

**1215134 [2013] RRTA 93 (31 January 2013)**

**DECISION RECORD**

<b>RRT CASE NUMBER:</b>	1215134
<b>DIAC REFERENCE(S):</b>	CLF2012/181445
<b>COUNTRY OF REFERENCE:</b>	Afghanistan
<b>TRIBUNAL MEMBER:</b>	Filip Gelev
<b>DATE:</b>	31 January 2013
<b>PLACE OF DECISION:</b>	Melbourne
<b>DECISION:</b>	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) 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] August 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. In a statutory declaration accompanying his application for a Protection Visa, the applicant stated that his name was [name deleted: s.431(2)], that he was [age deleted: s.431(2)] years old and he was born in [Village 2], [Uruzgan Province].
21. He said that his father was a "village representative" during the Najib government. He retired in approximately 1990 and became "a village leader" He was assassinated by some unknown masked men. The applicant's family suspected a local "Sipah" commander had killed him after the local commander's brother was kidnapped and probably killed.
22. In 2011, the applicant's younger brother was killed on his way to Kabul. The applicant thought someone had told the Taliban that the applicant's brother was working for the government (the applicant did not claim that his brother was in fact working for the government).

23. The applicant's older brother, who was serving in the army, was "arrested" by the Taliban after someone "reported" him to them for being "government staff". He has not been seen since.
24. The applicant expressed his fear that he would be targeted for reasons of being Hazara, Shia and for being a close relative of his brothers and his father.

*Delegate interview*

25. The applicant said that he lived in Afghanistan until about September-October 2011. When he left Afghanistan, he first went to Pakistan for about a month. He wanted to stay there but the situation was deteriorating. From Pakistan he travelled to Australia.
26. He said he was married and his wife and children lived with his extended family, including the applicant's mother, one sister, and the wife and kids of his missing brother in Pakistan. He had four sisters in Afghanistan – two in Kabul and two in [District 1].
27. His two sisters and brothers-in-law in [District 1] had not faced any problems. However, the applicant said that all Hazara and Shias were at risk. He said that his family still owned a large plot of land in the village on which 8-10 farmers worked. The crops included [crops deleted: s.431(2)]. The land generated "a good income".
28. When asked to describe the village, he said the village was so large that it took about a day to walk from end to end. Approximately 1,500 Hazaras lived in the village. He was asked to draw a picture showing the distance from the Hazara village to the closest Pashtun villages. The applicant drew a picture which was placed on the departmental file.
29. During the government of Dr Najib, the applicant's father was "the representative" of the Council of [District 1] for about 3 years. After the government collapsed he "came to the area" and became "the senior in the area". The applicant's family did not see the person who did it. The neighbours told them that a person with a covered face had killed him.
30. In the following year, the applicant's younger brother was killed on the way to Kabul where he wanted to check his university entry examination results. The applicant thought it was the same people who killed his father, "the opposition from the area" who had reported his brother to the Taliban.
31. When he was asked how he knew who had reported his brother, and that he was not the victim of bad luck, the applicant said that he knew because his own photo had been given to the Taliban and he was identified as someone working for the government. He added that there had been witnesses to his brother's murder. He was travelling in a vehicle with other people. When the car was stopped, he was the only person whose name was called out. He was taken out of the vehicle, taken some distance away from it and shot.
32. The applicant's older brother, who worked for the national army, was kidnapped. The applicant did not know if his brother was alive or not. He was working for the government and on his trip from home back to work, he disappeared in Maidan Wardak province. It happened between June and July 2011.
33. The applicant said that someone from his village had seen the Taliban with his photo, that is, the Taliban were looking for him to kill him after they killed his brothers. This had happened on three occasions in July-August 2011. The Taliban stopped cars and asked if the applicant

was in them. The incidents occurred within a few days of each other, except that he was forced to pay a tax which the Taliban called *wushu*.

34. The applicant was asked why he did not suffer any harm if the Taliban were looking for him in July-August and he “did not leave until October” Personally, he was never harmed.
35. [In] September 2012, the delegate refused the application on the basis that the applicant is not a person in respect of whom Australia has protection obligations.

### **Tribunal review**

36. The applicant applied for review of the delegate’s decision [in] October 2012.
37. [In] January 2013, the Tribunal received extensive submissions in relation to the applicant. Through his representatives’ submissions, the applicant made a significant new claim, namely, that he himself used to work for the Afghanistan National Army (ANA) from 2009 until before his departure from Afghanistan. According to the submissions, the applicant was misled into not disclosing this information, because he was told it would be adverse to his case. The submissions did not provide any details about his role or rank in the ANA or any other details. The submissions noted that “the applicant has provided documentary evidence attesting to his role” with the ANA.
38. Together with the submissions, the representatives provided to the Tribunal a “Certificate of Excellence” from an [IT company] which states: “This is to certify that [the applicant] has successfully completed 6 [sic] week Radio course at [organisation deleted: s.431(2)] From [March] 2009 to [April] 2009. Finally, he provided a photo with what appeared to be three Caucasian men and another man dressed in military fatigues.

### *Tribunal hearing*

39. The applicant appeared before the Tribunal [in] January 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages.
40. The applicant was represented in relation to the review by his registered migration agent.
41. The applicant provided his name and date of birth, consistent with the departmental file. He said he was married and had [children], aged [ages deleted: s.431(2)] years old, and his youngest child was about 5 month old when he left Afghanistan. He left Afghanistan [in] of Meezan 1390 ([in] September 2011).<sup>1</sup>
42. He said his wife and all his children were in Pakistan. They have not received any personal threats but according to the applicant it’s always dangerous for Shias and Hazaras in Pakistan.
43. The Tribunal asked about the applicant’s father – who was a village representative during the Najib government. The applicant said his father had been head of *Shura* (local council). This *Shura* was something created by the Najib government. Each ethnic group had a *Shura* and his father was involved with the Hazara one. He was one of two representatives for [District 1] District.

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<sup>1</sup> Conversion done through <http://www.afghaneic.org/converter.php> on 30 January 2013.

44. The Tribunal asked if that meant that the entire family were perceived as communists. The applicant said after the Najib government, when the Mujahideen came to power, his father was seen as a communist and came home from Kabul. After returning home from Kabul, he was a well-known person in the village, but he did not have an official position. In his home village of [Village 2] he was not under threat of harm, but people in surrounding villages did not like him.
45. The Tribunal asked who killed the applicant's father. He said some farmers had seen two masked men shoot his father. The applicant thought they were Taliban who targeted his father firstly, because he was with the Najib government and, secondly, because two of his sons were working with the ANA.
46. The Tribunal asked why the Taliban had waited for almost 20 years before harming his father and why they had not harmed him in the 1990s when they were in power. He said the Taliban were briefly in control of [District 1] District, but then the people fought back and regained control of the District.
47. He said that his father also had a problem with a local commander whose brother had been killed and the commander blamed the applicant's father. The commander was called [name deleted: s.431(2)] and he was with Sepah (Sepah-e-Pasdaran), a group supported by Iran. He is a very powerful commander in the village who has killed a lot of people, "mostly indirectly" He cannot do things directly because he is with the government and his wife is in the Afghan Parliament. He harms people indirectly, e.g. he might pass on information that leads to people being harmed and the applicant thought this was what happened to his younger brother.
48. According to the applicant, [the commander's brother] was killed in 1387 (2008) in [District 1] (but not in [Village 2]) and [the commander] thought the applicant's father's "people" killed him. When he said "people" he meant people from the same "tribe" as the applicant's father. The applicant added that his father went around with bodyguards.
49. He gave evidence consistent with the evidence he had given in his statutory declaration and at the departmental interview about the death of his younger brother (who was killed on his way to Kabul where he was going to check his university entry examination results) and the disappearance of his older brother (who was in the army and was taken away in Maidan Wardak Province on the way to work).
50. The Tribunal asked the applicant a series of questions about his military service. He said he joined the army in 1387, that is, 2008-2009.
51. The explanation as to the reason why he had not mentioned this claim earlier was that he had asked someone for "suggestions" and he was told that if he said that he had worked for the Afghan government, it would make his case more difficult. He said he was extremely sorry about this.
52. The Tribunal invited the applicant to say more about his military service. He said he served in Kunar Province. It was the ANA's decision to send him there. He did not have to undergo any formal training. He said during the Najib government he had 6 months of military training. He was about [ages deleted: s.431(2)] at the time. At that time, his name was recorded with the Ministry of Defence and when he heard that the ANA was recruiting, he volunteered. Even though it had happened many years ago, he did not need to do any more

training. However, he had to complete a test consisting of around 100 questions including military questions, mathematics, and geography.

53. He served only with Americans not with troops from any other country. He was a “[role deleted: s.431(2)]”. He said what his rank was but the interpreter did not know the word. He said it was written down, “[rank abbreviation deleted: s.431(2)]”. He had been made [rank deleted: s.431(2)] during the time of Najib. He did a 6 month course, then served for a year and he was made [rank deleted: s.431(2)].
54. He said he had “around 39 soldiers” serving under him. He was in charge of the [role deleted: s.431(2)].
55. The applicant said during his time of service, there were many attacks on the ANA and the US troops where he was serving. [name deleted: s.431(2)] was the head of the battalion. He was from Maidan Wardak and he was killed in combat. Under him was an officer called [name deleted: s.431(2)](the applicant did not recall his last name). “[name deleted: s.431(2)]” was how everyone referred to him. [name deleted: s.431(2)] was the brigade commander. The corps commander was also from Maidan Wardak Province. After thinking about it for some time, he said his name was General [name deleted: s.431(2)].
56. The Tribunal asked the applicant why the certificate he provided stated that he had undertaken a course of 6 week duration and it also stated that it lasted [from March [to] April 2009 (the period [between] March [and] April is only 12 days). The Tribunal said it had concerns about the certificate’s authenticity. The applicant said that he did not understand English. It was a 6 week course in Jalalabad.
57. He confirmed that one of the cards he had provided a photocopy of was an ANA card, the other one was a card permitting him to carry a weapon. He said he had been issued with a Kalashnikov. He could not tell the Tribunal what the calibre of Kalashnikov bullets was. He had a vest with three magazines and another one attached to the weapon itself. Each magazine could hold 30 bullets.
58. The Tribunal asked the applicant about the radios the ANA troops were using. He said they were US made radios. PRC1099 and PRC1077 (for contact between battalions), RT7000 (for contact with the brigade). The RT7000 transmits at a longer distance. For safety reasons they used different frequencies all the time. They communicated in Dari. They also used secret code e.g. umbers with agreed meanings.
59. The applicant decided to leave the army in late 1390 (late 2011) when he went home to see his family and people told him that the Taliban were looking for him. He did not go back to the army, nor contact them to tell them that he was quitting.
60. The Tribunal asked the applicant about his salary in the military. He said he was getting [amount deleted: s.431(2)] Afghani a month. This was more than someone at his rank would normally receive because he was acting in a senior position, [rank deleted: s.431(2)]. He did not know the word in English. He said it was level “[level deleted: s.431(2)]”.
61. The Tribunal asked about the family land. He replied that his father’s land had been divided among the siblings and he had a share. He would not have any problems taking his share from his siblings. That was not the problem he would face in Afghanistan. He has a security problem there, not a financial one.

62. He was asked why he could not go to Kabul and work there as an officer in the Australian National Army. He said the Ministry of Defence would choose where he goes. Whenever he had to travel from where he was stationed to his home area and back, he would have to go through Pashtun areas where his life will be at risk.

## Country information

### *Situation of the Hazara in Afghanistan*

63. The Hazara form one of the main ethnic groups in Afghanistan. They make up approximately 9 per cent of the population, down from about 67 per cent in the 19<sup>th</sup> century. More than half were massacred in 1893.<sup>2</sup> The majority of Hazaras live in the central mountainous region of the country, known as the Hazarajat.<sup>3</sup> The Hazarajat covers all of Bamiyan province and extends into parts of Ghor, Uruzgan, Wardak, and Ghazni. Decades of war have driven many Hazaras away from their traditional homeland to live on the fringes of the state, in areas that border Iran and Pakistan.<sup>4</sup> A significant proportion of Hazaras are also reported to be living in Kabul.<sup>5</sup>
64. The great majority of Hazaras are Shia Muslims. Most Pashtuns and the Taliban are Sunni Muslims. The US State Department Country Report on Human Rights Practices in Afghanistan (2010) stated that social discrimination against Shia Hazaras continued along class, race, and religious lines. The Country Report referred to UNHCR advice that a number of ethnic minorities, but particularly the Hazara, faced ‘official obstacles and discrimination’. Instances of discrimination included extortion of money through illegal taxation, forced recruitment and forced labour, physical abuse, and detention.<sup>6</sup>
65. There is no doubt that, relatively speaking, in the first few years after the fall of the Taliban government, the situation of the Hazaras improved dramatically.<sup>7</sup> More recently, there have been diametrically opposed views expressed with respect to their current circumstances and the risk of future harm Hazara applicants might face.

### *The security situation in Afghanistan*

66. In an April 2012 publication, Thomas Ruttig explained that the international forces will not leave Afghanistan entirely after 2014 but will remain in the background while Afghan National Security Forces (ANSF) take over responsibility for combating the insurgents. After 2014, during a ten-year ‘transformation’ phase some international troops will remain in the country in a training and mentoring capacity.<sup>8</sup> Nevertheless, there is no doubt that the number

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<sup>2</sup> Minority Rights Group International, “Afghanistan: Hazaras”, accessed at <http://www.minorityrights.org/?lid=5440> on 18 October 2012.

<sup>3</sup> Minority Rights Group International n.d., *World Directory of Minorities and Indigenous Peoples – Hazaras* <<http://www.minorityrights.org/5440/afghanistan/hazaras.html>> Accessed 18 June 2012.

<sup>4</sup> Minority Rights Group International n.d., *World Directory of Minorities and Indigenous Peoples – Hazaras* <<http://www.minorityrights.org/5440/afghanistan/hazaras.html>> Accessed 18 June 2012.

<sup>5</sup> Katzman, K 2012, *Afghanistan: Post-Taliban Governance, Security, and U.S. Policy*, 21 September, p.90 <<http://www.fas.org/sgp/crs/row/RL30588.pdf>> Accessed 4 October 2012.

<sup>6</sup> Accessed at <http://www.state.gov/g/drl/rls/hrrpt/2010/sca/154477.htm> on 18 October 2012.

<sup>7</sup> “Information on Situation of Hazaras in Post-Taliban Afghanistan”, US Bureau of Citizenship and Immigration Services, 4 April 2003, accessed at <http://www.unhcr.org/refworld/docid/3f52085b4.html> on 18 October 2012.

<sup>8</sup> Ruttig, T, 2012, *Afghanistan Analysts Network*, “Withdrawal in 2012? Myths and Realities”, 2 April, <<http://aanafghanistan.com/index.asp?id=2639>> Accessed 25 April 2012

of troops will be reduced significantly. Almost all reports refer to 2014 as the year when international troops will “withdraw” or “exit”, or the year when the US will end its involvement in the war in Afghanistan, rather than the year when international troops will engage in a period of transition or a slow drawingdown<sup>9</sup> The Tribunal notes recent news reports that US troops will start withdrawing earlier than what was originally envisaged.<sup>10</sup> The “shift from a combat to a support mission” may be finalised in 2013. Nevertheless, because few details are known about the changed timetable, the Tribunal refers to 2014 as the year when the withdrawal will be finalised

67. In a recent publication, Dr Antonio Giustozzi suggested that the prospects of a successful political settlement in Afghanistan before 2014, appeared limited. He notes that there were already signs the Taliban were “retraining their forces for more conventional operations such as taking towns and cities” and outlined the possibility of the Afghan state being reduced to Kabul and areas dominated by ethnic minorities in the event of a successful Taliban push in 2014-15.<sup>11</sup>
68. One of the most pessimistic assessments of Afghanistan’s future comes from Gilles Dorronsoro writing for the Carnegie Endowment for International Peace.<sup>12</sup> According to Dorronsoro not long after 2014 the Afghan government will be able at best to guarantee “the security of cities and a few naturally pro-government regions, but it will lose control of rural Pashtun areas and the border provinces of Pakistan, with no prospects of regaining ground”.<sup>13</sup> Except for Panjshir and Hazarajat, most districts will be “exposed to Taliban military operations”. The Taliban will be able to threaten Afghanistan’s main roads and seize some of the provincial capitals.<sup>14</sup> Dorronsoro envisaged three possible future scenarios two of which involved the fall of the regime; the third, according to the author the least likely outcome, is the establishment of an anti-Taliban sanctuary in the north of the country.
69. In June 2011, the International Crisis Group (ICG) presented the view that recent talks with the Taliban were unlikely to result in a sustainable peace, and may even destabilise the region further due to the many differing priorities and interests involved.
70. According to assessments carried out by the National Counterterrorism Centre, US Department of Defence and International Security Assistance Force (ISAF)<sup>15</sup> levels of

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<sup>9</sup> See for example, “Haqqani urges US to stay in Afghanistan beyond 2014”, *PakTribune*, 4 November 2012, accessed at <http://paktribune.com/news/Haqqani-urges-US-to-stay-in-Afghanistan-beyond-2014-254635.html> on 5 November 2012 and “NATO accepts Obama timetable to end war in Afghanistan by 2014”, *CNN*, 21 May 2012, accessed at [http://articles.cnn.com/2012-05-21/us/us\\_nato-summit\\_1\\_international-security-assistance-force-nato-forces-isaf?\\_s=PM:US](http://articles.cnn.com/2012-05-21/us/us_nato-summit_1_international-security-assistance-force-nato-forces-isaf?_s=PM:US) on 5 November 2012.

<sup>10</sup> Carol L. Lee and Adam Entous, “Obama speeds up troop withdrawals from Afghanistan”, *The Australian*, 12 January 2013, accessed at <http://www.theaustralian.com.au/news/world/afghanistan-withdrawal-not-ruled-out-after-obama-meets-with-karzai/story-e6frg6so-1226552458078> on 14 January 2013.

<sup>11</sup> Giustozzi, A, in Behr, T and C Salonius-Pasternak, eds, *The Beginning of the End?* “Afghanistan towards and after 2014”, April 2012, Finnish Institute of International Affairs

<sup>12</sup> G. Dorronsoro, “Waiting for the Taliban in Afghanistan”, *The Carnegie Papers*, Carnegie Endowment for International Peace, September 2012. Accessed at [http://www.carnegieendowment.org/files/waiting\\_for\\_taliban2.pdf](http://www.carnegieendowment.org/files/waiting_for_taliban2.pdf) on 26 November 2012.

<sup>13</sup> *Ibid.*, at p. 4.

<sup>14</sup> *Ibid.*, at p. 11.

<sup>15</sup> The security assessments by the National Counterterrorism Centre, Department of Defence and ISAF are challenged by the United Nations Development Programme and the United Nations Assistance Mission to Afghanistan which claim that levels of violence have continued to rise over 2011. For discussion on the difficulties of accurately measuring the levels of violence in the Afghanistan war see Cordesman, A & Burke, A 2012, *Afghanistan: The Failed Metrics of Ten Years of War*, 9 February, Center for Strategic and International

violence in Afghanistan have declined since 2011, particularly in the south-west where territory has been captured from insurgent groups.<sup>16</sup> In June 2012, the Afghanistan National Safety Office (ANSO) found that attacks initiated by Armed Opposition Groups (AOG)<sup>17</sup> over the first six months of 2012 had declined by 38 per cent compared with the same period in 2011.<sup>18</sup> AOG attacks declined significantly in the southern provinces of Helmand, Ghazni, Kandahar and Khost where the International Military Forces (IMF) surge was strongest.<sup>19</sup> By contrast, AOG activity increased in the eastern provinces.<sup>20</sup>

71. However, it remains to be seen whether IMF tactical victories and transfers of responsibility for security to Afghan forces can be converted into lasting Afghan government control.<sup>21</sup> The current relative de-escalation in AOG initiated attacks, in some provinces, is assessed to be a tactical response to the disengagement and withdrawal in 2014 of IMF and does not demonstrate any loss of operational ability by AOGs. The ANSO report concludes that AOGs are simply strengthening their position in anticipation of the international forces' withdrawal in 2014.<sup>22</sup>
72. On 13 September 2011, co-ordinated attacks attributed to the Taliban and the Haqqani Network occurred in central and western Kabul. Locations targeted included the US embassy, NATO headquarters and police buildings.<sup>23</sup> Bill Roggio, editor of the online *Long War Journal*, suggested that Western governments' focus on blaming this and other attacks on the Haqqani Network was a tactic to "salvage nascent peace negotiations with the Taliban's more mainstream leaders."<sup>24</sup>
73. Other incidents during 2011, including the murders of General Mohammad Daud Daud, the Police Commander for Northern Afghanistan, in May and President Karzai's half brother Ahmed Wali Karzai and prominent presidential ally Jan Mohammad Khan, suggested a significant resurgence of capacity by the Taliban and their ability to infiltrate centres of power and security. Both General Daud and Ahmed Wali Karzai were reportedly murdered

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Studies, p. 13 <[http://csis.org/files/publication/120209\\_Afghanistan\\_Failed\\_Metrics.pdf](http://csis.org/files/publication/120209_Afghanistan_Failed_Metrics.pdf)> Accessed 13 April 2012.

<sup>16</sup> Cordesman, A & Burke, A 2012, *Afghanistan: The Failed Metrics of Ten Years of War*, 9 February, Center for Strategic and International Studies, p. 13

<[http://csis.org/files/publication/120209\\_Afghanistan\\_Failed\\_Metrics.pdf](http://csis.org/files/publication/120209_Afghanistan_Failed_Metrics.pdf)> Accessed 13 April 2012.

<sup>17</sup> AOG attacks refer to combat operations only (IEDs, ambushes, indirect fire, etc) and not to non-kinetic activities such as threats, abductions or criminal activity.

<sup>18</sup> Afghanistan NGO Safety Office 2012, 'Quarterly Data Report Q.2 2012', 1 January- 30 June, p.1 <<http://www.ngosafety.org/store/files/ANSO%20Q2%202012.pdf>> Accessed 4 October 2012.

<sup>19</sup> Afghanistan NGO Safety Office 2012, 'Quarterly Data Report Q.2 2012', 1 January- 30 June, p.8 <<http://www.ngosafety.org/store/files/ANSO%20Q2%202012.pdf>> Accessed 4 October 2012.

<sup>20</sup> Afghanistan NGO Safety Office 2012, 'Quarterly Data Report Q.2 2012', 1 January- 30 June, p.8 <<http://www.ngosafety.org/store/files/ANSO%20Q2%202012.pdf>> Accessed 4 October 2012.

<sup>21</sup> Cordesman A. H. & Burke, A. A. 2012, *Afghanistan: The Failed Metrics of Ten Years of War*, 9 February, Center for Strategic and International Studies, p. 15

<[http://csis.org/files/publication/120209\\_Afghanistan\\_Failed\\_Metrics.pdf](http://csis.org/files/publication/120209_Afghanistan_Failed_Metrics.pdf)> Accessed 13 April 2012.

<sup>22</sup> Afghanistan NGO Safety Office 2012, 'Quarterly Data Report Q.2 2012', 1 January- 30 June, p.6 <<http://www.ngosafety.org/store/files/ANSO%20Q2%202012.pdf>> Accessed 4 October 2012.

<sup>23</sup> *BBC News*, 2011, "Afghan gun battle: Ryan Crocker says 'not a big deal'", 14 September, <<http://www.bbc.co.uk/news/world-south-asia-14909004>> Accessed 28 September 2011

<sup>24</sup> *The Christian Science Monitor*, 2011, "Who's really behind the Kabul attacks?" 14 September, <<http://www.csmonitor.com/World/Asia-South-Central/2011/0914/Who-s-really-behind-the-Kabul-attacks>> Accessed 29 September 2011

by trusted and long-serving security staff, a development which indicates active recruitment activity by the Taliban among existing security personnel.<sup>25</sup>

#### *Current situation in Uruzgan*

74. Information was located which suggested the security situation for Hazara minorities in Uruzgan province is more dangerous than in other provinces and that Hazaras have been targeted in the past because of their ethnicity. DFAT advice from February 2010 notes that:

The AIHRC said Hazaras outside of Hazarajat were more vulnerable to violent attacks and feared traveling beyond their immediate communities, in some cases even to the district centre. Hazara minorities in Uruzgan, Helmand, Kandahar and Herat, for instance, had particular challenges not faced by Hazaras in Hazarajat. In some of these areas pressure was felt from both the government and insurgents.<sup>26</sup>

75. In December 2011 the *Wakht News Agency*<sup>27</sup> reported that the local police commander and local police in the district of Khas Uruzgan were actively helping the Taliban to kill Hazaras and seize their lands.<sup>28</sup> In June 2010, 11 Hazara males were discovered beheaded in the Uruzgan Khas district of Uruzgan province.<sup>29</sup> According to the 2011 *United States Commission on International Religious Freedom Report*, police officials stated that they were killed by the Taliban "because they were ethnic Hazaras and Shiite Muslims."<sup>30</sup> The *Pajhwok Afghan News* reported that the bodies were "found in the Baghchar area of Khas Uruzgan district, where a notorious Taliban commander, Juma Khan, was killed a month back during a clash with coalition troops".<sup>31</sup>
76. In September 2010, the *Hazaristan Times*<sup>32</sup> published an article describing mass displacement forced migration of Hazaras in Uruzgan due to insecurity and also made comment on the limited amount of media attention surrounding the events against the Hazara in the area.<sup>33</sup> The displacement of Hazaras was also noted in the *Afghanistan Protection Cluster 2010 Report*, published by the United Nations Office for the Co-ordination of Humanitarian Affairs. The report provided data in relation to displacement (note, not only the displacement of Hazara) from Uruzgan Khas in April 2009 and June 2010 illustrating the insecurity in the area. The report stated that in April 2009, 778 families originally from districts of Uruzgan

<sup>25</sup> *BBC News* 2011 "Deadly week overshadows Afghan handover", 18 July, <<http://www.bbc.co.uk/news/world-south-asia-4190552>> Accessed 19 July 2011 and *BBC News* 2011 "Shift in Taliban tactics alarms Afghanistan government", 29 May, <<http://www.bbc.co.uk/news/world-south-asia-13589764>> Accessed 19 July 2011

<sup>26</sup> DIAC Country Information Service 2010, *Situation of the Hazara Minority*, (sourced from DFAT advice of 21 February 2010), 17 September

<sup>27</sup> Wakht News Agency is a Kabul-Afghanistan based independent private news agency. Wakht News Agency covers news stories and publishes it in two local languages (Pashto and Dari) and in English.

<sup>28</sup> 'Local police follows ethnic prejudice in Uruzgan: Official' 2011, *Wakht News Agency*, 28 December <[http://www.wakht.af/index.php?option=com\\_content&view=article&id=1909%3Alocal-police-follows-ethnic-prejudice-in-uruzgan-official&catid=6%3Asecurity-a-crime&Itemid=17&lang=en](http://www.wakht.af/index.php?option=com_content&view=article&id=1909%3Alocal-police-follows-ethnic-prejudice-in-uruzgan-official&catid=6%3Asecurity-a-crime&Itemid=17&lang=en)> Accessed 4 October 2012

<sup>29</sup> 'Police find 11 beheaded bodies in Afghan South' 2010, *Reuters*, 25 June 2011 <<http://www.reuters.com/article/2010/06/25/us-afghanistan-beheading-idUSTRE65O2ML20100625>> Accessed 29 July 2011

<sup>30</sup> United States Commission on International Religious Freedom 2011, *USCIRF Annual Report 2011 - The Commission's Watch List: Afghanistan*, 28 April, p.218 <<http://www.unhcr.org/refworld/docid/4dbe90bcc.html>> Accessed 28 July 2011

<sup>31</sup> '11 beheaded bodies found in Uruzgan' 2010, *Pajhwok Afghan New*, 25 June <<http://www.pajhwok.com/en/2010/06/25/11-beheaded-bodies-found-uruzgan>> Accessed 29 July 2011

<sup>32</sup> The Hazaristan Times is a pro Hazara news site.

<sup>33</sup> 'Hazara Mass Displacement from Uruzgan' 2010, *Hazaristan Times*, 26 September <<http://www.hazaranetwork.com/forum/topics/hazara-mass-displacement-from>> Accessed 29 July 2011

(Khas Uruzgan, Chora and Char China) had been displaced and in June 2010, 277 Families or 1,939 individuals were displaced to Uruzgan District Centre from Uruzgan Khas due to insecurity. The report also stated that in June 2010 the area was inaccessible for government and NGOS “due to the conflict the area”.<sup>34</sup> *The Liaison Office*, an independent non-government organisation, provided an analysis in of Uruzgan following a four year assessment of the province from 2006 - 2010. It specifically highlights Uruzgan Khas as having “greater problems with insecurity” and to be losing ground to the many insurgent groups in the district.<sup>35</sup>

77. Other reports indicate that Harazas have been involved in violent counter attacks against Pashtuns in Uruzgan Khas. The *Afghanistan Analysts Network* in June 2011 described these attacks and counter attacks as relatively common in the area,<sup>36</sup> and in June 2011, a blog on the *Afghanistan Analysts Network* claimed that Hazara local police in Malistan had conducted cross-border raids on Pashtun villages in Khas Uruzgan district of Uruzgan province.<sup>37</sup>
78. Although Hazaras continue to be subject to targeted attacks, reports indicate that general security conditions in the province have been steadily improving over the course of 2011 and 2012. The most recent of these reports published in May 2012 indicates that that the road linking Khas Uruzgan district and Tirin Kot, the capital of central Uruzgan province, had reopened after a decade of closure due to militant threats.<sup>38</sup> Similarly, on 16 February 2012 the Netherlands Ministry of Foreign Affairs evaluated their four year mission in Uruzgan and noted an improvement in the province, with “tangible results”:

The government and the House of Representatives reviewed the ISAF mission in Uruzgan today. The Netherlands was lead nation of the mission from 2006 to 2010, which operated in difficult and dangerous conditions to increase the level of security and stability in the Afghan province. There have been tangible results: the security situation and accessibility have improved and socioeconomic development has begun.

Uruzgan has become more stable and living standards have started to rise, but the situation remains fragile.<sup>39</sup>

*Targeting of individuals associated with the central government of Afghanistan or the international community*

79. The 2010 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan state that:

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<sup>34</sup> Afghan Protection Cluster 2011, *Protection Overview: Southern Region-2010*, 8 February, p.15 <<http://www.unhcr.org/refworld/pdfid/4d64d9d12.pdf>> Accessed 29 July 2011

<sup>35</sup> The Liaison Office 2010, *The Dutch Engagement in Uruzgan: 2006 – 2010*, August, p. 40 <[http://www.humansecuritygateway.com/documents/TLO\\_Dutch\\_Engagement\\_In\\_Uruzgan-2006-2010.pdf](http://www.humansecuritygateway.com/documents/TLO_Dutch_Engagement_In_Uruzgan-2006-2010.pdf)> Accessed 29 July 2011

<sup>36</sup> Afghanistan Analysts Network 2011, *Khas Uruzgan violence and ISAF press releases*, 26 June <<http://aan-afghanistan.com/index.asp?id=1846>> Accessed 29 July 2011

<sup>37</sup> Afghanistan Analysts Network 2011, *Khas Uruzgan violence and ISAF press releases*, 26 June <<http://aan-afghanistan.com/index.asp?id=1846>> Accessed 29 July 2011

<sup>38</sup> Wisal, A 2012, ‘Uruzgan road reopens after a decade’, *Pajhwok Afghan News*, 1 May <<http://www.pajhwok.com/en/2012/05/01/uruzgan-road-reopens-after-decade>> Accessed 29 May 2012; ‘Respite for troubled Afghan province’ 2011, *Institute for War and Peace Reporting*, 23 November <<http://iwpr.net/report-news/respites-troubled-afghan-province>> Accessed 30 May 2012

<sup>39</sup> Netherlands Ministry of Foreign Affairs 2012, *Uruzgan mission evaluated: Government and House see tangible results*, 16 February <<http://www.minbuza.nl/en/news/2012/02/uruzgan-mission-evaluated-government-and-house-see-tangible-results.html>> Accessed 30 May 2012

The volatile security situation in Afghanistan continues to restrict the operations of humanitarian and aid organizations, particularly in the southern and eastern regions. Humanitarian workers in areas where there are insurgent activities or infiltration by Taliban and/or Hezb-e-Islami continue to be targeted by these groups based on their perceived association with the central Government and the international community. National staff working for some UN agencies or international and local non-governmental organizations (INGOs and NGOs, respectively) reportedly face intimidation, attacks, abduction and death at the hands of the Taliban and other armed anti-Government groups, particularly in areas where these groups are active. Family members of humanitarian workers have also been targeted, especially if they live in areas where aid is delivered.<sup>40</sup>

80. According to one source cited by the Danish Immigration Service, people working for American funded organisations face a particular risk. The 2012 *Afghanistan: Country of Origin Information for Use in the Asylum Determination Process: Report from Danish Immigration Service's fact finding mission to Kabul* states that:

According to CPAU [Cooperation for Peace and Unity], in general everyone who is associated or employed with NGOs who are involved in political activities is a target for insurgent groups. If someone is working for US funded projects or organisations or for a contractor who works for Americans, he or she will be a high target not only because of his or her job but also because of the money he or she is perceived to have. Kidnapping would be a possible way to ask for money from such persons.

81. The Tribunal has also had regard to a report entitled "Unsafe Haven: Hazaras in Afghanistan and Pakistan".<sup>41</sup> Relevantly, it claims:

The Taliban usually arrest people through their informants embedded in the Afghan community. It is not so much the physical presence of the Taliban that threatens people's lives but the role of these informants. The informants usually report a person, for instance, who may be working for the government or the ISAF or an NGO ... by passing specific information to the Taliban such as the kind of passenger car the person is travelling in, and what kind of clothes they wear...

The people of Jaghori like most Afghans are not only threatened by the physical takeover the territory but also by having Taliban informants among the general population. In this way, they feel insecure and unsafe anywhere, and most importantly, when crossing Taliban controlled areas.

#### *Security situation in Kabul*

82. Hazaras in Kabul are reported to comprise about a quarter out of an estimated population of four to five million.<sup>42</sup> It is only a rough estimate because there has been no census in

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<sup>40</sup> UNHCR 2010, *Eligibility Guidelines for Assessing the International Protection Needs Of Asylum-Seekers From Afghanistan*, 17 December, p.9 <<http://www.unhcr.org/refworld/docid/4d0b55c92.html>> Accessed 31 March 2011.

<sup>41</sup> A.K. Hekmat, "Unsafe Haven: Hazaras in Afghanistan and Pakistan", *Cosmopolitan Civil Societies Research Centre*, UTS, October 2011, accessed at [http://ccsuts.files.wordpress.com/2011/10/unsafe\\_haven\\_report\\_lr.pdf](http://ccsuts.files.wordpress.com/2011/10/unsafe_haven_report_lr.pdf) on 4 November 2012, p. 19.

<sup>42</sup> A.K. Hekmat, "Unsafe Haven: Hazaras in Afghanistan and Pakistan", *Cosmopolitan Civil Societies Research Centre*, UTS, October 2011, accessed at [http://ccsuts.files.wordpress.com/2011/10/unsafe\\_haven\\_report\\_lr.pdf](http://ccsuts.files.wordpress.com/2011/10/unsafe_haven_report_lr.pdf) on 4 November 2012.

Afghanistan for more than 30 years, during which time the country has endured an almost uninterrupted period of conflict.<sup>43</sup> In addition, over the last ten years Kabul has been one of the fastest growing cities in the world.

83. In August 2010, a protest by Hazaras, most of them IDPs, in West Kabul ended tragically. They were protesting because of a perceived failure by the government to protect their rights in general and in relation to a protracted dispute with Kuchis in particular. When the police could not bring the protest under control, the army reportedly arrived with armoured vehicles and machine guns. It fired on the protestors and killed one person. The conflict then escalated further and eventually the army killed 15 to 20 protestors and injured 50 others. In the days that followed the government did nothing to address the Hazaras' grievances and instead stationed military vehicles in West Kabul.
84. Despite the high number of Afghan police and international forces in Kabul, the capital is far from secure from terrorists and insurgents. In September 2012, six civilians were killed in an attack blamed on the Haqqani network:<sup>44</sup>

[T]he insurgents' continued ability to strike so close to NATO headquarters has undermined coalition claims of improving security as foreign troops withdraw and hand over security responsibilities to Afghan forces across the country by the end of 2014.

The heavily fortified Afghan capital has experienced a series of attacks that are particularly valuable because they score propaganda points for the insurgents by throwing doubt on the government's ability to provide security even in its own seat of power.

85. In what was described as the largest attacks on Kabul since 2001, on 15 April 2012 there were coordinated attacks on foreign embassies, NATO bases and Afghan government buildings. Almost 50 people died although most of them were attackers.<sup>45</sup> President Karzai declared that the attacks were a sign of an intelligence failure on the part of both Afghan and especially NATO forces.<sup>46</sup>
86. In September 2011, there was a series of well-coordinated attacks by a "squad" of about ten suicide bombers in the area where many embassies and international organisations are located.<sup>47</sup> The attack started with three suicide attacks and continued with a 20 hour siege near the US embassy. At least 11 civilians were killed, more than half of them children.
87. Two articles published in 2011 in the Abu Dhabi based *The National* described the increased presence of insurgents in the vicinity of Kabul. According to the first article some insurgents

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<sup>43</sup> The Tribunal notes that Afghanistan's population is currently being counted in a national census, the first one since 1979. However, the census questionnaire avoids questions about ethnicity. It is unclear when the census will be completed. See Emma Graham-Harrison, "Census more than just a numbers game in Afghanistan", *The Age*, 5 January 2013, accessed at <http://www.theage.com.au/world/census-more-than-just-numbers-game-in-afghanistan-20130104-2c8vm.html> on 14 January 2013.

<sup>44</sup> "Kabul blast kills 6; Taliban, Haqqani blamed", *CBC News*, 6 September 2012, accessed at <http://www.cbc.ca/news/world/story/2012/09/08/kabul-attack.html> on 18 October 2012.

<sup>45</sup> "Taliban launches largest attack on Kabul in 11 years", *Guardian*, 15 April 2012, accessed at <http://www.guardian.co.uk/world/2012/apr/15/taliban-largest-attack-kabul> on 5 November 2012.

<sup>46</sup> ("Karzai Says NATO failed as 18-hour Siege Ends", *Reuters*, 17 April 2012, accessed at <http://www.reuters.com/article/2012/04/17/us-afghanistan-attack-idUSBRE83E05620120417?feedType=RSS&feedName=topNews&rpc=71> on 5 November 2012.

<sup>47</sup> ("Fear in Kabul after 20-hour Taliban siege", *Reuters*, 14 September 2011, accessed at <http://www.reuters.com/article/2011/09/14/us-afghanistan-attacks-idUSTRE78D0NC20110914> on 5 November 2012.

were based in a village less than 20 kilometres from the city from where they can launch attacks.<sup>48</sup> According to the second article Kabul residents have had to change the way they move about the city in order to minimise the risk of harm.<sup>49</sup> An aid worker commented that in 2010 it was still possible (for a foreigner, not a local) to believe that Kabul was a ‘bubble of security’ but by 2011 expatriates had lost their “feeling of insulation” and realised what the local had known for some time – the war had come to the capital.

### *Relocation to Kabul*

88. According to the 2010 UNHCR Guidelines on Afghanistan the relevant factors in relation to relocation within Afghanistan were:<sup>50</sup>
- (i) the availability of traditional support mechanisms, such as relatives and friends able to host the displaced individuals; (ii) the availability of basic infrastructure and access to essential services, such as sanitation, health care and education; (iii) ability to sustain themselves, including livelihood opportunities; (iv) the criminality rate and resultant insecurity, particularly in urban areas; as well as (v) the scale of displacement in the area of prospective relocation.
89. The UNHCR Guidelines pointed out that most Afghans were reliant on their extended family and community networks as a means of protection and to cope financially (e.g. to find employment and accommodation). Protection inside Afghanistan was therefore limited to areas where the putative refugee had family or community links. In addition, relocation may not be reasonable to an area where other ethnic or religious groups dominate demographically.
90. In relation to urban centres, the Guidelines stated that internally displaced population and growing economic migration were putting increased pressure on labour markets and resources such as construction materials, land and potable water. Widespread unemployment and underemployment limited the ability of many people to meet basic needs. The limited availability of humanitarian assistance had not improved this situation in a meaningful way.
91. Thus, the UNHCR generally considered that a person could relocate where protection was available from the individual’s own extended family, community or tribe in the area of intended relocation. Single males and nuclear family units might, in certain circumstances, subsist without family and community support in urban and semi-urban areas with established infrastructure and under effective government control. However, the UNHCR argued that a case-by-case analysis be undertaken given the breakdown in the traditional social fabric of the country caused by decades of war, massive refugee flows and growing internal migration to urban areas.
92. In a doctoral thesis published in October 2011, Mohammad Ali Karimi describes the chaos, lack of infrastructure and poverty of Kabul.<sup>51</sup> The city’s infrastructure was destroyed during

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<sup>48</sup> E. Cunningham, “Spate of Kabul Suicide Bombs Blamed on Nearby Valley”, *The National*, 17 February 2011, <http://www.thenational.ae/news/worldwide/south-asia/spate-of-kabul-suicide-bombs-blamed-on-nearby-valley> on 5 November 2012.

<sup>49</sup> E. Cunningham, “Kabul Grows More Fearful as Attacks on Civilian Targets Rise”, *The National*, 7 March 2011, accessed at <http://www.thenational.ae/news/worldwide/kabul-grows-more-fearful-as-attacks-on-civilian-targets-rise> on 5 November 2012.

<sup>50</sup> UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, 17 December 2010, accessed at [http://www.unhcr.org/refworld/pdfid/4d0b55c92.pdf?bcsi\\_scan\\_A4C9E8056B19D97F=2HuZvBKaXAsN0i05O3d1qYYIq9MQAAA AVL28NA==&bcsi\\_scan\\_filename=4d0b55c92.pdf](http://www.unhcr.org/refworld/pdfid/4d0b55c92.pdf?bcsi_scan_A4C9E8056B19D97F=2HuZvBKaXAsN0i05O3d1qYYIq9MQAAA AVL28NA==&bcsi_scan_filename=4d0b55c92.pdf) on 5 November 2012, pp. 39-40.

the civil war of the 1990s. In the last few years it had been expanding extremely fast without any proper management or planning. The city had grown from about 400,000 inhabitants in 1970 to about 1.7 million in 2000 and more than 5 million in 2010. About 70 per cent of the population lived in 'informal settlements' Less than a quarter of Kabulis had access to piped water with the average use 35 litres per person per day.<sup>52</sup> Half of the city's drains were not working and only one in 20 of the houses were connected to the sewage system.

93. Dr Ali Karimi described West Kabul as the Hazara ghetto 'where the rule of law is suspended'. Hazaras in West Kabul suffered systematic exclusion from basic public services and facilities. West Kabul was characterised by:

[L]ack of roads, electricity, water, sanitation services, poor housing, and lack of educational and healthcare facilities in the area, which all are linked to the systematic social exclusion of the Hazara people in the country at large. ... In the east side, the majority of government ministries, government housing schemes, cinemas, sport complex, business centers, better and more roads and recreational spaces are located. This concentration of power and money in the east draws a visible line of difference between east and West Kabul.

94. According to the author, even within West Kabul itself the Hazara neighbourhoods were distinguishable from the other areas:

The Hazara neighborhoods ... lack any city planning, proper roads, piped water, electricity (only some parts are linked to the power grid as of October 2011), sewage system, home telephone or any other services available to non-Hazaras in the city...

Being the most densely populated area in Kabul where typically in each house more than one and up to four families live, the Hazara ghetto in West Kabul has only one road, named Mazari which was constructed in 2006 after years of persistent civil and political pressure on the government. This lack of a viable road network has caused numerous economic, social and health problems in the area where it is extremely difficult to travel from one side of the ghetto to the other. In Dasht-e Barchi's dusty, narrow and twisted lanes sometimes cars get stuck for hours as they are not large enough to fit two cars passing by each other. In these situations the drivers have no option but to drive all the way back to make space from the other car coming from the opposite direction. No government health centers exist in the Hazara area and schools are scarce.

95. This country information is consistent with a February 2011 report from the Danish Refugee Council which observed that in Kabul many migrant families had no option but to set up tents and had access to limited assistance.
96. After the collapse of the Taliban regime and the return of Afghans from Pakistan and Iran, millions had settled in Kabul. In addition, thousands of families were still forced to leave their places of origin within the country, largely due to insecurity, poverty and drought.<sup>53</sup>

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<sup>51</sup> M.A. Karimi, "The West Side Story": Urban Communication and the Social Exclusion of the Hazara People in West Kabul, accessed at [http://www.ruor.uottawa.ca/en/bitstream/handle/10393/20322/Karimi\\_Mohammad\\_Ali\\_2011\\_thesispdf?sequence=1](http://www.ruor.uottawa.ca/en/bitstream/handle/10393/20322/Karimi_Mohammad_Ali_2011_thesispdf?sequence=1) on 5 November 2012, pp. 13-14, 58, 61-62.

<sup>52</sup> The average use in Melbourne is about 280 litres per person. Melbourne Water, accessed at [http://www.melbournewater.com.au/content/water\\_conservation/water\\_use/water\\_use.asp?bhcp=1](http://www.melbournewater.com.au/content/water_conservation/water_use/water_use.asp?bhcp=1) on 5 November 2012.

<sup>53</sup> CX259747: Reaching out to poor Afghans in urban tent settlements, *The Danish Refugee Council (DRC)*, 16 February 2011, <http://www.trust.org/alertnet/news/reaching-out-to-poor-afghans-in-urban-tent-settlements/>, added: 4 March 2011.

97. Many poor urban households had no access to food, water, medical aid or employment, and as a consequence survived in inhuman and often health-threatening conditions. One reason why people lived in tents was because they could not afford to pay the high rents in Kabul. At the beginning of 2011, at least 32 informal settlements were identified in Kabul, with over 15,000 inhabitants.<sup>54</sup>
98. The general economic and employment situation for the majority of residents of Kabul remains dire. In 2010, the estimated average income of Hazaras living in the Dasht-i-Barchi neighbourhood of Kabul was 13 Afghan (about \$0.25) per person.<sup>55</sup> According to some estimates the unemployment rate in Kabul is 50%.<sup>56</sup>

### State protection

99. The country information indicates that the ability of the Afghan state to protect its citizens is compromised by corruption, ineffective governance, a culture of impunity, a weak rule of law and a widespread reliance on traditional dispute resolution.<sup>57</sup> Official impunity and lack of accountability were pervasive, as were abuses of power by unofficial, traditional militias. There was limited independent, judicial, or external oversight of security and police organisations, and of crimes or misconduct committed by security and police officials, including torture and abuse.<sup>58</sup>
100. Concerns also exist regarding the loyalty and cohesion of the ANP with recruitment driven by factional, ethnic and partisan connections, particularly in Afghanistan's Northern provinces.<sup>59</sup> The ICG reported that the Taliban had taken advantage of the corruption in the Afghan security agencies and infiltrated entire units of the police and army in central eastern provinces such as Kabul.<sup>60</sup>
101. The 2010 UNHCR Guidelines on Afghanistan indicated that state protection was absent in most parts of Afghanistan.<sup>61</sup>
102. According to Professor William Maley the poor quality of Afghanistan's local police force combined with deep hostility towards the Hazara community "means that there is little

<sup>54</sup> CX259747: Reaching out to poor Afghans in urban tent settlements, *The Danish Refugee Council (DRC)*, 16 February 2011, <http://www.trust.org/alertnet/news/reaching-out-to-poor-afghans-in-urban-tent-settlements/>, added: 4 March 2011.

<sup>55</sup> US State Department Country Report on Human Rights Practices 2009, Afghanistan, 11 March 2010, accessed at <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136084.htm> on 18 October 2012

<sup>56</sup> *Afghanistan Investment Support Agency*, accessed <http://www.aisa.org.af/english/bus-env.html> on 26 November 2012.

<sup>57</sup> UK Home Office 2012, *Operational Guidance Note – Afghanistan*, 20 February, p.3 <<http://www.unhcr.org/refworld/pdfid/4f43788a2.pdf>> Accessed 2 August 2012.

<sup>58</sup> US Department of State 2012, *Country Reports on Human Rights Practices 2011 – Afghanistan*, 24 May, Section C <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>> Accessed 14 January 2013.

<sup>59</sup> Institute for War and Peace Reporting 2012, *Doubts Over Afghan Police Loyalties*, 17 February, UNHCR Refworld <<http://www.unhcr.org/refworld/country,,IWPR,,AFG,,4f4396b62,0.html>> Accessed 28 March 2012.

<sup>60</sup> Rondeaux, C 2011, *The Growing Danger in Kabul*, 29 June, International Crisis Group <<http://www.crisisgroup.org/en/regions/asia/south-asia/afghanistan/growing-danger-in-kabul.aspx>> Accessed 24 August 2012.

<sup>61</sup> UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, 17 December 2010, accessed at [http://www.unhcr.org/refworld/pdfid/4d0b55c92.pdf?bcsi\\_scan\\_A4C9E8056B19D97F=2HuZvBKaXAsN0i05O3d1qYYlq9MQAAAAVL28NA==&bcsi\\_scan\\_filename=4d0b55c92.pdf](http://www.unhcr.org/refworld/pdfid/4d0b55c92.pdf?bcsi_scan_A4C9E8056B19D97F=2HuZvBKaXAsN0i05O3d1qYYlq9MQAAAAVL28NA==&bcsi_scan_filename=4d0b55c92.pdf) on 4 November 2012, pp. 38-39.

prospect that the police will be willing or able to protect vulnerable Hazaras even in Kabul” and that it is unrealistic for decision makers to assume that Hazaras can expect state protection.<sup>62</sup> More recently in August 2012, Maley stated in an interview on *Radio National* that although there are a number of Hazaras in positions of power in the Afghan government, the influence of these individuals for ordinary Hazaras outside of Kabul is “virtually meaningless.” Maley concluded that “the capacity of the state to offer realistic protection for Hazaras against predatory groups such as the Taliban is negligible in most of the country.”<sup>63</sup>

## FINDINGS AND REASONS

103. Based on the applicant’s evidence, the photocopies of various forms of ID submitted in relation to his application and his knowledge of the Hazaragi language, and in the absence of evidence to the contrary, the Tribunal accepts that the applicant is a national of Afghanistan and has assessed his claims against that country for the purposes of the Refugees Convention.
104. The applicant claimed to have a well-founded fear of persecution for reasons of his Hazara ethnicity; his Shia religion; his actual or imputed political opinion as a supporter of the central government in Kabul; his imputed political opinion because of his father’s association with the Communist government of Najib (Najibullah) or his membership of a particular social group consisting of failed asylum seekers returning from a western country.
105. On the evidence before the Tribunal accepts there were other possible bases on which the applicant claimed to face a real chance of persecution: his membership of a particular social group of his brother’s or his father’s family, because (1) his brother was serving in the ANA; (2) his father’s family as his father was associated with the Najib government; or (3) his father’s family because of the murder of a local commander from Sepah-e-Pasdaran.
106. The Tribunal accepts that the applicant has a well-founded fear of persecution for reasons of his actual or imputed political opinion as a supporter of the central (Karzai) government and the international armed forces in the country. The Tribunal therefore finds it unnecessary to deal with the other putative Convention grounds.
107. The Tribunal accepts the applicant’s evidence, including the key claim that he worked for the ANA. He described various matters in sufficient detail to satisfy the Tribunal that he is a witness of truth. Unfortunately, the ANA claim was first made in pre-hearing submissions and the applicant did not provide a statement in support of these claims. However, the applicant was able to allay the Tribunal’s concerns.
108. He knew the names of military units (battalion, brigade, corps), he was familiar with the names of radio sets – PRC1099, PRC1077 and RT700 (the Tribunal found information about radio sets PRC1099<sup>64</sup>, PRC1077<sup>65</sup> and RT7000).<sup>66</sup> He provided a precise figure for his salary ([amount deleted: s.431(2)] Afghans a month) and the number of people under his command

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<sup>62</sup> Maley, W 2011, ‘On the Position of the Hazara Minority in Afghanistan’, 7 December <<http://bmrsg.org.au/wp-content/uploads/2011/10/Maley-Hazaras-Opinion-Updated2.pdf>> Accessed 15 June 2012.

<sup>63</sup> ‘The story of the Hazara people’ 2012, *Australian Broadcasting Corporation (ABC)*, 31 July <<http://www.abc.net.au/radionational/programs/rearvision/hazara/4165942#transcript>> Accessed 6 September 2012.

<sup>64</sup> <http://www.scribd.com/doc/26225838/Transworld-PRC1099-Technical-Manual>, accessed on 29 January 2013.

<sup>65</sup> [http://www.dtwc.com/sites/default/files/catalog/Datron\\_PRC1077\\_Catalog.pdf](http://www.dtwc.com/sites/default/files/catalog/Datron_PRC1077_Catalog.pdf) accessed on 29 January 2013.

<sup>66</sup> <http://www.dtwc.com/products/tactical/hf/rt7000> accessed on 29 January 2013.

(39 people). He gave the names of senior ANA officers from the same battalion, brigade and corps as him.

109. The applicant provided a copy of an army ID card, a separate card which authorised him to carry a weapon and a photograph in which he could be seen with three Caucasian males (US soldiers according to the applicant) and another person who the applicant says was another Afghan national. The photograph and the ID cards do not appear to have been tampered with. Despite the fact that he did not speak English, he pointed out that his military rank – [rank deleted: s.431(2)] or “[rank abbreviation deleted: s.431(2)]” appeared on his ANA ID card. The Tribunal finds that if the applicant had fabricated the claim to have been a military officer he would not have been aware that the card states “[rank abbreviation deleted: s.431(2)]”.
110. Despite the applicant’s inability to answer some questions – e.g. the calibre of Kalashnikov bullets – the Tribunal is satisfied that a lay person could not have given such detailed evidence if he were not actually an officer in the ANA.
111. The Tribunal accepts the applicant’s evidence that in Afghanistan he was materially well off relative to most other Afghans. He was on a salary of [amount deleted: s.431(2)] Afghans a month, approximately AU\$[amount deleted: s.431(2)]<sup>67</sup> and he was an officer in the army.
112. The Tribunal finds that the applicant joined the ANA around 2008-2009. The Tribunal further accepts the applicant’s evidence that this fact is well known in his home area and that, therefore, he is perceived as a person who supports the central government of Hamid Karzai.
113. The Tribunal accepts that one of the applicant’s brothers was killed on his way to Kabul and that it is possible that the applicant’s other brother was kidnapped (and possibly killed) for reasons of his political opinion, because he was with the ANA.
114. The Tribunal finds that the applicant was genuine in his evidence when he stated that he was not concerned for his material well-being – with a relatively high salary of over AU\$[amount deleted: s.431(2)] a month – but about his security. He referred to the dangers he faced both in his home area and in travelling from Kunar Province (where he was serving) to Uruzgan Province (his home area).
115. While some of the country information indicates that the situation in Uruzgan has improved (e.g. the Netherlands Ministry of Foreign Affairs evaluation of the Dutch mission 2006-2010), even that report is far from glowing. The progress that was made must be seen in relative terms. The Dutch report stated that the security situation had *improved* from a low base.
116. In any event, the task of the Tribunal is to consider the real chance of persecution in the reasonably foreseeable future, in this case after the withdrawal of international forces in 2014. The Tribunal has had regard to the views of many commentators such as Gilles Dorransoro, Dr Antonio Giustozzi, Thomas Ruttig and the ICG with respect to the prospects of sustainable peace in Afghanistan after 2014 (US troops took over security in Uruzgan after the Dutch left in 2010). There are strong indications that the Afghan government and security forces will be unable to maintain their already weak grip on the security situation in the country.

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<sup>67</sup> [reference deleted: s.431(2)]

117. The Tribunal has given weight to the continuing recurrence of terrorist attacks across Afghanistan, including Kabul. The Tribunal notes the country information according to which the current relative de-escalation in AOG initiated attacks in some provinces is likely to be a tactical response to the imminent disengagement and withdrawal of IMF, and this may explain partly the improvement in Uruzgan Province as well. It does not demonstrate any loss of operational ability by AOGs; to the contrary, AOGs appear to be strengthening their position in anticipation of the international forces' withdrawal.<sup>68</sup> Currently, the Taliban's focus is on the IMF. When they withdraw, it is a distinct possibility that the government of Hamid Karzai (and his successor after he retires in 2014) may not survive and another long civil war may commence.<sup>69</sup>
118. The Tribunal finds on the basis of the country information cited above about Uruzgan, Kabul and Afghanistan, that in the period leading up to and after the withdrawal of IMF the Taliban and their supporters will further increase their power.
119. The Tribunal further accepts the views of Maley, Monsutti and Ruttig with respect to the entrenched enmity of the Taliban and other Sunni extremists vis-à-vis the Hazara. The current gains made by the Hazara under a deeply corrupt and ineffective government – which, in any event, has indicated that it is prepared to negotiate with the Taliban and has been backed by hundreds of thousands of foreign troops. More importantly, in the case of this applicant, the Tribunal notes that the Taliban and other extremists hate the central government of Hamid Karzai as much as the international forces and Western NGOs which have been operating in Afghanistan since 2001.
120. The Tribunal notes the independent evidence cited above that in Uruzgan the security situation is more dangerous than in other province. Based on the applicant's evidence the Tribunal finds that if he were to return to Afghanistan, the applicant will face a real chance of serious harm in his home province (Uruzgan) as well as in other parts of Afghanistan whenever he travels on leave from the military or for any other reason.
121. The country information is unequivocal (see above, under heading "*Targeting of individuals associated with the central government of Afghanistan or the international community*") that individuals associated with the central government are at risk of harm. The Tribunal finds that the applicant's past service with the ANA is already known to the local Taliban and other extremists operating in the area ([District 1] District). The Tribunal finds that there is a real chance of the Taliban targeting the applicant for reasons of his actual or imputed political opinion. He will face a real chance of being stopped, assaulted and killed by the Taliban or other fundamentalists as a supporter of the government. His Hazara ethnicity and Shia religion will be additional risk factors.
122. Recalling that a 'real chance' is one that is not remote or insubstantial or a far-fetched possibility, well below 50 per cent, based on the country information and the applicant's evidence, the Tribunal finds that if the applicant were to return to his home area in Uruzgan there is a real chance that he will be harmed by the Taliban or other extremists.

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<sup>68</sup> Afghanistan NGO Safety Office 2012, 'Quarterly Data Report Q.2 2012', 1 January- 30 June, p.6 <<http://www.ngosafety.org/store/files/ANSO%20Q2%202012.pdf>> Accessed 4 October 2012.

<sup>69</sup> G. Dorronsoro, "Waiting for the Taliban in Afghanistan", *The Carnegie Papers*, Carnegie Endowment for International Peace, September 2012. Accessed at [http://www.carnegieendowment.org/files/waiting\\_for\\_taliban2.pdf](http://www.carnegieendowment.org/files/waiting_for_taliban2.pdf) on 26 November 2012, p.1.

123. Section 91R defines 'persecution' as, among other things, involving serious harm to the person. Section 91R(2) of the Act provides examples of what constitutes serious harm: a threat to the person's life, significant physical harassment and significant physical ill treatment (section 91R(2)(a), (b) and (c) respectively). The Tribunal concludes that the harm feared by the applicant at the hands of the Taliban or other extremists will constitute serious harm and therefore will amount to persecution as defined in the Act.
124. Section 91R(1) further requires that the feared persecution must not only involve serious harm but the essential and significant reason for the persecution must be a Convention reason. The Tribunal accepts that the Taliban and other extremists hold strong anti-government views and the applicant's imputed political opinion would be the essential and significant reason for the feared persecution.
125. Section 91R(1) also requires that the persecution involve systematic and discriminatory conduct. The Tribunal finds that the Taliban, or other extremists', conduct will amount to systematic and discriminatory conduct.
126. Based on the country information the Tribunal finds that the Afghan state will be unable to protect the applicant from harm. As the Tribunal has found that the harm feared from non-state actors is Convention motivated, it is not necessary to consider whether the state may be withholding protection for a Convention reason.

#### Relocation

127. Under Australian law where a person fears harm in one part of their country of nationality, he or she should not be expected to relocate within that country unless in all the circumstances of the case, it would be reasonable for him or her to do so: *SZATV v MIAC* (2007) 233 CLR 18).
128. The Tribunal has considered whether the applicant could relocate to another part of Afghanistan, outside of Uruzgan Province. He does not have any close relatives or any social connection to any city or place outside of Uruzgan. Kabul is by far the biggest city of Afghanistan and it has a large Hazara population. The Tribunal has therefore assessed the reasonableness of relocation to Kabul.
129. The High Court, in the case of *SZATV*, explained that what is reasonable in the sense of practicable, must depend upon the particular circumstances of the individual and the impact on that person of relocating within the country. While the High Court remarked that the Refugees Convention was not concerned with living conditions, it pointed out that it would be unreasonable to expect an individual to relocate to a place where they would barely be able to subsist.
130. Other relevant factors which go to the reasonableness of potential relocation include the applicant's social and familial links outside of his or her home area, his or her education and employment skills, general life experience, health, and family situation.
131. The country information indicates that to relocate in Afghanistan one requires social and financial support in the area of potential relocation. The Tribunal accepts the applicant's evidence that if he were to return to Afghanistan and resume employment with the ANA, he would not be able to choose Kabul as a place of relocation. He would have to go wherever the ANA wishes to send him. The nature of military service is such that the applicant can expect to be sent to the most dangerous parts of Afghanistan with active finding, rather than

the relatively safe parts such as Kabul. The alternative course of action available to the applicant would be to quit his job with the ANA and to move to Kabul where he would be unemployed. The Tribunal is satisfied that the applicant would have very little social support in Kabul. While he has two sisters in Kabul, they are married and have their own families. They would not be in a position to support the applicant and his large family.

132. The 2010 UNHCR Guidelines refer to the following other relevant factors: the availability of basic infrastructure and access to essential services, such as sanitation, health care and education; ability to sustain oneself, including livelihood opportunities; the criminality rate and resultant insecurity, particularly in urban areas; as well as the scale of displacement in the area of prospective relocation.
133. Many new inhabitants of Kabul have had no option but to settle in informal settlements with only limited assistance available and with little or no access to running water, medical aid or jobs. The Tribunal relies on the country information to conclude that the applicant and his family – wife and [young children] – are likely to live in substandard conditions in West Kabul or some other informal settlement. The Tribunal finds that the applicant would have great difficulty finding secure suitable long-term accommodation for a [family].
134. In terms of the applicant’s employment prospects in Kabul, the Tribunal finds that while the applicant is relatively skilled as an ANA officer, he speaks no English and is unlikely to be able to find a job where he could use his rather specialized skills in military radio communications.
135. The Tribunal has also had regard to the precarious, and seemingly deteriorating, security situation in Kabul since 2011. The applicant may become the victim of a sectarian motivated attack or criminal violence. In addition, the Tribunal finds that he is unlikely to receive state protection if he is the victim of criminal violence.
136. The Tribunal concludes that considering the applicant’s low levels of education, his large [family] and the young age of his children (the oldest one is only [age deleted: s.431(2)] years old), his lack of familiarity with Kabul, the limited familial networks connecting him to that city, the poor overall security situation in Kabul, the extremely high unemployment rate and the limited accommodation and infrastructure in that city, it would not be reasonable for him to relocate to Kabul.

## **CONCLUSIONS**

137. The Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

## **DECISION**

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