

1215348 [2013] RRTA 55 (2 January 2013)

DECISION RECORD

RRT CASE NUMBER: 1215348

DIAC REFERENCE(S): CLF2012/162713

COUNTRY OF REFERENCE: Afghanistan

TRIBUNAL MEMBER: Mara Moustafine

DATE: 2 January 2013

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(aa) of the Migration Act.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a **citizen of Afghanistan** applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] July 2012.
3. The delegate refused to grant the visa [in] October 2012, and the applicant applied to the Tribunal for review of that decision.

RELEVANT LAW

4. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant*

S395/2002 v MIMA (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

8. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression 'serious harm' includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
11. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
12. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
13. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
14. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb

of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

15. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Complementary protection criterion

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia 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 applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The applicant was represented in relation to the review by his registered migration agent, [name deleted: s.431(2)].
21. The applicant is a [age deleted: s.431(2)] year old Afghan man from [Village 1] in [Town 2], Jaghori district of Ghazni province, who arrived on [location deleted: s.431(2)] as an unauthorised boat arrival [in] April 2012. He is of Hazara ethnicity and a Shi'a Muslim, with [siblings] living in Afghanistan with his mother. His father died in [year]. The applicant, who completed four years of primary education, moved to Pakistan in [year] where he worked as a street vendor for his uncle in Quetta without wages as his uncle was supporting the applicant's family in Afghanistan.

22. No information was available from the applicant's entry interview, but personal details and claims were provided with his protection visa application [in] July 2012.

Statutory Declaration, [July] 2012

23. The applicant stated as follows:

4. I originate from [Village 1] area, in [Town 2], JAGHORI, GHAZNI, in Afghanistan. [Village 1] had around [number] HAZARA households and is situated in a large HAZARA populated region....

Why I left that country:

8. There was a dispute between my father and another HAZARA man, [Mr A], regarding the ownership of our farming land, which was about the size of a football field. I was a boy, so I don't know much about the circumstances,

9. Around 6 years ago, my father was murdered as a result of the dispute.

10. After my father was killed I was often approached by the children of [Mr A], who threatened that they would kill me if I came near the land.

11. I suffered terrible with sadness after my father's death and I was fearful for my life because of the threats made against me and my family. As a result my [uncle] suggested that I go to stay with him in Pakistan. My mother refused to abandon her country and remained with my younger siblings. My [uncle] now supports my mother and family.

12. The situation for HAZARAS started becoming as bad as AFGHANISTAN over last couple of security situation in Pakistan was extremely unsafe. Everyday HAZARA people were being targeted and killed by the LASHKE JANGUI and other groups. The HAZARA people are targeted because they are SHIA. The LASHKE JANGU group believes SHIA are infidels and must be killed....

14. The situation for HAZARAS was so terrible that I felt I had to leave PAKISTAN for my own safety. I knew that the situation for HAZARAS in Afghanistan would be the same as PAKISTAN because of the TALIBAN; and it would not be safe for me to return to Afghanistan because I am a HAZARA SHIA.

What I fear may happen to me in my country:

15. The TALIBAN target HAZARA people because the TALIBAN are SUNNI and the HAZARA are SHIA. The TALIBAN think HAZARAS are infidels and want to kill them....

Why I will be harmed:

17. I fear I will be harmed by the TALIBAN because of my HAZARA race and SHIA ethnicity.

18. If the TALIBAN discover that I have claimed asylum in Australia they will think I am a traitor and spy and they will execute me.

Do I think that there is a place in that country where I could be safe:

19. The TALIBAN operate in all areas of AFGHANISTAN, Therefore it's unsafe anywhere in Afghanistan.

20. I am recognisable as a HAZARA because my features

Do I think the authorities of my country can and will protect me and or my accompanying family members, where applicable, if I / we were to go back:

21. The authorities in Afghanistan are corrupt. They were unable to protect my family against the land dispute. There was an inadequate punishment of the person who executed my father and claimed our lands.

22. The authorities have no power to act against the TALIBAN.

23. I do not think the authorities in Afghanistan can offer me any protection.

Other Reasons - Complementary Protection:

24. If I were to return to Afghanistan I am unable to work on my lands and support myself. My life is at risk because of the land dispute, so I can't return to my area. There are no other areas where I can move because I don't have a family support network. Without lands and family I will be unable to survive.

Protection interview, [August] 2012

24. I have listened to applicant's interview with DIAC in which he elaborated on his background and claims and noted the following points:

- After his father died, [Mr A] was detained by the government for a month and was then released because he was able to bribe the authorities.
- [Mr A] was a wealthy man. His daughter was married to the son of [Mr B], an influential Hazara from another village who had good links with the government and the bazaar. As a result, [Mr A] got off lightly. There was no law about land in Afghanistan and a more powerful man could take the land of another.
- As the oldest son, the applicant was entitled to the land which [Mr A] took, but he never tried to get it back.
- His uncle who lived in the village tried to pursue a claim for the land, but without result as [Mr A] threatened him and told him not to involve himself.
- His father's [brothers] still lived in the village. They did not go near the land for fear of [Mr A].
- He fears that if he returns to the village he will be killed like his father. Besides, as he has no land, he cannot do anything in the village.
- Because of the land dispute he did not return to Afghanistan from Pakistan after the situation for Hazaras deteriorated there.
- As the Taliban are still in power in Afghanistan, they will kill him. A month ago a man from their village who was a soldier was killed in [town deleted: s.431(2)].
- When living in his home village, he did not travel to other areas as Hazaras had problems on the roads around Jaghori because they were Shi'a and the Taliban Sunnis.
- For the two years that he continued to live in village after his father was killed, he was threatened and beaten with a stick when he went over to the disputed land.
- Since then his family had not been harmed apart from verbal threats and his siblings were sometimes beaten.
- The family was still being supported by his uncle and also had some farm animals.
- Asked if he might be able to live in other areas in Afghanistan where he was not facing a land dispute, such as Kabul or other places in the Hazarajat, the applicant said he had nowhere else to go and that Kabul was not safe, giving the example of the 2011 Ashura violence.

Country Information Submission, [August] 2012

25. The applicant's representative provided a generic submission of country information on issues relevant to the assessment of applicants from Afghanistan, including persecution for reasons of race and religion; claims based on perceived opposition to the Taliban; relocation and access to effective protection from actors of protection; attacks on those perceived to be in support of government and international forces; and the situation in Uruzgan 18 months after the Dutch/Australian handover.

Primary decision and review application

26. The delegate made an adverse decision [in] October 2012 and the applicant applied for review [in] October 2012.

Submission, 4 December 2012

27. On 4 December 2012 the Tribunal received a 71 page submission by fax from the applicant's adviser.
28. It stated that the applicant feared that the Taliban would physically harm and/or kill him in Afghanistan due to his race (Hazara), religion (Shi'a), imputed political opinion of opposition to the Taliban (due to his application for asylum in Australia).
29. The submission included a response to the Delegates findings and attached generic country information addressing the issues of the security situation in Afghanistan, including in Kabul and Jaghori; Taliban attacks on Hazaras in Afghanistan; discrimination against Shi'a Hazaras in Afghanistan; threats to supporters of NGOs, the government and ISAF; the availability of state protection; and relocation within Afghanistan. The submission concluded that the applicant's fears that he will be persecuted because of his race and religion in Afghanistan were well-founded; that due to ongoing deterioration in the security environment in Afghanistan, the risk of his being persecuted would only increase throughout the reasonably foreseeable future; and that as there was a real chance he would be persecuted throughout Afghanistan, including in Kabul and in the Hazarajat, the issue of relocation did not arise.
30. The adviser submitted that, even if the harm feared by the applicant might in part be motivated by reasons unrelated to his race and religion, it could be characterised as being Convention-related in the context of the ongoing and oppressive campaign against the Hazara community and the historical antecedents to this campaign, and the applicant's inability to access protection from the Afghan authorities because of his race and religion.
31. The submission also address the issue of complementary protection, positing that there were substantial grounds for believing that, as a necessary and foreseeable consequence of his removal from Australia, there was a real risk that the applicant would suffer significant harm, in particular cruel or inhuman treatment and degrading treatment, through physical violence and the denial of social and economic rights.

RRT Hearing, 7 December 2012

32. The applicant appeared before the Tribunal on 7 December 2012, by video-link from the RRT offices in Melbourne, to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages. Both the interpreter and the applicant's representative were present at the RRT in Sydney.
33. The applicant confirmed that he left Afghanistan for Pakistan four years earlier because the children of the neighbour who took his family's land and killed his father were harassing and beating him; that he left Pakistan because Hazaras were being killed; and that he could not return to Afghanistan as he would be killed there, like his father.
34. The applicant confirmed his key biographical details. He said his family were Hazaras from the [tribe deleted: s.431(2)] and that his father's family had always lived in [Area 3] in Jaghori, which was about an hour from [Town 2]. The people in his village were

all Hazaras. His mother's family was from [town deleted: s.431(2)] near [Area 3] but were now living in Pakistan.

35. The applicant's father had [brothers]. Each had land but it was not adjacent and about 10-15 minutes away from each other. His father's land had been the size of a soccer field and he had been growing [crop] on it. The family house stood separately about 100 metres away from the land.
36. The applicant said the Taliban were not in [Area 3] itself, but on the roads to Ghazni and Kabul. There were, however, Hazaras in the area who were informers for the Taliban about such things as people coming back. Asked about other armed groups in [Area 3] or [Town 2], the applicant mentioned the Hizb-e-Wahdat, and confirmed that they kept control of the area and kept the Taliban out.
37. The applicant said the neighbour [Mr A], who took his father's land, was the elder of the *manteqa* and was from the same tribe as his family, but not a relative. The applicant found out about the land dispute when he came home one day to find people standing outside his home. He was told his father had been killed in an argument with [Mr A] about the land.
38. Asked what the dispute was about, the applicant said [Mr A] had previously been ordering his father as to what to do and not to do with the land. [Mr A] claimed the land was his; made fake documentation and took it to the government in [Town 2]. This was revealed after his father was killed. His father had been about to replant the [crop] after the harvest. Because he was young, he knew nothing about the land dispute until his father was killed.
39. The applicant said his uncle complained to the authorities in [Town 2], taking the title deeds which showed his father had inherited the land from his grandfather but he was told the documents were fake. Asked if his uncle tried to seek a resolution by the Hazara elders, the applicant said they spoke to them but they could not do anything because [Mr A] had links with the Taliban. He said [Mr A] was in a 'gang' with other powerful people [Mr B] in [Area 3] and [Mr C] from [location deleted: s.431(2)]. These people had links with the Taliban as well as the government and the Hizb-e-Wahdat. They had been powerful for a long time, did what they wanted and mistreated people, including reporting on them to the Taliban.
40. The applicant said that after [Mr A] killed his father he was imprisoned for one night and one day after his uncle called the police in [Town 2]. Then he paid a bribe and was released.
41. Asked if any efforts had been made to resolve the dispute through traditional mechanisms before his father was killed, the applicant said he did not know as he knew nothing about the dispute between [Mr A] and his father until after his father died. His uncles had spoken to him about it and what to do after his father died; but in Afghanistan they could not do anything in the face of someone with power. He could not do anything anyway and left for Pakistan after two years.
42. The applicant said that in those two years he lived in the house with his mother and siblings and continued to go to school but was beaten and taunted by [Mr A]'s children. He agreed that it was unusual for a woman to live alone without any adult male, but

said his mother was forced to live like that as she had no alternative. Asked what the family lived on, the applicant said the family had some animals, including cows. His paternal and maternal uncles also assisted his family.

43. Meanwhile [Mr A] was using the land he had taken. His uncles had gone to the government and tried to do something but could do nothing and could not afford to pay money to the corrupt government. The applicant left for Pakistan because of the constant harassment by [Mr A]'s children.
44. I asked the applicant why he could not go back to live in Afghanistan if the family had accepted that [Mr A] now owned the land. He responded that his uncles did not care about him so what could he do if he returned. Moreover, [Mr A] would realise he had grown up and suspect that he had come to reclaim his land so would kill him.
45. Asked if [Mr A] had threatened to kill him during the two years he was in Afghanistan after his father's death, the applicant said he was scared of [Mr A] so did not get close to him and was not allowed close to his house.
46. I summarised the applicant's claims and he confirmed that the main reason he feared returning to Afghanistan was that [Mr A] might think he had returned to reclaim the land and would kill him either himself or ask the Taliban to do it. He was also afraid that the Taliban might kill him because he was a Hazara and Shi'a; and, as a returnee from a Western country, they would consider him a foreign spy and informer.
47. I drew to the applicant's attention and sought his comment on a number of inconsistencies in his evidence as follows. While he told me at hearing that after he killed his father, [Mr A] was detained for one day and one night, he told the DIAC officer that [Mr A] was detained for one month. The applicant responded that [Mr A] had only been detained for one night and one day and that there may have been a mistake on the part of the interpreter, who was of Iranian background and spoke with an Iranian accent.
48. I noted that, while the applicant had previously said that [Mr A] was rich and had links to the government, until the hearing he had made no mention [Mr A]'s links with the Taliban. The applicant responded that previously he wanted to keep his account short because he was afraid he might get mixed up. However, after he had been rejected, he wanted to tell the whole story. I said I found it difficult to believe that, if [Mr A] had Taliban links, the applicant would not have mentioned this in his statement of claims or to DIAC. I asked the applicant why I should not believe that he had added this detail after he was refused in order to enhance his claims. The applicant denied this and suggested I check with people in Jaghori if I did not believe him.
49. I asked the applicant what work [Mr A] did in Jaghori. He responded that [Mr A] was a tribal chief who did not do anything himself but controlled others. He took other people's property by force; as well as the assistance provided by foreigners to poor people. While he had no formal government position, as a tribal elder, he was called on to solve problems and had links in the district, in the bazaar and with the government. Asked about the other people he had mentioned, the applicant said [Mr B] was also an elder and a mullah in Jaghori and that his son was married to [Mr A]'s daughter. [Mr C] was also their friend and one of the gang.

50. Later in the hearing, I asked the applicant why he had not previously mentioned that, after his father's death, his uncle had taken the deeds of the land to the government; that [Mr A] produced a forged document showing he owned the land; and the government accepted [Mr A]'s document instead of the title deeds provided by his uncle. The applicant said he only learned about this two months ago. He said his mother and uncle knew about it but did not discuss the details with him as he was very young at the time and only knew that his father had been killed. I asked the applicant why I should not believe that he added these details after his application for protection was rejected in order to strengthen his case? The applicant said he was not lying as he had taken an oath on the Koran.
51. Noting that he told me that he had discussed the land dispute with his uncle after his father was killed, I said I still found it curious that he would not have known about the false documents. The applicant said they had not talked in detail as he was under 18 years old. I said I found this surprising, given that, as the eldest son, he stood to inherit his father's land. The applicant said he could not have done anything about it anyway.
52. I observed that sometimes when applicants were refused protection, they added information which may or may not be truthful in order to strengthen their case. The applicant said he had not done so and that I could check in Jaghori.
53. I asked the applicant whether there was anything else his mother told him in the last two months. He said she only said that his siblings were still being beaten. Asked why his brother and sisters had not been sent to Pakistan, the applicant said there was no security in Pakistan and they might get killed.
54. I said I also found it odd that the applicant claimed [Mr A] would harm him if he returned to the village because he would think he had come to take back the land, yet he had taken no action against his father's brothers. The applicant said the uncles minded their own business.
55. I drew to the applicant's attention and invited his comment on country information on a number of issues which might be adverse to his claims.
56. I noted that according to authoritative sources, including DFAT, despite serious security problems and generalised violence affecting the population generally in Afghanistan, Hazaras were not targeted in a systematic way for their ethnicity and Shi'a religion alone, as they had been in the past. I noted that the UNHCR *Eligibility Guidelines* of December 2010, which were still active, indicated that there was 'a systematic and sustained campaign by armed anti-Government groups to target civilians associated with, or perceived as supporting, the Afghan Government or the international community, particularly in areas where such groups are active'; and that claims by particular ethnic groups should be assessed individually on their merits.
57. The applicant pointed to the massacre of Hazara Shi'as in Afshar (which took place in 1993) and said that in the Taliban time, lands were confiscated from Hazaras and given to others including the Kuchi and asked rhetorically what happen to Hazaras after the foreign forces withdrew? I again referred to country reports that, at the present time, as opposed to during Taliban time, it was unlikely that a Hazara would be persecuted by the Taliban for reasons of his ethnicity and religion alone. This did not mean, however, that a Hazara might not be persecuted if other factors were involved but each case had

to be assessed individually and geographic location and the prevalence of the Taliban were also important factors to consider.

58. In this context, I noted that reports from a variety of sources agreed that Jaghori was a comparatively safe district, although there could be a danger of Taliban attacks on the roads leading into the district. The applicant said he accepted that Jaghori was safe but it was a very small place and the only thing there was water – everything else had to be imported from outside and the surrounding areas of Ghazni and Uruzgan were controlled by the Taliban.
59. Drawing on information at paragraph 72, I noted that DFAT contacts in Afghanistan unanimously agreed that the main targets on the roads in Ghazni, and nationally, were people with direct links to the Afghan Government or international community, regardless of their ethnicity. The applicant suggested that the Taliban also targeted students, saying his [relative], who was studying in Kabul, had his head chopped off by the Taliban three years ago after they found his ID card.
60. With regard to his claim that as a returnee, he would be harmed by the Taliban because they would regard him as a foreign spy, I drew the applicant's attention to DFAT's advice of 31 October 2012 that it was not aware of instances of Afghan returnees suffering harm as a result of their time outside Afghanistan or an imputed pro-western view, as set out at paragraph 78. The applicant replied that he did not know about politics but that Hazaras had been and were being killed and no one cared. He would rather be killed in Australia than returned and killed there.
61. The applicant said he did not believe the Afghan government would protect him. Had they been able to do so, the neighbour could not have taken his father's land and he would not be here.
62. Noting that his land dispute with [Mr A] was a localised dispute with a neighbour, I asked the applicant if he could live safely elsewhere in Afghanistan. He said if there was, he would not have made the dangerous journey to Australia. He confirmed that his mother's family were all in Pakistan. Asked about the possibility of living in Kabul, which had a large Hazara community and was also regarded as relatively safe for Hazaras, the applicant said there was no security at all in Kabul. He referred to the killing of Hazaras on Ashura in 2011; and said that Hazaras were always being killed in Kabul in the month of Muharram, with 3-4 people being thrown out of apartment windows this year.
63. I put to the applicant that much of the commentary on the 2011 Ashura bombing in Kabul, including by Shi'a leaders, highlighted that it was not a typical occurrence; that the incident had been denounced by the Taliban as the work of a Pakistan terrorist group with links to Al Qaeda; and that conjecture that this incident heralded the unfolding of a Pakistan-type situation of serious sectarian violence had not been borne out by events. I had read reports of violence between Shi'a and Sunni university students in Kabul on Ashura day this year, but that the scale of the 2011 violence was not repeated. I noted that what would happen after foreign forces withdrew from Afghanistan was still in the realm of speculation.
64. The applicant did not wish to highlight any issues in the context of complementary protection.

65. The applicant's representative noted the detailed submission provided and made the following points. It was clear from the information I had elicited about [Mr A] as a person of control and influence that the applicant could not return to his family home in Jaghori. Moreover, the journey there was insecure. While the applicant's key claim was related to a family land dispute, [Mr A]'s role took this to a different plane. The applicant's uncle had tried but could not resolve the dispute through proper channels.
66. Noting the emphasis in the UNHCR guidelines on the importance of networks and support mechanisms for Hazaras in Kabul, the representative said relocation was inappropriate for the applicant, who had no family links there. As the eldest son, he would have to relocate the rest of the family to Kabul and would not have the means to set up house or get employment in the face of widespread unemployment. The same applied to the rest of the country.
67. The representative submitted that if the Tribunal did not find that the applicant's particular circumstances amounted to persecution on grounds of religion, ethnicity or imputed political opinion, there were substantial grounds for believing he would suffer significant harm if removed from Australia and returned to Afghanistan, so he should be recognised as requiring protection under complementary protection legislation. The representative also said that if I did not accept the applicant's evidence regarding [Mr A]'s false document, I should put this aside and consider the applicant's other claims.

Country Information

68. This case is one of five cases where the applicant is a Hazara and a Shi'a from Afghanistan which I received in October 2012 and which were interviewed in late November and December. I have considered country information detailed in the delegate's decision, material provided by the applicant's adviser and, in particular, the following:

Return to Pakistan

69. According to UNHCR Guidelines:

Afghans without a valid passport and visa, regardless of prior length of stay in Pakistan, can not enter Pakistan legally and would be subject to deportation under Article 14.3 of the Pakistan Aliens Act. Arrests for illegal stay, and subsequent imprisonment, fines and deportations of illegally staying Pakistanis are a daily occurrence with several hundred being deported to Afghanistan every month. (UNHCR, *Eligibility Guidelines for Assessing the Internal Protection Needs of Asylum-Seekers from Afghanistan*, July 2009, p. 62)

The situation of Hazaras in Afghanistan

70. Key sources consulted were:
 - The Afghanistan NGO Security Office (ANSO) Data Report January 1 2010 – December 31 2010 'Summary and Assessment', Kabul 2011
 - The Afghanistan NGO Security Office (ANSO) Data Report January 1 2012 – June 30 2012 'Summary and Assessment', Kabul July 2012
 - CPAU, 'Conflict Analysis: Jaghori and Malistan districts, Ghazni Province', April 2009 www.cpau.org.af
 - Danish Immigration Service, 'Report from Danish Immigration Service's fact finding mission to Kabul, Afghanistan 25 February – 4 March 2012,' Copenhagen, 29 May

2012, <https://www.nyidanmark.dk/NR/rdonlyres/3FD55632-770B-48B6-935C-827E83C18AD8/0/FFMrapportenAFGHANISTAN2012Final.pdf>

- Department of Foreign Affairs and Trade (DFAT), reports on Hazaras in Afghanistan between February 2010 and November 2012.
- Halima Kazem, Researcher and Journalist, 'Current view of Afghanistan' presentation to IMR, 8 October 2010
- Professor Alessandro Monsutti, 'Situation for Hazaras in Afghanistan', 19 August 2010: Response to questions.
- William Maley, 'On the Position of the Hazara Minority in Afghanistan' 9 September 2012
- William Maley, 'On Relocation to Kabul of Members of the Hazara Minority in Afghanistan' 19 November 2012
- Thomas Ruttig, 'A new Taleban Front?' dated 18 June 2010
- Amin Saikal, 'Afghanistan: 'The Status of the Shi'ite Hazara Minority' *Journal of Muslim Minority Affairs* Vol.32, No 1, March 2012
- United Nations High Commissioner for Refugees, 'Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan' 17 December 2010 <http://www.unhcr.org/refworld/docid/4d0b55c92.html>

71. UNHCR's *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* of 17 December 2010 (here forward UNHCR's *Eligibility Guidelines 2010*) stated as follows:

Although available evidence suggests that some members of (minority) ethnic groups, including Hazaras, may engage in irregular migration for social, economic and historical reasons, this does not exclude that others are forced to move for protection-related reasons. UNHCR therefore considers that members of ethnic groups, including, but not limited to those affected by ethnic violence or land use and ownership disputes, particularly in areas where they do not constitute an ethnic majority, may be at risk on account of their ethnicity/race and/or (imputed) political opinion, depending on the individual circumstances of the case. However, the mere fact that a person belongs to an ethnic group constituting a minority in a certain area does not automatically trigger concerns related to risks on the ground of ethnicity alone. Other factors including, inter alia, the relative social, political, economic and military power of the person and/or his and her ethnic group in the area where fear is alleged may be relevant. Consideration should also be given to whether the person exhibits other risk factors outlined in these Guidelines, which may exacerbate the risk of persecution. In the ever-evolving context of Afghanistan, the potential for increased levels of ethnic-based violence will need to be borne in mind. (UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* of 17 December 2010 pp.31-32).

Targeted Civilians

72. UNHCR's *Eligibility Guidelines 2010* stated as follows:

There is a systematic and sustained campaign by armed anti-Government groups to target civilians associated with, or perceived as supporting, the Afghan Government or the international community, particularly in areas where such groups are active. Attacks by armed anti-Government groups, which have ranged from intimidation, assassinations, abductions and stand-off attacks, to the use of improvised explosive devices (IEDs) and suicide attacks, increasingly target civilians associated with or perceived as supportive of the Government and the international community/ISAF. Targeted civilians include Government officials and civil servants, Government-aligned tribal leaders, Ulema Council (a national clerics' body) members, religious scholars, judges, doctors, teachers, and

workers on reconstruction/development projects. (UNHCR, Eligibility Guidelines, 17 December 2010 pp.7).

Danger on the roads

73. Reports from a variety of sources agreed that Jaghori is a safe district, but that there can be the danger of Taliban attacks on the roads into the district
74. A report from DFAT in Kabul in November 2012 addressed directly the question of whether Hazaras were singled out for harm and mistreatment while travelling on these routes as follows:

Contacts unanimously agreed the main targets on the roads in Ghazni, and nationally, were people employed by or with direct links to the Afghan Government or international community - regardless of ethnicity. Carrying documentation which pointed to a connection with the government remained dangerous. Nobody we spoke to was aware of targeting of any particular ethnic group on the roads. Several interlocutors pointed out the most significant threats to life safety on these routes were traffic accidents and IEDs - neither of which discriminated according to ethnicity.

Land Disputes

75. Land disputes are reported to be a significant issue in Afghanistan as there is no systemic registration of land or records. Land disputes among individuals and families are common. They occur all over the country and among all ethnic groups. Due to the absence of a properly functioning legal system, the state is unable to protect property rights. Land courts have been overwhelmed by the number of land claims, are time consuming, expensive and suspected of corruption. Many landowners prefer to resolve disputes through traditional mechanisms using local shuras/jirgas composed of local elders. However, there are mixed reports as to their impartiality. Proving land ownership is complex and title deeds and documents may be faked due to corruption.
76. The Danish Immigration Service Report on its 2012 fact finding mission to Kabul (pp.40-45) provides a detailed review of the issues. Also see Freedom House, *Freedom in the World – Afghanistan*, 22 March 2012, <http://www.unhcr.org/refworld/country,,FREEHOU,,AFG,,4f6b210837,0.html> and Internal Displacement Monitoring Centre, 'Land and Property', para 14, [http://www.internal-displacement.org/idmc/website/countries.nsf/\(httpEnvelopes\)/81604190AD126D11C125785200620C06?OpenDocument](http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/81604190AD126D11C125785200620C06?OpenDocument)
77. Sources cited in the Danish report suggest that, if someone has a land dispute with a rich or influential person, he will probably face the risk of being assaulted or even killed. Further, as land courts, as well as the shuras/jirgas are usually under the influence of influential and powerful persons, and the governmental institutions are corrupted, the rich or influential person will most probably win the case, so the case cannot be settled through these channels.
78. Sources suggest that if an individual gives up or renounces his land due to a land dispute, it will not be an option for him to stay on in the village because he will not be able to make a living and survive in the village without land. Moreover, losing a dispute is tantamount to "losing face" which is an important issue in Afghanistan.

79. The Danish report cites UNHCR to the effect that, even if the family agrees and does not claim their land back immediately, they may still be a target because there is a risk that they will claim back their land at a later stage. This is particularly the case where male members of the family (heirs) are alive who could claim the land back.
80. The report cites the Legal Union of Afghanistan (LUA) to the effect that if the injured party to a land dispute does not accept the outcome, it could result in threats and even murder and in some cases the threatened person would have to flee the country. The problem would still exist if the person tried to find protection in Kabul or other cities (Mazar and Herat) because 'the person who has caused the conflict and who has gained ownership of the land might want to eliminate the other party in order to make sure that he will not claim the land back. Unless the threatened person has personal relations to the authorities or to the National Security, he would always have to live with this threat.'

Failed asylum seekers returning from Western country

81. DFAT advised in October 2012 that it was not aware of instances of Afghan returnees suffering harm as a result of their time outside Afghanistan or an imputed pro-western view. The advice stated:

Post is not aware of any instances of returnees having suffered harm due to being considered supporters of the west. Afghans regularly travel abroad - to Iran and Pakistan, but also to Europe and other western countries - to seek work and greater economic or educational opportunities. Even under Taliban rule, Afghans continued to travel abroad to work or study, then returned to the country. Representatives of the several European countries that regularly conduct involuntary returns to Afghanistan have told us they are not aware of any returnees having suffered harm due to a prior claim for asylum.
82. DFAT advice of 3 February 2009 from an unidentified source in relation to the reported targeting of several Afghan returnees from Western countries suggested that most of the attacks appeared to have taken place for reasons additional to being a failed asylum seeker. These included attacks of a criminal nature, such as muggings and extortion; pre-existing family disputes; being a known opponent of the Taliban; being targeted as a result of residence in a Western country for financial reasons or being accused of spying for foreign troops. Deported asylum seekers have also been killed as a result of the general security situation in Afghanistan, including suicide attacks and bombings. (DFAT, AFG 9509 *Situation for Hazaras in Ghazni, Uruzgan and Dai Kundi Provinces, 3 February, 2009*).

FINDINGS AND REASONS

83. The applicant arrived at [location deleted: s.431(2)] without travel documents. He consistently identified as a citizen of Afghanistan who lived in Quetta, Pakistan for some four years before coming to Australia. In the absence of evidence to the contrary I accept the applicant is an Afghan national.
84. In light of UNHCR advice, cited at paragraph 69 above, that Afghans without a valid passport and visa cannot enter Pakistan legally and would be subject to deportation, I am not able to assess his claims against Pakistan. I have, therefore, assessed his claims against Afghanistan as his country of reference and receiving country.

85. I accept that the applicant is a citizen of Afghanistan from Jaghori, a Hazara by ethnicity and a Shi'a Muslim, as claimed.
86. The applicant has stated that the main reason he left Afghanistan was the land dispute with his neighbour, [Mr A], who had killed his father and seized his land. Because [Mr A] was an influential elder in the local Hazara community, with links variously to the government, the *Hizb-e-Wahdat* party and the Taliban, the applicant's family had been unable to resolve the dispute or reclaim their land, through either government or traditional tribal channels. The applicant left Afghanistan to live with his uncle in Pakistan after being harassed and threatened by [Mr A]'s children. The applicant fears that if he returns to Afghanistan [Mr A] will think he has come to reclaim his land and will kill him or have him killed by the Taliban.
87. The applicant also fears that he might be killed by the Taliban in Afghanistan because he is a Hazara and Shi'a; and as a returnee from a Western country, who would be regarded as a foreign spy or informer.
88. His advisers have characterised the applicant's claims as the Convention claims of race, religion and imputed political opinion. They have also posited that even if the harm feared by the applicant might in part be motivated by reasons unrelated to his race and religion and not be Convention-related, they could be characterised as being Convention-related because of the ongoing and oppressive campaign against Hazaras and the applicant's inability to access protection from the Afghan authorities because of his race and religion.
89. In assessing the applicant's claims, I have carefully considered and weighed a range of independent material relating to the situation of Hazaras in Afghanistan, including that provided by the applicant and his advisers.
90. I will first address the applicant's general claims of persecution as a Hazara and Shi'a.
91. I note the history of discrimination and violence suffered by Hazara and Shi'a in Afghanistan because of their race and religion; and the ongoing mistrust between the Hazara and the majority ethnic group, the Pashtun, based, in part, on the animosity of the Pashtun towards the Shi'a belief of most Hazaras. I accept that during its time in power, the Taliban targeted Hazaras for reasons of their race and religion.
92. However, on the basis of the independent information I have considered, I am not satisfied that the Taliban now specifically targets Hazaras or Shi'as in Afghanistan on a systematic and discriminatory basis solely by virtue of their race and religion, notwithstanding that individual Hazaras may have been targeted for other reasons, or been harmed in the general insurgency and Taliban attacks to which non-Hazara also fall victim.
93. There is general consensus that the security situation in Afghanistan remains highly unstable, with continued indiscriminate attacks by insurgents against civilian targets, government representatives and international forces. However, authoritative sources cited in a series of DFAT reports over the last two years, have consistently held that this situation is one which affects all Afghans, Hazara and Pashtun alike. I have also noted the *UNHCR Guidelines 2010*, which indicate that the main targets of the insurgency are not people of a particular ethnicity, but those seen to be in alliance with or supportive of

the government or international community and forces, particularly in areas where armed anti-government groups are active.

94. This information was put to the applicant at the hearing. In response, he referred to certain incidents against Hazaras which took place in the time of Taliban rule. The applicant later referred to the Ashura Day killings of Hazara Shi'as in Kabul in 2011. However, as I put to the applicant at paragraph 64, this was generally seen as an atypical occurrence and the conjecture that it was the precursor to serious sectarian violence had not eventuated.
95. On the basis of available current and authoritative material, I do not accept that Hazaras or Shi'a in Afghanistan face a real chance of harm amounting to persecution by the Taliban or other non-state actors simply by reason of their ethnicity and/or religion or that there is an ongoing and sustained campaign to target them. I do not accept that a person's identity as a Hazara Shi'a of itself causes them to fall within the Refugee Convention definition.
96. This does not mean however that a Hazara Shi'a cannot be found to be a refugee on the basis of the person's individual circumstances and experiences.
97. I am mindful that undue weight should not be placed on a degree of confusion and omission in accounts presented at various stages of the protection application process, leading to a conclusion that a person is not telling the truth. This is especially the case where initial interviews have been constrained by time, the use of interpreters and a lack of appreciation by an applicant of what is relevant and the degree of detail required. However, I am not required to accept uncritically any and all claims made by an applicant or to dismiss significant inconsistencies or embellishments.
98. By the applicant's own evidence, the Jaghori district of Ghazni province does not have a Taliban presence and is safe for Hazaras; the real danger being from insurgents on the roads leading from the district to Ghazni and Kabul. However, as put to the applicant at interview, authoritative reports indicate that those targeted on these roads were primarily people with direct links to the Afghan Government or international community, which on the available evidence the applicant does not have or claim to have.
99. On the basis of country information set out at paragraph 80 and put to the applicant at interview, I do not accept the applicant's claimed that he would be harmed by the Taliban as a returnee from a Western country because they would regard him as a foreign spy.
100. Consequently, I do not find that there is a real chance that the applicant would suffer serious harm for reason of race and religion as a Hazara and a Shi'a should he return to Afghanistan now or in the reasonably foreseeable future and I find that his fear in this respect is not well-founded.
101. On the whole, I found credible most of the applicant's evidence regarding the land dispute between his father and their neighbour [Mr A]. I accept that the applicant's father was killed by [Mr A], who then seized the land; that [Mr A] was a man of power and influence in the local Hazara community, with links to the government and the Hizb-e-Wahdat, the dominant Hazara party in the region; and that, as a result, the

applicant's family has been unable to resolve the dispute or reclaim their land, through either government or traditional tribal channels.

102. It is plausible that, as the eldest son, who had stood to inherit his father's property, the applicant was constantly harassed by [Mr A]'s children and that this prompted him to leave Afghanistan for Pakistan. It is also credible that if he returns to Afghanistan now, [Mr A] may think that the applicant has come to reclaim his land and may seek to harm or eliminate him, as the applicant fears; and that the authorities will not protect him against a powerful tribal elder. Such a scenario is borne out by country information as set out in paragraphs 75-79.
103. However, I consider that the applicant has been untruthful in evidence regarding several issues which he introduced for the first time at his hearing with me, having not mentioned them either in his interview with DIAC or in his statutory declaration prepared with the assistance of his adviser.
104. In this context, I am not satisfied that [Mr A] has links to the Taliban and might ask the Taliban to kill the applicant, should he return to Afghanistan. As I put to the applicant at hearing, I find it implausible that, if this were true, he would have omitted to mention such a significant piece of information earlier. I found disingenuous his explanation that he had wanted to keep his account short and was afraid he might get mixed up but after being refused protection decided he should tell everything. In my view, the applicant added this detail after he was refused in an effort to enhance his claims.
105. The same applies to the applicant's evidence at his hearing that after the death of the applicant's father, [Mr A] produced a forged title to the disputed land which the government accepted instead of the title deeds provided to the authorities by the applicant's uncle. As put to the applicant at the hearing, I find implausible that he had not mentioned this earlier because he only learned about it from his mother two months before his hearing; that she and his uncle had not previously told him these details because he was under 18. I note that he earlier told DIAC that after his father's death his uncles discussed with him the land dispute and what to do about it. Again, I consider the applicant embellished his evidence in an effort to enhance his claims after being refused protection by DIAC.
106. In view of country information at paragraphs 70-72 about the lack of systemic land title registration in Afghanistan and the inevitability that a man of power and influence will prevail in a land dispute, I find more likely that, as the applicant told DIAC, in the face of threats by [Mr A], his uncle was unable to pursue the land claim.
107. Nevertheless, I accept that there is a real chance that the applicant may be at risk of serious harm because his presence in Afghanistan would be seen by [Mr A] and his children as a sign he wishes to regain his land. However, on the basis of my findings above, I am not persuaded by the submission of the applicant's advisers that his claims can be characterised as Convention-related because of the ongoing campaign against Hazaras in Afghanistan, for which I have seen no evidence; and his inability to access protection from the Afghan authorities for reasons of his race and religion. I note that the applicant himself attributed his inability to access protection from the authorities to their corruption.

108. In view of the above, I find that there is a real chance that the applicant would suffer serious harm for reason of his land dispute with his neighbour should he return to Afghanistan now or in the reasonably foreseeable future and I find that his fear is well-founded. However, as the serious harm feared is not for a Convention reason I am unable to find that the applicant meets the criteria for a protection visa as set out in s36 (2)(a) of the migration Act.

Complementary Protection

109. As the applicant does not meet the criteria for the grant of a protection visa under s36 (2) (a) I have to consider whether he meets the criteria under the Complementary protection legislation. The relevant law is contained in s. 36 (2) (aa) of the Migration Act. "A non-citizen in Australia (other than a citizen mentioned in paragraph (a)) to 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."
110. I have dealt with the claims that the applicant has a well-founded fear of persecution in Afghanistan in paragraphs 82 to 107 above. I have found that there is not a real chance that the applicant would be persecuted for a Convention reason now or in the reasonably foreseeable future and that his fear of persecution in Afghanistan for a Convention reason is not well-founded.
111. I have considered whether the applicant would suffer 'significant harm' in terms defined in s.36(2A): s.5(1) of the Act as outlined in paragraph 17 above.
112. As noted above, the applicant's claims relate to a fear of significant harm that would be directed at him by his neighbour [Mr A] due to a land dispute. I accept as credible that the applicant's father was killed by [Mr A], who seized his land, as claimed; that [Mr A] was a man of power and influence in the local Hazara community, with links to the government and the Hizb-e-Wahdat, the dominant Hazara party in the region; and that as a result, the applicant's family has been unable to resolve the dispute or reclaim their land, through either government or traditional tribal channels. I find it plausible that, as the eldest son, who had stood to inherit his father's property, the applicant was constantly harassed by [Mr A]'s children and that this prompted him to leave Afghanistan for Pakistan.
113. I accept that if he returns to his home village in Jaghori, there is a real chance that his neighbour [Mr A] may think that the applicant has come to reclaim his land and may seek to harm or eliminate him; and that the authorities would not offer him protection against a powerful and well-connected tribal elder. Such a scenario is consistent with country information referred to in the Danish Immigration Report of May 2012, that a person involved a land dispute returning to Afghanistan and to his home area would be at risk.
114. I have considered whether it would be reasonable for the applicant to relocate to an area of Afghanistan where there would not be a real risk that he will suffer significant harm, such as Kabul. I note that the applicant has no family or tribal links in the area, which UNHCR Guidelines has identified as a pre-requisite for 'a reasonable alternative' Further, I note that sources cited in the Danish Report of May 2012, suggest that the

threat of harm to a person in a land dispute would still exist, even if the person moved location, unless the person involved has personal relations with the authorities or to national security, which the applicant does not have. In light of the above, I find that relocation to another area cannot be considered a reasonable option for the applicant.

115. In view of the adverse security situation in Afghanistan and UNHCR advice in its 2009 Guidelines that, 'to the extent that the harm feared is from non-State actors, State protection is on the whole not available in Afghanistan', I am not satisfied that the applicant will be able to access any adequate measure of State protection in Afghanistan.
116. I accept that in the particular circumstances of this case the significant harm feared is specific to the applicant, not to the general population of Afghanistan.
117. On the basis of the evidence before me in this particular case, I am satisfied there are substantial grounds for believing that as a necessary and foreseeable consequence of his removal to Afghanistan there is a real risk that the applicant will suffer significant harm.

CONCLUSIONS

118. The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
119. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).

DECISION

120. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(aa) of the Migration Act.