

**1300932 [2013] RRTA 321 (30 April 2013)**

**DECISION RECORD**

<b>RRT CASE NUMBER:</b>	1300932
<b>DIAC REFERENCE(S):</b>	CLF2012/170673
<b>COUNTRY OF REFERENCE:</b>	Afghanistan
<b>TRIBUNAL MEMBER:</b>	Don Smyth
<b>DATE:</b>	30 April 2013
<b>PLACE OF DECISION:</b>	Brisbane
<b>DECISION:</b>	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

## STATEMENT OF DECISION AND REASONS

### BACKGROUND

1. The applicant, who claims to be a citizen of Afghanistan, applied to the Department of immigration and Citizenship for a protection visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] August 2012. The delegate refused to grant the visa [in] December 2012, and the applicant applied to the Tribunal for review of that decision.
2. The Tribunal has before it the Department's file relating to the applicant. The Tribunal has also had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

### CLAIMS

3. According to information provided in the application, the applicant was born in [District 1] in Ghor Province in Afghanistan. He is from the town of [town deleted: s.431(2)]. The applicant married in Ghor in 1997. He has indicated that his wife was born in Kunduz Province.
4. According to the information provided in the application, the applicant lived in Pakistan during 2000 and 2001, then in Iran from 2001 to 2005. During 2005, he stayed for four months in Herat. From 2005 to 2008, he was in Mashhad, Iran. From 2008 to March 2012, he lived [in] Syria. The applicant claims that he received a Refugee Status Determination from the UNHCR in Syria in 2009. The applicant stated that his wife [and children] were living unlawfully in Iran at the time of the application.
5. According to the written claims set out in his application, the applicant's village was predominantly Hazara but was surrounded by several Pashtun, Uzbek and Tajik communities. In 1995, the applicant got a job working in a [retail store]. A Pashtun man named [Mr A] purchased [goods] from the applicant. The next day he came back to the shop and complained that the applicant had overcharged him and that he wanted to return the items. When the applicant told him it would not be possible to return them, [Mr A] became very angry and demanded that the applicant give him his money back. The applicant knew that [Mr A] was only after an excuse to harass him. He threatened to shoot the applicant "if I come to power".
6. Later the Taliban came to their village. [Mr A] became part of the Taliban and worked closely with [Mr B], the local Taliban commander. [Mr A] also became known for executing Hazaras. He was responsible for killing some local Hazara farmers. The applicant hid in the mountains nearby for about 20 days. While he was hiding in the mountains his wife told him that several Taliban had come to their house during the evening. They demanded to know where the applicant was. His wife told them she did not know where the applicant was. They told her that the applicant and his brother must be armed and planning to fight them. The applicant fled to Pakistan and later relocated to Iran.
7. According to the applicant's claims, he was deported to Herat in Afghanistan in 2005 when the factory in which he was working was raided. He stayed in accommodation in [location deleted: s.431(2)] for about four months while he renewed his driving licence and looked for work. He learnt from speaking to other people that [Mr A] had moved to Herat and was holding a military position there. One day, the hotel manager said to him that [Mr A] had come looking for him. The applicant made arrangements to return to Iran.

8. The applicant claimed they lived in fear of deportation in Iran. At the end of 2008 they relocated to Syria. In Syria they received a positive refugee status determination. They asked the UNHCR if they could be sent somewhere where they could live lawfully, but they were told that they would have to wait. They stayed in Syria until the security situation became so unstable they could no longer remain there as it was unsafe and they were harassed. The applicant was assaulted and had his money stolen. The applicant has provided copies of Refugee Certificates issued to him and his wife, [name deleted: s431(2)], by the UNHCR in Syria. These documents certify the holders as having been recognised as refugees in Syria. The applicant has also submitted a UNHCR Asylum Seeker Certificate issued to him by the UNHCR in Jakarta. This gives [District 1] as the applicant's place of birth.
9. The applicant has expressed a fear that he would be tortured and/or killed if forced to return to Afghanistan. In particular, he expressed a fear of being harmed by the Taliban because of his Hazara ethnicity and his Shi'a faith. He expressed a fear that the authorities would not protect him.
10. The applicant was interviewed by a delegate of the Minister [in] August 2012. The Tribunal has listened to the recording of the interview and has referred to relevant parts of the applicant's oral evidence in its reasons. In particular, the applicant made reference to claims concerning the issue with [Mr A]. He stated that, when the Taliban came to his area, they were looking for Hazaras. [Mr A] knew him specifically. He again claimed that [Mr A] came and looked for him when he returned to Herat. He was told that [Mr A] was working for the government and was driving a car.
11. The applicant's representative made a written submission to the Department after the interview. This set out additional information in relation to the applicant's claims. According to these submissions, it was in 1996 that the applicant had an altercation with [Mr A] when he tried to return items he bought at the store. [Mr A] returned five days later with five other Pashtun men who verbally abused the applicant and made insulting remarks. They told him to step outside and implied they wanted to fight and kill him. There was a loud argument. Other Hazaras gathered and [Mr A] was escorted out of the bazaar with five other Pashtun men. According to the submission, [Mr A] came to the applicant's home looking for him on several occasions. The applicant had fled to the mountains because he had heard the Taliban were in the village. With regard to the period when the applicant was deported to Herat, it was submitted that the applicant was told that [Mr A] was working in some kind of powerful military or government position at that time.
12. It was submitted that the applicant believed he remained of interest to [Mr A] because he had humiliated him in public and [Mr A] had lost face. The submission referred to Pakhtunwali, the code of conduct followed in Pashtun culture, and to "Badal" which was described as being closely related to honour. In this regard, reference was made to information from Professor William Maley and a number of articles concerning the Pashtun code of honour and "badal" The submission also addressed the security situation in Ghor, arguing that the situation was volatile, that the province was largely lawless and that the Taliban were active there. Reference was made to country information relating to these issues. It was submitted that the applicant would be at risk of persecution for reason of his religion and ethnicity. Submissions were also made in relation to the applicant's position as a failed asylum seeker. It was submitted that, if the applicant were forced to return to Kabul, he and his family would be at risk of persecution on the basis of imputed political opinion and religious belief. The risk to the applicant was higher because he had been living in exile for many years.

13. The applicant's representative made written submissions dated [in] March 2013. These submissions appear at folios 63 to 74 of the Tribunal's file. The Tribunal has had regard to these submissions, which addressed matters such as race and religion, the security situation, discrimination, the anticipated withdrawal of foreign troops and state protection. It was further submitted that the applicant would be subjected to serious harm on the basis of membership of a particular social group of failed asylum seekers. Reference was made to information regarding returnees from Western countries. The submissions also addressed complementary protection.
14. The applicant attended a Tribunal hearing [in] March 2013. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages. The Tribunal has had regard to the applicant's evidence at the hearing and has referred to relevant aspects of this evidence below.

### **RELEVANT LAW**

15. The criteria for a protection visa are set out in s.36 of the *Migration Act 1958* 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). The criteria in paragraphs (a) and (aa) are of particular relevance in the present matter.
16. Paragraph 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 Refugee as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
17. 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').
18. The issue in this case is whether the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

### **CONSIDERATION OF CLAIMS AND EVIDENCE**

19. The applicant claims to be a citizen of Afghanistan. He has provided a copy of an Afghan Motor Permit. He has provided documentation from the UNHCR describing him as an Afghan national and indicating that he was born in [District 1]. The applicant has consistently claimed to be from [District 1] in Ghor Province. While there has been some variation in the spelling, the Tribunal accepts that he has consistently referred to the same district of Ghor province. The Tribunal accepts that the applicant is an Afghan citizen from [District 1] in Ghor Province. It has assessed his claims against Afghanistan as his country of nationality.

20. The applicant has claimed that he had an altercation with a person called [Mr A] in about 1996. He has claimed that this person subsequently became active in the Taliban and came in search of the applicant after the Taliban came to his area in about 2000.
21. As the Tribunal has put to the applicant there are aspects of his evidence in this regard that have caused it some concern. Firstly, as the Tribunal put to the applicant at the hearing pursuant to s.424AA of the Act, the record of his entry interview in May 2012 indicates that he did not make any mention of his problems with [Mr A] at that interview. Rather, he referred to other matters such as being harassed by [Mr B] and his people. He stated that they were accusing him of having arms and fighting against the Taliban. The applicant's representative responded to this issue in the submission [of] April 2013. It was submitted that, the applicant's claims in relation to [Mr A] were nevertheless consistent with claims he put forward at the entry interview about being harassed by [Mr B] and his people. It was further submitted that the applicant had been informed by Hazara detainees that his interview with his migration agent and his protection visa interview were more important than his entry interview. The applicant was not represented at the time of the entry interview.
22. While it was of some concern to the Tribunal that the applicant did not specifically mention the Taliban commander with whom he claimed to have had a personal dispute, it is nevertheless true that the applicant's evidence at the entry interview about being harassed by [Mr B] and his people was generally consistent with his later claim that he was harassed by [Mr A]. He has consistently claimed that [Mr A] worked for [Mr B]. It is plausible that the applicant may have believed that he did not need to provide the full detail of his claims at the entry interview. In all the circumstances, the Tribunal accepts that the failure to specifically refer to [Mr A] at the entry interview is a matter of limited significance.
23. As the Tribunal has also put to the applicant, in his written statement to the Department and at his Departmental interview in August 2012, the applicant referred to the incident in which [Mr A] wanted to return some items and threatened him but failed to mention that [Mr A] came back several days later with five Pashtun men. In response, it has been submitted that this was not the immediate catalyst for the applicant to leave Afghanistan. It has also been submitted that the applicant divulged the details of the later incident to his migration agent during the natural justice break at the interview [in] August 2012 and that the agent indicated that she would provide these details to the delegate in the post-interview submission.
24. The Tribunal notes that, in the written statement, the applicant claimed that [Mr A] had become angry, that he had been after an excuse to harass the applicant and that he had threatened to shoot the applicant. He provided only limited detail about this incident. At the Departmental interview, there was only limited discussion of the initial dispute with [Mr A]. The applicant described having an "issue" with [Mr A]. He said that there was an argument and they said that one day they would get revenge. When asked later in the interview why [Mr A] would still have an interest in him, the applicant stated that he had had an argument with [Mr A] and that Pashtun people would never forget. On one view, the incident in which [Mr A] came back with five Pashtun men might appear to be a significant detail that was not explicitly referred to in the statement or at the interview. This does give rise to some concern. However, the Tribunal is conscious that these events are many years in the past. The claim that [Mr A] came with five Pashtun men and indicated that he wanted to fight the applicant is, in general terms, consistent with the claims about [Mr A] that were made at the Departmental interview and in the written statement. Particularly given the limited discussion at the interview of the initial dispute with [Mr A], the Tribunal attaches little weight to the initial omission of specific detail about this element of the applicant's argument with [Mr A].

25. As the Tribunal also put to the applicant, it had some concern about the applicant's apparent evidence at the hearing that the Taliban and [Mr A] only came to the applicant's house but did not go to any other house in the village. In response to this point, it has been submitted that the applicant had thought the Tribunal had asked him whether [Mr A] had come to the other houses in the village specifically asking for him. However, the Tribunal has some concern that the applicant appeared to indicate at the hearing that [Mr A] and the Taliban did not go to other houses in the village. On its face, the suggestion that they were present in the village but went only to the applicant's house would be somewhat difficult to accept. The Tribunal is concerned that the applicant may have sought to embellish his evidence in this regard. Nevertheless, this is by no means decisive in itself. The applicant has otherwise consistently maintained that [Mr A] and the Taliban came to the houses in the village and caused problems for the people there. He has also consistently claimed that [Mr A] came to his house asking specifically for him.
26. The Tribunal has had regard to information concerning the Pashtun Code of Honour and the concept of *badal* or revenge. It notes that this information indicates that, when some aspect of honour is damaged, it is to be restored through taking revenge. It notes also that the information indicates that revenge may be delayed but that a "Pakhtun will never forget to take revenge" (Khattak, R., "The Pashtun Code of Honour", *Central Asia*, [http://www.asc-centralasia.edu.pk/Issue\\_65/toc.html](http://www.asc-centralasia.edu.pk/Issue_65/toc.html)). The Tribunal considers it plausible that an incident some years before might lead a person to later seek revenge when the opportunity arose. The claim that [Mr A] sought out the applicant personally due to the dispute some years before appears plausible in this context.
27. While there are some aspects of the evidence about [Mr A] that have given rise to some doubt, the Tribunal nevertheless accepts that the applicant had a dispute with [Mr A] in around 1996. It accepts that [Mr A] sought to return some items that had been bought at the shop and threatened the applicant. It accepts that [Mr A] returned around five days later with other Pashtun men who verbally abused the applicant and implied that they wanted to fight and kill him. The Tribunal accepts that other Hazaras intervened on this occasion and caused the Pashtuns to leave. The Tribunal accepts the applicant's evidence that the Taliban later came to the village, that [Mr A] was a Talib who worked with the Taliban commander and that he was involved in harming Hazara people. The evidence to the Tribunal was that it was in around 2000 that the Taliban came to the applicant's village and the Tribunal accepts that this was the case. The Tribunal accepts as plausible that [Mr A] came to his house looking for him. While it considers that the Taliban would have had an interest in the men in the village generally, it accepts that [Mr A] had a particular interest in the applicant. The Tribunal accepts that it was these circumstances that led the applicant to flee Afghanistan.
28. The Tribunal has considered the applicant's evidence about encountering [Mr A] in Herat in 2005. It has considered his explanations with regard to how he was located by [Mr A]. Nevertheless, the Tribunal considered to be far-fetched the claims about having heard that [Mr A] was asking about him in Herat. The chance that the applicant would return from Iran to a place other than his home village where [Mr A] had apparently taken some role in the military would appear very small. The Tribunal does not accept that this occurred and that, within a short period of the applicant's return, [Mr A] had learnt of this. At the hearing, the applicant gave evidence that [Mr A] used to come to a specific hotel quite often. When asked how he would know that the applicant was coming to that hotel, the applicant stated that [Mr A] came to the hotel and asked who was staying there. Somebody told him the applicant had been there. However, on the applicant's own evidence, he was not staying at the relevant

hotel. The Tribunal does not accept the evidence about [Mr A] discovering the applicant's whereabouts in this manner. Further, the Tribunal has considerable difficulty accepting that, if [Mr A] had received intelligence about the applicant and had an interest in him personally, he would then have been unable to track him down personally. The Tribunal does not accept the applicant's claims about these events in Herat. It does not accept that he heard that [Mr A] was asking about him there. It finds that the applicant has sought to embellish his claims through his evidence that [Mr A] was looking for him in Herat in 2005. Nevertheless, the Tribunal accepts the applicant's claims about the circumstances that precipitated his departure from Afghanistan in 2000.

29. The Tribunal accepts that the applicant departed Afghanistan in 2000. It accepts that he has since returned to Afghanistan for only a short period in 2005 after being deported from Iran. It accepts that the applicant returned to Iran with his family in 2005 and then lived in Syria from 2008. It accepts that he left Syria due to the deteriorating security situation there.
30. The Tribunal must consider whether, looking to the reasonably foreseeable future, there is a real chance that the applicant could suffer persecution in Afghanistan for one or more of the five Convention grounds. In considering this question, the Tribunal has had regard to independent information about the general security situation in Afghanistan, the situation for people of Hazara ethnicity and the situation in Ghor Province in particular.
31. Independent evidence indicates that the civilian population of Afghanistan has, over recent years, been affected by worsening armed conflict. For instance, a September 2011 report stated that the Afghan conflict was continuing to expand geographically and to intensify in terms of violence. While it referred to the fact that the Taliban had suffered some setbacks in the north-east and had been under pressure in the south, it noted that just one out of 34 provinces remained unaffected by violence (Norwegian Country of Origin Information Centre (LANDINFO) 2011, *Afghanistan: Human Rights and Security Situation: Report by Dr. Antonio Giustozzi*, 9 September). According to the United Nations Assistance Mission in Afghanistan, between 1 January and 30 June 2012, conflict-related violence resulted in 3,099 civilian casualties. Anti-Government Elements were responsible for 80 percent of all civilian casualties (UNAMA 2012, *Afghanistan: Midyear Report 2012: Protection of Civilians in Armed Conflict*, July). In its report on human rights practices in Afghanistan for 2012, the US Department of State recorded that the Taliban and other insurgents "continued to kill civilians using improvised explosive devices, car bombs, and suicide attacks". It reported that antigovernment elements "also threatened, robbed, and attacked villagers, foreigners, civil servants, and medical and nongovernmental organization (NGO) workers" (US Department of State 2013, *Country Reports on Human Rights Practices for 2012: Afghanistan*, Introduction).
32. In its *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, issued in December 2010, the UNHCR reported that the intensification and spread of the armed conflict in Afghanistan had taken a heavy toll on the civilian population in 2009 and continued to worsen through the first half of 2010. It stated that continued instability in Afghanistan had resulted in the shrinking of the humanitarian space. It stated, "Reported 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, contribute to the deteriorating human rights situation in the country." (UNHCR 2010, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 17 December, p.10).

33. The Tribunal notes that Hazaras make up approximately nine per cent of Afghanistan's population (Central Intelligence Agency, *The World Factbook: Afghanistan*, <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html>) There is some information pointing to an improvement in the situation for Hazaras in recent years. In its eligibility guidelines issued in December 2010, the UNHCR stated that "ethnically-motivated tension and violence have diminished markedly in comparison to earlier periods". The UNHCR did caution that certain concerns remained, including ethnic discrimination and clashes, particularly in relation to land use. The UNHCR observed that the Hazara community had been marginalised during the Taliban rule. It stated that the Hazara community continued to face some degree of discrimination despite significant efforts by the government to address historical ethnic tensions. The UNHCR described as comparatively stable the security situation in provinces and districts where the Hazara community constituted a majority or a substantial minority (UN High Commissioner for Refugees 2010, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 17 December, HCR/EG/AFG/10/04, UNHCR Refworld, p.31-32 <<http://www.unhcr.org/refworld/pdfid/4d0b55c92pdf>> Accessed 21 September 2011). Nevertheless, the US Department of State has observed that ethnic tensions between various groups have continued to result in conflict and killings. It has also referred to continuing societal discrimination against Shi'a Hazaras (US Department of State 2013, *Country Reports on Human Rights Practices for 2012: Afghanistan*, Section 6).
34. The Tribunal notes that information from the Department of Foreign Affairs and Trade has pointed to an improvement in the situation for Hazaras in Afghanistan. In September 2010, DFAT reported that its interlocutors agreed that conditions for the Hazara community had improved significantly since the fall of the Taliban, although it referred to limited employment opportunities, security challenges and a perception of discrimination on the part of Hazaras (DIAC Country Information Service 2010, *Country Information Report No. 10/60 – the Hazara*, (sourced from DFAT advice of 28 September 2010), 29 September (CISNET Afghanistan CX250180)). In advice of March 2012, DFAT stated that Hazaras continued to face societal discrimination but were not being persecuted on a consistent basis and did not face systemic violence or an existential threat. It referred to positive and real changes for minorities over the previous decade (Department of Foreign Affairs and Trade 2012, *AFGHANISTAN: Hazara Community Update*, 12 March (CISNET Afghanistan CX283654)).
35. In March 2012, Professor Amin Saikal of the Australian National University stated that the Hazara provinces were among the safest in Afghanistan and that, at the very least, Hazaras were no worse off than many other groups in the country. He did state that there were "acts of violence and persecution by the Taliban against them here and there" (Saikal, Amin 2012, 'Afghanistan: The Status of the Shi'ite Hazara Minority', *Journal of Muslim Minority Affairs*, March, Vol.32, No.1, pp.80-87).
36. In contrast, in a paper of December 2011, Professor William Maley referred to the general security situation in Afghanistan as "profoundly threatening", referred to the history of discrimination and persecution of Hazaras in Afghanistan and stated that the overthrow of the Taliban regime had done nothing to secure Hazaras against Taliban attack in the vast tracts of Afghanistan where the Kabul government was ineffectual. Professor Maley questioned the ability of Australian Embassy staff to conduct field research given the tight security constraints. Professor Maley stated that there was no reason to believe that the underlying ethnic and sectarian factors fuelling hostility towards Hazaras had dissipated. Professor Maley argued that there was evidence of targeted violence against Hazaras and that the

situation was subject to rapid change, making positive assessments suspect (Maley, W 2011, 'On the Position of the Hazara Minority in Afghanistan', 7 December <<http://bmrsg.org.au/wp-content/uploads/2011/10/Maley-Hazaras-Opinion-Updated2.pdf>> Accessed 15 June 2012).

37. The Tribunal notes that the applicant comes from the district of [District 1] in Ghor Province. Independent information indicates that the eastern half of Ghor that includes [District 1] falls within the Hazarajat and the Hazara reportedly constitute a majority in this part of Ghor (Program for Culture and Conflict Studies 2008, "Ghor Province", Naval Postgraduate School, 23 October, <<http://www.nps.edu/programs/ccs/Ghor/Ghor.html>> Accessed 23 June 2010). According to the independent information, Ghor is poor and desolate even by Afghanistan's standards, with no proper roads, hospitals and schools. The situation is described as being particularly dire in the densely populated district of [District 1] ([source deleted: s.431(2)]). [District 1] is described as being isolated and as barely supporting its 120,000 widely-scattered inhabitants ([Source deleted: s.431(2)]).
38. A October 2011 report described Ghor province as being "relatively peaceful" ('Provinces that could be listed for Afghan second stage handover' 2011, *The Telegraph*, 31 October, <<http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/8860265/Provinces-that-could-be-listed-for-Afghan-second-stage-handover.html>> Accessed 27 February 2013; see also Afghanistan NGO Safety Office 2011, 'The ANSO Report', Issue 68 , 16-28 February, p.17, <[http://www.ngosafety.org/store/files/The%20ANSO%20Report%20\(16-28%20February%202011\).pdf](http://www.ngosafety.org/store/files/The%20ANSO%20Report%20(16-28%20February%202011).pdf)>, Accessed 21 March 2011). [District 1] was described in January 2010 as being "usually quiet" ([Source deleted: s.431(2)]). The Hazara-dominated districts in the east of Ghor have been described as appearing calmer than the other districts in the province, in spite of a deterioration in the security situation in the province as a whole (LANDINFO 2011, *Afghanistan: Security Report November 2010 – June 2011 (Part II)*, 20 September).
39. Nevertheless, reports do point to the presence of the Taliban and other armed groups in the province. A 2009 report described Ghor Province as "basically devoid of political control" and a place where the insurgency was free to circulate (Dorransoro, G. 2009, *The Taliban's Winning Strategy in Afghanistan*, Carnegie Endowment Organisation, p.20, [http://carnegieendowment.org/files/taliban\\_winning\\_strategy.pdf](http://carnegieendowment.org/files/taliban_winning_strategy.pdf), accessed 27 February 2013). A July 2011 report referred to comments from a female MP who stated she only returned to her home province of Ghor once per year due to insecurity. In the article, a government spokesman stated that nearly 80 per cent of Ghor was controlled by more than 15,000 illegally armed fighters ('Ghor MP Ruqia Nayel visits home district once a year' 2011, *Pajhwok Afghan News - Afghanistan*, 27 July <http://www.pajhwok.com/en/2011/07/27/ghor-mp-ruqia-nayel-visits-home-district-once-year> – Accessed 8 May 2012). In February 2013, the governor of the province stated that there were 124 illegal armed groups active in the province and that security problems had recently increased ('Security Transition Completed in Ghor', 2013, *Afghanistan Times*, 23 February, <[http://www.afghanistantimes.af/news\\_details.php?id=2644&&cid=1](http://www.afghanistantimes.af/news_details.php?id=2644&&cid=1)> Accessed 6 March 2013). In December 2012, the governor observed that the Taliban held sway in five districts of Ghor ("Visiting ministers briefed on Ghor security" 2012, *Pajhwok Afghan News*, 29 December, <http://www.pajhwok.com/en/2012/12/29/visiting-ministers-briefed-ghor-security>, accessed 18/3/2013). In February 2012, it was reported that a policeman with suspected links to the Taliban had shot dead a senior police officer in Sharak district, Ghor province ('Garbage bomb kills six Afghan children in Tarin Kowt' 2012, *BBC News*, 6 January,

Accessed 8 May 2012. CISNET: CX281040). In October 2012, Taliban militants abducted 13 civilians in the Charsada district of Ghor province (“Taliban abduct 13 Afghan civilians: official”, *Xinhua News*, 30 October, [http://news.xinhuanet.com/english/world/2012-10/30/c\\_131939875.htm](http://news.xinhuanet.com/english/world/2012-10/30/c_131939875.htm), accessed 18/3/2013). More recently, it was reported in February 2013 that the Taliban had flogged and exiled a couple for committing adultery in a village in Charsada district (‘Taliban Flog Ghor Couple on Adultery Charges’, 2013, *RAWA News*, 18 February, <<http://www.rawa.org/temp/runews/2013/02/18/taliban-flog-ghor-couple-on-adultery-charges.html>> Accessed 26 February 2013).

40. With regard to travel on the roads, DFAT observed in advice of 31 October 2012 that “[t]he poor condition of Afghanistan's limited road network is added to by insecurity” Taliban and criminal elements targeted the national highway, setting up arbitrary armed checkpoints. Official Afghan National Police and Afghan National Army checkpoints designed to secure the road were sometimes operated by poorly-trained officers who are known to use violence to extort bribes. Vehicles “are routinely stopped and harassed, and occupants occasionally abducted or killed” However, DFAT stated that the vast majority of deaths on Afghan roads were caused by traffic accidents rather than targeting by the insurgency. DFAT stated that, overall, interlocutors agreed that road travel within the broad Hazara “belt” was safe and that their contacts indicated that the main targets on the roads were those employed by or with direct links to the Afghan Government or international community. DFAT stated that nobody it spoke to was aware of targeting of any particular ethnic group on the roads (DFAT 2012, *AFGHANISTAN: CIS Request AFG13987: Security Situation for Hazaras in Afghanistan, Country Information Report No. 12/64*, 31 October).
41. In advice of March 2012, DFAT stated (referring to the provinces of Bamiyan, Daykundi and Ghazni), “Travel into and out of most districts, and all three provinces, could still be dangerous in the context of broader security in Afghanistan.” It stated that the situation was equally risky for all travellers. In all three provinces, individuals associated with or working for the Government and international community were at greater risk of targeting from the insurgency. DFAT stated that Hazaras outside of the Hazarajat were more vulnerable and avoided travel outside their immediate communities (Department of Foreign Affairs and Trade 2012, ‘AFGHANISTAN: Hazara Community Update’, 12 March (CISNET Afghanistan CX283654)).
42. In April 2012, Thomas Ruttig, Co-Director of the *Afghan Analysts Network*, was asked to provide expert advice to IPAO on conditions for Hazaras who travelled between Kabul and the Hazara dominated areas of Ghazni (including Jaghori). Mr Ruttig stated that Hazaras were still afraid to pass through Pashtun/Taliban influenced areas and could do so only with a number of precautions such as deleting “conspicuous” phone numbers indicating contact with westerners or government authorities and not carrying papers of the same character. He referred to occasional road blocks where individuals were singled out, apparently based on reports by informers (Ruttig, T 2012, *Comments provided by Thomas Ruttig on travel between Kabul and Ghazni for Hazaras*, 25 May).
43. In advice of 2010, Professor Monsutti (a social anthropologist and specialist in Afghan migratory networks) stated that Hazaras were under threat of being harmed by the Taliban and that the Taliban considered Hazaras to be against them. He stated that Hazaras were killed on roads because they were considered potential enemies. The Taliban used the uncertainty of whether or not they would attack to intimidate and restrict Hazaras. Sometimes they would harm or even kill a Hazara and sometimes not. He stated that the most dangerous areas for Hazaras had become around the Pashtun/Hazara ethnic boundaries in Uruzgan,

Ghazni, Wardak and Kabul. He stated that creating a dangerous environment in Afghanistan was an intentional Taliban tactic and Hazaras were particularly at risk in those conditions (Monsutti, A. 2010, *The Situation for Hazaras in Afghanistan*, 19 August).

44. Halima Kazem, a researcher with Amnesty International, stated in 2010 that majority Hazara areas were considered relatively safe but Hazaras were at risk outside these areas, which she described as shrinking. She stated that Hazaras were more at risk than other ethnic groups in Afghanistan. She stated that they were treated more violently and were more at risk of death when involved in confrontations with Taliban or other militia forces. She referred to a risk of Hazaras being attacked or killed by the Taliban at checkpoints (Kazem, Halima 2010, 'Presentation for the Independent Merits Review, 8 October 2010', Presentation Briefing Notes).
45. In assessing the risk to the applicant, the Tribunal has considered carefully the independent information. The independent information points to a generally volatile situation in Afghanistan.
46. Independent information points to the historic persecution of the Hazara population in Afghanistan (for instance, DIAC Country Information Service 2010, *Situation of the Hazaras Minority*, (sourced from DFAT advice of 21 February 2010), 17 February). Sources such as DFAT and Professor Saikal point to an improvement in the position for Hazaras since the fall of the Taliban. DFAT has stated, for instance, that Hazaras do not face systemic violence or an existential threat. Other sources such as Kazem and Professor Monsutti have suggested that there is ongoing enmity towards Hazaras and some targeting of Hazaras by Pashtuns and groups such as the Taliban. Monsutti, for instance, has stated that Hazaras are killed due to being considered as potential enemies. The UNHCR has also referred to regular reports of ambushes, robberies, kidnappings and killings by the Taliban along certain roads. The US Department of State has pointed to ongoing ethnic tensions between Pashtun and non-Pashtun ethnic groups, resulting in conflict and some killings.
47. The Tribunal has considered the evidence carefully. There is little direct information in the available sources to indicate that Hazaras generally are being persecuted in the predominantly Hazara district of [District 1]. Some sources, including the UNHCR, have suggested that the security situation is relatively stable in Hazara dominated districts. The Tribunal notes that, in December 2010, the UNHCR observed that members of ethnic groups, including those affected by ethnic violence, may be at risk on account of their ethnicity and/or imputed political opinion, particularly in areas where they do not constitute an ethnic majority. It stated that the mere fact that someone belonged to an ethnic group constituting a minority did not automatically trigger concerns related to risks on the ground of ethnicity alone. However, the independent evidence indicates that there is still some violence in Afghanistan based on ethnicity. The general security situation in Ghor Province has deteriorated. The Taliban remain active and continue to engage in violent activities. The areas around Pashtun/Hazara ethnic boundaries have been identified as dangerous. Ghor Province has been described as being devoid of political control and as being a place where the insurgency is free to circulate freely. The independent information points to growing insecurity in the province, 80 per cent of which is reported to be controlled by more than 15,000 illegally armed fighters. It has been reported that the Taliban hold sway in five of the province's districts. The influence of the Taliban and the deterioration in the security situation are both reflected in the abduction of 13 civilians in October 2012 and the flogging of a couple for adultery in February 2013. Both incidents occurred in Charsada district, a district close to the applicant's home district of

[District 1] (See Tribal Map Ghor 2011, Naval Postgraduate School: Program for Conflict and Culture Studies, 15 November).

48. The Tribunal accepts that the applicant has come to the adverse attention of the Taliban in the past. It accepts that he was particularly targeted by a prominent member of the Taliban with whom he had had a dispute in the past. He is a person of Hazara ethnicity and Shi'a religious faith from a province where the insurgency is reportedly able to circulate freely and where there have been a number of recent Taliban attacks on the civilian population. The Tribunal accepts that the applicant has been absent from Afghanistan for a lengthy period and would face some challenges in re-establishing himself in his home village. In seeking to re-establish himself in these circumstances, the Tribunal considers that the applicant would necessarily need to move around. The Tribunal considers this to be the case in particular given that [District 1] is a poor and isolated place with very limited facilities.
49. Various sources, including DFAT, Monsutti and Kazem have referred to risks associated with travel. DFAT has stated that Hazaras avoided travel outside their immediate communities. It has stated that both Hazaras and Pashtuns are limited in their ability to move through districts dominated by the other. There is evidence from some sources indicating that those Hazaras who come to the adverse attention of the Taliban are differentially targeted for reason of their ethnicity.
50. Having regard in particular to the applicant's history and his circumstances, the Tribunal finds that there is a real chance that the applicant would be persecuted by the Taliban if he were to return to his home village. Having regard to the independent information concerning violent acts carried out by the Taliban, the Tribunal is satisfied that the applicant faces a real chance of serious harm in the form of significant physical ill-treatment or a threat to his life or liberty. The Tribunal notes the information from Halima Kazem to the effect that Hazaras are more at risk than other ethnic groups and are more at risk of death when involved in confrontations from the Taliban. It also notes the information from Professor Monsutti concerning the attitude of the Taliban towards Hazaras. It has accepted that the applicant has come to the adverse attention of the Taliban in the past. The Tribunal accepts that people of other ethnicities may also face some risk from the Taliban. Nevertheless, it is satisfied that the essential and significant reason for the harm the applicant faces is his Hazara ethnicity.
51. With regard to state protection, the Tribunal notes, for instance, that a UK Home Office Operational Guidance Note of June 2012 described state protection nationally as compromised by corruption, ineffective governance, a culture of impunity, a weak rule of law and a widespread reliance on traditional dispute resolution. The report noted that the ability of the police to provide protection was limited (UK Home Office 2012, *Operational Guidance Note: Afghanistan*, June). In a report of March 2012, the Danish Immigration Service noted that the UNHCR had stated that the common perception of the police in Afghanistan was negative. It stated, "In general, people consider the police to be corrupt and weak and it would be the last resort for people to seek protection with the police and other law enforcement agents." (Danish Immigration Service 2012, *Country of Origin Information for Use in the Asylum Determination Process: Report from Danish Immigration Service's fact finding mission to Kabul, Afghanistan, 25 February to 4 March 2012*, May 2012) A Jane's Security *Country Risk Assessment* of April 2011 stated that the Afghan National Police had never had an effective national enforcement capacity. It stated, "The ANP does not function as a united, professional and disciplined law enforcement entity and is unable to preserve law and order across the majority of the country." (UK Home Office 2011, *Country of Origin Information Report: Afghanistan*, 11 October, p. 59, Sections 10.05 and 10.06). The

Tribunal finds that the applicant would not be able to access adequate state protection in relation to the harm he fears.

52. With regard to relocation, the Tribunal notes information from the UNHCR and other sources referring to the importance of family and community structures and the difficulties associated with moving to a place where a person lacks networks. The applicant's family network has been very much disrupted. He has spent periods living in Iran and Syria. His evidence, which the Tribunal accepts, is that his wife [and children] are currently resident in Iran. It has been submitted that the applicant has no family connections in places such as Kabul. The Tribunal accepts that the applicant has a wife and [children] for whom he is responsible. It accepts that he has no family network in places such as Herat and Kabul. He has been absent from Afghanistan for a lengthy period. While he has shown some resourcefulness in the past, the Tribunal is satisfied that it would not be reasonable in all the circumstances to expect the applicant to relocate to Kabul or elsewhere within Afghanistan in order to avoid the harm he fears.
53. The Tribunal is satisfied, for reasons set out above, that there is a real chance that the applicant would be targeted and harmed by the Taliban if he were to return to Afghanistan. The Tribunal is satisfied that this would involve "serious harm" as required by paragraph 91R(1)(b) in that it involves a threat to his life or liberty and significant physical harassment or ill-treatment. The Tribunal is satisfied that such conduct by the Taliban would be systematic in the sense of being deliberate and premeditated (see *VSAI v MIMIA* [2004] FCA 1602) and discriminatory in the sense that it would be directed at the applicant for reason of his race: s.91R(1)(c). It is satisfied that his race would constitute the essential and significant reason for the persecution, as required by paragraph 91R(1)(a) of the Act.
54. The Tribunal accepts that the applicant does not have any right to enter and reside in any third country such that s.36(3) of the Act would apply to his circumstances. While he has lived in Iran in the past and other members of his family are still there, the Tribunal accepts that he was previously deported from Iran. There is nothing in the evidence to indicate that he has a presently existing legally enforceable right to enter and reside in Iran. The Tribunal is satisfied that he does not have a legally enforceable right to enter and reside in Iran.
55. The Tribunal notes that the applicant has provided documentation issued to him by the UNHCR in Syria, including a Refugee Certificate. Independent information confirms that the UNHCR issues Refugee Certificates to those in Syria who undergo individual Refugee Status Determination (Immigration and Refugee Board of Canada 2008, *Syria: Description of the Refugee Certificate issued by the Office of the United Nations High Commissioner for Refugees (UNHCR) in Syria in 2007*, SYR102798.E, 3 April, UNHCR Refworld <<http://www.unhcr.org/refworld/country,,IRBC,,SYR,,4829b5572c,0.html>> Accessed 27 February 2013). A UNHCR Refugee Certificate is issued to individuals who are determined in UNHCR mandated procedures to meet the criteria for refugee status (UN High Commissioner for Refugees, 2003, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 20 November <<http://www.unhcr.org/refworld/docid/42d66dd84.html>> Accessed 28 February 2013). It has been reported that the issuance of a Refugee Certificate does not guarantee the holder protection (International Justice Resource Centre, 2011, *Refugee Law: Enforcement Claiming Asylum* <[http://www.ijrcenter.org/refugee-law/#ENFORCEMENT\\_CLAIMING\\_ASYLUM](http://www.ijrcenter.org/refugee-law/#ENFORCEMENT_CLAIMING_ASYLUM)> Accessed 28 February 2013).

56. Syria is not a signatory to the Refugees Convention (“SYRIA: Undocumented, overlooked and struggling to survive” 2010, *IRIN*, 31 March, <http://www.irinnews.org/printreport.aspx?reportid=88638>, accessed 30 April 2013). According to a March 2013 UNHCR Fact Sheet on Syria, there were 1,730 Afghan refugees registered with UNHCR at the end of February 2013. UNHCR noted that “[t]heir situation remains precarious”. It observed that “UNHCR documentation, which is frequently the only document they have, does not suffice by itself to legitimate their presence in Syria” (UNHCR 2013, ‘UNHCR Syria Fact Sheet’, March <http://www.unhcr.org/4ec630e09.html>, Accessed 30 April 2013). The Tribunal finds that the evidence indicates that possession of UNHCR documentation does not give rise to any right to enter and reside in Syria. The Tribunal is satisfied on the evidence before it that the Refugee Certificate issued to the applicant does not give him a legally enforceable right to enter and reside in Syria or any other country.
57. In any event, Syria has a record of deporting refugees, including those registered with the UNHCR. For instance, in the period from late 2007 to February 2008, Amnesty International identified the refoulement of ten Iraqis registered with UNHCR, including one 16-year-old girl deported from a detention centre (US Committee for Refugees and Immigrants 2009, *World Refugee Survey 2009: Syria*, <http://www.refugees.org/resources/refugee-warehousing/archived-world-refugee-surveys/2009-wrs-country-updates/syria.html>). During 2008, Syria forcibly returned 69 refugees and asylum seekers (ibid.). For reasons set out above, the Tribunal has found that the applicant does not have a legally enforceable right to enter and reside in Syria. However, even if he did have such a right, the Tribunal finds that he would, in any event, have a well-founded fear that Syria would return him to Afghanistan. The Tribunal has found that the applicant has a well-founded fear of Convention-related persecution in relation to Afghanistan. In these circumstances, s.36(3) would in any event not apply in relation to Syria: s.36(5).
58. Further, the Tribunal notes that the UNHCR has stated that it has received reports of threats against refugees in Syria as well as abductions. It has reported the death of an Afghan refugee (“Inaction of Govt. on Afghan Refugees in Syria” 2013, *The Daily Outlook*, 17 February, [http://outlookafghanistan.net/editorialdetail.php?post\\_id=6650](http://outlookafghanistan.net/editorialdetail.php?post_id=6650), accessed 30 April 2013). It has been reported that, in the course of the armed conflict in Syria, Afghans living in Syria have suffered violence, threats and forced displacement. It has been reported that the Afghans in Syria are easily identifiable by their Asiatic features and foreign accents, making them easy targets for attack (Shuja, A. 2013, “Syria’s Afghan Refugees Trapped in a Double Crisis”, 28 January, <http://www.undispatch.com/syrias-afghan-refugees-trapped-in-a-double-crisis>, accessed 30 April 2013). The applicant has claimed that he has been attacked and assaulted in Syria in the past. Such an attack is consistent with independent information and the Tribunal accepts that this occurred. Particularly having regard to the information about the precarious situation for Afghans in Syria, the Tribunal accepts that the applicant would not be able to access adequate or effective state protection against such attacks. In all the circumstances, the Tribunal is satisfied that the applicant would have a well-founded fear of being persecuted in Syria for reason of his Afghan nationality. This provides a further basis on which s.36(3) is not applicable in relation to Syria: s.36(4). The Tribunal has found in any event that the applicant does not have a legally enforceable right to enter and reside in Syria.
59. The applicant has provided a record of having registered as an asylum seeker with the UNHCR in Indonesia. However, there is nothing in the evidence to indicate that the applicant has a legally enforceable right to enter and reside in Indonesia. The Tribunal is satisfied that

he does not have a legally enforceable right to enter and reside in Indonesia or any other third country.

60. The Tribunal finds that the applicant is outside his country of nationality, Afghanistan. For the reasons set out above, the Tribunal finds that the applicant has a well-founded fear of being persecuted for reason of his race if he returns to his country of nationality. The Tribunal is satisfied that the applicant does not have a legally enforceable right to enter and reside in any third country and that the applicant is not excluded from Australia's protection obligations by s.36(3).

### **CONCLUSIONS**

61. 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**

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