

1215726 [2013] RRTA 138 (6 February 2013)

DECISION RECORD

RRT CASE NUMBER:	1215726
DIAC REFERENCE(S):	CLF2012/178096
COUNTRY OF REFERENCE:	Afghanistan
TRIBUNAL MEMBER:	Roger Fordham
DATE:	6 February 2013
PLACE OF DECISION:	Adelaide
DECISION:	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. Shortly after his arrival in Australia the applicant was interviewed by a departmental officer in which the applicant identified himself as a national of Afghanistan who was from [Village 1], Parwan which the departmental officer found was either [a certain number of] kilometres from Kabul or [a certain number of] kms. from Kandahar.
21. The applicant was born in Kabul and was [age deleted: s.431(2)] years old at the time of the interview.
22. His father died when he was [age deleted: s.431(2)] and his mother treated him as the head, male of the family.
23. He said that he had no birth certificate but provided a copy of his Afghani drivers license and his Taskera (Afghan ID). He also had watermarked copies of pages of his passport. He said that he had specifically applied for and been given this passport for the purpose of travelling to Australia.

24. He said that he had travelled through Pakistan where a smuggler helped him to go through Thailand and Malaysia to Indonesia where he took a boat to come to Australia.
25. He stated that his mother had died around the age of [age deleted: s.431(2)] and his wife, [daughters] and [sons] continued to live in Kabul.
26. He said that neither of his daughters, [ages deleted: s.431(2)]. Were currently in school as a consequence of an incident that had occurred and which he later described.
27. In regard to his own schooling he said that he had attended primary school, leaving at the age of 13 when he was in year 6, became unemployed for five years because of a lack of employment opportunities at that time.
28. He applied for military service for two years and following this he became a taxi driver and did this for twenty years. He claimed that he had developed lower back problems because of this and he told the interviewer that he had lost some of his teeth and his eardrum was perforated as a consequence of an incident with Taliban.
29. He described the incident as occurring when he took his family to spend their school holidays at a place called [place deleted: s.431(2)] in Parwan. This trip was in September of 2011 and while travelling the car was stopped by Taleban forces who found they were Hazaras. The children were taken to a place where animals are kept and held them there while they took him to a mountainous region where they beat him and demanded \$30,000 from him. They held him for three days and, as a consequence of the beating his eardrum was damaged and some of his teeth were knocked out.
30. He didn't give them any money and finally they released him with his family and he was able to drive on. He became disturbed when they were passing a river and his oldest daughter had wanted to get out of the car and go into the river. He became angry with her thinking she wanted to swim but was then told that she had been raped by Taliban and wanted to clean herself.
31. In the interview the applicant became very distraught when he was relaying the account of his daughter's rape and said that his family told him they had also wanted to assault the younger daughter but hadn't done so.
32. The family returned to Kabul but both daughters stopped attending school because of shame and the family also felt shame.
33. He decided to leave Afghanistan and take his family to safety and when a friend told him that he knew of a smuggler he took advantage of that but said he was distressed as there was no one to care for his family.
34. Together with his application for a protection visa the applicant lodged a statutory declaration dated 20 August 2012 in which he stated:
 - a. My name is [name] and I am a [age] year old male born in [Village 1], [District 2], Parwan province in Afghanistan. My ethnicity is Hazara and my religion is Muslim Shi'a.
 - b. I am married and my wife and children currently reside in Afghanistan. My brothers and sisters are all deceased.
 - c. I was forced to leave my country Afghanistan in approximately April 2012 as my life was in danger.

- d. During the school holiday period in Sumer, my family and I would go back to the [name] valley and my father's village of [Village 1]. We would go for approximately ten or fifteen days. During this trip, we would pass through [area] Rather, on route to our village, we have to pass through all Pashtun areas until we get to the [Village 1]. [Area] and the [name] valley are not under the Government's control. It is all controlled by the Taleban.
- e. Last year, as we were travelling back to my father's village, our vehicle was intercepted by the Taleban. When they stopped me, they told me that I am a Hazara and Shia and that I should pay them 30,000 American dollars. I told them that I could not afford this large sum of money and they took me to the mountains and tortured me and beat me. They broke my teeth, my finger and damaged my eardrum. During this time, they took my family into custody and locked them in a stable where they kept animals. Eventually I was let go when I was in a very bad condition from all the beating. I was brought back to my family and we were released as they could not get money out of us. I quickly took my family and left to return to Kabul. As I was driving, I was asking my family what happened to them as my oldest daughter kept trying to throw herself out of the car. She wanted to commit suicide. My wife told me that my daughter had been raped by the Taliban. When I returned to Kabul, I felt very guilty because my daughter was very suicidal. She constantly just wanted to kill herself because of what had happened to her. We tried to stay in hiding as we were afraid that we would be pursued by the Taleban. All that has happened to us happened because we were physically identifiable as being Hazara and Shia. This is why we were targeted.
- f. I cannot return to Afghanistan and relocate as there is no place that is secure and safe for me. No matter where we go there are bomb blasts and suicide attacks.
- g. I fear returning to my country as I believe that I will most definitely be killed.
- h. I fear returning to Afghanistan as I will be harmed and mistreated by the Taliban.
- i. I believe that I will be harmed and mistreated in Afghanistan on the basis of my Hazara and Shi's faith. In respect of the Taliban, this is my crime. The situation for Hazaras and Shi'a has drastically deteriorated. If the foreign troops pull out of the country, the current government will collapse and the Taleban will come back into power. The Taleban is supported by countries such as Pakistan and they will do what they can to bring them back into power.
- j. My family and I have been personally attacked already and we were forced to endure such great pain. My daughter was raped and I made her promise me before I came here that she would not kill herself. My other family members were also beaten. They live in constant fear now and so did I while I was there.
- k. The Taleban think that the Hazara and Shi'a people are not Muslims. They think that we are infidels and that we do not belong in the country. They are responsible for these ongoing terrorist attacks in the country and are responsible for targeting people just because of our race and religion. They have targeted and killed many Hazaras. Next time I too will be killed.
- l. If the Taleban find out that I went to a Western country, they would be very angry. They hate the western countries and they think that they are enemies. If I was to go back I too would be their enemy. They would think that I support the foreign countries.
- m. The authorities are not capable of protecting me. Kabul is the capital of Afghanistan and they cannot create a safe environment or protect the Hazara and Shia there. The Taleban are still active in these areas and the government has done nothing. They are corrupt. They do not protect the ordinary people and work for their own self-interest. If they had to serve the country with loyalty, we would not have this much terrorism in the country.
- n. I believe that I will suffer significant harm if I was to return to Afghanistan on the basis of my religion and race. I will be tortured as I have before and perhaps killed. As a Hazara and Shi'a, we are regarded as being inferior and are treated in a degrading, cruel and inhuman manner. This is evident from the way in which my family was targeted on our trip returning to Kabul.
- o. All the dates that I have provided in my application are approximates.

35. The delegate found that the applicant was a credible witness and said:

- a. I found no sign of him embellishing his claims and he appeared to narrate events from actual experience. He was able to answer clarifactory questions without hesitation and he showed no signs of being evasive

when answering questions. As a whole I find him to be credible and his claims appear to be plausible. I therefore accept his claims as factual.

36. The delegate found that the applicant suffered serious harm in a particular location away from where he lived and further found that if he didn't go to his family's former home in Parwan he would not face any further chance of serious harm.
37. He further found that the applicant could remain in Kabul and that, since Taleban had not followed him or sought him in that area that he would be safe from harm at the hands of Taleban.
38. The applicant appeared before the Tribunal on 30 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.
39. The applicant was represented in relation to the review by his registered migration agent.
40. The applicant was hard of hearing as a consequence of his injury and, at the beginning of the hearing I acknowledged this and advised him to raise his hand if, at any time, through the hearing he was unable to hear or unsure of what had been said.
41. I informed him that I had listened to the recording of the delegate's interview and had carefully gone through his departmental file and the submissions lodged by his adviser.
42. The applicant was clearly emotionally upset by what had happened in Afghanistan and, cried openly on several occasions.
43. The delegate, not surprisingly, had found the applicant to be honest and that his account was genuine. Having considered his claims and evidence, including the interview with the delegate I also found his claims to be credible and the manner in which he had put them convincing.
44. I told the applicant that I would not be asking him to recount his story as that would be traumatic and, having considered his evidence before the hearing I accepted his claims to have been taken by Taleban and detained for three days while his family were separated from him and his oldest daughter raped.
45. Despite this, from time to time the applicant wished to recount some of the evidence in this regard and became emotionally distressed when he did so. I made every attempt to reassure him that there was no need to do this as the evidence in this regard was accepted as fact.
46. I put to him that I had noticed in his application that he had a number of siblings who were deceased and asked if there was anything in regard to their deaths that was relevant to his claims.
47. He said that they had all died, "Godly deaths" and there was nothing untoward in their deaths.
48. I had noted that he had been living in Kabul at the time that Taleban was in control from 1996 to 2001 and asked how he had earned a living at that time. He said that he had driven a taxi then also.

49. He said that he made every effort to stay away from Taleban but they forced them to pray in a certain way and to pray when Taleban demanded it.
50. He said that he was hit frequently, once or twice a week and, if he had a female passenger in his taxi Taleban would make her get out and accuse him of intending to rape her and they then beat him. He said it was a time of fear and each morning when he left home he did so with no expectation of returning in the evening.
51. As he had indicated that he had changed addresses and moved from one district of Kabul to another I asked why he had done this. He replied that the houses he had were rental properties and the moves were only the consequence of the leases running out.
52. He said that prior to Taleban there had already been problems between the Hazaras and Abu Sayef militia.
53. I asked him what the current situation of his family was and, he became distraught but said that they couldn't afford the rent and had moved out of their rented house into a makeshift [accommodation details deleted: s.431(2)].
54. He said, however, that his wife had bought a mobile and he had been able to remain in contact with her and had last spoken to her a week prior to the hearing.
55. I asked what the nature of their conversation had been and he said that mostly it had been about the problems they were facing in regard to medicines, the cold, sickness, fear of lack of security, thieves and economic problems.
56. I said that the area I was interested in regarding his account was why Taleban would think he would be able to pay US\$30,000. He said that possibly it was because he had his own taxi and they may have assumed he had money.
57. I said that even if that was the case they wouldn't expect him to be carrying that amount of cash on him. He said that they told him to get a family member to send the money to the area.
58. I put to him that this seemed to be about money but, he said that it was because he was Shia and Hazara and what had happened to him and his family would not have happened had he been a Pashtun.
59. He said that the rape of his daughter was intended as a grave insult and was soul destroying.
60. In regard to his taxi driving I asked if he had driven outside of Kabul or had stayed inside its boundaries.
61. He said that he wouldn't dare to drive outside of the confines of Kabul after his experience.
62. His adviser gave oral submissions saying that her client relied on all previous submissions and that he did have a well-founded fear.
63. **COUNTRY INFORMATION**
64. The UK Border Agency Country of Origin Report 2011 advises:

The Joshua Project Profile also observed:

“During the 1978-2001 war years numerous Hazara fled with other Afghans to Pakistan or Iran. While many returning refugees settled in Kabul to work as laborers, market vendors or in service positions, a majority returned to their mountain homelands. Comprised of a half-dozen tribes, the Hazara identify by village location more than by family ties. Marriage is arranged for a price – usually for the groom’s economic advantage – and the bride joins her husband’s family.”

The MRGI Profile, undated, accessed on 6 September 2010, further observed:

“The gradual descent of the standing of the Hazaras has seen them plunge to the very depths of the social hierarchy in modern Afghanistan. Their engagement mainly in providing the unskilled labour required by society has resulted in further stigmatization, with a good indicator of this being the low rate of inter-ethnic marriages with the Hazara. Perhaps as a consequence of this, the Hazaras have been relatively isolated from the influence of the other ethnic cultures of Afghanistan, and their identity has remained relatively static...”

65. The report states that the situation for Shi’a has improved since the Taliban were removed but adds.

... Despite the overall improvement for the status of the Shi’a Muslim community, its members are still threatened by insurgents. In June 2010, the decapitated corpses of 11 Hazara males were discovered in the Khas Oruzgan district of Oruzgan province. Police officials reported they were killed by the Taliban „because they were ethnic Hazaras and Shiite Muslims.” There also are claims of forced expulsions of ethnic Hazaras and Tajiks from areas controlled or conquered by the Taliban, as well as harassment of these minorities throughout Taliban-controlled areas.

66. Reports such as this consistently point to the strength of Taliban in today’s Afghanistan:

- a. The picture is of an underground government by local fighters, organized under the Taliban's banner, who have established the rudiments of a civilian administration to complement their shadowy combat force. They run schools, collect taxes and adjudicate civil disputes in Islamic courts. And when they fight, their gunmen and bomb makers are aided by an intelligence and support network that includes villagers, who signal for them and provide them shelter, and tunnels in which to elude capture or find medical care. <http://www.ndtv.com/article/world/afghanistan-s-hidden-taliban-government-83965> downloaded 10 December 2012.

67. DFAT provides a range of views from various bodies in a cable held at CX240092 of 21 February 2010:

- a. **Afghanistan's Hazaras do not live in fear of violence or systemic persecution as they did under Taliban rule.** And the current period is perhaps the best in several hundred years for Hazaras in terms of personal and community freedoms, opportunities and human security. However, they claim to face social, economic and political barriers to upward mobility and community development. The human rights gains Hazaras have experienced in recent years are very real but they wonder if it will continue.
- b. Post has recently spoken to a range of contacts on the human rights and security situation of the Hazara minority in Afghanistan. As requested in reftel this is an unclassified version of the report from these discussions. (emphasis added)
- c. Historical context
- d. Hazaras constitute approximately 10 percent (although there is debate over the precise number) of the population and live mostly in the central highlands region of the country, particularly Bamiyan, Ghazni and Daykondi provinces as well as in Kabul.
- e. As members of an easily identifiable ethnic group, and mostly followers of Shia rather than the more prevalent Sunni Islam, the Hazaras have always been a distinct community in Afghanistan. They claim to be indigenous to large parts of the country but were pushed, including from Oruzgan, in the 17th century, (mostly) into the central highlands - an area often described as "Hazarajat" which encapsulates Afghanistan's Hazara dominated-region - by the Tajiks and Uzbeks from the north and by the Pashtuns from the south. It is estimated that 60 percent of the Hazara population was killed or displaced in the late nineteenth century under the reign of the Emir Abdur Rahman Khan. Mistrust between Hazaras and Pashtuns (and the central government usually associated with them) has been strong ever since. They experienced windows of opportunity during Afghanistan's experiment with constitutional monarchy and under the Communist regime, although higher education, foreign service and army service were all

closed to them. During the Mujahedin era the Hazaras experienced attacks from both sides of the conflict. The Taliban regime with its anti-Shia attitudes, severely restricted their movements by keeping them contained in Hazarajat and committed atrocities against them.

68. Professor Maley reports as follows:

f. Hazaras have been subject to discrimination and persecution at least since the 'Hazara Wars' of 1891-1893, and there is no reason to believe that the underlying factors (both ethnic and sectarian) fuelling hostility towards Hazaras have dissipated. Under the Taliban, however, discrimination against Hazaras took a murderous form. When the Taliban occupied Mazar-e Sharif on 8 August 1998, they embarked on a three-day massacre which Ahmed Rashid described as 'genocidal in its ferocity' (Ahmed Rashid, Taliban: Militant Islam, Oil and Fundamentalism in Central Asia (New Haven: Yale University Press, 2010, p.73). The most conservative estimate of the number killed was 2000 and others went much higher. In an article protesting how little attention it received at the time, Rupert Colville of UNHCR, writing in his personal capacity (Colville, 1999), described some of the things that happened to the Hazara victims (Rupert Colville, 'One Massacre That Didn't Grab the World's Attention', International Herald Tribune, 7 August 1999):

g. "Some were shot on the streets. Many were executed in their own homes, after areas of the town known to be inhabited by their ethnic group had been systematically sealed off and searched. Some were boiled or asphyxiated to death after being left crammed inside sealed metal containers under a hot August sun. In at least one hospital, as many as 30 patients were shot as they lay helplessly in their beds. The bodies of many of the victims were left on the streets or in their houses as a stark warning to the city's remaining inhabitants. Horrified witnesses saw dogs tearing at the corpses, but were instructed over loudspeakers and by radio announcements not to remove or bury them."

h. The massacre was supervised by Mulla Abdul Manan Niazi, a fanatical Pushtun chauvinist from the Shindand area who incited his troops to further action through incendiary speeches over loudspeakers in which he denounced Shiite Muslims as unbelievers. Niazi personally oversaw the selection of prisoners to be moved in containers (see Afghanistan: The Massacre in Mazar-i Sharif (New York: Human Rights Watch, 1998)). This frenzy of killings was in all probability the worst single massacre in the entire history of modern Afghanistan. It was in the immediate aftermath of these killings that a substantial flow of Hazara refugees from Afghanistan commenced.

i. The overthrow of the Taliban regime and its replacement by the Interim Administration under Hamid Karzai put an end to official discrimination against Hazaras, but did nothing to secure them against Taliban attack in the vast tracts of Afghanistan where the Kabul Government is ineffectual.

j. For example, on 6 January 2004, there was a grisly massacre of Hazara travellers near the border between Uruzgan and Helmand, leading a provincial official, Mohammed Wali Alizai, to suggest that the object of the assailants was 'to stir up ethnic tensions' (Associated Press, 7 January 2004.) A much more recent example came in late June 2010. As reported by Reuters newsagency ('Police find 11 beheaded bodies in Afghan south', 25 June 2010): 'Afghanistan, June 25 (Reuters) - The bodies of 11 men, their heads cut off and placed next to them, have been found in a violent southern province of Afghanistan, a senior police official said on Friday. A police patrol discovered the bodies on Thursday in the Khas Uruzgan district of Uruzgan province, north of the Taliban stronghold of Kandahar, said police official Mohammad Gulab Wardak. **"This was the work of the Taliban. They beheaded these men because they were ethnic Hazaras and Shi'ite Muslims,"** he said.' [emphasis added]. It is particularly alarming that this has occurred in Uruzgan, the province in which substantial numbers of Australian troops are deployed to boost local security.

69. A report in New York Times reports on the rapid deterioration of the situation in Afghanistan:

- a. KABUL — Two separate killings this past weekend sent a new kind of chill down the spines of observers in Kabul. The first was a suicide blast in a mosque in Faryab Province, in the northwest, during the Muslim festival of Id al-Adha, which killed at least 45 people, many of them civilians. In the second attack — which got much less attention — five Hazaras, a Shiite ethnic minority, were reportedly pulled off a van and killed in Ghazni, in eastern Afghanistan.
- b. Although this country already sees a daily toll of civilian deaths from gunfights, I.E.D.'s and airstrikes, these killings were particularly worrisome because they suggest two types of nihilistic violence common

in Iraq and Pakistan but that Afghanistan has yet to see: attacks designed to cause mass casualties among civilians and sectarian murders.

- c. The conflict in Iraq has had a strong Sunni vs. Shiite dynamic, with Sunni militant groups bombing Shiite mosques and shopping areas, and Shiite death squads — often with links to the government — kidnapping and executing Sunnis. In Pakistan, the violence is more lopsided, with extremist groups like Lashkar-e-Jhangvi carrying out a campaign of assassinations against Shiites, mostly Hazaras, in the city of Quetta. It is also common for militants in Pakistan to target mosques and bazaars in reprisal for successful government operations against them.
- d. Despite more than three decades of conflict, Afghanistan has yet to see much violence of this sort. Bombings in cities kill many innocent civilians but they are not typically the intended targets. In Kabul, the Taliban have hit military convoys with car bombs; had they wanted to, they could just as easily hit one of the city's many crowded markets, killing dozens or even hundreds. When their attacks do kill large numbers of civilians, the Taliban tend to deny responsibility for them, even when they are responsible. Last year in Logar, a car bomb attack by the Taliban destroyed a hospital, causing scores of casualties, but the bomber appears to have confused the building with the intended government targets nearby.
- e. Afghanistan has not seen serious sectarian violence either. Although Shiite militias and the Taliban fought during the 1990s — more over politics than ideology — since then the overwhelmingly Sunni insurgency in Afghanistan has never targeted Hazaras, Shiites with easily identifiable Asiatic features who are singled out for attack in Pakistan.
- f. So far the violence in Afghanistan has followed the logic of warfare rather than terrorism. This is, I believe, because the Taliban in Afghanistan are still embedded in largely rural networks that rely on the population for support, and because they are driven by specific political aims they favor carefully calibrated methods. In Iraq and Pakistan, Al Qaeda and Lashkar-e-Jhangvi and other insurgents are urban groups divorced from any specific community. Their motivations are largely ideological, with killing often an end in itself.
- g. This could change. Already last year, Lashkar-e-Jhangvi, which had not been known to operate in Afghanistan, claimed responsibility for a bombing attack in Kabul during the celebration of Ashura that killed about 80 Shiites, many of them women and children.
- h. But Afghans have overwhelmingly rejected these methods. There was a strong pushback against the bombing in Faryab this past weekend. President Hamid Karzai traveled to the province to offer condolences, and Afghan leaders of all political persuasions condemned the attack, heaping scorn on the Taliban. (The Taliban denied any involvement.)
- i. I made some calls to Ghazni about the second attack, and it turns out the five Hazaras allegedly killed there were actually three Hazaras and two Sunni Tajiks. The five men were caught by the Taliban returning from building a police station in Waghaz District and were killed for their association with the government, not their ethnicity or religion.

And so the nightmare scenarios of indiscriminate attacks and sectarian violence have not yet come to pass in Afghanistan. Still, these killings are a reminder that for all this country has suffered, there are worse things that must be kept at bay. <http://latitude.blogs.nytimes.com/2012/11/01/a-new-kind-of-killing-in-afghanistan/>

70. A recent International Crisis Group report, *Afghanistan: The Long Hard Road to the 2014 transition* 8 October 2012 states at pg.16:

- a. It has become increasingly clear that ISAF is unable to dislodge the Taliban from its strongholds in the south and east. A widening trust deficit between NATO and Afghan forces has also put ISAF further on the defensive. The Taliban, the Haqqani network and other affiliated insurgent actors have exploited these weaknesses by sending fighters into particularly vulnerable areas such as Kunar, Nuristan, Paktika, Paktia, Ghazni, Wardak and Logar. <http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/236-afghanistan-the-long-hard-road-to-the-2014-transition.pdf>

71. Information regarding Kabul and provided by the applicant's representative in a submission of 24 January 2013 advises:

72. Kabul Press of 13 August 2010 advises:

- a. Breaking news from Kabul today informs us that a demonstration by men, women and children to call attention to the violence being perpetrated against the Hazara people turned bloody, with several shot to death, allegedly through indiscriminate firing into the crowd by Afghan police. The large Hazara community in West Kabul has been closed off by police.
- b. This is the latest in a string of anti-Hazara attacks that began earlier in the summer with Kuchi insurgents attacking Hazara in the traditional Hazara area of Bamiyan. Thousands of Hazara were forced to flee the area, their homes were looted, and many of those left behind were beaten or killed.
- c. The Hazara are known for having a much more progressive culture than the Pashtuns who run the Afghan government, including Afghan president Hamid Karzai and most of his cabinet ministers. For example, the Hazara promote the education of women, welcome foreigners, support free choice in marriage, freedom of speech, performance of music and dance, and peaceful discussion and demonstration over violence. <http://kabulpress.org/my/spip.php?article22807>

FINDINGS AND REASONS

73. Country of Reference

74. The applicant provided the department with a copy of an Afghan Taskera at the delegate's interview. It, and other Afghan documentation is held at folios 29 to 32 of the departmental file.

75. The applicant gave a credible account of his experiences in Afghanistan and, both the delegate and I accept that his claims were genuine.

76. At all interviews he spoke Hazaragi, the language of the Hazaras and showed a sound knowledge of the situation in Afghanistan.

77. In the absence of any evidence to the contrary I find that the applicant is an Afghan national and therefore the country of reference in this matter is Afghanistan.

78. The applicant's claims

79. The applicant claims that he is Hazara and of the Shi'a faith.

80. He claims, and those claims are accepted, that he was stopped by Taleban members on his way to his family's former home in Parwan.

81. Taleban ordered him to pay them a large sum of money, which he could not do.

82. He was taken away from his family, who were separately detained, and he was beaten severely resulting in a loss of teeth and damage to his eardrum.

83. On going back to his family, he discovered that his [daughter] had been raped by the Taleban men and that threats had been made to rape his [other] daughter as well though this did not occur.

84. The delegate accepted that these claims were genuine and, having considered them separately, I also find this to be the case.

85. The delegate also considered the motivation for the attacks on the applicant and his family.

86. The claimed motivation for the harm suffered
87. The delegate stated in his decision, noting the improvements for Hazaras under the Karzai regime, “[d]espite these developments, people of Hazara ethnicity report continuing incidences of discrimination and neglect. This perception, combined with the poor security situation and limited economic opportunities have served to encourage Hazara migration...
88. ...Whilst it may be considered that this [taking money] was the main motive of the Taliban in abducting the applicant and his family, it cannot be ruled out that the targeting of the applicant may be due to his being a Hazara...I cannot be fully satisfied that there is no racial or religious motive for the harm inflicted by the Taliban on the applicant and his family.”
89. The applicant’s representative, in a submission of 24 January 2013 provides evidence from an Afghan expert, Prof. Alessandro Monsutti in an essay, *The Situation for Hazaras in Afghanistan*, 19 August 2010, in which he states:
 - a. The Taliban are following a systematic strategy now including the use of random violence particularly against Hazaras, to maintain fear and instability...If the Taliban regain sufficient power in Afghanistan the Hazaras are right to fear they will be systematically targeted again, and with renewed vengeance by the Taliban.
90. Further to this the submission quotes Ms. Halima Kazen-Stojanovic, researcher on Afghanistan for Amnesty International, from a presentation to the IMR (IPAO) 8 October 2010 in which she said of Hazaras: “[they are] always more at risk because their ethnicity can be observed by their facial features...[they are] treated more violently...more at risk of death when involved with confrontations with Taliban or other militia forces...likely to be attacked or killed by Taliban at checkpoints.”
91. These views are shared by another Afghan expert, Professor William Maley, cited above:
 - a. The overthrow of the Taliban regime and its replacement by the Interim Administration under Hamid Karzai put an end to official discrimination against Hazaras, but did nothing to secure them against Taliban attack in the vast tracts of Afghanistan where the Kabul Government is ineffectual.
92. Even the DFAT cable which Maley takes exception to is prefaced by, “Afghanistan's Hazaras do not live in fear of violence or systemic persecution as they did under Taliban rule.”
93. Taking the above information into account I find, as did the delegate, that significant and essential reasons for the loss of liberty and serious harm the applicant suffered at the hands of the Taliban included his race and religion as a Hazara of the Shi’a faith.
94. Section 91R of the Act
95. This section of the Act at 91R(1)(a)-(c) serves to provide the criteria to determine Convention persecution.
96. As discussed above I am satisfied that the essential and significant reasons for the harm suffered are race and religion.
97. I am further satisfied that 91R(1)(b) is met as the harm constituted a loss of the applicant’s liberty.

98. The independent material before me advises that Taliban has a long held enmity towards Hazaras, a race it regards as inferior and heretic, and its actions against them are both discriminatory and systematic.
99. Thus, I am satisfied that the applicant's past suffering amounted to persecution for Convention reasons.
100. The Convention, however, is not an instrument to compensate for harm suffered but rather is an instrument to protect from future harm.
101. A real chance of prospective harm?
102. Past harm and a history of harm to a group may be indicators as to whether or not there is a real chance of the harm continuing or that it may occur in the reasonably foreseeable future.
103. Professor Monsutti's comments look to the future as do those of Professor Maley.
104. The applicant has had ample opportunity to embellish his claims if he chose. He could have claimed his siblings died at the hands of Taliban or that his family had faced harassment from Taliban factions in Kabul. He did not do so, nor has he provided any evidence which lacks credibility or plausibility throughout.
105. Taking this into account, I accept the applicant's claims to the effect that his family has now become so impoverished that they have not been able to continue with their rent and now live in a makeshift dwelling away from the immediate confines of Kabul.
106. In the event that he returned to Afghanistan I am of the view that he would do whatever he could to support his family and, since his previous occupation was that of a taxi driver it is more than likely that he would choose to do this again.
107. This being the case, it is neither remote nor insubstantial that he could face a similar situation to that he has already faced should he go outside the confines of Kabul even though he said he would not dare to.
 - a. Juma Khan, who often travels along the Kabul-Jalalabad Road, says that security has worsened along the road and people cannot travel conveniently. Also, the Taliban and other gunmen often block the road and harass travelers. "Unknown gunmen killed two of my cousins and three other passengers during Ramadan," he said. "The Taliban and thieves both are creating problems and harassing people. Security check-posts only monitor the road until 5:00 p.m. and then the area turns into a jungle and everybody is his own king."
 - b. Mawla Gul, a taxi driver agrees. "We had more passengers and traveled twice a day to Jalalabad. But due to the security challenges and poor road conditions, we can only reach to the destination once a day," he said. "The Taliban and other gunmen often ambush early in the morning and late in the evening." *Insecurity Increases along Kabul-Jalalabad Road* Published 31 October 2012 (Bamdad Society and Culture) <http://www.bamdad.af/english/story/1989> downloaded 5 February 2013.
108. The question arises then as to whether or not Taleban is, or would be in the reasonably foreseeable future, in a position of control such that they could persecute the applicant.
109. In making my findings in this regard I give weight to the independent material cited above and that in two papers, *The Taliban's Winning Strategy in Afghanistan* *The Carnegie Endowment for International Peace: Gilles Dorronsoro*.

The Taliban are a revolutionary movement, deeply opposed to the Afghan tribal system and focused on the rebuilding of the Islamic Emirate. Their

propaganda and intelligence are efficient, and the local autonomy of their commanders in the field allow them both flexibility and cohesion. They have made clever use of ethnic tensions, the rejection of foreign forces by the Afghan people, and the lack of local administration to gain support in the population. In so doing the Taliban have achieved their objectives in the South and East of the country, isolating the Coalition, marginalizing the local Afghan administration, and establishing a parallel administration (mainly to dispense Sharia justice and collect taxes). In recent months, a more professional Taliban have succeeded in making significant inroads by recruiting from non-Pashtun communities...

... One of the key reasons for the lack of a productive IC strategy is the IC's and broader western misperception of the Taliban. They are often characterized as "backward," "medieval," and "reactionary," and as an association of loosely organized groups. The insurgency is perceived as a local problem to be solved locally; the national and dynamic dimension of the struggle is not taken into account. In fact, the Taliban are quite capable of strategic planning and coordinated action. This means that they will adapt to and counter any moves by the International Coalition. **On-the-ground observations and reliable evidence suggest that the Taliban have an efficient leadership, are learning from their mistakes, and are quick to exploit the weaknesses of their adversaries. They are building a parallel administration, have nationwide logistics, and already manage an impressive intelligence network.** Based on the analysis of the insurgency, I argue that the Taliban organization and goals call for a different IC strategy...

... The Taliban are the dominant political force in numerous regions of Afghanistan, including Pashtun-majority provinces in the East and the South: Paktia, Paktika, Zabul, Kandahar, Uruzgan, Ghazni, Wardak, Logar, Helmand, Farah, Kunar, and Laghman. (In Ghazni, Uruzgan, and Wardak, the Hazara-populated areas exclude the Taliban). The Taliban also dominate the Bala Murghrab and Gormach districts (Badghris) and most of the Kunar and Laghman provinces. The situation in Nangrahar is confusing, especially around Jalalabad, and requires separate analysis, but the insurgency is well entrenched, notably in the southern part of the province (Khogiani district) and in the northern part. Helmand is often misdiagnosed: this province is not the main base of the Taliban—even though the opposition is extremely strong there, the organization of the insurgency is not classically Taliban. Overall, the core territory for the movement is Kandahar, Zabul, and from Ghazni to the south of Wardak. In this area, the Taliban have the support of a significant part of the population and its elites (mostly mullahs, but also landlords and tribal leaders).

Here, the clear strategy of the insurgency is to destroy the Afghan administration, isolate the IC, and build a parallel administration in the countryside. In these provinces, the situation of the International Coalition is comparable to that of the Soviet Union in the 1980s in that the IC, largely isolated at its posts, is operating with neither the social support nor the acceptance of the Afghan population. The insurgents control the countryside and have a strong presence even inside cities like Kandahar and Ghazni. The Afghan administration is nonexistent outside the major cities. www.carnegieendowment.org/files/taliban_winning_strategy.pdf

110. The second paper, Afghanistan: Post-Taliban Governance, Security, and US Policy Congressional Research Service Kenneth Katzman January 4 2013 claims:

The Administration view is that, no matter the U.S. and allied drawdown schedule, Afghan stability after the 2014 transition is at risk from weak and corrupt Afghan governance and insurgent safe haven in Pakistan. Among other efforts to promote effective and transparent Afghan governance, U.S. officials are pushing for substantial election reform to ensure that the next presidential election, scheduled for April 2014, will be not experience the fraud of the elections in 2009 and 2010. A potential contributor to stability would be a negotiated settlement to the conflict. Negotiations have proceeded sporadically since early 2010, but, by the end of 2012, began to evolve into a discussion of specific proposals to settle the conflict. Afghanistan's minorities and women's groups worry about a potential settlement, fearing it might produce compromises with the Taliban that erode human rights and ethnic power-sharing... <http://www.fas.org/sgp/crs/row/RL30588.pdf> (downloaded 4 February 2013.)

111. It would be premature to predict that Taliban will regain overall control of Afghanistan in the reasonably foreseeable future but, it is not fanciful speculation to form the view that they will have a significant role in the country's future post 2013 and the independent material before

me leads me to find that they already have significant influence and are gaining power such that they operate a shadow government in many areas and have shown that they can infiltrate Kabul.

112. That being the case, I do not consider the applicant's claimed fear of harm at the hands of the Taliban to be fanciful speculation or to be remote or insubstantial in the reasonably foreseeable future and his fear is therefore well-founded and for Convention reasons.
113. Accordingly, I find that the applicant faces a real chance of serious harm and the significant and essential reasons for that harm are his race and religion and imputed political opinion as being opposed to Taliban. I am further satisfied that the harm is systematic and discriminatory and, since the evidence before me states that loss of life or liberty is the level of harm he has a real chance of facing I am satisfied that this is of such gravitas as to constitute persecution.
114. There are still two questions which still need to be addressed.

(1) Can the applicant be protected from the harm he fears by the state?

(2) Since the agent of persecution is a non-state body can he find protection by moving to another area?

State Protection

115. The Applicant's fear of persecution is not at the hands of the state but, at the hands of Taliban and associated groups. These are non-state agents and raise the question as to whether or not the state could protect the Applicant from any harm he may fear at their hands. However, the country information before me advises that, in many areas, they operate an incredibly powerful shadow or parallel government which the state is powerless to work against.
116. A United Kingdom Guidance Note: Afghanistan June 2012 advises:

Protection in Afghanistan generally is compromised by high levels of corruption, ineffective governance, a climate of impunity, lack of official impetus for the transitional justice process, weak rule of law and widespread reliance on traditional dispute resolution mechanisms that do not comply with due process standards, all of which contribute to a deteriorating human rights situation in the country.¹¹ Official impunity and lack of accountability were pervasive, as were abuses of power by unofficial, traditional militias. There was limited independent, judicial, or external by NDS and ANP officials, including torture and abuse.¹² The International Crisis Group reported that the Taliban and other insurgents had taken advantage of the corruption in the Afghan security agencies and infiltrated entire units of the police and army in central eastern provinces like Kabul. Held at <http://www.unhcr.org/refworld/publisher,UKHO,,AFG,4fd731b62,0.html>

117. Professor Maley, in his report also quotes:

- a. recent reports to the UN Security Council, on Afghanistan by the Secretary-General: 'The deterioration of Afghanistan's security situation has continued, with 2009 being the most volatile year since the fall of the Taliban in 2001, averaging 960 security incidents per month, as compared with 741 in 2008. The situation worsened in January 2010, with the number of security incidents 40 per cent higher than in January 2009 ... Overall, the intensification of the armed conflict in the south, and its expansion into areas previously considered stable, made 2009 the worst year for civilian fatalities since the fall of the

Taliban regime in 2001' (The Situation in Afghanistan and its Implications for International Peace and Security. Report of the Secretary-General (New York: United Nations, A/64/705 - S/2010/127, 10 March 2010) paras.23, 24) [emphasis added]. In his second 2010 report, the Secretary-General stated that 'Overall, the number of security incidents increased significantly, compared to previous years and contrary to seasonal trends ..

118. Given the volatility and insecurity in Afghanistan, together with corruption and the state's inability to protect itself from Taliban and other insurgents and its unwillingness or inability to prosecute abuses by its own officials I find, the state, could not protect the Applicant.
119. I have found that the Applicant would face a real chance of serious harm amounting to persecution if he returned to his former home in Ghazni province. The remaining question is whether or not he could find protection from the persecution by relocating.
Relocation
120. The logical place to relocate is Kabul since it is the capital and the most heavily defended part of the country. However, since I have found he faces a real chance of persecution even if he remains in Kabul it is not relevant in this matter.
121. The only other place he could relocate to is his family's former home area where his initial problem first arose. In regard to other regions of the country I accept the comments of three experts, Professor Maley, Professor Monsutti and Ms. Halima Kazem (Comments by Professor Alessandro Monsutti on Hazaras in Afghanistan provided to the Independent Protection Assessment Office on January 2012) to the effect that it would not be possible to integrate and remain in any other area without proper family or community supports. Their view is that logistically and for safety reasons relocation of a single person to a new environment in Afghanistan is not practical or reasonable. This being the case, I find it is not reasonable to expect that the Applicant could find protection from the harm he fears by relocating to another area in Afghanistan.
122. I am bound by the findings of Kirby J in the matter of SZATV v MIAC (2007) 233 CLR 18 at [80]-[81];
 - a. [I]nternal relocation will not be a reasonable option if there are logistical or safety impediments to gaining access to the separate part of national territory that is suggested as a safe haven. Nor if the evidence suggests that there are other and different risks in the propounded place of internal relocation; or where safety could only be procured by going underground or into hiding; or where the place would not be accessible on the basis of the applicant's travel documents or the requirements imposed for internal relocation.
123. In the Applicant's case I accept the advice from the three experts cited above and I am satisfied that "there are logistical or safety impediments to gaining access to the separate part of national territory that is suggested as a safe haven." Thus, the suggestion that the Applicant could relocate does not pass the test of reasonableness.
124. In summary, I find that the applicant, as a member of a minority race and religious group with an imputed political opinion, faces a real chance of systematic, serious harm in a discriminatory manner for reasons of his race and religion.

125. I further find that he could not find protection from this serious harm through either state protection or by relocating to another area.

126. Accordingly I find that the applicant is a refugee.

CONCLUSIONS

127. 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

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