

**1000358 [2010] RRTA 328 (30 April 2010)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1000358

**DIAC REFERENCE(S):** CLF2009/119122 CLF2009/119605  
CLF2009/146751

**COUNTRY OF REFERENCE:** Afghanistan

**TRIBUNAL MEMBER:** Tony Caravella

**DATE:** 30 April 2010

**PLACE OF DECISION:** Perth

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

## **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 and Citizenship 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, arrived in Australia [in] September 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] September 2009. The delegate decided to refuse to grant the visa [in] January 2010 and notified the applicant of the decision and his review rights by fax dated [on the same day].
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] January 2010 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

6. 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. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to 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).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

### **Definition of 'refugee'**

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to 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. 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 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. 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.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. 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.
14. 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. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. 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.
16. 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 persecution 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.
17. 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.

18. Whether an applicant is a person to 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.

### **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.

#### *Application made to the Department for a Protection visa*

20. In the *Application for an applicant who wishes to submit their own claims to be a refugee* (Form 866C) the applicant claims to be born in Beshood Afghanistan on [date deleted: s.431(2)]. He claims to be a member of the Hazara ethnic group and a Shia Muslim by religion. He claims to have never married. He claims he is Afghani by citizenship at birth.
21. In the Form 866A the applicant claims to have departed Afghanistan in June 2005 and went to Pakistan and he states his purpose of travel then was "Escaped from the opposition". He claims that he left Pakistan in December 2006 and travelled to Dubai. He claims he departed Dubai to come to Australia [in] September 2009. It should be noted that the applicant subsequently admitted that aspects of his original claim were incorrect or false. This is discussed later in this decision.
22. The applicant's reasons for claiming to be a refugee are set out in his replies to questions 40 to 45 which he replies in "Annexure 1A" which is titled "Statement of [the applicant]". The following relevant statements are extracted from Annexure 1A and reproduced as follows:

I was born on [date]. Originally I am from Afghanistan. My family and I are followers of Shia Islam. I was living peacefully in [Location 1] Beshood, Afghanistan until the end of 2004.

My father owned a piece of land there for farming purpose. The neighbouring land was owned by a person known as [Politician A] who was a powerful member of the NASR Party. Around December 2004, he tried to extend his border of land into my father's land. There was high tension between both sides. There was serious conflict resulting in fighting between my father and elder brothers with the people from [Politician A].....my father and my two elder brothers were injured. Some people took them to hospital. My mother told me to leave Beshood for Kabul where my uncle was living. She said that she and the others would join me later.

Later I learned that my eldest brother died on the way to the hospital and the other brother had his collar bone broken..... Afterwards, I did not hear about my father and my brother any more.

In Kabul he worked there as a driver and was there for 6 months ending June 2005.....We were living in [Location 2] of Kabul One day after work a friend told me that some people came to look for me. These people wearing clothing of [Politician A]'s group (the NASR Party) and carrying guns. They left after knowing I was not there. My youngest brother

disappeared. I did not see my younger brother since then.....I decided to leave Kabul for my safety.

.....I then entered Pakistan. I started working in the clothing industry and learning English. I was living in [Location 3], Quetta in Pakistan I was there fore about 1½years. One day the owner of the place where I lived described that some strange people were looking for me. They looked like those who were tracing me in Kabul....Within a week, I decided that I would leave Pakistan for Dubai for my safety.

In January 2007, I arrived at Dubai where I worked with the underground clothing factory. I was taken to the place by unknown people. I stayed in Dubai illegally. The owner of the factory did not issue me any document apart from giving me a salary. He mentioned to me that he knew someone who could assist me to come to Australia.....

Around [dates] September 2009, I was escorted to Malaysia by plane with the smuggler. We stopped over for about 2 to 3 hours in transit in Malaysia. We then boarded the plane and the person left the plan and never returned. I flew to Perth alone. On [date] September 2009, I arrived at Perth International Airport and proceeded to the Immigration counter for assistance.

I worry that if I return to Afghanistan the people of the NASR Party will take revenge on me. They intended to intrude my father's land, injured by father and brothers (even killed my eldest brother). Both the incidents of the Nasr Party people tracking me in Kabul and Pakistan clearly showed that they were still locating me. The disappearance of my youngest brother in Kabul is still a mystery. I do not know what has happened to my family after I escaped from home. Especially, in Dubai I was not able to contact the outside world. We are members of the minority group of Shi'as always subject to attack to by major ethnic groups. I do not have confidence in the Afghan government to give me protection. For these reasons I hope that the Australian government will give asylum and grant me Protection Visa to reside in Australia

To sign:

[Applicant]

[Date]

23. The applicant also swore a statutory declaration [in] October 2009 which makes similar statements as made in the applicant's statement referred to in the preceding paragraph.
24. A statutory declaration was also sworn by a representative of the United Hazara Association Incorporated (held at folio 39 of file CLF2009/146751) The declarant declares, amongst other things, that he visited the applicant at the Immigration Detention Centre on 6 to 7 occasions for about 30 minutes each time He concludes that he is of the opinion that the applicant has a background from Afghanistan and is a member of Shia Islam. He states "In this matter, my confidence...is over 90%."

#### *The delegate's decision*

25. [In] January 2010 the delegate decided that the applicant is not owed protection obligations for the purposes of section 36 of the Migrations Act and criteria 866.221 of the Migration Regulations. As the delegate found the applicant failed to meet the prescribed criteria for the grant off a Projection (Class XA) visa, the delegate refused the grant of such a visa. The delegate's reasons for decision are set out in the Decision Record held on the Department's file. The delegate makes the following relevant findings in the Decision Record:

- The applicant arrived in Australia as an undocumented arrival [in] September 2009 and claimed during the airport interview to be [applicant's name] dob: [date], an Afghan national;
- [In] November 2009 the Department's officers advised the applicant that his identity had been assessed as [Alias 1] dob [date] on the basis that [Alias 1] had been a missing passenger on the same flight that he had arrived in Perth. ACBPS footage showed the applicant alighting from the flight. He was informed the Department would proceed on the basis of this identity, that is, [Alias 1];
- [Alias 1] was in Australia from [date] August 2007 until [date] August 2009 on a Class TU Subclass 572 (Vocational Education and Training Sector) visa;
- The applicant maintained that he is [the applicant] and has since provided Afghani identity documents. The delegate found that the evaluation of the documents has proven inconclusive;
- The documents appear to confirm the applicant's claims, however in light of the evidence indicating the applicant's true identity, namely that of [Alias 1], the delegate concluded the documents are fraudulent;
- The delegate summed up the applicant's claim for protection as follows:

The applicant claims to be an Afghani citizen born on [date]. He is a Shia Muslim of Hazara ethnicity. He lived peacefully there until 2004, when his father became involved in a land dispute with a neighbouring "landlord". This landlord was a "powerful member of the Nasr party". The dispute resulted in a fight where the applicant's older brother was killed and his father and older brother were injured. Later in Kabul the applicant found out that members of the Nasr party were looking for him and his brother, who subsequently disappeared. The applicant then fled to Quetta in Pakistan. He lived there for 1½ years and then heard "some strange people" were looking for him. Presuming the people to be from the Nasr party, he then fled to Dubai and from there met a people smuggler who arranged a passport and flight to Australia via Malaysia.

- The delegate finds the applicant is in fact [Alias 1], a Pakistani national.
- The delegate finds that there is no evidence that applicant's fear of harm has anything to do with his race, nationality, political opinion or religion. The delegate also considered whether a group identified as "people threatened by Afghani warlord" might constitute a particular social group for the purposes of assessing the applicant's claims against the Convention. The delegate rejected such a proposition and found a group of people threatened by Afghani warlords is so defined by the fear of harm or mistreatment and found such a group cannot be said to have a unifying characteristic that distinguishes it from the broader society.
- The delegate found that the applicant's fear of harm is not related to the Refugees Convention and is instead a fear of criminal behaviour as a result of being an enemy of an Afghani warlord;

- The delegate concluded by finding he was not satisfied as to the applicant's credibility but notwithstanding credibility concerns the delegate finds he was not satisfied that the applicant would experience on return to Pakistan.

*Application for review.*

26. [In] January 2010 the applicant applied to the Tribunal for a review of the delegate's decision.

*The applicant's revised claims as set out in his statutory declaration sworn [in] March 2010*

27. In this statutory declaration which was received by the Tribunal [in] March 2010, the applicant declares that he is [applicant's name], an Afghan citizen born in [Location 1] on [date deleted: s.431(2)] and goes on to declare:
2. My mother is [name] born in 1948. My father is [name] born in 1944. I have a brother who is deceased. His name was [Brother 1] and he was born in 1971. I have three other brothers. Their names are: [Brother 2] born in 1975, [Brother 3] born in 1985 and [Brother 4] born in 1987. I also have a sister, [Sister 1] born in 1977.
  3. I belong to the Hazara community and I am Shia Muslim.
  4. In about 1989 or 1990, my father left Afghanistan to go to Pakistan. This was because the Hazaras were being killed by the Pashtuns, Tajiks and Uzbeks. When my father left Afghanistan, my mother took all my siblings and me to Pakistan. We travelled to Pakistan illegally. We did not have any travel documents with us. At that time I was about [age] years old. I do not have a clear recollection of what happened at that time. I also found out later that the other reason for my parents fleeing Afghanistan is because of a feud over land between a man called [Politician A] who was a member of the Nazar Party and my family.
  5. In this dispute, my elder brother [Brother 1] was killed. He was about 17 or 18 years of age at this time.
  6. When my mother took my siblings and me to Pakistan we went by car or taxi. On our way to Pakistan, my brother, [Brother 4] disappeared. My parents believed that he was kidnapped by the Pashtuns.
  7. Since that time my family and I have lived illegally in Pakistan. We have lived in Hazara Town which is in Quetta in Pakistan since that time.
  8. My father arranged for me to get a passport. It was a Pakistani passport under the name '[Alias 1]'. As far as I know the passport is not a genuine document. I understand that my father paid someone, some money to get me this passport. This is why my real name is not on the passport.
  9. While in Australia I studied at [Education Provider 1]. I also worked part time while I was a student.
  10. In August 2009, I went back to Pakistan in order to visit my mother who was very sick. When I went back to Hazara Town, I discovered that the situation there had gone far worse than it was before. Many Hazara people were being killed.

11. My parents and I have always lives in Pakistan in fear. This is because we are illegal immigrants in Pakistan and we cannot get the protection of the authorities there. The people who are targeting the Hazaras are the Wahabis the Sunni Muslims and the Baloch. I discovered that people could not go outside their homes after 6.00pm. Hazara people are found dead in the streets if they go out after 6.00pm. I found this extremely difficult to cope with. I was too frightened to go outside my house after this time. Having lived in Australia for two years, I found this to be very shocking and distressing. The situation had become far worse than it had been before I left for Australia.
12. When I returned to Australia I decided to apply for a protection visa as I knew my student visa would run out soon and I was very frightened to return to Afghanistan or Pakistan I thought because my father had probably paid a bribe for a passport and it was in a false name as was my visa, I would get into trouble if I tried to apply for protection. It all seemed so complicated and I was so afraid I would be sent to Afghanistan if I admitted that, that I thought I would say I knew nothing of '[Alias 1]' and just apply in my own name.
13. My family and I cannot go back to Afghanistan. This is because crimes against the Hazaras continue in Afghanistan. The Hazaras are mainly attacked by the Taliban.
14. I fear that I will be killed or harmed in some way if I go back to Afghanistan. The fact that I am Hazara and also a Shia Muslim will place me in great danger if I go back to Afghanistan.
15. The authorities in Afghanistan cannot protect me, because the authorities are often the cause of the problems. Most of the Government officials are not Hazaras and they tend to attack the Hazaras in the night time. If there are any Hazara officers, they often have limited powers and they will not have the capacity to protect me if I go back to Afghanistan. There is no peace, no security and no protection for me in Afghanistan. I am unable to rely on anyone or any institution in Afghanistan to provide me with any protection.
16. As I am also an illegal immigrant in Pakistan, I cannot rely on the Pakistani Government to provide me with any protection in Pakistan as well.

*Procedural history regarding the Tribunal's hearing of this matter*

28. After examining the Department's file on this matter, the Tribunal found there was insufficient information for it to make a favourable decision in favour of the applicant and therefore the Tribunal decided it was necessary to hold a hearing with the applicant. As this matter involved the applicant who is being held in immigration detention, the Tribunal sought to hold the hearing as soon as possible, however, in this case there were delays as explained in the following paragraphs.
29. This case was constituted to the Tribunal Member [in] January 2010. The first hearing was scheduled for [date] February 2010. [Two days earlier] a request for an adjournment was received from the applicant's representative, [details deleted: s.431(2)], on the basis that it had only recently received instruction to represent the applicant. The Tribunal agreed to adjourn the hearing to [a date in] March 2010.
30. The first hearing was held at the Perth Immigration Detention Centre [in] March 2010. At that hearing the applicant made claims which are set out in detail (see under the heading [Hearing 1]).



31. [In] March 2010 the applicant's representative wrote to the Tribunal and advised that after the hearing the day before the applicant instructed his representative that he was the same gentleman who travelled to Australia on a student visa under the name of '[Alias 1]'. In the same letter, the applicant's representative requested the applicant would like the Tribunal to consider new information that he would like the present in support of his application for a Protection visa. In light of this the representative sought a further adjournment of between 4 to 6 weeks in order to prepare the applicant's application and to gather further evidence in support of his claim.
32. [In] March 2010 the Tribunal granted the applicant's request for the further adjournment advising the applicant's representative that the adjournment would be granted for approximately four weeks when a further hearing would be scheduled.
33. [In] March 2010 the Tribunal received a statutory declaration sworn by the applicant. The statutory declaration contains the applicant's revised claims in support of the Protection visa application and the details are set out above.
34. [In] April 2010 a second hearing for this matter was scheduled for [a date in] April 2010.
35. At both hearings the applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages.
36. The applicant's representative attended both hearings.

*[Hearing 1]*

37. The Tribunal asked the applicant whether he had read and understood the Department's refusal decision. He said he had and that he had also had it explained to him. He explained that he understands that the Department decided he is not a refugee and also that he is not Afghan.
38. The Tribunal asked the applicant to provide his full name, to which he replied "[Applicant's name]". Date of birth [deleted: s.431(2)] He claims he was born in [Location 1], (the applicant's spelling) a small town in Afghanistan. He said it is located in Beshood in Wardak Province He described it as a small village surrounded by mountains. He said it is [a number of] hours by car depending on the type of car and road conditions, from Maydan Shahr, the capital of Wardak.
39. The applicant told the Tribunal that he arrived in Perth [in] September 2009 and had been in detention since then for all except 3 weeks.
40. The Tribunal asked the visa applicant which airline he flew to Perth from. He answered he flew Singapore Airlines to Perth The Tribunal asked from what city did he fly to Perth? Initially he said that he flew direct to Perth from Dubai. He then changed his response and said it was from Malaysia but he was not sure which city. Later he said he thinks it might have been Malaysian Airlines.
41. The Tribunal told the applicant that he claims to be [the applicant] however the Department believes he is [Alias 1]. The Tribunal asked the applicant what information he could provide the Tribunal to prove his identity. He provided a copy of his driver's license, showing he is licensed to drive a motor vehicle and a motor cycle. The driver's licence was issued in

Kabul, Afghanistan. He also provided a copy of a letter from [Mr A] who is regarded as a leader in the village of [Location 1].

42. The applicant told the Tribunal that he has also provided a copy of his taskera.
43. The Tribunal asked the applicant why he arrived in Australia without any documents. He said that from his home village of [Location 1] he went to Kabul and from Kabul he went to Pakistan and he decided not to take his papers. He said he sent his papers back to Kabul. He said before he went to Dubai he saw people in Pakistan who told him they could organise documents for him. The Applicant told the Tribunal that he has never been issued with an Afghan passport and nor has he ever applied to such a passport. He said it is easy to cross the border from Afghanistan to Pakistan, although it can be difficult for Hazara to cross because the area is controlled by Pashtuns. He explained that there are four ethnic groups: Hazara, Tajik, Pashtun, and Ozbuch. He said the border area is controlled by the Pashtun who are also Taliban.
44. The Tribunal asked the applicant “have you ever been issued with a Pakistan Passport?” He replied no. The Tribunal asked if he has ever applied for a Pakistan passport? He replied no. He added that some people do because if they pay they can get a forged Pakistani passport.
45. The applicant told the Tribunal that he left his license where he was living and asked the person to pass the documents to his uncle. He said that if he travelled to Pakistan with identity documents he would be in trouble. This was because at the time he went to Pakistan there was many issues about terrorism so when the Pakistani authorities intercepted Afghans they were sent back to Afghanistan so he decided not to take documents. He explained that it was better not to have any identification documents to protect himself. He said also when he went to Pakistan he was not thinking of going to Dubai or of coming to Australia.
46. The Tribunal asked when you left Afghanistan in 2005 you had no idea you would be coming to Australia. He replied “yes”. The Tribunal asked if this is the first time he had been to Perth? He replied yes. The Tribunal asked if this was the first time he had been to Australia. He replied “yes”. The Tribunal asked the applicant if he had ever been to Sydney before? The applicant replied no. The Tribunal asked the applicant if he knows a [Alias 1]? The applicant replied he did not.
47. The Tribunal asked the applicant whether the Department had shown him documents which they had concerning [Alias 1], to which he replied the Department had shown him they had a copy of a passport or a copy of a Pakistan ID for [Alias 1].
48. The Tribunal advised the applicant that the Department claimed [Alias 1] still held a current student visa and that the Department thinks he was able to board the flight coming to Australia. The Tribunal asked the applicant whether he had any comment to make about [Alias 1] boarding the flight but not getting off the flight. The applicant replied by then telling the Tribunal that the people smuggler who he was dealing with told him that their job was made harder if he asked too many questions. He said the people smuggler was holding all the documentation.
49. The Tribunal asked the applicant whether he was in [Location 1] during the worst of the war with the Taliban. He replied the Taliban, who he added are mostly Pashtun, knew his family did not have much money but they would take their resources, animals etc. He said he was not involved in the fighting with the Pashtuns because they had no power and he was not

involved in any resistance or armed conflict. He said they had problems with the Taliban who are Pashtuns, but they also had trouble with Pashtuns who were not Taliban.

50. Asked to speak about his education, the applicant said he did not go to school at all in Afghanistan. He said he went to Quetta Pakistan and worked as a tailor and also went to English language classes for enjoyment because it had girls in it, as well as boys, and so he could spend time with girls. He said he did not go to school at all in Afghanistan. Asked if he can read or write, he replied he could read the Holy Koran in Arabic. Asked whether he can read and write English, he replied that he has been attending English at the detention centre. The Tribunal asked whether he attended any primary school or high school and he said he did not.
51. Asked what he did as a job in Afghanistan, the applicant said he is the fourth son. He added that his two older brothers would hang around the farm and his third brother was not as active as the others, he was lazy and not so intelligent. He said he is normal but he is very quiet and did not doing anything. He said while living on the land before leaving for Pakistan he would do some work on the land and also read the Koran.
52. He told the Tribunal that he started working as a tailor in Quetta. In Quetta it was easy to learn this job. He told the Tribunal that he did not do any military service in Afghanistan.
53. The applicant said he travelled from Kabul to Quetta. He chose that route because it could be done in one day. He said he knew there were other Hazara people in Quetta and that he might be able to get work there. He said he travelled by van from Kabul to Quetta. He said he stayed in Quetta for about six months and left there after someone told him [Politician A]'s people had tracked him down and were after him in Quetta too. He said from Quetta he went to Karachi and from there by boat to Dubai. He told the Tribunal that he met the people smugglers in Quetta to get him to Dubai. He said that he paid them a total of 25,000 Rupees in 2 instalments, one of 10,000 Rupees and another of 15,000 rupees. Asked how he got the money, he said that he earned it and saved it from working in Quetta. He said that he became one of the best employees and his pay increased. He said it took him 2 years to accumulate the money. He said he had some money also from his work in Kabul as a driver.
54. The applicant told the Tribunal that he travelled from Quetta to Karachi by bus and then from Karachi to Dubai by boat, a trip which took 8 days. He said that upon arriving in the UAE they landed at a beach and they had to walk a long way to where they were met by a driver with a car. He said this was all organised by the people smugglers, that is, the people smuggler organised the job in Dubai and that is why he paid more for that. While in Dubai he said he lived and worked in a factory.
55. Asked whether the same people smuggler that got him to Dubai was also the people smuggler that got him to Australia, the applicant responded that it was not. He said this other people smuggler was paid US\$10,000 to get the applicant from Dubai to Australia. Asked how he managed to accumulate this amount of money, the applicant said he saved it through working 2½ years in Dubai. He told the Tribunal that the people smuggler he used to get from Dubai to Australia offered him two options, he could travel by boat or by plane. Having travelled by boat from Karachi to Dubai and having found that dangerous, he said he decided to take the more expensive, but safer, option to travel by aircraft. The applicant told the Tribunal that the people smuggler was an Arab and that he lead him through check in, immigration and boarding the aircraft in Dubai. He said they sat next to each other on the flight from Dubai to Kuala Lumpur. He also said that the people smuggler also accompanied him through

immigration and onto the Perth-bound flight in Kuala Lumpur and told him to take his seat and that he would be back, however after doing that he did not see the people smuggler again. The Tribunal told the applicant that it found it difficult to accept this evidence because the general information available to the Tribunal on international airport security is that a person would not be permitted to board a flight as described by the applicant. The applicant did not resile from his claim in this respect.

56. Asked whether the applicant was aware that according to the Department his ticket to travel to Australia was booked by [a travel agency in] Sydney, the applicant said he was not aware of this.
57. Asked about his family background, the applicant said his family was from an average family, not rich nor poor for that location. He said they are not well educated, and they don't use money a lot, nor are they usually dealing with money. The Tribunal asked how long his family had been in the area. He said his family used to be in Jalalabad but his great grandfather moved to [Location 1] in Beshood. He said he is the 22<sup>nd</sup> generation in [Location 1], based on word of mouth and based on his knowledge of family history
58. About the dispute with [Politician A], the applicant told the Tribunal that [Politician A] is a member of the Nasr party. He added that [Politician A] is just a member of the party and he has connections through the party who will help him. He said he is in his 50's perhaps although it is hard to say. He is Hazara too. He is an ordinary member of the Nasr party.
59. The applicant told the Tribunal that after leaving [Location 1] he stayed in Kabul for 6 months before fleeing for Quetta in Pakistan. He said that he was living with his brother in Quetta. He said he had to pay 50 Rupees to cross the border from Afghanistan to Pakistan
60. The applicant told the Tribunal that [Politician A] is powerful because he is in a party and the party will back him up when he needs help. He said that when he was in Kabul for 6 months with his younger brother, he got the news that some people came after me. From that day he said he did not see his brother
61. The applicant said that [Politician A] has more money than his family has but he is not a wealthy man. He is an active member of the Nasr party. He was trying from the start to do anything he could to get rid of his family because he wanted to get through the land for the water. The dispute is about the land. There were two issues he said, one involved the difference between the Nasr and the Sipa groups, and the second issue is about the land. He said the dispute and escalated in 2004. [Politician A] wants them to leave the land. He said that the people who live there don't like the city so they do not want to sell so [Politician A] is trying to take the land by force.
62. The Tribunal asked whether the dispute has been taken to a court. He replied that even if you go to a court if you belong to a group the party will back them up, but his family is really weak.
63. Asked why [Politician A] would want to hurt the applicant, the applicant replied that [Politician A] wants to kill them all. He said he is the only remaining brother.
64. Asked to explain the incident when he brother was killed, he told the Tribunal that he saw a crowd of people. He said he was trying to get in but he was too small to get in. The incident happened on their land. He said [Politician A]'s men came for them. He said his two brothers

and father were working on the land when the group of 8 men came onto the land and started to beat them up. They claim that one of their people died at the same incident and so they want to get revenge. He told the Tribunal that he does not think that claim is true, that is, he does not think one of their people died in the incident. He said his brother died due to being beaten to the head. The fight was stopped when other people from the area came around and broke it up. Those people took the applicant's brother to hospital. He said the incident was not reported to police or to newspapers. He said it is a small village and no one is interested, and the authorities recruit their own people.

65. Asked what contact the applicant had with [Politician A] and whether he would recognise him if he saw him, the applicant replied that [Politician A] would definitely recognise him because his face is similar to his father's. The Tribunal asked why [Politician A] would still be after him after all this time had passed. He replied that if he goes back [Politician A] will get him because he came after him after 1½ years. He said that in Afghanistan this kind of revenge goes on for ages. He said that none of his family is now living on the land they previously occupied in [Location 1]. He said he asked his uncle to find out if his mother and father still lived on the land. Asked what he thinks may have happened to his mother and father, he said he has no idea, he said maybe on the way to Kabul they got them, or maybe they went somewhere else. He said his uncle found out about his parents leaving the land through a contact of his uncle's who goes to the village. Asked if he knows whether [Politician A] has taken over the land, he replied he did not know.
66. Asked how his contact in Pakistan (Quetta) knew it was [Politician A]'s people were looking for them, the applicant replied that they have different clothing and faces so it was easy to tell that they were not from Quetta. Asked how [Politician A] will find out if he returns to Afghanistan, he replied that through word of mouth he would find out. He claimed that when he applied for his identity documents he insisted that he uncle not tell anyone that the applicant was in Australia.
67. The Tribunal asked the applicant to comment on whether he would be protected by the police in Afghanistan. The applicant replied that he would try to hide himself within the Hazara community, but would have to go out to shop and for other reasons so someone would see him. He added that killing people in Afghanistan is like killing flies. He said that if he went to the police the police would ask him whether anything had happened to him, they would say that when something happens to him they will do something. He claims the police are corrupt and because they are weak no one will support them or listen to him. The Tribunal asked why the police will not protect him. He said they won't protect him because he is weak and no group will protect him. Also, if he goes to the government office to talk to someone he would have to pay money to get through the door, the office workers won't let him in. he said Afghanistan it is 100% corrupt. Even if he gets a chance to talk to the right person, if he is Hazara then he might be able to talk to him, but if he is Pashtun or some other group he will not provide help. The four groups were fighting each other for 30 years and they want to take revenge because they might have lost someone in the wars.
68. The applicant said that the first fear and risk he has is from [Politician A], but there are still risks in Afghanistan because of the Taliban. He said he cannot judge if the Hazara will help him and he has no one powerful who will listen to him to help.
69. The applicant told the Tribunal that he does not have any rights to live in another country.

70. The Tribunal asked the applicant if he might be safe in another part of Afghanistan. The applicant replied that if [Politician A] can reach Quetta after 1½ years he does not believe he can hide anywhere in Afghanistan.
71. In closing this hearing and in view of the conflicting evidence before the Tribunal about the applicant's identity and other aspects of the applicant's evidence, the Tribunal told the applicant that if the applicant changed his mind about his actual identity, or if he wanted to change his claim in any way, he was at liberty to advise the Tribunal at the hearing, or after the hearing but before the Tribunal makes its decision. The Tribunal informed the applicant it would consider any new claims he might want to make on the basis of another identity and other circumstances.

*[Hearing 2]*

72. This hearing was held after the Tribunal received the statutory declaration sworn by the applicant [in] March 2010 which changes the applicant's claims substantially.
73. At this hearing the applicant provided the Tribunal with a copy of an Affidavit sworn by [Mr B] and a written statement by [Mr C].
74. The Tribunal acknowledged the receipt of the applicant's statutory declaration sworn by the applicant [in] March 2010 and invited the applicant to clarify or expand on the contents of the declaration.
75. The applicant told the Tribunal that his father left Afghanistan two or three years before he, his mother and his siblings left Afghanistan. He explained how his father fled after the fighting with [Politician A]. He said that they, that is, his mother and his siblings, remained on their land after his father fled and that during this time the elders of the area ensured that [Politician A] did not cause harm to them even though the dispute still existed. He explained how he, his mother and his siblings fled Afghanistan for Quetta in 1989-90 to join his father there.
76. Regarding the dispute over the land, the applicant told the Tribunal that the dispute did happen and that the NASR party were too powerful and were disrespectful of his family. He said how once they left the land in 1989-90 and fled to Quetta, [Politician A] took over the land. He added that he does not know for certain if [Politician A] is still alive or whether he is still in possession of the land however he thinks he is. He told the Tribunal that his brother was killed in the dispute over the land and that if he was to return he would be in grave danger. He said that even if [Politician A] was no longer in control of the land then whoever was in control of it, probably [Politician A]'s family, would threaten him in the same way as [Politician A] has.
77. The applicant explained how another of his brothers disappeared when he, his mother and his siblings were en route fleeing from Afghanistan to Quetta. He said that they travelled through Kandahar in Afghanistan and were waiting at a bus station. While waiting there his brother disappeared. He said he believes he was kidnapped by the Pashtun and was killed. He said no one in his family has seen or heard from him since the day he disappeared 20 years ago. He explained that he recalled how they waited at the bus station for a long time, a day or so, but then his mother decided they would have to leave without his brother to ensure the safety of the rest of them. He said he recalls how traumatised his mother was over having to leave the bus station and Afghanistan without one of her children.

78. In respect of living in Pakistan, the Tribunal asked why his family did not apply for refugee status in Pakistan. He said that his family did not apply for refugee status there for several reasons. Firstly, at the time when they arrived there, that is 1989-90, there was no strict law on migration between Afghanistan and Pakistan. He acknowledged that Pakistan was not sending Afghan people back to Afghanistan; however, Afghans with refugee cards were harassed by the police. In the light of this his family decided to simply live in Pakistan illegally. He told the Tribunal that they did not live in a refugee camp in Quetta because they lived in Hazara Town.
79. Asked if he had applied for refugee status, he said that he had not. He explained that during the war the Pakistan authorities were issuing Pakistan and Afghan identity cards and there were rumours that the government of Pakistan would send Afghans back to Afghanistan once they were registered and holders of identity cards. He decided, based on the rumours, not to apply for refugee status.
80. The Tribunal asked the applicant the circumstances in respect of his obtaining a false passport in the name of [Alias 1]. The applicant told the Tribunal that his father arranged for him to obtain the false passport. He told the Tribunal that his father knows who the person who made the false passport is however he has not included the name in his letter to the applicant because if he did this may cause trouble for his father. Asked what he had done with the passport in the name of [Alias 1] since the Department had found that he did not have it on him when he arrived at Perth airport and claimed protection in September 2009, he replied that he destroyed it and threw it away on the flight before landing in Perth.
81. The applicant told the Tribunal that from around 2002 and for years following that there was more fighting and the Hazara and Shia people were targeted by various groups including the Baloch. He explained how there had been several incidents where groups of Hazara people had been killed by suicide bombers while they were praying Friday prayers in the mosques. He told the Tribunal that they could not travel and there was a lot of targeted killing of Hazara. In the light of this his father decided to obtain the false passport in the hope that the applicant could travel overseas, study and settle in another country. It was because of this he decided and was able to come to Australia to study between 2007 and 2009 as [Alias 1].
82. The Tribunal asked the applicant why he did not apply for refugee status when he was first in Australia as [Alias 1]. The applicant told the Tribunal that he did not know that he could apply at that time. He added that he was aware that many people were refused student visa for Australia at the time as well. He added that as he was holding false documents at the time he did not feel he would be able to talk with the Department about his situation at the time. He said that he was educated but he was still blind because he did not know how things worked. He added that he asked some Hazara people in Sydney but they told him that he could not apply for protection.
83. The applicant explained that he returned to Pakistan in 2009 because his mother's health had deteriorated. He said that she has a long standing heart problem. Asked what he planned to do once his student visa issued in the name of [Alias 1] expired, he explained that he had hoped to be able to extend the visa, however he added that he was aware the situation in Australia was getting difficult for students and the attitude he observed was that Australia wanted students to study and leave once they finished their studies. He added that since his return to Pakistan in 2009 he observed that things had deteriorated there and he was constantly worried whether he would be harmed if he left his home.

84. The Tribunal advised the applicant that some country information available to it suggests that the situation in Afghanistan has improved in recent months. He responded that things might be better for some who have body guards but the situation in remote areas such as [Location 1] is not safe. The applicant also questioned the interpreting and the reporting that he claimed would be done by those who are sympathetic to the Pashtun.
85. The Tribunal asked the applicant about his claims made at the first hearing. He acknowledged that many of those claims were not true. He said that at the first hearing he claimed that he was a tailor and that is true. He also said that it is true that he studied in Hazara Town where he was permitted to attend school. He said that in 1996 he began studying English and to become a tailor and in 1998-2000 he became a professional tailor. He explained that the claims that he travelled from Quetta to Karachi and then on to Dubai and to Asia and ultimately to Australia with the help of people smugglers was not true. He confirmed that he purchased his air tickets to travel from Australia to Pakistan to visit his mother and then back to Australia at a travel agent [in Sydney]. He confirmed that what he had claimed about his family history was correct.
86. The applicant clarified his explanation of his father's relationship with the SIPA as compared to the NASR party. He explained that the SIPA and the NASR are two separate and rival subgroups within the Hazara Shia community. He explained that they are distinguished by their geographic area of origin. He explained that his father was not a member of either however because the SIPA were nice to him and his family he was more supportive of them and this displeased the rival NASR party.
87. Asked to explain why he would be fearful of [Politician A] even though some 20 years had now passed since they left [Location 1], the applicant said that if he returned there he would still be threatened because it would be his objective to recover his father's land that had been taken by [Politician A]. He explained that [Politician A] would be aware of this and would therefore consider the applicant a threat and that he would cause harm to him so as to eliminate the threat. The Tribunal explained that the threat of harm from [Politician A], if it was as he described it, did not appear to be based on a Convention reason. The applicant told the Tribunal that the authorities in Afghanistan would provide him with protection because he is a Hazara and Shia.
88. The applicant summarised his claims as being fearful of the persecution he faced from [Politician A] and the fear that the police would not provide protection from that because of his Hazara and Shi a background; the persecution he faces as a Hazara in Afghanistan and the persecution he faces because he is Hazara and Afghan.
89. The Tribunal asked the applicant if he had travelled to any other country since leaving Afghanistan in 1989-90 and why he chose Australia. He told the Tribunal that he had not travelled to any other country since leaving Afghanistan when he was [age] years old. He said that when he was studying in Quetta there was an agent located nearby the school who told him that people were moving to Australia and that there were many Hazaras in Australia and they could help him.
90. The Tribunal asked the applicant how he could afford to pay for the travel and for the expenses of studying in Australia. The applicant said that he had saved some money while working as a tailor and also his father who used to run a [shop] gave him some money as well.



91. The Tribunal asked the applicant whether he had been politically active or whether he had been outspoken in pro-Hazara or pro-Afghan matters while living in Pakistan. The applicant replied that he had not been politically active or outspoken and that he was an ordinary person and had a low profile.
92. The Tribunal asked the applicant what had caused him to change his story from his original claims and from the version of events he gave at the first hearing. The applicant told the Tribunal that he wanted to say the truth before and at the first hearing. He said that even though he gave false statements he has a fear of persecution in both Pakistan and Afghanistan. He acknowledged that he could have attempted to claim protection using the false passport in the name of [Alias 1] however he was frightened that if it was discovered by the Department that he had a false passport he would be sent to gaol. He said that he had heard that using false identity papers and passports was a very serious crime.
93. Asked what evidence he had that he was Hazara, the applicant replied that he is Hazara and anyone who knows Afghanistan would identify him as Hazara because of the dialect that he speaks.
94. The applicant told the Tribunal that he had the Afghan identity documents prepared in 2005 and these were genuine. He said that at that time he had learned some English and had thought that he might return to Afghanistan to find work there as an advisor or interpreter. He said that one of his friends was working in [Location 4] with the New Zealand army and he had told the applicant that it might be safe for the applicant if he got a job at the army base there too, However, he added, his friend was subsequently captured by the Taliban and because they found that he had a working permit with the New Zealand army they killed him.
95. At the hearing the applicant provided a certified copy of a statement he claims his father, [name deleted: s.431(2)] wrote. The statement states, amongst other things, that the applicant fled Afghanistan and went to Pakistan and that life in Pakistan is not safe. He goes on to state he decided for the applicant to travel to Australia and that he prepared a forged passport and ID for his son. The applicant also provided a copy of an affidavit prepared by [Mr B] a neighbour of the applicant's who states that the applicant has been living in the neighbourhood for the last few years and that the applicant is ".very gentle, honourable and has no dispute with any family or person of our community."

#### *Country of origin information*

96. In respect of the treatment of Pakistani nationals who return to Pakistan on the basis that they applied, and failed to be granted, refugee status, according to research carried out by the Research Directorate of the Immigration and Refugee Board of Canada between 2003 and 2008, there are no provisions in Pakistani law to charge failed refugee claimants with any crime. Returnees who have entered foreign countries using fraudulent travel documents may be detained and questioned on their return, with the possibility of criminal charges being laid against them as a result.
97. The Research Directorate of the Immigration and Refugee Board of Canada (IRB) also provides information regarding the treatment of nationals returning to Pakistan after having departed without a passport or returning as failed refugee claimants in a report dated 26 June 2003 This report is slightly dated, but no information was located which suggests that the situation has changed since the report was written. According to this report, there are no

provisions under Pakistani Law to charge returning nationals who are failed refugee claimants. Nonetheless, returnees who are suspected of violating visa or passport laws by travelling on a false passport or without a valid visa are likely to be detained and questioned. The Human Rights Commission of Pakistan is quoted as stating that “Pakistanis entering another country illegally may be detained on their return, but are generally released within a few days”.

98. The IRB report also quotes a London-based advocate of the Supreme Court of Pakistan who claims that “charging returning nationals is a recurring theme [in the] news”, and that detained returnees who can afford to pay bribes to avoid prosecution. The report also quotes “a Pakistan-based political and defence consultant”, who claims that “when a Pakistani national is deported by a foreign government and handed over to Pakistani authorities, the first thing the Pakistani authorities check is if he/she travelled on [a] forged passport and fake visa”. If so, the authorities “would like to know about the travel agent or any other person who facilitated his/her departure. Second, the authorities can file a criminal case in a lower court for having forged travel documents”, with the possibility of a gaol sentence for travel document fraud.
99. Information sourced by the IRB from the United Nations High Commissioner for Refugees (UNHCR) office in Islamabad states that: “Generally, there is no punitive action for failed refugee claimants; nonetheless it has to be seen in each case ... what reasons [the returning national] had left the country upon which action will be decided under the law” The UNHCR source also notes that authorities may be moved to investigate high-profile failed refugee claimants who have received media publicity. [Source: Immigration and Refugee Board of Canada 2003, *PAK41611.E – Pakistan: Whether the Penal Code, Passport Act 1974 and Emigration Ordinance 1979 contain provisions regarding returning nationals who are failed refugee claimants; amendments, if any, to the Passport Act and Emigration Ordinance; interview and detention of failed Pakistani refugee claimants by the Federal Investigative Agency (FIA) upon their return to Pakistan; possibility of punitive measures against returning nationals*, 26 June]
100. In a report dated 2 December 2008, the IRB quotes a 2002 *United Press International (UPI)* report which claims that a Pakistani national deported from the United States was “detained for many days”, and a 2004 *UPI* report which claims that deportees from the US “have been arrested upon arrival by Pakistani immigration officials”. This IRB report also quotes a 2005 *Agence France-Presse* article which comments that a “high-profile asylum-seeking family who were deported from Australia after a five-year battle arrived safely in Pakistan but have since disappeared” No further information on this family was located. [Source: Immigration and Refugee Board of Canada 2008, *PAK102974.E – Pakistan: Treatment of failed refugee claimants in Pakistan, including whether failed Pakistani refugee claimants are interviewed and detained by the Federal Investigation Agency (FIA) upon their return to Pakistan; whether there have been any amendments to the Passport Act 1974 and Emigration Ordinance 1979, and their application by Pakistani immigration and customs officials*, 2 December – Accessed 2 February 2009]
101. In respect to [Politician A] or [derivative of Politician A], a search of the sources consulted did not locate specific information on a powerful warlord in Afghanistan named [Politician A] or [derivative of Politician A]. Reference was found to a warlord in Jalalabad named [Politician A]. [Source deleted: s.431(2)]. However, sources indicate that [Politician A], who had become [a Minister], was assassinated in [year] [Source: RRT Country Research 2005, *Research Response AFG17530*, 16 September]

102. As to records of a dispute over land in 2005 in Wardak province between [Politician A] and the Muradis, a search of the sources consulted did not locate information on a dispute over land in 2005 in Wardak province between [Politician A] and the Muradis.
103. As to the Nasr Party and the relationship to the Taliban, a paper dated 16 June 2003 by Dr Sayed Askar Mousavi indicates that Sazman-e Nasr was “formed in and supported by Iran,” and was one “of the 6 main Hazara and Shi’a groups of the time” that formed the original Wahdat Party in 1989 in Bamyan:

The original WP was formed in 1989 in Bamyan, with the coming together of the 6 main Hazara and Shi’a groups of the time. These were: Sazman-e Nasr, Sepah-e Pasdaran, Nazhat-e Islami, Jabha-ye Mottahid-e Ingelab-e Islami, Harakat-e Islami and Sazman-e Niroo-ye Islami (Mousavi, 1998: 185). From the beginning it was clear that Sazman-e Nasr was the dominant force, rivalled by Sepah-e Pasdaran. The relationship between Mohammad Akbari, leader of Sepah-e Pasdaran, and Ali Mazari, leader of Sazman-e Nasr, was very tense following the inter-fighting of the 1980s. Mazari was elected leader of the WP, as Akbari did not enjoy much popularity outside his party.

The personal differences between the two became obvious in 1992, when the Mujahideen took over Kabul, and peaked in 1994 during the struggle for the capital. Fierce infighting began between followers of the two factions, resulting in a split between WP forces’ presence in Kabul. While Mazari’s followers remained in West Kabul, a Hazara stronghold, Akbari’s followers took refuge in the east of the city. The former group came to be known as ‘the Mazari Faction’ and the latter ‘the Akbari Faction’ This was not so much a factional split, as the inevitable separation of the Nasr and Sepah parties from an uncomfortable alliance. Both parties were formed in and supported by Iran, and continued to receive financial support from Iran until the fall of the Taliban.

Currently, the WPK [Wahdat Party-Khalili Faction], which is in effect the former Nasr party under the leadership of Khalili, is the most powerful and popular political organisation amongst the Hazaras and in Hazarajat. The WPA [Wahdat Party-Akbari Faction], still under the leadership of Akbari, is the other group with presence in the Hazarajat. Both parties, however, are suffering internal struggles. The WPK has three separate claimants to leadership: Khalili himself, Qurban Ali Irfani, and Mohammad Mohaqqiq. Khalili, who was elected leader for one year in 1995 following the death of Mazari, has continued in that capacity for seven years now. Irfani, who is from Yekaulang, is currently Khalili’s deputy in the party. Mohaqqiq, who is in charge of northern Afghanistan as representative of the WPK, is effectively an independent local leader with a strong political and military power base. [Source: Mousavi, S.A. 2003, *The Hazaras in Jaghori and Kabul in 2003*, 16 June]

104. A DFAT advice dated 3 February 2009, provides information from two sources and refers to “the Nasr faction of Wahdat party... maintaining its influential government positions at the district level” in the district of Malistan in Ghazni province. “They have also control over armed individuals, who are ready to counter-attack or prevent possible attacks by the AGEs [anti-government elements].” There were “political factions of Naser Hizbe Wahadat” in Malistan, with Hizbe Wahdat being “pro Afghanistan Government”. The DFAT advice also provides a list of persons “originally from Jaghori district of Ghazni and politically affiliated to Nasr branch of Wahdat party”, who “are some of the well known and main local commanders and government officials in Malistan district”. The advice also refers to “Mr. Urfani, former local commander ‘Nasr’, working as the head of the human rights section of the Police department” in Jaghori district, and to “District Commanders Erfani and Wassiq” having “control of the Hezbi Wahdat faction” in Jaghori. [Source: DIAC Country Information Service 2009, *Country Information Report No. 09/14 – CIS Request No. AFG*

9509; *Situation for Hazaras in Ghazni, Uruzgan and Dai Kundi Provinces*, (sourced from DFAT advice of 3 February 2009)]

105. On whether Shi'a Muslims of Hazara ethnicity are likely to experience ill-treatment more than any other ethnic group in Afghanistan, the most recent US Department of State report on religious freedom in Afghanistan dated October 2009 indicates that "[h]istorically, the minority Shi'a community faced discrimination from the majority Sunni population. This discrimination continued." The report also indicates that "[m]ost Shi'a were members of the Hazara ethnic group, which was traditionally segregated from the rest of society for a combination of political, ethnic, and religious reasons, some of which resulted in conflicts... Although there were reported incidents of unofficial discrimination, and treatment varied by locality, Shi'a generally were free to participate fully in public life." According to the report:

The government took limited steps to increase religious freedom, but serious problems remain. Still recovering from more than 30 years of violence and suffering from an ongoing insurgency, the country continued to move toward greater stability and democracy. Residual effects of years of jihad against the USSR, civil strife, Taliban rule, popular suspicion regarding outside influence and the motivations of foreigners, and still weak democratic institutions remain obstacles. Intolerance was manifested in harassment and occasional violence against religious minorities and Muslims who were perceived as not respecting Islamic strictures

...Relations between the different branches of Islam continued to be difficult. Historically, the minority Shi'a faced discrimination from the Sunni population. Since Shi'a representation has increased in government, overt discrimination by Sunnis against the Shi'a community decreased. Sunni resentment over growing Shi'a influence was expressed widely often linked to claims of Iranian efforts to influence local culture and politics.

Most Shi'a were members of the Hazara ethnic group, which was traditionally segregated from the rest of society for a combination of political, ethnic, and religious reasons, some of which resulted in conflicts. The Hazaras accused the government, led by Pashtuns, of providing preferential treatment to Pashtuns and of ignoring minorities, especially Hazaras. The government made significant efforts to address historical tensions affecting the Hazara community, including affirmative hiring practices. Although there were reported incidents of unofficial discrimination, and treatment varied by locality, Shi'a generally were free to participate fully in public life.[Source: US Department of State 2009, *International Religious Freedom Report for 2009 - Afghanistan*, October, Introduction & Section III ]

106. An article in *The Washington Post* dated 26 July 2009 indicates that:

For generations, Afghanistan's Hazara minority has occupied the humblest niche in the country's complex ethnic mosaic. The political power structure has been dominated by the large southern Pashtun tribes, followed by the slightly less numerous northern Tajiks.

During various period in history, the Shiite Hazaras have been forced from their lands and slaughtered in bouts of ethnic or religious "cleansing." In more recent times, they have often been relegated to lowly jobs as cart-pullers or domestic servants.

107. However, the article also indicates that Hazaras stood "poised to play a decisive role in the Aug. 20 presidential and provincial council elections" in Afghanistan, having "had high voter-registration and turnout rates in the last presidential election, in 2004." Afghanistan's President Karzai and his major challengers were "aggressively courting the Hazara vote":

Karzai, whose second vice presidential pick is a Hazara, took pains to appease conservative Hazara leaders in March by approving a controversial Shiite family law, even though it

outraged human rights groups because it subjected Hazara women to the absolute control of their fathers and husbands.

Yet the political emancipation of Afghanistan's Hazaras, whose children are flocking to universities and office jobs, has created a generational and political split in a community that long fell in lockstep behind ethnic militia or religious leaders such as [Mohammed] Mohaqeq as a matter of survival.

Many older or less educated Hazaras still express strong loyalty to such leaders and say they intend to follow their political instructions on voting day. But many others, including students and former refugees who have returned after years in Iran, said they value their political independence.

...As a minority group that has long faced economic exploitation and social oppression, Hazaras seem to be taking particular advantage of political freedoms that have opened up since the fall of extremist Sunni Taliban rule in late 2001.

...In West Kabul, the rundown but bustling heart of the capital's Hazara community, every public surface is papered with campaign posters. Yet many cart-pullers, mechanics and other workers said they are fed up with both national and ethnic politics. They said that their community suffers from widespread unemployment and poverty, but that no one in power has done anything to help. [Source: Constable, P. 2009, 'Hazaras May Play Key Role in Afghan Vote; Long-Oppressed Minority Is Wooed Karzai, Others', *The Washington Post*, 26 July 2009]

108. Another article in *The Wall Street Journal* dated 31 October 2009 refers to the Hazaras having a crucial role in Afghanistan's presidential runoff on 7 November 2009. "While the Hazaras account for only one-tenth of Afghanistan's population, their voting power is much greater because central Afghanistan's Hazara heartland is almost untouched by the Taliban insurgency that kept voters at home in many other parts of the country. In August, the Hazaras accounted for an estimated one-quarter of ballots cast." The article also indicates that:

Mr. Karzai, a member of Afghanistan's biggest ethnic community, the Pashtuns, has long courted the Hazaras. He appointed a Hazara as one of his two vice presidents and named Hazaras to key government jobs. He also fulfilled a series of Hazara demands, giving official state recognition to Shiite Islamic jurisprudence and carving out a separate Hazara-majority province, Daykundi, from the Pashtun-dominated Uruzgan. Hazara leaders expect Mr. Karzai to create additional Hazara-majority provinces from parts of the provinces of Ghazni and Wardak, which adjoin the Hazara heartland. [Source: Trofimov, Y. 2009, 'Afghan Minority Savors Its Pivotal Role in Runoff', *The Wall Street Journal*, 31 October 2009]

109. An article in *The New York Times* dated 4 January 2010 indicates that there has been a revival by the Hazaras "built largely on education". The article also indicates that "[t]he Hazara resurgence is not so geographically concentrated. The principal Hazara provinces, while relatively safe, remain impoverished". It is stated in the article that:

Since the 2001 invasion, an influx of Hazaras has changed the composition of the capital [Kabul]. More than a million Hazaras now live here, making up more than a quarter of the city's population.

With a new generation of Hazaras attending school in relative security and motivated by their parents' dispossession, their success could alter the country's balance of ethnic power.

...The Hazara resurgence is not so geographically concentrated. The principal Hazara provinces, while relatively safe, remain impoverished and, their leaders complain, are bypassed by the foreign aid sent to Pashtun areas as a carrot to lure people from the insurgency. [Source: Oppel Jr., R.A. & Wafa, A.W. 2010, 'Hazara Minority Hustles to Head of the Class in Afghanistan', *The New York Times*, 4 January]

110. In relation to the security situation for Hazaras, information was found on the security situation in Bamyan province in Afghanistan, which is largely populated by Hazaras. A *Deutsche Presse Agentur* article dated 28 November 2008 indicates that “[w]hile Coalition forces and Taliban insurgents battle it out in neighbouring provinces, the absence of hostilities” in Bamyan “stems from Bamyan’s almost exclusive population by Hazaras”. The Hazaras’ “brutal persecution by the Taliban during the radical militia’s rule of Afghanistan from 1994-2001 means that today they guard their territory with ruthless efficiency.” [Source: Allen, N. 2008, ‘Kiwis work rare peace in Afghanistan’s Bamyan’, *Deutsche Presse Agentur*, 28 November]

111. A more recent *BBC* article dated 17 August 2009 indicates that:

Peaceful Bamyan is peopled largely by ethnic Hazaras who have suffered greatly in Afghanistan’s quarter-century of war. It sits in the central highlands, bordering more volatile provinces. Violence has already started to spill over.

...In recent months New Zealand, which heads the Bamyan command, has started using armoured hummer vehicles after a sharp rise in attacks.

Shortly after our visit, Mullah Borhan, the Taliban’s self-appointed shadow governor of Bamyan was arrested. [Source: Doucet, L. 2009, ‘Putting Bamiyan back on the map’, *BBC*, 17 August ]

112. A further article dated 30 September 2009, which also refers to the detention of Mullah Burhan, the Taliban’s shadow governor for Bamyan, indicates that Bamyan’s Governor Habiba Sarabi had “warned that the Taliban are pushing into Bamyan from neighbouring provinces where the insurgency is growing strong.” The Taliban had increased their strength in Day Kundi, Ghazni, Wardak and Baghlan provinces, which border Bamyan. [source: Roggio, B. 2009, ‘Afghan police detain Taliban shadow governor of Bamyan’, *The Long War Journal*, 30 September].

113. The DFAT advice dated 3 February 2009 provides information on the situation of Hazaras in Ghazni, Uruzgan and Dai Kundi provinces in Afghanistan. The advice indicates that in relation to Malistan district in Ghazni province, “the absolute majority of its population are of Hazara origins”, which “contributes to the peaceful situation in the district. The only problem that has been reported is linked to the insecurity on the highways to this district, as the insurgent elements are trying to connect different districts of Ghazni to each other... The insurgents and various criminal groups continue to target civilians and steal cars and other valuable goods.” The advice refers to the area of the main road from Ghazni city through to Jaghori having “a ‘shadow’ Taliban government”, and indicates that “[i]n Ghazni the area insurgents are particularly active against Hazara people, specifically in the districts in which the main road passes through Jaghori and Malistan Districts. In both Jaghori and Malistan there is factional conflict between HIG Hizbe Gulbuddin Hekmatiyar and Hizbe Wahdat factions.” The DFAT advice also refers to conflict between nomadic Pashtuns, known as Kuchis, and Hazaras in 2008:

Traditionally, Kuchi Afghans are given the right of use to pastoral land in the areas of Behsud 1, II districts of Maidan/Wardak province, Yakawlang, Waras and Panjaw districts of Bamyan province, Lal wa Sar Jangal district of Ghor province and Nawor district of Ghazni province. The recent conflict between Kuchis and Hazaras have affected people living in the villages of Behsud 1, II, Waras, Kajaw, and Nawor, that share borders with the neighbouring districts of provinces inhabited by Pashtun Afghans. [Source: DIAC Country Information Service 2009, *Country Information Report No. 09/14 – CIS Request No. AFG 9509; Situation for Hazaras in Ghazni, Uruzgan and Dai Kundi Provinces*, (sourced from DFAT advice of 3 February 2009), 5 February].

114. In respect to information about the incidence of private land disputes between neighbours in Afghanistan and the approach the authorities take in maintaining law and order in land disputes, according to an International Crisis Group report dated 31 August 2009:

After years of turmoil, it is extremely difficult to determine who owns what in Afghanistan. Successive governments and warlords have used land to reward their followers; religious and customary law have their own forms of land documentation; title deeds have gone missing or have been forged; and often the same land has been sold repeatedly. Multiple claims to land should therefore come as no surprise as people return. Disputes are in general dealt with at the village level but returning families often have limited access to justice. In 2003, the government established a special land court to examine the property rights of returnees. This body has only had limited success partly because, in the absence of the rule of law, many of its judgments could not be enforced. District primary courts now hear land dispute cases, but local powerbrokers often influence the proceedings.

In 2003, the Norwegian Refugee Council started offering legal advice and representation in Pakistan and Afghanistan to returning refugees and IDPs who claimed their property had been confiscated during their absence. The NRC has, however, relied almost exclusively on communities' traditional and informal systems of justice such as *jirgas* (councils of elders) and *shuras* (councils). Although such traditional and informal community-based mechanisms may resolve some disputes, they do not necessarily uphold individual or even human rights and are also patently discriminatory against women. At best, they should be regarded as only as a transitional system which should be replaced by a formal, non-politicised and impartial justice system.

The government-mandated National Solidarity Program (NSP) maintains that the Community Development Councils (CDCs) it has established in rural communities have proved efficient in settling land disputes. However, their scope is limited to local level resolution of individual claims, while many of the conflicts over land originate from past grievances among competing ethnic groups and tribes. [Source: International Crisis Group 2009, *Afghanistan: What Now for Refugees?*, Asia Report No. 175, 31 August, p. 8]

115. A UNHCR document dated July 2009 indicates that:

Land disputes, particularly when ethnic differences are involved or claims are made against persons in positions of authority, may be resolved violently or with some measure of threatened force. A recent case in point involves 77 Pashtun families returning to their villages of origin in Takhar province, where a thousand people from the local Tajik and Uzbek communities started demonstrating violently against their return the day after their arrival. In January 2008, a local community in Sar-e Pol province complained that several families had become internally displaced because of land confiscations and armed violence by local commanders, and that local authorities were unable to address the problem. In many of these cases, land occupiers may be local commanders with relationships to political parties in Parliament. In case restitution is being pursued, the rightful owners may be at risk if they do not have political, tribal or family protection, and the authorities are unable or unwilling to

protect their rights – including the enforcement of a court decision. The rightful owners risk ill-treatment, arrest and detention by local militia leaders or security officials. [source: UNHCR 2009, *UNHCR eligibility guidelines for assessing the international protection needs of asylum-seekers from Afghanistan*, July, p. 19].

116. An issues paper dated April 2009 on land conflict in Afghanistan indicates “that the majority of land disputes in Afghanistan fall into one or more of five principle categories.” These are:

1. Conflicts involving the illegal occupation of land by powerful people
2. Conflicts involving inheritance rights to private property
3. Conflicts involving the return of people to land they previously owned
4. Conflicts over private property between established villagers (not returnees, refugees or internally displaced people)
5. Conflicts involving common property resources managed through common property regimes, for instance certain pastures, forests and water for irrigation

117. An *Integrated Regional Information Network (IRIN)* article dated 13 May 2009 refers to the UN Assistance Mission in Afghanistan (UNAMA) “supporting an initiative to try to resolve a long-running dispute over access to grazing land between Pashtun nomadic herders, known as Kuchis, and ethnic Hazaras living in central Afghanistan”:

UNAMA spokesman Dan MacNorton said: “UNAMA is supporting the presidential commission and the governor of Wardak Province in their initiative to find a solution and we are engaged with both communities, and have held several meetings with a wide range of interlocutors in Kabul and in Wardak.”

...The onset of spring traditionally marks the influx of Kuchi (Pashtun nomad) herders into central and northern parts of the country. But over the past three years ethnic Hazaras from the central highlands have opposed the practice. Hazaras are mainly Shia and some estimates say they comprise about 9 percent of the population.

Some Kuchis say Hazaras have seized their land in Maidan Wardak and Bamiyan provinces in central Afghanistan. Both groups say clashes could break out unless the government steps in to resolve the dispute.

Several people reportedly died and some families were displaced in clashes between Hazaras and Kuchis in May-June 2007, before a temporary ceasefire was brokered by UN officials.

...In 2007 the president set up a commission to find a viable solution to the problem of access to grazing lands and land ownership disputes to prevent future clashes.

Government assurances that a legal solution would be found helped prevent Kuchis from entering Hazara areas in 2008, but there has been no official ruling to permanently resolve the disputes. [Source: ‘UNAMA supporting efforts to end dispute over grazing land’ 2009, *Integrated Regional Information Network (IRIN)*, 13 May]

118. The US Department of State’s 2008 report on human rights practices in Afghanistan, which notes that “[l]and disputes remained the most common civil dispute and were most often resolved by informal local courts,” indicates that in June 2008, “a violent clash between Hazaras and Kuchis in the Behsud District of Wardak province continued for several weeks... According to the AIHRC [Afghan Independent Human Rights Commission], the ANA response to the conflict was ineffective and failed to prevent an escalation of violence. The AIHRC reported ANP [Afghan National Police] units were successful in preventing some violence and allowing some villagers to return to agricultural activities.” [Source:US



Department of State 2009, *Country Reports on Human Rights Practices for 2008 – Afghanistan*, February, Sections 1(e) & 5].

119. In respect to whether anyone who is not affiliated with the Nasr party/Hezb-i Wahdat Khalili, or in the alternative anyone actually affiliated with it, would be likely to face ill-treatment or other adverse consequences, a number of sources refer to Hezb-i Wahdat Khalili in Jaghori district, Ghazni province. For example, the UNHCR advice from 2004 cited in response to question 2 explains that “[d]uring 2003 abuses were committed by local militias, rallied to *Nasr* [Hezb-e-Wahdat (Khalili)] faction, motivated by money. However, anyone perceived to be opposed to their rule – especially Harakat or Hezb-e-Wahdat (Aqbari) could be a potential victim of their abuses”. [Source: UNHCR 2004, *Compilation of Country of Origin Information on Afghanistan Relevant in the Context of Refugee Status Determination in Australia*, 22 March].
120. UNHCR advice from 2002 indicates that “Jaghori district, as the rest of Hazara-majority regions, is under the control of Hezb-e-Wahdat (Khalili faction). Officially, members of other political & military parties, specifically Harakat are said to be accepted but not present”. [Source: UNHCR 2002, *UNHCR Sub-Office Central Region District Profile: Jaghori district, Ghazni province*, 30 July] In addition, a 2003 paper states that “Jaghori is currently under the control of the Khalili faction of the Wahdat Party ... [A]nyone known for sympathising with any group other than the Wahdat Party feels very insecure”. [Source: Mousavi, S. A. 2003, *The Hazaras in Jaghori and Kabul in 2003*, 16 June]
121. UNHCR advice dated 18 March 2004 identifies “faction disputes between the various Hazara parties (Hizb-e-wahdat- Khalili, Hizb-e-wahdat-Akbari and Harakat Islami), and their affiliated commanders at the field level” in Khadir, capital of Daikundi district in Uruzgan province; as well as “inter-factional disputes and tensions between the various Hazara parties” in both the Sharisdan and Daikundi districts in Uruzgan province. [Source: UNHCR 2004, ‘General information on Uruzgan and Wardak Province: UNHCR Canberra email response dated 18 Mar 2004 to Refugee Review Tribunal’s letter of 18 Nov 03’, 18 March] In addition, a report published by the Netherlands’ Ministry of Foreign Affairs in 2001 describes a multitude of human rights violations committed by the Khalili faction of Hezb-i-Wahdat from 1994 to 1999. [Source: Netherlands Ministry of Foreign Affairs 2001, ‘Afghanistan: Hezb-i-Wahdat Human Rights Violations (1992-1999)’, 26 April]
122. In respect to the applicant’s claims that in 1989 or 1990 there was trouble in Afghanistan whereby Hazaras were being killed by the Pushtuns, Tajiks and Uzbeks, in its overview of Afghanistan, Minority Rights Group International refers to “the ethnic dimension” of the civil conflict in Afghanistan beginning after the Soviet withdrawal in February 1989:

After the Soviet withdrawal [in February 1989 following the Geneva Agreement of 1988], an internal war commenced between the Soviet-supported Government of President Najibullah and the various Afghan factions supported by the US. The civil conflict rapidly acquired an ethnic dimension as people from various localities fled their homes, changing the population dynamics of the state. As a result the population of various localities fluctuated in the numbers of one or other ethnic group.

...

In terms of the relations between the different ethnic groups within the state, it can be stated that the Pashtuns have largely dominated Afghan politics though other ethnic groups, notably the Tajiks, have, at various stages of history also maintained a strong political influence. Many attribute the worsening of ethnic relations and the emerging tensions between the groups to the Afghan-Soviet war which is said to have changed society significantly.

After the withdrawal of Soviet forces in February 1989, civil war continued between the Soviet-backed government of President Najibullah and the Afghan guerrilla groups known as the *Mujahadin* (holy war fighters), who had fought against the Soviet troops until their withdrawal. With the departure of the common enemy, differences submerged during the war re-emerged and *Mujahadin* groups began to fight among themselves. [Source: Minority Rights Group (undated), 'Afghanistan Overview', Minority Rights Group International website <http://www.minorityrights.org/5429/afghanistan/afghanistan-overview.html> – Accessed 9 April 2010]

123. In January 1990, the UN Special Rapporteur noted “acts of terrorism” and that “the armed conflict had intensified in particular around large towns and villages and strategic points”:

There appears to be an increase in civilian targets, which is contrary to humanitarian law. Government forces endeavour to hit mainly military goals, whereas the opposition forces seem to fire indiscriminately, as well as committing acts of terrorism as defined by the First Additional Protocol to the Geneva Conventions. The shelling of cities and public places such as markets, bus stations, mosques and schools has caused the death of more than 1,000 civilians since September 1989. Other forms of terrorism have been reported, such as assassinations or the abuse of women and children. It has not been possible to trace the underlying responsibility for these acts. [Source: United Nations 1990, *Report on the situation of human rights in Afghanistan prepared by the Special Rapporteur, Mr. Felix Ermacora, in accordance with Commission on Human Rights resolution 1989/67*, 31 January, paragraphs 16-17 and 78(6) <http://www.unhcr.org/refworld/pdfid/48299c7c2.pdf> – Accessed 12 April 2010]

124. As to evidence regarding Afghan Hazaras escaping to Pakistan around the time the applicant claims this occurred, amongst the sources consulted, no specific mention was found of Hazaras amongst the flow of refugees from Afghanistan to Pakistan in 1989-90, although it is noted that references found tend to refer only to “Afghan refugees” rather than to separate ethnicities. For example, in a report dated January 1990, the UN Special Rapporteur observed:

According to official estimates from the Government of Pakistan, there were, at the end of December 1989, 3,280,959 refugees spread over the North-West Frontier Province, Baluchistan, the Punjab and Sind.

... the 74 camps located in the five administrative districts of Baluchistan contained 850,000 registered Afghan refugees; the number of unregistered refugees is estimated at over 100,000, mainly in Quetta.<sup>2</sup>

125. In respect of land disputes in the 1890's in Afghanistan, sources indicate that disputes relating to land ownership predate the land reform programmes of the 1980s. A 2003 International Crisis Group report states:

Tackling conflict and providing security in Afghanistan requires a greater effort to deal with local disputes that frequently flare into violence and lead to wider problems. Although these attract less attention than the threat from the resurgent Taliban, they are important as they produce an environment of insecurity which destroys all quality of life for ordinary civilians and undermines the legitimacy of the Afghan Transitional Administration in Kabul. Local commanders often exploit these disputes to consolidate their positions, further weakening the authority of the central government.

The disputes are of three main kinds: first, over land and water, two of the most important and scarce resources; secondly, ethnic, and often closely linked to land and water but also to the struggle between political parties; and finally family-based, frequently revolving around women.

Contested claims over land often go back generations. The picture has been complicated by decades of poorly considered land reform and development programs, the flight of so many people during the war and the fact that successive waves of political parties and combatants have seized both private and state property to claim as their own. Examples abound across the country where land has changed hands repeatedly. Few people have clear legal title, and the court system is ill equipped to mediate disputes or the police to enforce judgments. [Source: 'Peacebuilding in Afghanistan: Executive summary and recommendations' 2003, International Crisis Group website, 29 September <http://www.crisisgroup.org/home/index.cfm?l=1&id=2293> – Accessed 15 April 2010]

126. On the treatment or protection of illegal Afghan Hazara Shia Muslim refugees, especially those who moved into Pakistan around 1989 or 1990, by the Pakistani authorities, and whether the treatment of those who moved then is any different to the treatment of those who moved more recently, Pakistan is not a party to the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol, but has provided temporary protection to millions of refugees from Afghanistan during the past three decades. Information provided in the US Department of State's 2009 report on human rights practices in Pakistan provides an overview of Pakistan's treatment of refugees from Afghanistan. The report states:

The country is not a party to the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol, but in practice, the government in most cases provided protection against the expulsion or return of refugees to countries where their lives or freedom would be threatened. The country is a member of the UNHCR's governing Executive Committee and cooperated with the UNHCR in protecting, assisting, and repatriating Afghan refugees.

Since 1979 the government has provided temporary protection to millions of refugees from Afghanistan According to the government-run National Database and Registration Authority, there were approximately 1.7 million registered Afghan refugees in the country. There were no credible estimates of how many Afghans are undocumented or unregistered. The government continued to work closely with the UNHCR to provide support to this refugee population, although the Tripartite Agreement between the UNHCR and the governments of Pakistan and Afghanistan, setting the terms and conditions under which Afghan refugees can remain in Pakistan and the structure for the UNHCR-assisted voluntary repatriation program, expired December 31. Although the prime minister did not sign the Afghan Management Strategy by December 31, the Ministry for States and Frontier Regions (SAFRON) released a statement to the UNHCR that Pakistan would comply with the Tripartite Agreement and would not force Afghan refugees to return to Afghanistan upon expiration of their Proof of Registration (PoR) cards. SAFRON also requested that the Ministry of Interior issue instructions to provincial home departments and other authorities to prevent harassment of PoR card holders while the Management and Repatriation Strategy for Afghan Refugees in Pakistan (201012) was being finalized. According to the UNHCR, there were more than 80 Afghan refugee camps in the country, including 71 in the NWFP, 12 in Balochistan, and one in Punjab. Most Afghan refugees resided in urban areas.

127. The report referred to in the preceding paragraph indicates restrictions on access to work and to services, particularly for those not registered with the UNHCR or the Pakistan's Commissionerate for Afghan Refugees, as well as unsanctioned discriminatory treatment:

Police in some cases demanded bribes from Afghan refugees. There were credible reports that members of the intelligence services harassed refugees. Some female refugees who accepted jobs with NGOs reported harassment from Taliban sympathizers in their own community. Refugees faced societal discrimination and abuse from local communities, which resented economic competition and blamed refugees for high crime rates and terrorism.

Although refugees did not have access to courts, the government provided access to basic health and education services, especially for Afghan refugees. Every refugee who registered with both the UNHCR and the government-run Commissionerate for Afghan Refugees was granted admission to public education facilities after filing the proper paperwork. Single women, female-led households, and children working on the streets were particularly vulnerable to abuse, including trafficking.

The country lacks a legal and regulatory framework for the management of refugees and migration. In many instances the rights of refugees and services to which Afghans can or cannot have access are open to local government or even individual interpretation. For example, the State Bank governor decided that Afghans could not have bank accounts, but the National Database and Registration Authority regularly verified for banks the identity of refugees who wished to open accounts. Although there is no legislation specifically permitting Afghans to obtain driver's licenses, Afghans drove a large percentage of the trucks in the NWFP. Afghans owned and leased property, but occasionally a city or a provincial government issued instructions to cancel all leases to Afghans. Afghans could not get jobs in government but could often get jobs in industry, although sometimes there will be a local order to fire Afghan workers. Although there are a number of Afghan schools funded by foreign assistance, Afghan children usually had no problem attending Pakistani primary schools. For older students, and particularly in cities, access was harder. Even Afghans who have grown up in Pakistan usually needed a student visa to attend university in Pakistan but could get a student visa on the basis of their refugee PoR card. Afghan refugees could avail themselves of the services of police and courts, but some, particularly the poor, were afraid to do so. In some cases of particularly abhorrent crime, the UNHCR has taken up legal cases on behalf of refugee victims.[Source: US Department of State 2010, *Country Reports on Human Rights Practices for 2009 – Pakistan*, March 2010].

128. A 2002 report by the New York-based Women's Commission for Refugee Women and Children on youth refugees in Pakistan notes that the majority of Afghan refugees are ethnic Pashtuns, "but there are also Hazaras, Tajiks, Uzbeks and other minority groups among them". Relevant to the matter of protection by the authorities, the report observes:

International efforts to ensure the protection and care of at least 200,000 new Afghan refugees in Pakistan in recent months have followed a traditional pattern of neglect for those taking refuge in urban areas. Humanitarian assistance is favoring new arrivals residing in Pakistan government-sanctioned, United Nations-administered camps. Development assistance has also not significantly reached long-standing Afghan refugee and migrant populations, who stretched their thin resources to receive the new refugees. As a result, tens of thousands – perhaps the majority of the new refugees – have integrated into already struggling, pre-existing urban refugee communities in Pakistan with limited to no access to humanitarian assistance or protection interventions...

Working young people also stated concerns about arbitrary arrest of their peers and adults by Pakistani authorities without access to representation, further worsening their socioeconomic situation and exposing them to abuse in jail. Few have access to or can afford health care or education. Life is especially difficult for Afghan minority groups living among the Pashtun majority in Pakistan, as they often face deeper discrimination than other Afghan refugees and have fewer opportunities.

What limited interventions do exist for refugees in these areas focus principally on those residing in camps, not in urban areas. United Nations and other international organizations say that the double standard in the provision of humanitarian assistance and protection stems from long-standing Pakistan government policies and actions to thwart refugee screenings and discourage work with Afghans in urban areas. Providing assistance and protection to a large,

mobile, urban population is also not easy. However, traditional hands-off policies are a violation of refugees' rights to humanitarian assistance and protection.

...

Minority groups face particularly difficult choices, as they are discriminated against in the wider Pashtun-majority Pakistani and Afghan communities in Pakistan, often facing lower wages and fewer job opportunities in urban areas and conflict in mixed camps. Relocation camps designated for minority groups have been established, but members of the Hazara community interviewed, for example, are waiting to make any moves as a whole community and have not yet transferred in large numbers to relocation camps despite enormous economic hardship. [Source: Women' Commission for Refugee Women and Children 2002, 'Fending for Themselves: Afghan Refugee Children and Adolescents Working in Urban Pakistan', UNHCR Refworld website, January, pp. 2, 24  
<http://www.unhcr.org/refworld/pdfid/48aa82dc0.pdf> – Accessed 12 April 2010.]

129. The US Department of State's report on human rights practices in Afghanistan for 2009 included the following information:

In accordance with the Tripartite Agreement among the government, the Pakistan government, and the UNHCR, repatriation must be voluntary. During the year 48,320 documented refugees voluntarily repatriated from Pakistan with UNHCR assistance, a significant decrease from the 274,200 refugees repatriated in 2008.

In August the UNHCR suspended repatriation of local citizens from Pakistan due to insecurity in the country and in the processing areas in Pakistan. Pakistan abandoned its unilateral December 31 deadline to repatriate all refugees, and the Pakistan government's commitment to permit registered Afghan refugees to remain in Pakistan through 2012 was not formalized by year's end. In Pakistan three of the four refugee camps scheduled for closure during the year remained open. There were an estimated 1.7 million registered refugees in Pakistan, an estimated 180,000 unregistered individuals eligible for refugee status, and an estimated 230,000 individuals who may have been eligible for refugee status but who had not come forward to register.[Source: Department of State 2010, *Country Reports on Human Rights Practices for 2009 – Afghanistan*, March].

130. In respect of the applicant's claims that the people who are targeting the Hazaras in Pakistan are the Wahabis and the Sunni Muslim and the Baloch, information on the South Asia Terrorism Portal (SATP) website indicates that there has been "a sharp increase in incidents of targeted killing" in the Pakistani province of Balochistan, including the targeted killing of Hazaras in Quetta, the provincial capital. The website's 'Balochistan Assessment – 2010' reports "substantial militant activity, both from the Islamist extremists and the Baloch nationalists":

According to a senior official of the provincial Government, there have been two principal kinds of targeted killings – the sectarian and those backed by insurgent or separatist groups. In most reported incidents, the targets were found to have been shot in the head by highly trained shooters. Most of the victims of these targeted killings have been Shias and Punjabis generally referred to as settlers). In Quetta and other Baloch-dominated areas of the province, Punjabi barbers and labourers have also been routinely targeted. Dr. Farrukh, the Superintendent of Police in Quetta, disclosed that the Police had arrested four high-profile killers and blamed the outlawed Sunni outfit, Lashkar-e-Jhangvi (LeJ), for the targeted killing incidents. The Hazara community in Quetta claims that over 270 of its people have been killed over the past six years.

Currently, there are at least six active insurgent groups in Balochistan: the Balochistan Liberation Army (BLA), the Baloch Republican Army, the Baloch People's Liberation Front, the Popular Front for Armed Resistance, the Baloch Liberation Front (BLF) and BLUF.

The insurgents retain capabilities to carry out acts of sabotage on a daily basis across the province. Acts of violence are, importantly, not restricted to a few areas but are occurring in practically all the 26 Districts, including the provincial capital Quetta. Quetta continues to witness substantial militant activity, both from the Islamist extremists and the Baloch nationalists. There were 73 militancy-related incidents in Quetta during 2009 (till November 15) as against 81 in 2008; 72 in 2007; 75 in 2006; 61 in 2005; 51 in 2004; and 32 in 2003. [Source: 'Balochistan Assessment – 2010' (undated), South Asia Terrorism Portal (SATP) website <http://satp.org/satporgtp/countries/pakistan/Balochistan/index.html#> – Accessed 9 April 2010]

131. An article published in Pakistan's *Daily Times* on 6 February 2009 reported that Hazaras residing in Balochistan:

have been subject of discrimination by the majority Balochs and Pashtuns due to their ethnic background and religious affiliations. While a majority of Hazaras is Shia, local Baloch and Pashtun are Sunnis. The Hazaras in Quetta have been targeted by some religious quarters for some time now, with more than two dozen men from the minority tribe having been killed in the last two months. Lashkar-e-Jhangavi (LJ), a banned Sunni organisation has accepted responsibility for most of the killings [Source: Akbar, M.S. 2009, 'Hazara tribesmen under attack in Quetta', *Daily Times*, 6 February [http://www.dailytimes.com.pk/default.asp?page=2009\02\06\story\\_6-2-2009\\_pg7\\_15](http://www.dailytimes.com.pk/default.asp?page=2009\02\06\story_6-2-2009_pg7_15) – Accessed 29 March 2010]

132. The Wahabi (or Wahhabi) sect is one of a number of Sunni sects in Pakistan that “advocate[s] a rigid and radical version of Islam... similar in their exclusionary principles and in their stand on guarding their cause through violence”. [Source: Behuria, Ashok 2002, 'Many Pakistans within Pakistan', International Centre for Peace Studies website <http://www.icpsnet.org/description.php?ID=350> – Accessed 30 October 2008 ] Specific mention of suspected Wahabi involvement in the targeting of Shiite Muslims in Quetta was found only in a media report from 2003:

On July 4, Sunni Muslim terrorists attacked Shiites performing prayers in a Quetta, Pakistan mosque. About 60 people were killed...

And it was Wahhabi madrassas in South Asia that educated the Taliban's leaders, most of al-Qaeda's shock troops and, almost certainly, the dozens of militants arrested in connection with the Quetta attack. [Source: Kay, J. 2003, 'Defaming Islam – one bomb at a time', *National Post*, 16 July].

133. As to the applicant's claims that Hazara people in Quetta are unable to go out freely at night or that they are found dead in the streets, research indicates that targeted killings of Hazaras in Quetta have been reported, as has the Hazara community's ongoing vulnerability to such attacks. An article published in *The Australian* on 13 April 2010 reported that a senior official with the human trafficking arm of Pakistan's Federal Investigation Agency had said Hazaras were regularly targeted in Balochistan province, and that in Quetta “eight to 10 Hazaras are being murdered every week [Source: Hodge, A. 2010, 'Officials ridicule visa rethink', *The Australian*, 13 April]

134. In a report dated 21 March 2010, *Hazara News Pakistan* reported a public protest in Quetta :

Hazara Democratic Party held a large protest rally against the sectarian and target killing of Hazara. The protesters holding banners with slogans against the failure of Provincial Govt. demanded of the concerned authorities to immediately arrest the group behind target killing. Speakers called on all the nationalist parties of Balochistan Province to raise voice against target and sectarian violence.

...

General Secretary of HDP [Politician A]Khaliq Hazara, addressing protesters at Mezan Chowk, said that the Government must take stern action against those behind the target and sectarian killing of Hazaras immediately. He added the Government is involved in creating conflicts among the brotherly nations of Quetta, while it has totally failed to maintain an orderly situation. He added that sectarian outfits have been given free hands and perpetrators of Hazara target killing have not been arrested. [Source: 'HDP Protests Hazara Target Killing' 2010, Hazara News Pakistan website, 21 March <http://hazaranewspakistan.wordpress.com/2010/03/21/hdp-protests-hazara-target-killing/> – Accessed 15 April 2010]

135. The previously mentioned document on the South Asia Terrorism Portal website reported that “[t]he Hazara community in Quetta claims that over 270 of its people have been killed over the past six years”.
136. Country research provides detailed information on the targeted killings of Hazaras in Quetta including, most relevantly to the current matter, the following list of documents illustrating “the extent to which the Quetta Hazara community have been subject to attack over the recent year” [source: RRT Country Advice and Information 2010, *Country Advice PAK36448*, 30 March].:
- 4 March 2009: “Four Hazara laborers and their Punjabi colleague were killed by unknown gunmen on Eastern Bypass today”. [Source: “‘Unknown Gunmen’ Strike Again, Kill 5 On Eastern Bypass’ 2009, Hazara News Pakistan, 4 March <http://hazaranewspakistan.wordpress.com/2009/03/04/unknown-gunmen-strike-again-kill-5-on-eastern-bypass/> – Accessed 30 March 2010];
  - 11 March 2009: “Unknown gunmen shot dead two Hazara tribesmen in an apparent sectarian attack at Arbab Karam Khan Road here on Monday”. [Source: ‘2 tribesmen gunned down’ 2009, *The Nation*, 9 March];
  - 11 March 2009: “In row of merciless target killings of Hazara minority tribesmen, three more Hazaras came under fire and all of them escaped unhurt, but a passerby got bullet wounds, here on Spini Road on Wednesday, police officials said”. [Source: ‘Three escape unhurt in row of target killings in Quetta’ 2009, *Baluchistan Times*, 11 March];
  - 12 April 2009: “Ghulam Hussein Hazara was killed while another person sustained critical wounds when unknown armed men opened fire at them on Kirani Road”. [Source: ‘Pakistan police say 11 killed in Baluchistan violence’ 2009, *BBC Monitoring Newsfile*, source: *Associated Press of Pakistan* (11 April 2009), 12 April];
  - 12 October 2009: “Unidentified armed men killed the Balochistan Chief Mines Inspector on Sariab Road in Quetta. Ashraf Ali was a member of the Shia Hazara community”. [Source: ‘Pakistan: 2009: Year of Terrorism’ 2009, *Daily The Pak Banker*, 25 December];
  - 15 October 2009: “Another Hazara, Muhammad Asif, brother AIG Musa Jaffari has been shot dead on Jinnah Road, Quetta this evening at 7:30pm. A friend of him is critically injured” [Source: ‘Another Victim of Target Genocide’ 2009, Hazara News Pakistan website, 15 October <http://hazaranewspakistan.wordpress.com/2009/10/15/another-victim-of-target-genocide/> – Accessed 29 March 2010];
  - 18 March 2010: “gunmen attacked three construction workers, killing two of them and injuring the third. All of them belonged to the Hazara tribe”. [Source: Shahid, S. 2010, ‘Retired SP among three shot dead in Quetta’, *Dawn*, 18 March <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/front-page/retired-sp-among-3-shot-dead-in-quetta-830> – Accessed 29 March 2010];

- 19 March 2010: “gunmen killed a trader belonging to Hazara tribe in the Hazargangi area. Sources said Asad Ali Hazara was sitting in his shop when the gunmen opened fire. He died on the spot”. [Source: Shahid, S. 2010, ‘Violence in Balochistan leaves five dead’, *Dawn*, 19 March <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/provinces/22-three-killed-and-twelve-injured-in-balochistan-aj-02> – Accessed 29 March 2010];
- 21 March 2010: “gunmen riding a motorcycle killed three people and injured three others who were travelling in a pick-up in the Killi Sardo Karez area near western bypass. ... All the six men belonged to the Hazara tribe.” [Source: Shahid, S. 2010, ‘More violence in Balochistan leaves six dead’, *Dawn*, 21 March <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/front-page/19-six-killed-in-balochistan-130-hh-09> – Accessed 29 March 2010]

137. On the question of the treatment of the Hazara of the Shia Muslim religion in Afghanistan and whether they face serious harm in Afghanistan, the Australian Department of Foreign Affairs and Trade (DFAT) released in February 2010 a report on the situation of the Hazara minority in Afghanistan. DFAT’s introductory summary states:

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. [Source: Department of Foreign Affairs and Trade 2010, ‘Afghanistan: Situation of the Hazara Minority’, 21 February]

138. Information from various sources is included in the DFAT report, however, and is not consistently indicative of an absence of “fear of violence or systemic persecution”. Subsequent to the introductory paragraph, above, the full text of the DFAT advice is as follows:

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.

Historical context

2. 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.

3. 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.

#### UNHCR

3. UNHCR in Afghanistan has developed “eligibility guidelines” in July 2009 for Afghan asylum seekers which will be updated in 2010. The guidelines (see CISLIB#17703) seek to provide an approach to the assessment of claims that recognises that despite the situation in Afghanistan, not all Afghans abroad were refugees or in need of international protection. Case-by-case analysis was needed. (Also at CISLIB#18280 is a presentation given by a UNHCR Senior Protection Officer to EU Missions in Kabul in December 2009. It is noteworthy that the presentation states belonging to a minority ethnicity was “not currently a major cause of flight”). UNHCR believes that countries should not give blanket consideration to claims of particular ethnic groups from Afghanistan. UNHCR has abandoned the practice of designating zones of generalised violence within Afghanistan where the conflict lent itself to refugee claims. Claims should be assessed individually on their merits.

4. UNHCR said there was no evidence of a campaign by the insurgency to target Hazaras. There were anomalous cases, such as in Ghazni (where majority Hazaras had clashed with nomadic Kuchi people over pastoral issues: see para 8) but in general Pashtun communities were suffering more from the insurgency because they were the primary targets for Taliban control. The Hazaras were experiencing a relative “golden age” in light of their tragic past.

5. UNHCR considered that there was a well-organised Hazara people-smuggling operation in existence. UNHCR was witnessing migration patterns that were out of sync with levels of threat and more in keeping with economic imperatives associated with labour migration. The Hazaras seeking protection abroad were a reflection of this. UNCHR thought that the Afghan Government needed to do more to prevent people smuggling.

6. While UNHCR were not convinced that the majority of Hazara protection seekers abroad were genuine, the political and security situation in Afghanistan was fluid and therefore the current situation where Hazaras enjoyed freedom from fear of persecution might not last indefinitely. Currently, however, Hazaras were not being persecuted on any consistent basis.

#### United Nations Assistance Mission in Afghanistan (UNAMA)

7. The UNAMA’s Human Rights Unit said it was difficult to find data on the socio-economic situation of “minorities” in Afghanistan. Some studies on poverty across the country, however, seemed to indicate that being Pashtun did not automatically correlate with any economic advantage. In some areas, such as in the north, Pashtuns were a minority and faced associated difficulties. UNAMA had not received reporting of Hazaras specifically being targeted or discriminated against in the current environment.

8. The primary incidents of violence in Hazara communities over recent years had been with the Kuchis – a Pashtun nomadic minority – in Hazara-dominated areas, for example in Bamiyan and Wardak provinces in 2008. These sorts of clashes, however, generally related to disputes over land and access to natural resources.

9. Claims that development assistance tended to neglect Hazara-populated provinces were not completely accurate. Daykondi province, for example, had received not inconsiderable donor support. Some areas were also less accessible because of their difficult geography.

#### US Embassy

10. The US Embassy pointed us to the State Department’s 2008 Afghanistan "Country Report on Human Rights Practices", including:

- “Since Shi’a representation has increased in government, there has been a decrease in hostility from Sunnis. However, social discrimination against Shi’a Hazaras continued.”
- “Ethnic Hazaras reported occasionally being asked to pay additional bribes at border crossings where Pashtuns were allowed to pass freely.”

11. A similar formulation was expected to appear in the 2009 report which should be released in coming weeks. The Embassy considered that while discrimination against Hazaras did occur it was not a major systemic concern.

#### Afghanistan Independent Human Rights Commission (AIHRC)

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

13. Development challenges in Hazarajat were significant and disproportionate to the rest of the country, despite the permissive security environment. A 2009 AIHRC survey, for instance, found that 400 families in Bamiyan were still living in "caves" without access to basic services. Comparisons of schools built per capita were significantly less in Bamiyan than in other provinces, such as Helmand, where the insurgency was active. Schools in Hazara areas of Kabul were almost non-existent.

#### Views of Hazara advocates

14. Despite indications that Hazaras have made significant advances in recent years there are still strong perceptions of discrimination and systemic neglect from within the Hazara community. Conversations with a number of Hazara rights advocates from Afghanistan Watch, Kabul Centre for Strategic Studies and The Human Rights and Eradication of Violence Organisation – revealed several consistent themes:

- The Hazarajat region was neglected by the government and donors in terms of development assistance in the areas of education (particularly the lack of adequate buildings) and public infrastructure. Hazara advocates consistently cited the lack of progress on construction of paved roads in the central highlands as indicative of the lack of attention given to the region. Limited socio-economic development was consistently compared against the resources that have flowed to less secure areas in the Pashtun-dominated southern provinces. Hazaras perceive themselves as being penalised for their peace and stability while the insurgency was being rewarded for its violence. (It should be noted however that this is a common theme echoed by all areas of the country where the insurgency is not dominant, not just the Hazara areas)
- The failure of Parliament to yet confirm a single Hazara minister in the recent rounds of Cabinet nominations was seen as demonstrating the dominance of other groups, particularly Pashtuns, in central Government institutions. (However, a Hazara MP told us that some of the nominees may have been rejected because they had lived abroad for many years and were not well known to the Parliament, or even to the Hazara community)
- Hazaras were denied academic posts in Afghanistan's universities despite being qualified. Administrative requirements, including needing to have degrees from within Afghanistan rather than from abroad, were blocking the way for qualified lecturers.
- Hazaras were denied employment opportunities in government agencies through administrative barriers such as requiring a record of past Government experience (which was impossible considering historical circumstances) or needing to be fluent in Pashto.
- Hazaras were anxious that current talk of re-integration and reconciliation was paving the way for further Pashtun domination of the central Government.

15. On the success of Hazaras in educational achievement, Hazara advocates said this reflected an attempt by the community to make the most of an opportunity - but could not be attributed to any Government assistance or facilitation. What Hazaras were achieving was based on their own efforts. Recent reports quoted in the New York Times of 3 January noted that Hazara-dominated provinces of Bamiyan, and Daykondi have the highest pass rates for

university admissions in Afghanistan and that of final year high school students in those provinces three-quarters and two-thirds respectively passed compared to a national rate of 22 percent. Girls are also making significant strides in education in Hazara communities.

Comment

16. The Bonn Agreement and subsequent Afghan Constitution of 2004 protect the rights of the Hazaras, by enshrining “equality among all ethnic groups and tribes”. While unofficial discrimination still persists, there is no doubt that Hazaras are today very active in Afghan civil society, are well represented in government institutions, vote in proportionally high numbers in political elections (with women more represented than men), making strong progress in education and live mostly in areas where the insurgency is not active. They have been described, using an Iraq analogy, as the “Kurds of Afghanistan” in that they are making the most of the new dispensation but with a view to past grim history, remain anxious about the future.

139. With respect to minority ethnic groups, the UNHCR guidelines state in part:

Generally, asylum-seekers originating from areas where they are an ethnic minority are at heightened risk if they attempt to reclaim land and property...

Land disputes, particularly when ethnic differences are involved or claims are made against persons in positions of authority, may be resolved violently or with some measure of threatened force... In many of these cases, land occupiers may be local commanders with relationships to political parties in Parliament. In case restitution is being pursued, the rightful owners may be at risk if they do not have political, tribal or family protection, and the authorities are unable or unwilling to protect their rights – including the enforcement of a court decision. The rightful owners risk ill-treatment, arrest and detention by local militia leaders or security officials.

Social discrimination against the Hazaras continues to be reported, including being asked to pay bribes at border crossings where Pashtuns were allowed to pass freely. Despite significant efforts by the Government to address historical tensions affecting the Hazara community, including preferential employment, some Hazaras community leaders accused President Karzai of providing preferential treatment to Pashtuns to the detriment of other minorities, particularly the Hazaras. Furthermore, the rising power of warlords is also a concern for the Hazaras as they may pose a direct threat to the Hazara community given the absence of State presence and rule of law in many areas. Despite constitutional guarantees of “equality among all ethnic groups and tribes” and Government’s attempts to address the problems faced by ethnic minorities, discrimination and ethnic clashes, particularly in relation to land ownership disputes, still occur. Severe discrimination against ethnic minorities in some areas is also reported, most commonly in the form of denial of access to education and other services and political representation. As such, members of ethnic groups may be at risk of persecution on the ground of their ethnicity/race, in areas where they constitute a minority. In this respect, the fear of being persecuted need not always extend to the whole territory of Afghanistan.

140. The US Department of State’s report on human rights practices in Afghanistan for 2009 notes, at Section 2(c):

Social discrimination against Shia Hazaras continued along class, race, and religious lines. Ethnic Hazaras reported occasionally being asked to pay additional bribes at border crossings where Pashtuns were allowed to pass freely.<sup>6</sup>

141. Section 6 of the report states that Hazaras face economic oppression:

Ethnic minorities continued to face oppression, including economic oppression. Dasht-i Barchi, one of Kabul’s poorest neighbourhoods, was home to a large Hazara population.

Average earnings per day were 13 Afghanis (25 cents) per person, although the minimum wage was 63 Afghanis (\$1.25) per day; average household size was nine to 10 persons. In Dasht-i Barchi, 60 percent of all families rented their homes and were therefore subject to landlord exploitation; 50 percent of families' income went to cover rent, and families moved frequently.<sup>6</sup>

142. More recently, an article published in *The Australian* on 13 April 2010 cited opinion from a "senior official" within Pakistan's Federal Investigation Agency that Hazaras are being persecuted both in Pakistan and in Afghanistan. The article reports:

The Rudd government's claim that Afghanistan's Hazara population is no longer at risk has been rejected in Pakistan.

Pakistani immigration and human rights officials say Hazaras faced life-threatening persecution on both sides of the border.

A senior official with the human trafficking arm of the Federal Investigation Agency said yesterday Hazaras were regularly targeted in Pakistan's Balochistan province, where most of its 500,000 Afghan Hazara refugees were based.

...

Immigration Minister Chris Evans said last Friday "the Taliban's fall, durable security in parts of the country, and constitutional and legal reform to protect minorities' rights have improved the circumstances of Afghanistan's minorities, including Afghan Hazaras".

But asked if the security situation for Hazaras in Afghanistan had improved sufficiently for them to return, the FIA official replied: "No, there's no basis for saying this."

"Right now they're being persecuted on both sides of the border. In Quetta (the capital of Balochistan), eight to 10 Hazaras are being murdered every week. If that's happening just in Quetta, magnify this problem all the way to central Afghanistan.

UNHCR Pakistan spokesman Killian Kleinschmidt said he had discussed the persecution of Hazaras in Balochistan with an Australian delegation, ahead of the government announcing the six month suspension on Friday.

Laurent Saillard, the Kabul-based director for the Agency Co-ordinating Body for Afghan Relief, said while conditions had improved for Hazaras under the Karzai regime, there was no basis for suspending the visas.<sup>11</sup>

143. In respect of the applicant's claims that the authorities in Afghanistan cannot protect him because the authorities are often the cause of the problem because most of the Government officials are not Hazara, in view of the estimates that Hazaras constitute approximately 10 percent of the population and have not historically not been associated with central government, it is likely that most government officials are not Hazara. The previously mentioned report by DFAT on the situation of the Hazara minority in Afghanistan noted conversations with Hazara rights advocates who had observed that "Hazaras were denied employment opportunities in government agencies through administrative barriers such as requiring a record of past Government experience (which was impossible considering historical circumstances) or needing to be fluent in Pashto".<sup>23</sup> The DFAT report's concluding comment, however, observed that:

While unofficial discrimination still persists, there is no doubt that Hazaras are today very active in Afghan civil society, [and] are well represented in government institutions... They have been described, using an Iraq analogy, as the "Kurds of Afghanistan" in that they are making the most of the new dispensation but with a view to past grim history, remain anxious about the future.<sup>23</sup>

144. The US Department of State's most recent report on human rights practices in Afghanistan observes, at Section 2d, that "human rights problems persisted" in the police force and that:

The formal justice system was relatively strong in the urban centers, where the central government was strongest, and weaker in the rural areas, where approximately 72 percent of the population lives. Nationwide, fully functioning courts, police forces, and prisons were rare.<sup>6</sup>

145. Against this background of the limited resources available for offering protection, the following observations regarding the endemic nature of official corruption were made at Section 4 of the report:

The law provides for criminal penalties for official corruption; however, the government did not always implement the law effectively, and officials frequently engaged in corrupt practices with impunity.

Corruption was endemic throughout society... Prisoners and local NGOs reported that corruption was widespread across the justice system, particularly in relation to the prosecution of criminal cases and "buying" release from prison. Provincial police benefited financially from corruption at police checkpoints and from the narcotics industry.<sup>6</sup>

146. At section 6 of the report, it was noted that:

Claims of social discrimination against Hazaras and other Shias continued.

.. Soldiers also reportedly discriminated along ethnic lines when harassing drivers at checkpoints.

... Discrimination continued in some areas, in the form of extortion of money through illegal taxation, forced recruitment and forced labor, physical abuse, and detention.<sup>6</sup>

## **FINDINGS AND REASONS**

### *The applicant's identity*

147. The applicant's identity and nationality is the first issue to be determined in this case. When the applicant arrived at the Perth International Airport [in] September 2009 and submitted an application for a Protection visa he claimed to be [applicant's name], an Afghan national. The applicant has been in Immigration Detention since his arrival in Australia. The applicant initially denied, both to the Department and to this Tribunal at the first hearing, that he had ever been to Australia. The Department, on the other hand, believed the applicant to in fact be [Alias 1], a holder of a Pakistani passport who had been in Australia as a student from [a date in] August 2007 until [a date in] August 2009. The applicant maintained his claim that he was not [Alias 1] but that he is [applicant's name] throughout all his dealings and interviews with the Department but then [in] March 2010, after the first hearing with this Tribunal, through his representative the applicant claimed that he is the same gentleman who travelled to Australia on a student visa under the name of '[Alias 1]' (*sic*). The applicant amended his claim to say that while he previously travelled to Australia under a forged Pakistani passport issued in the name of [Alias 1], he is in fact [applicant's name], an Afghan national. Having carefully examined all the evidence before it, and after conducting two hearings with the applicant, the Tribunal is satisfied that the applicant is [applicant's name], an Afghan national. The Tribunal bases this finding on the applicant's evidence given at the

hearing on this particular issue. The Tribunal that evidence to be clear, consistent and credible. The applicant's claim of being an Afghan of Hazara ethnicity is further supported by a statutory declaration sworn by [Mr D], [a representative] of the United Hazara Association [in] October 2009 which was provided to the Department and which is held on the Department's file (folio 39 of CLF2009/146751). Based on the Department's records, and the applicant's own admission, the Tribunal also finds that [the applicant] previously travelled into Australia under the false name of [Alias 1] and lived in Australia from [a date in] August 2007 until [a date in] August 2009.

148. In light of the applicant having now acknowledged he was the same man who travelled on a student visa to Australia as [Alias 1], the Tribunal carefully considered whether the applicant's other claims and evidence for a Protection visa is credible. The applicant, by his own admission, fabricated his identity to obtain a student visa under the name of '[Alias 1]', therefore a decision maker, whether it is the Department or this Tribunal, in considering his claims for a visa must proceed with caution and thoroughly examine the claims. Put another way, if the applicant previously declared, in writing, and orally under oath, a certain identity and background which he later admits to be false, the question for the decision maker necessarily involves a consideration of whether a subsequent version, sworn or otherwise, by the applicant might also be false.
149. In view of the issues raised in the two preceding paragraphs, the Tribunal considered all the applicant's claims and evidence and the detailed country information available to it. The Tribunal concluded that the applicant's false identity and forged passport and the maintenance of the false evidence given under oath are matters of grave concern. However, the Tribunal does accept the applicant's version of his circumstances once the circumstances of his false passport and false identity are expunged. His claims of fear of persecution due to his Hazara ethnicity and his Shia religion have been internally consistent and plausible in the light of country information. In other words, the applicant's claim that his family were victims of a land dispute which turned violent and resulted in the death of his brother and his claims of the serious harm he fears as a member of the Hazara and Shia minority has been consistent notwithstanding the inconsistency over his identity. The Tribunal's ultimate task in a case such as this is to determine if it is satisfied that the applicant has, amongst other things, a well founded fear of persecution and the Tribunal acknowledges that sometimes an applicant might, due to fear, desperation uncertainty, or some other factor, present claims that might not, in themselves be valid or even truthful, which however may still support the claim of a genuine well founded fear of persecution. In this case the Tribunal finds that the applicant's claims made subsequent to his admission that he had fabricated the [Alias 1] identity and lived as an impostor on a false passport are genuine. The Tribunal adds that had the applicant not recanted his fabrication of the [Alias 1] identity the Tribunal's decision in this review may well have been to affirm the delegate's decision.
150. The Tribunal makes one further observation in respect to the delegate's decision in this matter. The Tribunal understands and accepts substantial parts of the reasoning in the delegate's decision to refuse the Protection visa. The Tribunal accepts the delegate considered the evidence available at the time of the delegate's decision. The Tribunal has the benefit of additional documentary and oral evidence and the benefit of two hearings with the applicant and his representatives. The Tribunal commends the Department for its detailed investigative work in identifying the disputed identity and found the Department's recording and information of this aspect of the case most helpful for the Tribunal's review of the matter.

### *Country of nationality*

151. The Tribunal finds that the applicant is a Hazara Afghan. The Tribunal accepts the applicant's claim in this regard as supported by the applicant's language. The Tribunal accepts the applicant's claims that he and his family fled Afghanistan and took up residence in Quetta Pakistan in 1989-1990. The Tribunal bases this finding on, amongst the other relevant evidence before it, the supporting country information as to the movement of Hazara and Shia and other refugees from Afghanistan into Pakistan around this time.
152. The applicant makes claims of persecution against both Afghanistan and Pakistan. The Tribunal finds that the applicant is a national of Afghanistan and if he were to be deported from Australia it follows that he would be deported to Afghanistan. However, the Tribunal also finds that the applicant has not lived in Afghanistan since he and his family fled that country in 1989-1990 and that his country of former habitual residence has been Pakistan. Article 1A(2) of the Convention provides that a person may qualify under the definition of refugee based on his or her fear of persecution in a country of former habitual residence only if the person does not have a nationality, in other words the person is stateless. As the Tribunal finds the applicant in this case is not stateless but rather is an Afghan national, persecution claims against Pakistan are not relevant for determining whether the applicant meets the definition in Article 1A(2) of the Convention. However, the applicant's claims of persecution in Pakistan are relevant in determining Australia's protection obligations in respect of the applicant pursuant to subsections 36(3) to 36(5) of the Migration Act. This is discussed below.

### *Assessment of Protection Claims, country information and credibility issues*

153. The applicant's claims for protection are essentially threefold. He claims he is fearful of the persecution and serious harm he faces from [Politician A], the man who has taken over the applicant's father's land in [Location 1]. He claims further that the police would not provide protection from this threat because of his Hazara and Shia background. The applicant also claims that he faces persecution as a Hazara and a Shia Muslim in Afghanistan and finally, he claims he faces persecution because he is Hazara and Shia Afghan in Pakistan.
154. The Tribunal finds that the applicant's claims are supported by the country information extracted above. The Tribunal is satisfied that the country information sources indicate that land disputes in Afghanistan predate the land reform programmes of the 1980s and that contested claims over land often go back generations. The Tribunal is satisfied that the Hazara and Shia people in Afghanistan still suffer a real chance of serious harm from other and more powerful ethnic groups in Afghanistan.
155. Sources indicate that ethnic relations in Afghanistan worsened following the withdrawal of the Soviet forces in February 1989 and that civilians were targeted in the conflict. More recent information on the current treatment of Hazaras in Afghanistan indicates that the situation for Hazaras has improved, but there is inconsistency of reporting on the subject of whether they continue to face serious harm. Overall, the Tribunal finds that the country information suggests the applicant is more likely than not to face a real risk of serious harm in Afghanistan because of his Hazara ethnicity and because of his Shia religion.
156. Subsection 36(3) of the Migration Act provides that Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose

or is expressed, any country apart from Australia, including countries of which the non-citizen is a national. However, subsection 36(4) of the Migration Act provides that if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, then subsection (3) does not apply in relation to that country. The Tribunal considered the applicant's claims of persecution in Pakistan, the Tribunal finds that country information supports the conclusion that Pakistan has provided temporary protection to millions of refugees from Afghanistan since 1979, however access to services and to employment, particularly for the many refugees not registered with the UNHCR or with Pakistan's Commissionerate for Afghan Refugees, is restricted. Country information also supports the applicant's claims that Hazaras in Quetta have been targeted, and responsibility for many targeted killings having been accepted by a banned Sunni organisation. Source extracted above also indicate that the Hazara community in Quetta is subject to targeted killings, with most reported incidents in recent years taking place in the streets. The Tribunal finds based on the applicant's evidence of his experiences in Pakistan, and the country information available to the Tribunal, that the applicant has a well founded fear of serious harm amounting to persecution based on his Hazara ethnicity if he were to return to Pakistan. The Tribunal therefore finds that the applicant satisfies subsection 36(4) of the Migration Act and the effect of this is that subsection 36(3) does not apply and therefore does not remove Australia's protection obligations in the circumstances of this case.

*Well founded fear and risk of serious harms capable of amounting to persecution under the Convention.*

157. The Tribunal is satisfied that the applicant has a well founded fear of persecution amounting to serious harm or death if he were to return to Afghanistan. The Tribunal accepts the applicant's claim that one of his brother's was killed at the hands of [Politician A] or his followers or supporters. The Tribunal also accepts the applicant's claim that a second brother fell into serious harm or death, having been now missing for twenty years, when the family were in Kandahar during their fleeing from Afghanistan to Pakistan. The Tribunal accepts that there is a real chance of serious harm aimed at Hazara and Shia in Afghanistan as supported by the country information referred to in this decision. The Tribunal also finds that the applicant is motivated, if he is forced to return to Afghanistan, to make efforts to resume possession of his father's land from which he and his family has been dispossessed. The Tribunal finds that such a course of action would present a real chance of serious harm or death at the hands of [Politician A] or his followers or family and for the reasons stated in the following paragraph, the Tribunal is satisfied that the applicant is likely to be denied state protection because of his Hazara and Shia membership and this is capable of amounting to persecution under the Convention.

*State Protection*

158. The Tribunal finds that the applicant's claims that he would not be provided with state protection if he was to return to Afghanistan is supported by indicative country information extracted above. The Tribunal finds that the threats of serious harm aimed at the applicant by [Politician A] is, in itself, insufficient to meet the requirements of the Convention since the reason for the threat of serious harm is not based on one of the five Convention grounds, however, the country information suggests that unofficial discrimination persists against Hazaras and Shias and that endemic corruption – as well as limited resources – restrict the availability of protection. The Tribunal is therefore satisfied the Tribunal that there is a real



chance that state protection may be denied the applicant because of his Hazara ethnicity and because of his Shia religion.

159. For the purposes of considering subsection 36(4) of the Migration Act, in respect of the applicant's fear of serious harm amounting to persecution in Pakistan, the Tribunal is satisfied, based on the applicant's evidence and the country information set out in this decision, for example, information provided in the US Department of State's 2009 report on human rights practices in Pakistan, that the he is likely to be denied state protection because of his ethnicity if her were to return to Pakistan.

#### *Internal relocation*

160. The Tribunal considered whether internal relocation to some other location within Afghanistan would make the applicant safe from the risk of serious harm. The Tribunal considered that internal relocation would not make the applicant safe because in the first place, it is likely the applicant would seek to take possession of his family's land from [Politician A] and this would give rise to conflict which would put the applicant in a position of real chance of serious harm without adequate state protection. Furthermore, on the basis of the applicant's Hazara ethnicity and Shia religion, the Tribunal finds that the persecution directed at members of these groups appears to be widespread throughout most parts of Afghanistan.
161. For the purposes of considering subsection 36(4) of the Migration Act, in respect of the applicant's fear of serious harm amounting to persecution in Pakistan, the Tribunal is satisfied, based on the applicant's evidence and the country information set out in this decision that internal relocation within Pakistan will not lead to the applicant being safe from persecution in that country.

#### **CONCLUSIONS**

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

#### **DECISION**

163. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*

Sealing Officer: PRMHSE