

1314268 (Refugee) [2015] AATA 3894 (9 December 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1314268
COUNTRY OF REFERENCE:	Afghanistan
MEMBER:	Fraser Syme
DATE:	9 December 2015
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 09 December 2015 at 11:11am

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. The applicant is a [age] year old Hazara man from Kabul, Afghanistan. According to the applicant, he worked at a foreign company where he was discriminated against by Pashtun colleagues and customers. The Taliban threatened him because of his work and believes his Pashtun colleagues were involved in those threats. He then went to work in [Country 1]. He returned to Afghanistan to visit his mother. His former colleagues and neighbours warned him suspicious people had been asking about him. He thinks they are Taliban too, so he returned to [Country 1] then made arrangements to come to Australia. He fears if he returns to Afghanistan, he will be harmed by the Taliban or other Pashtun extremists because he is a Hazara, worked for a foreign company and because he applied for asylum in Australia. In the application before the delegate the applicant had claimed he feared harm because he is a Shia Muslim. Before the Tribunal, the applicant claimed he had ceased practicing this faith and that too would be a reason he feared future harm if he returned to Afghanistan.
2. The applicant has applied to the Tribunal for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
3. This review application raises the following issues for the Tribunal to determine:
 - a. Does the applicant have a well-founded fear of persecution in the reasonably foreseeable future if he returns to Afghanistan.
 - b. Are there substantial grounds for believing there is a real risk the applicant will suffer significant harm if he is removed to Afghanistan.

HISTORY OF APPLICATION FOR REVIEW

4. The applicant arrived in Australia as an unauthorised maritime arrival in July 2012. He applied for a protection visa [in] November 2012 and the delegate refused to grant him that visa [in] September 2013. The Tribunal has listened to a recording of the interview between the delegate and the applicant conducted in May 2013 with the assistance of an interpreter in the Hazaragi and English languages.
5. The applicant appeared in person before the Tribunal on 24 August 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages, however the applicant regularly addressed the Tribunal in competent English.
6. The applicant was represented in relation to the review by his registered migration agent. The migration agent attended the hearing via telephone and provided written submissions before the hearing, which the Tribunal has had regard to, as set out relevantly in more detail below.

RELEVANT LAW

7. The criteria for a protection visa are set out in s.36 of the Act and 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 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.

8. 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 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).
9. 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.
10. 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').
11. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.
12. There are three reports published by DFAT relevant to the applicant's claims. A country information report on Afghanistan and two thematic reports: 'Conditions in Kabul' and 'Hazaras in Afghanistan and Pakistan'. The Tribunal discussed information from those reports with the applicant at the hearing. Subsequent to the hearing, DFAT issued a new country report on Afghanistan and a new thematic report 'Conditions in Kabul'. The Tribunal has had regard to all five reports. It has compared the information in the earlier reports and the two new reports. The information in the two new reports is substantially the same as the information in the earlier reports. However, both the two newer reports reflect a worsening of the security situation in Afghanistan generally (the new country report) and Kabul in particular (the new thematic report). The Tribunal considers the relevant information in the new reports is materially the same as in the earlier reports it discussed with the applicant during the hearing and if anything, the new reports tend towards being more supportive of the applicant's claims.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. For the following reasons, the Tribunal has decided to affirm the decision.
14. In summary, the applicant claims he was discriminated against by Pashtun colleagues and customers at the [business in] which he worked in the past. His employer [provided a service to] a foreign company and provided services to the Afghan military and government. He was threatened by the Taliban and he thinks his Pashtun colleagues may have caused that to happen. After being threatened, he left Afghanistan to work in [Country 1]. He returned to

Afghanistan a few months later to visit his ill mother, while there, neighbours and former colleagues told him strangers were asking about him. He thinks the strangers were Taliban. He cut short his visit to return to [Country 1] where he continued working for another two years before coming to Australia. He fears if he returns to Afghanistan he will be harmed for a number of reasons: because he is Hazara, because he has applied for asylum in Australia and because he worked for a foreign company which provided services to the Afghanistan government. He feared too that he would be harmed because he has ceased practicing as a Shia Muslim. He fears he may be harmed by a number of persecutors including the Taliban, other Pashtun extremists and Islamic State. He fears too he may be harmed by his family, his former friends or members of the community. The Tribunal discussed in detail each of the applicant's claims during the hearing.

Ceasing practice of his Shia Muslim faith

15. The applicant told the Tribunal at the commencement of the hearing, he had a new claim to make which he had never raised before. For the past year, he has ceased practicing his faith as a Shia Muslim. He explained in the past he was a moderate Muslim, attending Mosque only for large festivals. While living in Afghanistan and [Country 1] he felt forced to practice Islam. But in Australia he had the freedom of expression and freedom of opinion not to follow any religion. He had no intention to ever practice Islam or any other religion again. He feared he would be harmed if he returned to Afghanistan because he has ceased to be Muslim he may be perceived as an infidel.
16. He explained his family would oppose his ceasing his faith, but conceded that although his family are religious, they would not harm him for that reason. He explained too that although his moderate practice in the past did not cause him any difficulty, it would soon be exposed that he had ceased practicing his faith entirely. He gave the example that at social occasions, if he had lunch at the home of a friend, it would be noticeable he did not participate in prayers. He again conceded his friends would not likely harm him for that, but it would become known in the community and he feared he would be targeted for harm. He further claimed he had committed a crime. He said Afghanistan is full of uneducated people who do crazy things for religion. He confirmed he had not taken the faith of any other religion or made any formal step to formally renounce his Muslim faith. He was unaware it was necessary to do so, he considered it his own decision.
17. The Tribunal discussed with him information from the DFAT country report did not suggest his ceasing to be a Muslim was a crime under Afghan law. There was some information regarding apostasy being a crime against Islamic law. The Tribunal agreed with the request of the migration agent to provide submissions and supporting country information after the hearing regarding the risk of harm to the applicant because he has ceased being a Muslim. At the time of making this decision, the Tribunal has not received any further submissions or country information.
18. The Tribunal is willing to accept the applicant was a former moderate follower of Shia Islam and since coming to Australia has ceased to practice that faith. Although the applicant has claimed his family and friends will be opposed to his doing that, the Tribunal considers the applicant he has conceded the risk that his family and friends opposition will evolve into actually causing any serious harm to him is not likely and the Tribunal considers that to be only a remote and therefore not a real chance. However, the Tribunal does accept that under Sharia law, if the applicant was considered to have committed apostasy that would be considered a crime. The Tribunal considers though the applicant has exaggerated the ease that people in the community will become aware of his decision to cease practicing his faith and has exaggerated the risk that will be a reason for people in the community to cause serious harm to him for that reason, particularly as he was a former moderate follower of Islam there is only a speculative chance people in the community will become aware of his

changed religious practices. On the evidence before it, the Tribunal considers there to be only a remote or speculative chance and therefore not a real chance that the applicant would be harmed by his family, friends or people in the community because he has ceased to practice his faith, now or in the reasonably foreseeable future if he returned to Afghanistan.

Imputed Shia Muslim faith

19. The Tribunal discussed with the applicant notwithstanding his no longer practicing his Muslim faith, it was mindful his physical appearance as a Hazara may cause the Taliban or other individuals or groups opposed to Shias to impute that the applicant is a Shia Muslim. Therefore, it would still consider whether he faced a real chance of serious harm as someone who is imputed to be a Shia Muslim.
20. The Tribunal discussed information from the DFAT country report and thematic report about Hazaras that there have been limited instances of targeted attacks on Shia (or Hazaras) in his home city of Kabul. An exception to that was a large bomb blast in 2011 for which the Pakistani group *Lashkar e Jhangvi* claimed responsibility. On the basis of that information, the Tribunal considers there to be only a remote and therefore not a real chance the applicant will face serious harm from the Taliban or other anti-Shia individuals or groups as someone imputed to be a Shia Muslim, now or in the reasonably foreseeable future if he returns to Afghanistan.
21. The Tribunal considers the applicant's claims he was threatened by the Taliban because of his job and his claims regarding Islamic State below.

Hazara

22. The Tribunal discussed too with the applicant his claims he would be targeted for harm as a Hazara. He said that the situation for Hazaras is worsened now in Kabul, since the withdrawal of the international security forces and the rise of Islamic State.
23. The Tribunal referred to the same country information discussed above regarding there being limited targeted attacks on Hazaras in Kabul. It noted too from the DFAT Kabul report that Hazaras make up a considerable proportion of the several million people who reside in Kabul. The applicant stated he too did not have any reports indicating Hazaras were being targeted for harm in Kabul. On the basis of that country information, the Tribunal considers there to be only a remote chance the applicant would suffer serious harm in his home city of Kabul from the Taliban or other Pashtun extremists for reason of his race.
24. The Tribunal considers the applicant's claims he was threatened by the Taliban because of his job and his claims regarding Islamic State below.
25. The applicant has claimed he was harassed and discriminated in the past by his former colleagues and customers who are Pashtun. The Tribunal accepts that occurred. The DFAT country report and Hazara report make reference to Hazaras having experienced social harassment and discrimination in the past. The Tribunal notes, despite experiencing that discrimination from his former colleagues and customers in the past, he continued in his work. It was only after he claimed to be threatened by the Taliban did he cease work. That supports the conclusion of the Tribunal that the level of discrimination and harassment he suffered in the past was similar to that indicated in the DFAT reports. That information supports the conclusion too that when having regard to the non-exclusive instances of serious harm in s.91R(2), the harassment and discrimination was not so serious as to be serious harm.

26. The Tribunal is willing to accept too that if the applicant returns to Afghanistan, he may face a real chance of experiencing further social harassment and discrimination. However for the same reasons that it found the harm he faced in the past was not serious harm, the Tribunal finds the harm he may suffer in the future from that social discrimination and harassment is not so serious as to be serious harm. The Tribunal therefore is not satisfied the applicant faces a real chance of serious harm by way of social harassment or discrimination because he is a Hazara now or in the reasonably foreseeable future if he returns to Afghanistan. The Tribunal considers this claim further below in relation to complementary protection.

Imputed political opinion – employment and threats from Taliban

27. The Tribunal told the applicant it was willing to accept his claims his father disappeared in [2005]. It accepted too that he commenced work at a [foreign company] in 2007. The Tribunal was further willing to accept that he had some conflict with two Pashtun co-workers and some customers at that job. As noted above, his experiencing such conflict is consistent with country information regarding societal discrimination against Hazaras. It was willing to accept too that the applicant had a genuine fear that the two Pashtun co-workers played some role in the telephone threats he claimed to have received from the Taliban in early 2010. He claims the threats related to his job with a foreign company and it's helping the Afghan government. The Tribunal discusses those threats in more detail below, but it is convenient to note here that the Tribunal is willing to accept this was in part why the applicant was motivated to go to [Country 1] in July 2010. He explained he returned to Kabul to visit his mother in October 2010, but left after only a week because friends at his former employer and neighbours both told him strange men wearing turbans had been asking around about him. He further explained that he stayed to work in [Country 1] for the next two years to earn money to support his family and to save funds to pay to come to Australia.
28. The applicant claimed at the hearing his former employer [provided a service to the military and government]. The Tribunal showed him photographs from the website ¹ of his former employer. He identified it as the place where he worked. The Tribunal noted his employer was [part] of a foreign company that was a manufacturer of [products] and it noted there were no [specified products] depicted onsite. He replied some of the [products] depicted were used by [officers]. The Tribunal expressed doubt that [officers] would [use those products and not specified products]. The Tribunal noted even if at accepted his employer did [provide a service to the government], he was only an employee at the [business]. It did not see why he would be targeted for harm. He replied he too did not understand why he was of interest, but he was.
29. The Tribunal queried why if he was of such interest, the Taliban did not find him to carry through on any threats when he was in Afghanistan. He agreed if they wanted to, his Pashtun colleagues could have obtained the applicant's address from his personnel records. The applicant initially denied, but later conceded that was the case. He said the Pashtun colleagues may now have gotten his address, but confirmed that no harm had happened to his family since he left Afghanistan. The Tribunal considers the persons the applicant concludes were Taliban never harming him at his workplace (which they must have been aware of the location of as his work was the reason he claims they threatened him) and their never getting the home address of the applicant while he was in Afghanistan undermines that those persons were Taliban and undermines that the Taliban had any genuine interest in harming the applicant. He confirmed that when he visited Kabul in 2010, he personally received no threats of harm, only that others told him some strange men were looking for him. He concludes those men were Taliban. He told the Tribunal if he did return to Afghanistan, he would not return to work with the same employer. He confirmed he was the

¹ [Information deleted].

only staff member he knew of to receive any such threats. However, he explained two former Hazara colleagues were killed in an explosion at a [factory]. Dozens of others were killed or injured at the [factory] and another [factory] in what was reported as an industrial accident. There was suspicion the two Hazara men were the true target of the attack, because the Pashtun [colleagues] and none of the foreign staff were onsite at the time of the blast. The Tribunal noted that it was speculation at best that his colleagues were the intended target in a deliberate blast

30. The Tribunal put to the applicant if he returned to Afghanistan and no longer worked at the same employer and given there has been a passage of about 5 years, why would there remain any interest in anyone to harm him. He replied in the view of the Taliban, he had already committed the crime working with foreigners. The Tribunal queried how anyone would know he had returned to Kabul. He said it would soon become known, and that he would be targeted for harm.
31. The applicant raised that worsening level of insecurity in Kabul would increase his risk of harm. He made reference to a number of recent bomb attacks but agreed with the Tribunal the information from the DFAT report indicates those attacks were targeted at the Afghan government, police and army, albeit innocent civilians were also harmed and killed in those attacks. The Tribunal noted harm faced by the population as generally was outside the definition of persecution or complementary protection. The applicant raised too that Kabul was a difficult place to live, the Tribunal agreed that may be the case, but that was not a form or serious harm.
32. In relation to his fear of harm from the Taliban, the Tribunal notes the applicant's claims are he was threatened by persons he concludes were Taliban before going to [Country 1]. He says there were 4-5 phone calls before he took the threats seriously. He claims too his friends told him strange persons wearing turbans, who he concludes were Taliban, were looking for him after he had gone to [Country 1]. As discussed above, the Tribunal considers that no harm came to the applicant between the threats starting and his departing to [Country 1] undermines the threats were from the Taliban. Particularly where the applicant is claiming he suspects his Pashtun colleagues had some role in the threats and those Pashtun colleagues could have obtained the applicant's contact details from their work place. The Tribunal concludes the persons making the threats must have known his place of work as it was his job that he claims to be the reason for the threats.
33. The Tribunal accepts the applicant received threats and that others told him strange men were looking for him. The Tribunal accepts too that the applicant subjectively suspects the persons who threatened him and who came looking for him were Taliban. However, the applicant's evidence about the nature and the timing of the threats was lacking in detail. He states they began in early 2010 and related to his work with the foreign company helping the Afghan government, but it took 4-5 times before he took the threats to be serious. His evidence is vague too regarding the strange men wearing turbans who looked for him after he went to [Country 1]. However, the Tribunal is mindful he relying on things told to him by his friends and not what he experienced personally.
34. The Tribunal is uncertain whether the applicant was actually threatened by the Taliban, or someone pretending to be the Taliban at the behest of the Pashtun colleagues with whom the applicant had some conflict at work or by some other unknown persons. The Tribunal notes the threats he received related to the applicant's employment. It is mindful there could be mixed motivation for the threats, including his race and at that time Shia religion. However, his evidence he was unaware of any other Hazara colleagues receiving threats. were threatened The Tribunal considers the applicant was generally credible and in the absence of clear evidence to the contrary, the Tribunal is willing to give the applicant the benefit of the doubt that he was threatened by the Taliban in the past and that Taliban came

looking for him after he went to [Country 1]. The Tribunal finds that the essential and significant reason for those threats was the applicant's employment.

35. The Tribunal has had regard to the UNHCR eligibility guidelines for asylum seekers from Afghanistan² and notes it includes as persons having potential risk profiles civilians associated with or perceived as supporters of the Afghan National Security Forces or International Military Forces and it includes civilians perceived as supporting the government or the international community. The DFAT report assesses individuals working for the government or international community are at a high risk of violence perpetrated by anti-government elements. The Tribunal does not consider though that the applicant has worked in the past in support of the Afghan government, military or the international community or military. It considers the applicant has exaggerated his claims that his employer [provided a service to the military] or that it supported the Afghan government. The foreign company the applicant's employer [was part] of is not a manufacturer of [products]. It is a manufacturer of [other products]. This is evidenced from the company website discussed with the applicant at the hearing.
36. The migration agent has submitted if the applicant returns to Afghanistan, his English language ability mean he will seek employment with some other international organisation and will remain a future target for harm by the Taliban or other anti-government forces. The Tribunal considers this submission to be speculative.
37. The Tribunal finds the applicant was at most of a very low-level interest to the Taliban. In reaching that conclusion the Tribunal places weight on the Taliban not carrying through on any threat prior to the applicant going to [Country 1]. The Tribunal notes too the applicant has not claimed the Taliban continued to look for him after his return to visit his mother in October 2010. The Tribunal places weight too on the evidence he ceased working for the [business] in 2010 and his evidence is he would not return to work there. The Tribunal considers these factors together with the Tribunal's finding his former employer did not support the Afghan government or military or international forces or community cumulatively supports a finding there is only a remote or speculative chance and therefore not a real chance the applicant would suffer serious harm from the Taliban or any other anti-government individual or organisation because he worked for a foreign company in the past.

Imputed political opinion – applied for asylum in Australia, pro-Western

38. The applicant claimed he feared he would be harmed as someone who had returned to Afghanistan from a western country and would be assumed to be a spy because of his English skills and time in a western culture. The Tribunal discussed with the applicant that many tens if not hundreds of thousands of Afghans had returned to Afghanistan after seeking asylum overseas. It did not consider it plausible that all of those returnees would be considered spies. He made reference to two Hazara men returned from Australia in 2014, one of whom was killed by the Taliban and the other escaped. The Tribunal indicated the DFAT country report states there were conflicting reports about the kidnapping of one returnee from Australia in 2014, but that the victim was one of many hundreds if not thousands of returnees and that had returned to Afghanistan from Australia and of millions of returnees to Afghanistan who had returned from other countries. Having regard to the number of returnees the Tribunal was uncertain there was a real chance the applicant would be harmed for that reason.
39. The Tribunal accepts if the applicant returns to Afghanistan, he will do so as someone who is a failed asylum seeker who has spent time in a Western culture and with English language

² UNHCR, "UNHCR Eligibility Guidelines for assessing the international protection needs of asylum-seekers from Afghanistan", (6 August 2013) <http://www.refworld.org/pdfid/51ffdca34.pdf>

skills. However, on the evidence before it, the Tribunal considers there is only a remote or speculative chance and therefore not a real chance the applicant will suffer serious harm due to his being a failed asylum seeker who speaks English and lived in a Western culture, if he returns to Afghanistan.

Fear of harm from Islamic State

40. The applicant has claimed too he fears harm from Islamic State. He has given multiple motivations why those organisations may harm him, including that he is a Hazara, he is Shia and because he worked for a foreign company which provided services to the Afghanistan government. All of these have been discussed to some degree above, but it is convenient for the Tribunal to assess collectively his claims regarding fear from Islamic State.
41. The Tribunal discussed with the applicant a report ³ that the Taliban leadership were warning Islamic State not to interfere in Afghanistan. This confirmed Islamic State had a presence in Afghanistan but did not suggest Islamic state were targeting Hazaras in Kabul. Since the hearing, the presence of Islamic State in Afghanistan has increased, but is still at a relatively low level and mainly in Nangarhar province in the East and Helmand province in the west, not in the applicant's home city of Kabul. ⁴ In relation to his individual and cumulative fears of harm from Islamic State, the Tribunal relies upon the country information Islamic State are not prevalent in his home city of Kabul to support a finding there is only a remote chance the applicant would be harmed by Islamic State for reason of his race, religion or membership of a particular social group of employees who worked for a foreign company.
42. After assessing all the evidence and being mindful of the applicant's personal circumstances, the Tribunal has considered the claims of the applicant individually and cumulatively. For the above reasons the Tribunal is not satisfied the applicant faces a real chance of serious harm from: his family; his former colleagues or customers; the Taliban; other Pashtun extremist groups; other anti-Shia groups; Islamic State or any other individual or group for reasons of: his being a Hazara; his ceasing to practice as a Shia or imputed to be a practicing Shia; or his having worked with a foreign company and/or because he applied for asylum in Australia, speaks English and spent time in a Western culture. The Tribunal is not satisfied the applicant has a well-founded fear of persecution for reason of his race, religion, membership of a particular social group or for any Convention reason or combination of reasons, now or in the reasonably foreseeable future if he returns to Afghanistan. Therefore, the applicant does not satisfy the requirements of s.36(2)(a).
43. The Tribunal considers the applicant's claims further below in relation to complimentary protection.

Real risk of significant harm

44. The Tribunal has also considered the application of s.36(2)(aa) to the applicant's circumstances. In making its findings, the Tribunal has considered the Complementary Protection Guidelines as required by Ministerial Direction No.56, made under s.499 of the Act.
45. The Tribunal accepted above the applicant faced harassment and discrimination in the past because he is a Hazara and there is a real chance he may face such harassment and discrimination in the future if he is removed to Afghanistan. He referred to having difficulty

³ 'Taliban warn Abu Bakr al-Baghdai not to interfere in Afghanistan', The Economic Times (16 June 2015) <http://economictimes.indiatimes.com/news/international/world-news/taliban-warn-is-leader-abu-bakr-al-baghdadi-not-to-interfere-in-afghanistan/articleshow/47691894.cms>

⁴ B.Rubin, 'ISIL won't get very far in Afghanistan – for now' Al Jazeera (2 November 2015) <http://www.aljazeera.com/indepth/opinion/2015/11/isil-won-afghanistan-151101062739786.html>

attending school during the period the Taliban were in power. He referred as well to conflicts between himself and Pashtun customers and colleagues. The Tribunal has had regard to whether that harassment and discrimination amounts to significant harm. The Tribunal considers the only relevant forms of significant harm are torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment. On the evidence before it, the Tribunal is not satisfied the harassment of or discrimination towards Hazaras involves severe physical or mental pain or suffering, therefore it does not meet the definition of torture in s.5(1). Similarly, the harassment and discrimination cannot meet limb (a) in the definition in s.5(1) of cruel or inhuman treatment or punishment, nor could the harassment or discrimination be reasonably regarded in all the circumstances as cruel or inhuman in nature for the purpose of limb (b) of that definition. The Tribunal accepts the harassment and discrimination may cause some humiliation to the applicant, but is not satisfied that the harassment and discrimination would cause extreme humiliation which is unreasonable. Therefore, the Tribunal is not satisfied any harm arising from the harassment or discrimination will amount to significant harm.

46. In relation to the balance of the applicant's claims, as set out above, the Tribunal found the applicant did not have a well-founded fear of persecution on any ground as he does not face a real chance of serious harm in relation to any of his claims. Given the real chance test for well-founded fear of persecution imposes the same standard⁵ as the real risk test of significant harm, for the same reasons set out above, the Tribunal is not satisfied the applicant faces a real risk of significant harm.
47. The Tribunal therefore considers there are no substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan there is a real risk the applicant will suffer significant harm, in the form of: arbitrary deprivation of life; the death penalty being carried out; torture; cruel or inhuman treatment or punishment, or degrading treatment or punishment. Therefore the applicant does not meet the requirements of s.36(2)(aa).

CONCLUSIONS

48. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
49. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
50. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

51. The Tribunal affirms the decision not to grant the applicant a Protection visa.

Fraser Syme
Member

⁵ *MIAC v SZQRB* [2013] FCAFC 33