



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

AFGHANISTAN

IAA reference: IAA21/09509

Date and time of decision: 25 August 2021 11:24:00

M Tubridy, Reviewer

Decision

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

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of 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 national of Afghanistan. On 25 September 2017 he lodged an application for Safe Haven Enterprise visa (SHEV). On 21 May 2018 a delegate of the Minister (the delegate) refused to grant the visa, and on 22 May 2018 the matter was referred to the IAA. On 3 September 2018 the IAA affirmed the decision not to grant the visa, and on 2 July 2021 the Federal Court of Australia remitted the matter to the IAA for reconsideration.

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. On 22 July 2021 the applicant's current representative provided the IAA with a submission, and also new information, and in so doing it was requested that previous submissions be withdrawn, and consideration given to the new information provided in the submission attached. The intent of this would appear to be that the applicant wishes the IAA to focus upon recently published information about events in Afghanistan, including attitudes toward education, and also the posture and influence of the Taliban and also Islamic State. I have proceeded accordingly. I note, in this regard, that the IAA has been provided with a number of country information reports, and to the extent that these have been provided in accordance with the *Practice Direction for Applicants, Representatives and Authorised Recipients* I have accepted these.
4. With regard to the s.473DD(b) requirements I note that to the extent that the country information provided consists of personal information (about individuals who are reasonably identifiable) it is not personal information of a kind that may have affected the consideration of the applicant's claims (since the relevance of this new country information derives from the information which these reports provide about matters like attitudes toward education and the Taliban, rather than about any reasonably identifiable persons). I am not satisfied that s.473DD(b)(ii) is met. Nevertheless, it is information which could not have been provided to the delegate before he made his 22 May 2018 decision such that I am satisfied that s.473DD(b)(i) is met. Given this, and given also the need for recent country information about the developing situation in Afghanistan, I am satisfied that there are also exceptional circumstances to justify considering this new information.
5. I have myself obtained recently published country information about the developing situation in Afghanistan,¹ and I am likewise satisfied that there are also exceptional circumstances to justify considering this new information. I note also that the previous IAA of 2018 obtained new information in the form of the then most recent DFAT report on Afghanistan. Given the passage of time, and that much more recent information of this kind is now available to me, I am not satisfied that there are exceptional circumstances to justify considering the DFAT report in question.

¹ UNHCR, "UNHCR Position on Returns to Afghanistan", 17 August 2021, 20210818083956; AAN, "Afghanistan Has a New Government: The country wonders what the new normal will look like", 17 August 2021, 20210818105315; OHCHR, Afghanistan - Weekly Humanitarian Update 9-15 August 2021, 19 August 2021, 20210820085652; Reuters, "Rising prices, shuttered banks add to misery for Kabul", 23 August 2021, 20210823085949; UN News, "Afghanistan: UN agencies sound alarm over emergency aid supply logjam", 23 August 2021, 20210824080517.

6. I note also that the applicant has provided new information in the form of a [May] 2018 letter from the Canberra Embassy of the Islamic Republic of Afghanistan. The letter presents as having been issued by a consul. It states that the applicant's taskera (Afghan national identity document) is a verified and genuinely issued document, and that the applicant is a citizen of Afghanistan, and that he was born in Laghman on 31 December [Year]. By way of explanation the applicant's former representative has submitted that the new information is credible personal information which, had it been presented, may have affected the consideration of the applicant's claim, with reference being made to how the delegate made it plain at the 22 February 2018 SHEV interview that he had doubts about the applicant's claim to be a national of Afghanistan.
7. I accept, in this regard, that the [May] 2018 letter is credible personal information in the relevant sense since it concerns the applicant as a reasonably identifiable individual, and it is information which (without entering into a deliberative consideration of the broader evidence) is capable of being believed on its face, and as such may have affected the consideration of the applicant's claims in that the delegate would have considered this evidence. I am satisfied that s.473DD(b)(ii) is met. However, and although the [May] 2018 letter could not have been provided to the delegate in the sense that the applicant did not obtain it until after the delegate made his decision, no explanation has been provided as to why the applicant did not obtain and provide this letter prior to the delegate's making his decision, and I note in this regard that it is not in dispute that the applicant was on notice about the need to prove his claim to be a national of Afghanistan. I am not satisfied that s.473DD(b)(i) is met.
8. Further, the mere fact that information is capable of being believed without entering into a deliberative consideration of the broader evidence, does not make for exceptional circumstances. I note, moreover, that when some consideration of this information is entered into some serious concerns arise. First among these is that the [May] 2018 letter states that the applicant was born in Laghman on 31 December [Year]. The problem with this is that (as will be discussed below) this date of birth was allocated to the applicant by the Department as an estimation of when the applicant was born, and with the applicant himself stating that he does not know his exact date of birth and that the 31 December date was provided to him by the Department. Thus, and even if the [May] 2018 letter has been genuinely issued by an official at Canberra Embassy of the Islamic Republic of Afghanistan, the fact that it attests to a nominal date of birth as being a fact, suggests the author of this letter was willing to assist the applicant by uncritically attesting to whatever identity claims the applicant was making in association with his SHEV application. Given this, and given also that the [May] 2018 letter provides no explanation as to how (if at all) the applicant's purported taskera was "verified" as genuine, I am not satisfied that there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

9. The applicant's claims can be summarised as follows:
 - He is a national of Afghanistan, an ethnic Pashtun, and a Sunni Muslim who originates from [a] in [District] of Afghanistan's Laghman Province.
 - The applicant had worked as a farmer. [In] October 2011 he married his wife, [Ms A], an Afghan national who was born in [a][District] of Afghanistan's Laghman Province (in a village which neighboured the applicant's own) but had been raised in Pakistan where her parents went as migrants when she was young, only returning to Afghanistan when

she married the applicant in October 2011. In around May 2012 he and his wife began a business which provided simple private education classes in their house where his wife taught English and Pashto to both male and female children between the age of [Ages 1 and 2] years. The classes were conducted [Numbers 1 and 2] times a week between [Times 1 and 2], and they had about [Numbers 3 and 4] students. The applicant assisted his wife by getting students. It was a service for which they charged AFN[Amount] (around AUD[Amount]) per month per student, and the business provided them with income, but they also liked to see children become successful.

- On [Date] they had a child, [Ms B].
- In around September/October 2012 his father was killed by the Taliban. His father had been warned (as the most senior member of the household) by Taliban that the classes must stop, but the applicant's father had not told the applicant or his wife about this. The applicant's mother was very upset by the death of her husband, and she died two months later.
- Following the death of his father the applicant received three telephone calls on his mobile telephone from the Taliban who warned him to stop the classes or else he too would be harmed. His village had many Taliban and Taliban supporters and he suspected the caller was from his own village, but he did not know who the caller was.
- The final call came in February 2013 when the applicant was on his way home from the mosque where, after prayers, he had handed a business card about the classes to a [Mr C]. The caller alleged that the applicant had not stopped the classes, and that they had information he had handed a business card to a fellow villager at the mosque. The caller sounded angry and had said that the applicant would be killed because he had not only not stopped the classes but had misused the mosque to carry out acts against the teaching of Islam.
- The applicant became afraid. He asked his uncle to look after his (the applicant's) land, and he (the applicant) and his wife went immediately overland across the border into Pakistan. That same month, February 2013, he departed Pakistan by air out of Lahore's international airport travelling to [Country 1], and then to [Country 2] and [Country 3]. His wife and child remain in Pakistan in Peshawar with his wife's parents.
- The applicant claims to fear that the Taliban will kill him because he operated English classes for girls and boys. He also claims he has become famous because of his [Social media] activities such that it will be widely known that he has travelled to Australia, and that because of this and because he has left his country he will be perceived as having left Islam, and that he will be harmed on this basis by the Taliban and government officials and other people in Afghanistan.

Refugee assessment

10. 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

11. 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.
12. The applicant arrived in Australia as an unauthorised maritime arrival [in] May 2013. On 5 July 2013 he participated in a Departmental irregular maritime arrival & induction interview. He gave his name as [Given names] and when asked for his family name he gave this as [Surname – alternative spelling] (spelt as “[Surname]” in the written record of this interview). He claimed to be a national of Afghanistan and no other country, and to be a [Tribe] Pashtun. The applicant was asked where he was born, and he said he was born in [Village] in Afghanistan’s Laghman Province. It is not apparent that the applicant was asked when he was born during this interview but the written record states this as 31 December [Year], and five years later at his 22 February 2018 SHEV interview with the delegate the applicant would indicate that this date had been allocated to by the Department as an estimation of his date of birth (and 31 December is the date typically employed by the Department as a nominal date of birth in instances where persons claim not to know their exact date of birth, as is often the case among Afghans).
13. The applicant’s claims about his identity have remained as they were when he first arrived in Australia in 2013 (including the 31 December [Year] nominal date of birth) and in support of his identity claims the applicant has provided a number of original documents, including a document which present as being his [November] 2011 issued taskera (Afghanistan birth certificate and national identity document), and also his [November] 2011 certificate for his [October] 2011 marriage, and also his [January] 2012 Afghanistan driving licence. The details of these documents are broadly consistent with the applicant’s identity claims (including his approximate date of birth of 31 December [Year]; since the purported taskera indicates that at the applicant was [Age] years of age according to his facial appearance [in] November 2011).
14. The delegate nevertheless had some concerns with regard to the applicant’s identity. At the 22 February 2018 SHEV interview the delegate questioned the applicant about his family name, and the applicant indicated that in Afghanistan he was known by the name [Given names] but if someone asked his family name he would say '[Surname – alternative spelling]'. The delegate, in his decision related that the applicant had indicated that the name '[Surname – alternative spelling]' came from his (the applicant’s) grandfather’s name; with the delegate then noting that the applicant’s taskera listed the applicant’s (paternal) grandfather’s name only as [Mr C – given names]. I note, however, that from the 22 February 2018 SHEV interview audio recording it is not apparent that the applicant actually attributed

this name to his grandfather specifically. He seemed instead to indicate that it was simply the name employed by the family as a surname. I note also that Afghan identity documents typically list only the given names of the bearer and given names of his/her father and (paternal) grandfather, and in the context of Afghanistan the absence of any mention in such documents of a surname (or family name) does not necessarily mean that an individual has or has not been known by a surname. I note, moreover, that it is not unusual for Afghans to present their tribal identity as their family name, and I note that the [Tribe] are one of the major Pashtun tribes in Laghman Province, and that when the delegate asked the applicant for his ethnicity he referred to himself as being a Laghman [Tribe] and a Pashtun (consistent with what he had said at his 2013 interview).

15. When the applicant was asked about when he obtained his driving licence (in terms of how long this was before he departed Afghanistan) the applicant said he could not recall when this was. This seemed odd since, if the applicant departed Afghanistan in February 2013, he must have obtained this document just weeks before his departure such that this seemed likely to be something the applicant could be expected to recall even allowing for the passage of time. Asked where he obtained this document from, he said he obtained personally and while in the company of a friend in Jalalabad. This, understandably, raised concerns for the delegate since Jalalabad is the provincial capital of Nangarhar Province whereas the applicant's driving licence presents as having been issued in Laghman Province. The delegate put these concerns to the applicant and the applicant responded that because his father had died, he was not thinking straight at the time. This at least offered an indication that the applicant in fact did place the issuance of this document as occurring after the death of his father, as might be expected. As to the matter of where the document was issued, the applicant nonetheless maintained his claim to recall having obtained this document in Jalalabad. When asked how often he had been to Jalalabad he said that that he had been there some other times for medical treatment for his mother because it was the closest major city to his village. This is true in the sense that Jalalabad is a far larger city than Laghman Province's own capital of Mihtarlam.
16. Asked about when he obtained his driving licence (relevant to when he obtained his taskera) he dated his driving licence as being issued after the issuance of his taskera, which is consistent with the details of these documents. Asked about how he travelled by air from Pakistan to [Country 1] the applicant said that it was a Pakistan passport made by the smuggler. Asked for the name in the passport the applicant said that because he could not read. It was put to the applicant that at his 2013 Departmental entry interview he had said he did know the name. The applicant now said that perhaps he had said it was in his name, but that he had forgotten what had occurred because it was more than five years since all of this occurred. The delegate put it to the applicant that at his 2013 Departmental entry interview he had said the passport carried the name [Given name]. The applicant said he could not recall. I note in this regard that the applicant did appear to be recalling that in 2013 he may have said that he was told that the name in the false Pakistan passport was his own (and I note that the applicant's name is, indeed, [Given name]). Asked what became of this document the applicant said, as per his 2013 entry interview, that it was taken from him by a smuggler in [Country 2].
17. Also discussed during the SHEV interview was evidence held by the Department regarding financial transfers. With regard to the transfers which had been made by the applicant from Australia to parties in Pakistan, the applicant said that he had made these to Afghan friends now in Pakistan who had collected these to pass on to his wife. The delegate also put it to the applicant that there was evidence before the Department of transfers having been made to the applicant's wife in Pakistan by other persons in Australia. I note, however, that there is no

evidence before me to indicate that other persons have transferred money from Australia to the applicant's wife in Australia. There is evidence before me of the applicant having transferred money to various persons in various locations in Pakistan. This raises concerns but, even so, it nevertheless also the case that the applicant's claim to have done this as a means of providing support to his wife is not implausible, and it is also true that Pakistan hosts a large number of Afghan nationals who entered the country unlawfully.

18. The delegate also put it to the applicant that prior to his arrival in Australia he had received money transfer from persons in Australia with whom he was acquainted (such as the brother of the person with whom the applicant was now residing, and who had travelled on the same boat as that which brought the applicant to Australia). The applicant denied having ever received such transfers. The delegate also noted that the applicant maintained a [Social media] profile in which the name [Name] appeared, and that the brothers involved in these transfers likewise had the name [Name] suggesting they were relatives. The applicant denied this and said that he used the name [Name] on his [Social media] profile to reflect his Pashtun identity. It was put to the applicant that his [Social media] profile appeared to be in Urdu and to be following a number of Pakistan news sources. The applicant said that he followed information sources from both Afghanistan and also the Pashtun areas of Pakistan. It was also put to the applicant that on [Social media] he appeared to be friends with people from Pakistan rather than Afghanistan. The applicant said that he was friends with persons in Pakistan who his wife knew. It was put to the applicant that he had posted photographs of the Pakistan cricket team but none of the Afghanistan cricket team. The applicant said that he considered Pakistan's players the best and loved them for this reason. It was put to the applicant that his [Social media] activity was not consistent with his claim to be an illiterate person from Afghanistan. The applicant asserted that he had learned how to use [Social media] since his arrival in Australia.
19. The above matters were discussed in some detail at the SHEV interview but from the Facebook evidence which is before me, and which would appear to have been archived by the Department, I have only evidence that the applicant has used his [Social media] account to post some photographs and to re-post some information from a Jalalabad (that is, an Afghanistan based, welfare organisation). From the applicant's [Social media] activity (to the extent that there is evidence of this before me) it is not apparent that the applicant has any connections with Pakistan beyond those which he has claimed. I note also before me there is evidence of money transfers having been made by persons in Australia (who the applicant is associated with) to someone in Pakistan with the same name as the applicant but with a date of birth different to the applicant's own claimed age (by some five years). The appearance of the same name invites the question of whether this person, and the applicant, are one and the same but the applicant has denied having ever received any such transfers prior to his arriving in Australia, and the evidence before me is not sufficient to cast any significant doubt upon what the applicant has said in this regard.
20. Even so, it is understandable given the matters discussed above that the delegate had doubts about the applicant's claims regarding his identity and, in particular, his claim that he was not a national of Pakistan. The applicant's former representative offered little in the way of further explanation in response to the delegate's concerns (preferring instead to protest, in a very unhelpful manner, that the matter of the applicant's claims regarding his identity, nationality or citizenship were somehow not at issue). Nevertheless, taken as a whole the evidence currently before me is such that I have no significant reason to reasonably suspect that the applicant's evidence of his identity, nationality or citizenship are bogus. The grant of the visa to the referred applicant is not prevented by s.91W. Taken as a whole, the evidence currently before me is not sufficient to lead to a finding that the applicant is national of

Pakistan, or that he is not a national of Afghanistan. Given this, and given that the applicant has provided documentary evidence consistent with his claim to be a national of Afghanistan, and given that at interview he appeared to be familiar with the geography of the areas in which he claims to have resided in Afghanistan, I am satisfied that the applicant is a national of Afghanistan, and I therefore find Afghanistan to be the applicant's receiving country for the purpose of this review. The applicant claims to have no other nationality, and to be without the right to enter and reside in any country other than Afghanistan. Taken as a whole, the evidence currently before me is such that I have no significant reason to doubt this claim. Section 36(3) does not apply to the applicant.

21. With regard to the matter of the applicant's claim that he and his wife were involved in running English classes (with his wife teaching English to mixed classes of boys and girls), the applicant has provided little in the way of documentary evidence. First, he has provided his wife's school leaving certificate issued [in] April 2007 by a school in [Town] in Pakistan's Hangu District which indicates that she attended the school for two years between April 2004 and March 2006 such that she completed Year [Number] (when she would have been just under [Age] years of age). Thus, the document provides no evidence that the applicant's wife held any teaching qualifications, or even that she ever completed anything more than [Number] years of schooling (and indeed this was what the applicant confirmed at his SHEV interview), but even so in the context of rural Afghanistan it is plausible that a person with even such a limited education as this might have been able to establish themselves as a private teacher of the English language (since English is taught in Pakistan's schools). Next, the applicant has provided what he claims are the promotional documents he distributed in his area to advertise their purported teaching services. These are no more than plain paper pages or cards carrying plain printed text, in what appears to be the Pashto language. The translations indicate that these advertise home tutoring in Pashto and English at the beginner level for male and female students. Such documents do not make for compelling evidence. Nevertheless, I am also mindful that it is plausible that the applicant would have little documentary evidence of having run such a business in the context of Afghanistan. And I accept that, in the context of rural Afghanistan, it is plausible that a person with no more than a Pakistan Year [Number] education might have been able to offer home tutoring in Pashto and English at the beginner level. At the SHEV interview the applicant provided a reasonable account of how his wife taught English at their home.
22. I note, with regard to such matters,² that the Taliban's stance on education has dramatically evolved over the past two decades. In the early years of the insurgency, the Taliban orchestrated and publicly condoned attacks on teachers, students and schools, seeing them as symbols of the foreign occupation. These attacks, however, provoked an intense civilian backlash in some areas of the country, forcing the insurgency to reverse course and allow schools to operate. Its position continued to evolve as the Taliban gained territory and sought to transform itself into a shadow state capable of governing. The Taliban now not only permits formal schools, but increasingly seeks to influence, control and take credit for the provision of education. Even so, the manner in which the Taliban's membership has condoned or tolerated education has varied, and in some rural areas there have sometimes been adverse reactions to the teaching of English, and (to a greater degree than the matter of teaching English) the non-segregation of girls from boys. Such matters have sometimes resulted in Taliban attacks upon persons involved in providing education services. It is not

² Amiri, R. & A. Jackson, "Taliban attitudes and policies towards education", Centre for Study of Armed Groups, February 2021; HRW, "You have no right to complain, Education, Social restrictions, and Justice in Taliban Held Afghanistan", June 2020; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 30 August 2018.

apparent that there have been any reports of attacks along such lines occurring in [District] during the period in question, but there have been reports of attacks upon schools and educators in the surrounding districts over recent decades, and it is thus not implausible that Taliban in a particular area such as Charbagh might react with threats and then violence if non-segregated classes in English were provided as per the applicant's claims.

23. Asked whether he considered a service of this kind would be opposed by the Taliban he said that he did, and that he only offered the service to persons with whom he was friends such that he felt confident they were not Taliban. Asked if he felt doing this was risky he said that he did but that he wanted to offer this service because he felt it would be good for the children of the village because English was increasingly being used in Afghanistan, and it was the language you needed to understand to progress yourself. Asked what happened to his father, he said that he said his father killed about nine to 10 months before his 2013 interview in Australia. The applicant said that his father was shot. Asked how the Taliban had approached his father, the applicant said that his father went to the bazaar and disappeared and that about two to three days later his father's dead body was found. Asked how he knew it was the Taliban who had done this, the applicant said that his mother had told him that his father had received threat letters from the Taliban. The applicant said this was the first that he learned of this, and that he never saw the letters, but that they had stated that the teaching must stop. The applicant said he did not know exactly how many letters were sent or when they were sent. The delegate asked the applicant why he had continued with the classes even after his father had been killed by the Taliban. The applicant said he was ready to take this risk for the future of the children. The applicant then recounted his claim about how he received a telephone call from the Taliban where they stated that they had seen him at the mosque distributing the business card for the classes. He said that this call made him very afraid because they said they had seen him and knew what he looked like, and this was when he decided to leave Afghanistan. Asked how many calls from the Taliban he received he said that he received two or three such calls before he received the final call which led to his decision to leave Afghanistan. Asked what was said when he was first telephoned the applicant said that he was told that the classes must stop or what happened to his father would happen to him also.
24. Although the applicant's evidence about these matters was not compelling, and although it seems unlikely that a person's father would say nothing about warnings from the Taliban in such circumstances, and although it seems unlikely that a person such as the applicant would be so committed to assisting local children in finding an education that he would continue to operate an education service of this kind even after his father had been killed because of this, the applicant's claims nonetheless remain within the realm of plausibility, and I have no reason significant enough to reject the credibility of the applicant's claims with regard to these matters. Given this, and while I have my doubts, I accept that the applicant and his wife operated an education service of this kind and that the applicant's father was killed by the Taliban for this reason, and that the applicant's life was then also threatened by the Taliban: first by way seeking to compel him to shut down the classes, and then with the threat that he would be killed because he had not complied with this directive, and because he had not only not stopped the classes but had misused the mosque to carry out acts against the teaching of Islam (by distributing a business card for the classes at the mosque).

25. Given this, and noting also that the situation in Afghanistan³ has developed such that the Taliban now control much of the country including [District] where the former authorities of the Islamic Republic of Afghanistan have been displaced, and given that I cannot discount the possibility that the Taliban member or members who made these threats against the applicant remain in [District], and given that it cannot be discounted that there is a real chance that persons willing enough to kill the applicant's father would (even with the passage of time, and even with the applicant's having not operated his home tutoring business since early 2013) would seek to make good on threats to kill the applicant because he had not only not stopped the classes but had misused the mosque to carry out acts against the teaching of Islam, and given that for the foreseeable future it seems doubtful that the Taliban leadership would be able to restrain acts of this kind in rural areas like [District], I am satisfied that for the foreseeable future there is a real chance that the applicant would be killed by local Taliban on this basis if he were to return to [District]. Such a threat to his life amounts to serious harm.
26. However, I am not satisfied that the applicant would face a real chance of harm in all areas of his receiving country. For the possibility that the applicant's activities in education in [District] would be more broadly known seems remote. The applicant has given no indication that his wife would seek to return to Afghanistan within the foreseeable future, and the possibility that the applicant (whose own English is limited to the little he has learned here in Australia) would seek to establish an educational facility on his own, or in collaboration with some other party, or that he would find employment in this regard, is too speculative. The applicant has also submitted that he it will become known that he has travelled to Australia because this will have become famous by way of his [Social media] activities, that he will be perceived as having left Islam, and that he will be harmed in this basis by the Taliban and government officials and other people in Afghanistan. I note, in this regard, that while some sources have asserted that persons can face harm on such a basis, and as a result of having resided for an extended period in a western country where they sought asylum, there have been very few documented instances of such harm notwithstanding the large numbers of Afghans who have returned to Afghanistan from western countries (and from Europe in particular) over the recent decade.⁴ It is not apparent that the situation has appreciably changed in this regard as a result of the recent and dramatically quick success of the Taliban in winning control of much of the country, including Kabul (where there has been a high degree of scrutiny of Taliban actions by local and international media). What is more, and contrary to the applicant's assertions, it is not apparent that his [Social media] activities have made the applicant famous. Indeed, it seems unlikely that the applicant would be personally known to anyone in Afghanistan outside of [District].
27. Given all of this, and even taking into account the extent to which recent developments have resulted in fluctuating levels of general security in Afghanistan, I am not satisfied that the real chance of harm faced by the applicant in [District] relates to all areas of Afghanistan. I am not satisfied that the real chance of persecution relates to all areas of the receiving country.

³ UNHCR, "UNHCR Position on Returns to Afghanistan", 17 August 2021, 20210818083956; AAN, "Afghanistan Has a New Government: The country wonders what the new normal will look like", 17 August 2021, 20210818105315; OHCHR, Afghanistan - Weekly Humanitarian Update 9-15 August 2021, 19 August 2021, 20210820085652.

⁴ UK Home Office, "Afghans perceived as 'Westernised'", January 2018, OG9EF76792; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan", 30 August 2018; DFAT, "DFAT Country Information Report - Afghanistan", 27 June 2019, 20190627113333; EASO, "Afghanistan Security Situation, COI Report", June 2021.

Refugee: conclusion

28. 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

29. 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

30. 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.
31. 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.
32. 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.
33. For the reasons already given above I am satisfied that for the foreseeable future there is a real risk that the applicant would be killed by local Taliban if he were to return to [District]. Since this would amount to the applicant's being arbitrarily deprived of his life, I am satisfied that this would amount to significant harm. Given the manner in which the Taliban currently exercises control in [District], and given also the extent to which currently it remains unclear to what extent the Taliban's central leadership may be unable to enforce restraint in rural areas like [District] upon local Taliban, I consider that for the foreseeable future the applicant will be unable to obtain, from an authority of the country, protection such that there would not be a real risk that he will suffer significant harm. Given that the reasons for there being a real risk of such harm for the applicant derive from his own past personal actions, I consider that the real risk is one faced by the applicant personally, and that it is not a risk faced by the population of Afghanistan generally.

34. The question then arises as to 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. It has been generally considered the case of Afghanistan that aside from major urban centres like Kabul it would, generally speaking, be prohibitively difficult for a person to relocate for a person who would be without a support network of some kind in the prospective area of relocation such as would assist him in establishing himself in earning a livelihood and finding accommodation. It has, however, been broadly considered the case that able-bodied men (arriving without the encumbrance of establishing themselves with dependents) may, depending on their individual circumstances, be able to establish themselves in cities like Kabul even without a support network. The question then becomes whether a person's individual circumstances are such that he would be able to overcome the challenges posed by relocating to one of Afghanistan's cities. For while on the one hand it is the case that cities like Kabul offer greater opportunities for arrivals than any other location in Afghanistan (in terms of employment and access to services) it is also the case that Kabul and also Afghanistan's other major cities have been placed under considerable strain over the recent decade by the arrival of large numbers persons displaced by conflict and drought in other parts of the country such that it has become challenging for new arrivals, and in particular new arrivals without any connections in the city and with limited skills, to find employment and accommodation.
35. The situation in Kabul and Afghanistan's other cities has become particularly acute over recent months, and even more so in recent weeks, as a result of the Taliban's rapid capture of almost all of Afghanistan, and all of its major cities, leaving only a few areas (like the Panjshir) under the control of forces opposed to the Taliban and loyal to the Islamic Republic of Afghanistan, and with these latter areas being effectively under siege. It is estimated that since the beginning of 2021 over 550,000 Afghans have been internally displaced by conflict within the country, including 126,000 new IDPs between 7 July 2021 and 9 August 2021.⁵ According to OHCHR there has, since 1 July 2021, been an influx of people fleeing to Kabul and other large cities, seeking safety from conflict and other threats, and 17,500 newly internally displaced people have been identified in the past month.⁶ With unemployment levels already high, and with basic services and resources and housing availability already stretched, various commentators have warned that a serious crisis may unfold in Afghanistan's cities within the new future as much of the country struggles with transitioning from the rule under the authorities of the Islamic Republic of Afghanistan to rule under the Taliban's declared Islamic Emirate of Afghanistan.
36. Although the situation in Kabul has (aside from the situation at the airport) been reasonably orderly, and although offices, shops and even schools have slowly opened again in the days following the arrival of the Taliban in the capital,⁷ it nonetheless is the case even in Kabul that there has been a surge in the prices of essential items such as food. According to Reuters: prices of staples like flour, oil and rice have risen by as much as 10%-20% in a few days.⁸ The UN's World Food Programme's country director for Afghanistan has called for swift, coordination action; "otherwise, an already horrendous situation is just going to become an absolute catastrophe, a complete humanitarian disaster".⁹ On 17 August 2021 UNHCR expressed the view that view of the volatility of the situation in Afghanistan, UNHCR does not

⁵ UNHCR, "UNHCR Position on Returns to Afghanistan", 17 August 2021, 20210818083956.

⁶ OHCHR, Afghanistan - Weekly Humanitarian Update 9-15 August 2021, 19 August 2021, 20210820085652.

⁷ AAN, "Afghanistan Has a New Government: The country wonders what the new normal will look like", 17 August 2021, 20210818105315.

⁸ Reuters, "Rising prices, shuttered banks add to misery for Kabul", 23 August 2021, 20210823085949.

⁹ UN News, "Afghanistan: UN agencies sound alarm over emergency aid supply logjam", 23 August 2021, 20210824080517.

consider it appropriate to deny international protection to Afghans and former habitual residents of Afghanistan on the basis of an internal flight or relocation alternative.¹⁰

37. The applicant claims to have no family or other networks of support outside of [District]. Nevertheless, he is also an able-bodied man and he would be arriving in Afghanistan without the burden of accompanying dependents (since he has given no indication that his wife and child would, for the foreseeable future, seek to join him in Afghanistan were he to return). The applicant has limited English, and no formal education, and he has previously worked only as a farmer and in managing his wife's home tutoring service, such that in the context of Afghanistan's cities his opportunities may be limited to labouring. Even so, this would not in previous years have necessarily meant that relocation to one of Afghanistan's cities would have been unreasonable. However, at the present moment, the concerns noted above and the fluid nature of the current situation in Afghanistan is such that there is a real concern that the applicant's attempting to establish himself in a location in Afghanistan other than [District] would result in his living, at least for some periods, in a state of near poverty, and/or in a situation where he was unable to access accommodation and/or foodstuffs and basic services. Given this, in the present moment, I am not satisfied that 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.

Complementary protection: conclusion

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

Decision

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

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

¹⁰ UNHCR, "UNHCR Position on Returns to Afghanistan", 17 August 2021, 20210818083956.

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.

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...