afghan women who have lived in the west. Attitudes to the west are also quite different in urban areas such as Kabul compared to rural areas. However, EASO states that documented instances of individual targeting of returning Afghans on the basis of 'Westernisation' due to having travelled in or lived in Europe, holding Western ID documents, or adopting ideas that are seen to be 'un-Afghan', 'Western' or 'European' following time spent outside Afghanistan were scarce.<sup>8</sup> Societal attitudes towards Christianity also remain negative.<sup>9</sup> EASO provides some limited indication that Afghans that adopt European attitudes to marriage are not able to do so openly as this is not socially acceptable. This is within a context where returnees may face community gossip and rumour.<sup>10</sup>
42. The final consideration here is the current security environment within Kandahar. Up until very recently, Kandahar City and Shah Wali Kot district remained under government control. In the applicant's submissions, all indications were that the districts in Kandahar (including Shah Wali Kot) were under Taliban control, and the provincial capital was under siege.<sup>11</sup> As of

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<sup>6</sup> UNHCR, 'Eligibility Guidelines for Afghanistan', 30 August 2018, CIS7B839419284.

<sup>7</sup> UNHCR, 'Eligibility Guidelines for Afghanistan', 30 August 2018, CIS7B839419284.

<sup>8</sup> EASO, 'Afghanistan - Individuals targeted under societal and legal norms', 12 December 2017, CISED50AD7870.

<sup>9</sup> EASO, 'Afghanistan - Individuals targeted under societal and legal norms', 12 December 2017, CISED50AD7870; UNHCR, 'Eligibility Guidelines for Afghanistan', 30 August 2018, CIS7B839419284.

<sup>10</sup> EASO, 'Afghanistan - Individuals targeted under societal and legal norms', 12 December 2017, CISED50AD7870.

<sup>11</sup> Bill Roggio, 'Taliban battles Afghan military for control of Kandahar City', FDD's Long War Journal, [www.longwarjournal.org/archives/2021/07/taliban-battled-afghan-militaryfor-control-of-kandahar-city.php](http://www.longwarjournal.org/archives/2021/07/taliban-battled-afghan-militaryfor-control-of-kandahar-city.php), 22 July 2021; and others.

the time of this decision, Kandahar has since fallen to the Taliban, as has Kabul and most of the country, and the Afghan Government and security forces have yielded to the Taliban.<sup>12</sup>

43. Key to this assessment is the fact that the Taliban now control Kandahar. It is not yet clear what the Taliban or its proposed Islamic Emirate of Afghanistan will look like. While the Taliban promised mercy in its victory, few are reassured. In terms of Kandahar, there are limited reports of armed Taliban going door to door in Kandahar seeking out people who worked for the Western government.<sup>13</sup>
44. I have accepted the applicant and his family have a past profile with the Taliban. If the applicant were to return to Kandahar, I consider there is a more than remote chance that he could be re-identified or linked to his family's past profile by local Taliban. I consider his time in the west (Australia), and his profile of having married a western non-Muslim woman, may be additional factors that enliven the Taliban's adverse interest in him. In this regard, I note the applicant has some remaining family in Kandahar, and information about his time in the west and marriage to an Australian Christian / non-Muslim woman might be known or shared if he were to return to Kandahar.
45. In the context of Taliban controlled Kandahar, I consider the applicant's past profile with the Taliban and his cumulative current profile put him at a chance of harm that must be considered more than remote. In all the circumstances, I find there is a real chance of the applicant facing harm for these reasons.
46. However, outside of Kandahar, I am not satisfied there is a real chance of the applicant facing harm for these reasons. I consider his profile is localised to Kandahar and dependent on him being re-identified by local Taliban and linked with the enmity the Taliban had for him and his family. I do not consider that profile is extant, or that there is any chance or possibility of the Taliban identifying him or targeting him for those reasons outside of Kandahar.
47. Similarly, in the context of a city such as Kabul, I consider his time in the west would be less remarkable, and more in line with the scarce risks identified by EASO in its report. Moreover, having no family in the area, I consider the applicant would not be at any chance or risk of having his links to the west being identified by others in the community, or facing harm for those reasons.
48. Outside of this profile, the applicant has no other risk profile. He is from the Pashtun and Sunni ethnic and religious majority. He has no other risk profile of note. While it would be an understatement to describe the security environment in Kabul and Afghanistan as uncertain, it is not yet clear what the future security environment will look like, or the persons or profiles that may be at an elevated risk of harm. In terms of broader insecurity, I note the main cause of civilian casualties in Kabul (and Afghanistan) has been the conflict between the Taliban and the Afghan security forces,<sup>14</sup> which is now at an end.
49. In view of all the information before me, I am not satisfied there is a real chance of the applicant facing serious harm in Kabul, or elsewhere in Afghanistan, for any of the reasons he has claimed. It follows that while I accept there is a real chance of serious harm in terms of

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<sup>12</sup> The New York Times, 'Afghanistan Live Updates: 20-Year U.S. War Ending as It Began, With Taliban Ruling Afghanistan', 16 August 2021, 20210816095115; The Economist, 'The Taliban's terrifying triumph in Afghanistan', 15 August 2021, 20210816081613; T Akhgar, R Faiez & J Gambrell, 'Taliban take Kandahar, Herat in major Afghanistan offensive', Associated Press, 13 August 2021, 20210813074704.

<sup>13</sup> The Economist, 'The Taliban's terrifying triumph in Afghanistan', 15 August 2021, 20210816081613.

<sup>14</sup> UNAMA, 'Protection of Civilians in Armed Conflict - Midyear Report 2021', 26 July 2021, 20210726161326.



Kandahar, I am not satisfied the real chance of harm relates to all areas of Afghanistan. It follows that the applicant does not have a well-founded fear of persecution.

### **Refugee: conclusion**

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

### **Complementary protection assessment**

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

### **Real risk of significant harm**

52. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
  - the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.
53. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
54. While I have found there is not a real chance of the applicant facing serious harm outside of his home area, for example in Kabul, I have found there is a real chance of the applicant facing serious harm if he were to return home to Kandahar. For the same reasons, and having regard to the same information, I consider there is a real risk of the applicant facing significant harm if he were to return to live in Kandahar, now or in the reasonably foreseeable future.

### **Qualifications to the real risk threshold**

55. Section 36(2B) 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
  - the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or
  - the real risk is one faced by the population of the country generally and is not faced by the person personally.

56. Having found there is a real risk of the applicant facing significant harm in the area of his return in Kandahar, I have considered whether it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that he will suffer significant harm for the reasons he has claimed.
57. Outside of Kandahar, I consider there are a number of areas where the applicant would not face a real chance or risk of harm on the basis of his specific profile, such as Kabul. The applicant is from the Sunni Pashtun majority. I consider in the ordinary course, he could travel to live in a city such as Kabul and face no real risk of harm on the basis of his ethnic, religious or individual profile. He speaks Pashto and Farsi, and some English. He has some work and technical skills. I note he is currently working in Sydney as [a specified occupation]. He is also a practising Sunni. I consider these are strong factors that go towards the reasonableness of such a relocation.
58. The applicant is married and has [number] children. The applicant's submissions refer to the difficulties and additional threat to his family members if they returned with him to Afghanistan. The applicant's partner and children are not parties to this visa application. As Australian citizens, they would not need to return to Afghanistan to be with the applicant. Indeed, as noted above, given the security environment in Afghanistan, I do not accept he seriously contemplates his family returning to Afghanistan with him. However, I do accept the separation would have a significant impact on him and his family, and that he would seek to find work on his return to assist in their welfare, and to fund travel to see them where this would be possible.
59. I am conscious that the applicant's immediate family (outside of his wife and children) live in Pakistan. It appears he has maternal and paternal uncles in Kandahar and [Town 1], but the extent of those relationships was not explored in detail.
60. The advice before me indicates the importance of family and tribal networks in the proposed areas of relocation. While I consider there a range of considerations that indicate he may be able to overcome those concerns (for example his language and work skills), I have weighed the fact that the applicant would not have those support networks in the proposed area of relocation.<sup>15</sup>
61. The country advice before me refers to significant pressures in terms of employment, accommodation and access to services in Kabul.<sup>16</sup> UNHCR has indicated significant push factors towards Kabul putting an additional strain on the capital's existing infrastructure.<sup>17</sup> Those assessments were made prior to the current situation in Afghanistan. The most recent advice from UNOCHA has already shown significant additional pressures in Kabul from the recent arrival of internally displaced persons caused by the recent conflict and demise of the Afghan Government.<sup>18</sup> At least presently, I have serious concerns as to whether the applicant would be able to find work and accommodation given the current pressures in Kabul, particularly in the absence of social or family connections in the city to assist him.

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<sup>15</sup> UNHCR, 'Eligibility Guidelines for Afghanistan', 30 August 2018, CIS7B839419284.

<sup>16</sup> EASO, 'Key socio-economic indicator: Focus on Kabul City, Mazar-e Sharif & Herat', 14 August 2020, 20200817120822.

<sup>17</sup> UNHCR, 'Eligibility Guidelines for Afghanistan', 30 August 2018, CIS7B839419284.

<sup>18</sup> UN Office for the Coordination of Humanitarian Affairs, 'Afghanistan: Internal Displacement in Kabul - Flash Update No. 4', [https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/flash\\_update\\_4\\_-\\_internal\\_displacement\\_-\\_kabul\\_15\\_aug\\_2021.pdf](https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/flash_update_4_-_internal_displacement_-_kabul_15_aug_2021.pdf), 15 August 2021.

62. The security environment in Kabul remains precipitous, and while I consider that open conflict will likely ease given the demise of the Afghan Government and ANDSF, I have little reason to consider the situation will ease or stabilise in the immediately foreseeable future.
63. In all the circumstances, I am not satisfied it would be reasonable for the applicant to relocate to Kabul or another provincial capital outside of Kandahar where there would not be a real risk that he will suffer significant harm.
64. All indications are that the ANDSF and Afghan Police have fallen.<sup>19</sup> If the Taliban is the de facto police or security force in Kandahar, then as this is the group he fears will harm him, I am not satisfied the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that he will suffer significant harm.
65. Finally, I have found there is a real chance and risk of the applicant facing serious and significant harm from the Taliban in the area he would return to live in Kandahar. I consider his profile is an individual one, where the risks are dependent on him being re-identified by local Taliban and linked with the enmity the Taliban had for him and his family, and the discovery of his profile linked to Australia. It follows that I am not satisfied the real risk is one faced by the population of the country generally and is not faced by the applicant personally.
66. In view of all the information before me, I am satisfied that there is a real risk that the applicant will suffer significant harm if he were to return to Afghanistan now or in the reasonably foreseeable future.

#### **Complementary protection: conclusion**

67. 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**

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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.

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<sup>19</sup> The New York Times, 'Afghanistan Live Updates: 20-Year U.S. War Ending as It Began, With Taliban Ruling Afghanistan', 16 August 2021, 20210816095115.

## Applicable law

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### **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.