

1313776 (Refugee) [2016] AATA 3430 (2 March 2016)

**DECISION RECORD**

**DIVISION:** Migration & Refugee Division  
**CASE NUMBER:** 1313776  
**COUNTRY OF REFERENCE:** Afghanistan  
**MEMBER:** Amanda Goodier  
**DATE:** 2 March 2016  
**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.

Statement made on 02 March 2016 at 2:02pm

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

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Afghanistan applied for the visa [in] November 2012 and the delegate refused to grant the visa [in] August 2013.
3. 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. Prior to hearing the Tribunal received a detailed submission from the applicant's representative.
4. Having considered all of the material before me, for reasons discussed below, the Tribunal finds it is in a position to be able to make a decision favourable to the applicant and there is no need to invite him to present further material at a hearing of the Tribunal.
5. The applicant was represented in relation to the review by his registered migration agent.

### CONSIDERATION OF CLAIMS AND EVIDENCE

6. The Tribunal must consider and decide whether the applicant has a well-founded fear of being persecuted in Afghanistan for one or more of the five reasons set out in the Refugees Convention and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of him being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm. In considering these issues, the Tribunal has applied the law set out in Annexure "A" and has carefully considered all of the applicant's claims and evidence in light of the independent material referred to by the applicant, referred to in the delegate's decision which was provided by the applicant as well as the independent country information referred to in this decision as set out in Annexure "B".
7. For the following reasons, the Tribunal has concluded that the decision under review should be remitted.

### Country of reference and home area

8. The applicant claims to be a citizen of Afghanistan. The applicant indicated that he resided illegally in [Country 1] and he has no right to return or right to residence in [Country 1].
9. In the absence of any evidence to the contrary, the Tribunal accepts that the applicant is a citizen of Afghanistan and that Afghanistan is his country of nationality and receiving country.
10. The Tribunal is satisfied on the evidence before the Tribunal, the applicant does not have a right to enter and reside in any other country, therefore, the Tribunal finds that he is not excluded from Australia's protection obligations under s36(3).
11. The Tribunal finds that [District 1], Uruzgan Province, Afghanistan is the applicant's home area.

### **Background**

12. The applicant states he was born on [date] in [District 1], Uruzgan Province, Afghanistan. He states he is a Hazara and a Shia Muslim. He lived from about [year] to 2012 in [a] Town, [in Country 1]. He departed [Country 1] in April 2012, arriving in Australia in June 2012 as an irregular maritime arrival.
13. He was young when the family fled Afghanistan and only knows the reasons why as explained to him by his mother. His mother told him they had a farm in his home village which his father worked growing crops. His family fled although the village in which they lived was Hazara, they were surrounded by Pashtun communities. There was fighting between the communities and his father feared for the safety of the family so they fled with other Hazaras. The applicant has no family remaining in his home area. His father supported the family in [Country 1] by working in [an] industry until his death in 2007. Following his death, the applicant took responsibility for supporting his mother and siblings.
14. The applicant received limited schooling but has completed [courses] for the purposes of finding better employment. He was self-employed in [Country 1] as [an occupation].
15. He has lived outside Afghanistan for over 20 years. He has no skills to avoid harm from the Taliban if he returns to Afghanistan. He will be identified by his accent, dress, mannerisms and lack of Afghani culture awareness if he returns to Afghanistan. He speaks English better than other people in Afghanistan and believes he may be imputed as having worked with the international forces.
16. He is unable to relocate to Kabul as it is not safe for Hazara Shi'a Muslims, he has no family or networks in Kabul and no access to funds.
17. The delegate found the applicant credible and that he was consistent with his responses and reasons for leaving [Country 1]. The delegate found that if he was unable to return to his home area he could relocate to Kabul.
18. The applicant also fears returning to Afghanistan because he is a Hazara Shia who has lived outside Afghanistan for a long period, including in Australia.

### **Assessment of claims**

19. The Tribunal accepts that the applicant is originally from [District 1], Uruzgan Province. The applicant comes from a small Hazara dominated village surrounded by Pashtun villages. The Tribunal further accepts that the applicant left his village aged about [age] years and has not returned since.
20. The most recent DFAT Report indicates that most areas of Afghanistan outside of Kabul and the Hazarajat generally have high levels of insecurity, and are considered dangerous for people of all ethnicities, including Hazaras. DFAT assesses that Hazara minorities living in Pashtun-majority areas across Afghanistan are less safe than those living in Kabul or Hazara-majority areas.<sup>1</sup>

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<sup>1</sup> DFAT Thematic Report *Hazaras in Afghanistan* (8 February 2016)

21. An Immigration Department report on Uruzgan<sup>2</sup> makes the following comments:

Uruzgan is a mainly Pashtun province, as all its Hazara districts went to the new Daykundi Province in 2004. Today only Gizab and Khas Uruzgan districts have Hazara minorities – about 25% in each case.

The security situation for Hazaras in Uruzgan province is more dangerous than in other provinces and Hazaras have been targeted by insurgents because of their ethnicity. In 2014 DFAT provided this assessment for Hazaras in Uruzgan:

DFAT assesses that Hazara minorities living in Pashtun-majority areas in Uruzgan, Helmand and Kandahar are less safe than those living in Kabul or Hazara-majority areas of Hazarajat. These Pashtun-majority areas typically experience higher levels of violence, which affects all Afghans in these areas, including Hazaras. Hazaras living in these areas typically avoid travel outside their immediate communities.

DFAT also provided similar advice from the Afghanistan Independent Human Rights Commission (AIHRC) in February 2010:

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

[Country information deleted.]<sup>3</sup>

22. Save the Children Australia states:

Uruzgan province is one of the most insecure and least developed provinces in Afghanistan. Located in the southern region, it has an estimated population of 386,000 with most of the population living in rural areas.

#### Health

Uruzgan has one of the least developed health sectors and some of the worst maternal and child health outcomes in the world.

While specific data on Uruzgan is scarce, the available information paints a bleak picture. According to the Ministry of Public Health (2011), only a third of children under the age of one were immunised against common preventable diseases such as measles, diphtheria, whooping cough, and tetanus. It is also estimated that eight out of every ten women give birth at home without skilled birth attendants. This has contributed to one of the highest maternal mortality rates in the world.

The government's Basic Package of Health Services has improved access to health care, but significant barriers remain, particularly for women and children. This is due to a lack of infrastructure and health staff. Currently, 90 percent of doctors, nurses and midwives are from other provinces, and turnover is high due to the difficult living conditions.<sup>4</sup>

23. Recent news from Uruzgan includes the killing of a district administrative head for Sarab, a roadside bombing killing two and injuring three labourers, and a Grand Ulama Council

<sup>2</sup> Afghanistan: Hazaras Issues Paper, July 2014, Department of Immigration and Border Protection, pp34-37.

<sup>3</sup> [Information deleted].

<sup>4</sup> <http://www.childrenofuruzgan.org.au/about-uruzgan-afghanistan/>



member and Tribal chief being killed by the Taliban.<sup>5</sup> The warlord in the region, Matiullah Khan, whom Australia maintained a relation with in Uruzgan was killed by a suicide bomber in March 2015.<sup>6</sup>

24. The Tribunal notes the most recent DFAT report on Afghanistan indicates insurgent forces contest many areas of the country and no part of the country can be considered free from conflict-related violence and that the situation remains fluid. While the government retains control of much of the country, particularly in the provincial and district centres, some areas are openly contested, with varying levels of control exerted by the government and by insurgents. The security situation across the country deteriorated significantly over the last 12-18 months, as anti-government groups intensified their efforts and the international military contingent gradually withdrew. The security situation is better in areas where government forces maintain strong control, such as major urban areas like Kabul, but attacks remain a common occurrence even in these areas.<sup>7</sup>
25. The Tribunal considers that there are additional aspects to the applicant's profile, namely his years in [Country 1] and Australia, which increase the risk to him as a Shia Hazara returning to his home area. The applicant has lived the majority of his life in [Country 1] and developed an accent from his time in that country. He has lived in Australia since early 2012, a period of 3 years and the Tribunal notes reports of Hazaras from Australia being targeted on their return to Afghanistan within the last 12 months. As the applicant has been absent from Afghanistan since his childhood, he is no longer a local resident familiar with the area or familiar with his home area. The Tribunal finds the applicant would be easily recognised as Hazara and an outsider by his clothes, accent, mannerisms and his lack of familiarity with local cultural practices.
26. The Tribunal accepts the applicant's evidence that he has no continuing family ties or support networks in his home area and his family left the province in about [year]. The Tribunal notes the *UNHCR's* 2010 guidelines indicate without the protection of his family, community or tribe it is unlikely that he would be able to lead a relatively normal life without undue hardship as Afghans rely on these structures.<sup>8</sup> The applicant will need to find work as well as accommodation on his own which will require him to travel and as such putting himself at even greater risk given his profile and his Hazara appearance.
27. Having weighed carefully the country information, the Tribunal considers the aspects of the applicant's profile as discussed clearly distinguishes him from other Hazara returnees, increasing the risk the Taliban will target him if he travels on the roads into or out of or around his home area, especially as he lives in a Pashtun majority area. The Tribunal notes the available country information of the network of informers, including amongst the Hazara population itself,<sup>9</sup> which provide information about the identity of travellers to the Taliban.
28. The Tribunal considers that reports of the growing Islamic State (IS) presence in Afghanistan further adds to the current risk of harm to the applicant in Afghanistan as a Shia Hazara, from [Country 1] and Australia. The Tribunal notes available information of the sectarian

<sup>5</sup> <http://www.pajhwok.com/en/tag/urozgan>

<sup>6</sup> A powerful warlord in Afghanistan who was both a key Aussie ally and a vicious brute has been killed <http://www.news.com.au/world/middle-east/a-powerful-warlord-in-afghanistan-who-was-both-a-key-aussie-ally-and-a-vicious-brute-has-been-killed/story-fnh81ifq-1227270629412>

<sup>7</sup> DFAT Country Report *Afghanistan* 18 September 2015

<sup>8</sup> The United Nations High Commissioner for Refugees, '*Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*' 17 December 2010, <http://www.unhcr.org/cgi-bin/textis/vx/refworld/rwmain?docid=4d0b55c92&page=search>

<sup>9</sup> See for example reports such as *Nazari Foundation*, 2010, "Security Update", 10 January <http://nazarifoundation.com/juma-post/>; and Abdul Karim Hekmat, "Unsafe Haven: Hazaras in Afghanistan and Pakistan", Cosmopolitan Civil Societies Research Centre, UTS, Sydney, October 2011, p.19

nature of the IS and its targeting of religious groups or individuals they consider deviate from their own interpretation of Islam.

29. In view of the available evidence and the applicant's particular circumstances the Tribunal finds there is a real chance of him being abducted and killed by either Taliban or IS forces in Afghanistan. Specifically, the Tribunal finds that the need to find accommodation, work and therefore travel out of his home area would place the applicant at a real chance of serious harm from the Taliban. The Tribunal is satisfied this amounts to serious harm involving systematic and discriminatory conduct and therefore amounts to persecution under the Act. The Tribunal is satisfied that the essential and significant reason for the harm the applicant fears is a combination of the applicant's religion and race as a Shia Hazara and imputed political opinion of being aligned with the west because of his ethnicity and background.
30. The Tribunal finds that the applicant has a real chance of serious harm in his home region for a Convention reason, now and in the reasonably foreseeable future. The Tribunal finds that the applicant has a well-founded fear of persecution for a Convention reason in the region.

#### *State protection*

31. The applicant primarily fears harm from the Taliban, a non-state insurgency group, however, harm from non-state agents may amount to persecution for a Convention reason if the motivation of the non-state actors is Convention-related, and the state is unable to provide adequate protection against the harm.
32. The UNHCR reported that state protection in Afghanistan is compromised by high levels of corruption, ineffective governance, a climate of impunity, lack of official impetus for the transitional justice process, weak rule of law and widespread reliance on traditional dispute resolution mechanisms that do not comply with due process standards.<sup>10</sup> On the basis of its comprehensive assessment of the available sources at that time, it was UNHCR's recommendation that, 'to the extent that the harm feared is from non-State actors, State protection is on the whole not available in Afghanistan'.
33. It is clear from the country information from the most recent DFAT assessment in particular, that the government struggles to exercise effective control over all parts of the country and it lacks the ability to adequately address human rights issues, protect vulnerable groups and prosecute human rights violators, in some (particularly rural) areas. The available information also indicates that there is an absence of effective state protection outside major urban areas.<sup>11</sup>
34. Given this information, the Tribunal finds that the applicant would not be able to access state protection in accordance with with international standards as discussed in *S152/2003*.<sup>12</sup>

#### *Relocation*

35. The Tribunal has considered whether it would be reasonable for the applicant to relocate to another area of Afghanistan, and thereby avoid the harm he faces in his home area. Given the applicant's circumstances, the Tribunal considers that Kabul is the only place to which relocation could realistically be considered. DFAT assesses that the Government maintains effective control over major urban areas, particularly Kabul, although there have been an increased number of security incidents there in recent months.

<sup>10</sup> 'Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan', *UNHCR*, 6 August 2013 at 23-25.

<sup>11</sup> DFAT Thematic Report *Hazaras in Afghanistan* (8 February 2016)

<sup>12</sup> (2004) 222 CLR 1.

36. The 2010 UNHCR *Guidelines*<sup>13</sup> state that it is unlikely that an Afghan would be able to lead a relatively normal life without undue hardship upon relocation to an area where he or she is not fully protected by his/her family, community or tribe, including in urban areas of the country; this is because traditional extended family and community structures of Afghan society constitute the main protection and coping mechanism, and Afghans rely on these structures. The *Guidelines* state that for a person without familial or social networks and the associated support system, relocation to Kabul would be extremely difficult. The most recent 2013 *Guidelines* are in similar terms, and state that the mere presence of members of the same ethnic background in the proposed area of relocation does not mean that an applicant would benefit from meaningful support from that community; and even if an extended family network is present it cannot be assumed that they would be in a position to assist. The 2013 *Guidelines* suggest that unless a person has access to “pre-identified accommodation and livelihood options”, their situation may be difficult.<sup>14</sup>
37. The most recent DFAT Thematic Report *Hazaras in Afghanistan* (8 February 2016) indicates that Kabul provides the most viable option for many people for internal relocation and resettlement. Relatively good economic opportunities (as compared to the rest of Afghanistan) and greater levels of security are important motivations for migration to Kabul. However, despite having better conditions than the rest of the country, Kabul remains one of the poorest cities in the world and regularly experiences serious security incidents. The report restates comments from previous reports indicating traditional extended family and tribal community structures of Afghan society are the main protection and coping mechanisms for people in Afghanistan, who rely on these networks for their safety and economic survival, including access to accommodation and an adequate level of subsistence. Internal relocation is generally more successful for single men of working age, provided they are able to make use of family or tribal networks.
38. There is other information documenting the extremely difficult conditions faced by displaced persons, including Hazaras, in Kabul, which include overcrowding and associated violent clashes over resources such as running water; inadequate housing; high unemployment and a lack of formal jobs; extremely low wages and widespread exploitation in the informal employment sector; and a lack of access to basic services such as electricity and health care<sup>15</sup>. A report by Amnesty International describes conditions for displaced persons, including returning refugees, in Kabul as unrelentingly miserable.<sup>16</sup>
39. Given the absence of family and social links in Kabul, his level of education and his employment history, the Tribunal does not consider it reasonable for the applicant to relocate to Kabul. While he has demonstrated considerable resilience during the periods that he has spent in [Country 1] and Australia, where he appears to have managed well, in Kabul he would be competing with many similarly uneducated, unqualified displaced Hazaras for limited job opportunities without a family or social network to assist him to find work. Country information indicates that work in the construction industry or selling fruit and vegetables - occupations the applicant has limited experience with - is the recourse for many displaced Hazaras in Kabul and obviously cannot provide a living for all of them. The Tribunal finds that as a person with no family or social network in Kabul, a limited skill base as well as a limited education and with a mother and siblings to support, the applicant could not

<sup>13</sup> The United Nations High Commissioner for Refugees, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* 17 December 2010, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4d0b55c92&page=search>

<sup>14</sup> UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 6 August 2013, Pages 74-5, <http://www.refworld.org/pdfid/51ffdca34.pdf>

<sup>15</sup> “Sanctuary in the city? Urban displacement and vulnerability in Kabul”, V Metcalfe and S Haysom, with E Martin, Overseas Development Institute, Humanitarian Policy Group Working Paper, June 2012, <http://www.odi.org.uk/publications/6685-displacement-kabul-afghanistan-refugees-idps-urban>

<sup>16</sup> Fleeing war, finding misery, The plight of the internally displaced in Afghanistan, Amnesty International, February 2012, [http://www.amnesty.org.uk/uploads/documents/doc\\_22361.pdf](http://www.amnesty.org.uk/uploads/documents/doc_22361.pdf)



reasonably be expected to relocate there. In addition, the country information indicates that there is an atmosphere of generalized insecurity in Kabul, with the Taliban and other armed insurgent groups increasingly carrying out attacks in the city.<sup>17</sup> While the Tribunal does not consider that this establishes that Hazaras have a well-founded fear of persecution in Kabul, it considers that it is an additional factor that renders relocating to Kabul neither a reasonable nor practicable option for this applicant. The Tribunal does not consider that there is any other part of Afghanistan to which it would be viable for the applicant to relocate.

40. In the circumstances of the applicant, the Tribunal accepts that it is not reasonable for the applicant to relocate to Kabul or to any other location in Afghanistan to avoid his risk of Convention based persecution.
41. The Tribunal is satisfied the applicant has a well-founded fear of persecution due to the overlapping Convention reasons of his race and religion from the Taliban, now or in the reasonable foreseeable future if he returns to Afghanistan.
42. For the reasons given above, the Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

### **DECISION**

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

Amanda Goodier  
Member

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<sup>17</sup> See for example, *Washington Post*, "Taliban brings war to Afghan capital", 29 November 2014, at [http://www.washingtonpost.com/world/asia\\_pacific/in-afghanistan-taliban-fighters-attack-foreign-compound-in-capital/2014/11/29/f0aef902-77d4-11e4-a755-e32227229e7b\\_story.html](http://www.washingtonpost.com/world/asia_pacific/in-afghanistan-taliban-fighters-attack-foreign-compound-in-capital/2014/11/29/f0aef902-77d4-11e4-a755-e32227229e7b_story.html), accessed 24 April 2015.



## ANNEXURE A

### Relevant law

44. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.

### Refugee criterion

45. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
46. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:  
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
47. 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.
48. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
49. 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)). Examples of 'serious harm' are set out in 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.
50. 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.
51. 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.

52. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A '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.
53. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
54. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

#### *State protection*

55. Harm from non-state agents may amount to persecution for a Convention reason if the motivation of the non-State actors is Convention-related, and the State is unable to provide adequate protection against the harm. Where the State is complicit in the sense that it encourages, condones or tolerates the harm, the attitude of the State is consistent with the possibility that there is persecution: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [23]. Where the State is willing but not able to provide protection, the fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify an unwillingness to seek their protection: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [28]. In such cases, a person will not be a victim of persecution, unless it is concluded that the government would not or could not provide citizens in the position of the person with the level of protection which they were entitled to expect according to international standards: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [29]. Harm from non-State actors which is not motivated by a Convention reason may also amount to persecution for a Convention reason if the protection of the State is withheld or denied for a Convention reason.

#### *Relocation*

56. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: *Randhawa v MILGEA* (1994) 52 FCR 437 per Black CJ at 440-1. Depending upon the circumstances of the particular case, it may be reasonable for a person to relocate in the country of nationality or former habitual residence to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. Thus, a person will be excluded from refugee status if under all the circumstances it would be reasonable, in the sense of 'practicable', to expect him or her to seek refuge in another part of the same country. What is 'reasonable' in this sense must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country. However, whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political

and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense: *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.

### **Complementary protection criterion**

57. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
58. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
59. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

### **Section 499 Ministerial Direction**

60. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.<sup>18</sup>

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<sup>18</sup> DFAT Thematic Report *Hazaras in Afghanistan*, 8 February 2016; DFAT Country Report *Afghanistan*, 18 September 2015, DFAT Thematic Information Report *Conditions in Kabul*, 18 September 2015.



## ANNEXURE B

### COUNTRY INFORMATION

61. The Tribunal notes that security concerns in Afghanistan, particularly for Hazaras, have increased in recent months with the addition of a growing *Islamic State* (IS or DAESH) presence in the country. The Afghan President recently acknowledged that the Islamic State is gaining influence in Afghanistan<sup>19</sup>. The *Associated Press* has reported on not only the emergence of an IS presence in Afghanistan but also of the "Taliban spreading their own influence to areas where they have not had a significant presence in the past."<sup>20</sup> Some of the reported recent attacks on Hazaras have been attributed to IS fighters - foreign fighters and/or defectors from the Taliban. For example a March *RFE/RL* article states:

The mass kidnapping of members of Afghanistan's Hazara minority has raised concerns that Islamic State militants are entering a new, active, phase in the country. Details about the mass abduction, which took place in Zabul Province on February 23, remain murky, with claims that it was carried out by Islamic State militants countered by denials that the group is present in the southeastern province.

... Provincial government official Abdul Khaliq Ayubi blamed the abduction on IS, which has a strong anti-Shi'ite agenda. He said the gunmen all wore black clothing and black masks. Eyewitnesses who spoke to ToloNews said the gunmen spoke in a foreign language. Other Afghan officials have expressed skepticism about the involvement of IS in the abduction, however. Islam Gul Sayal, the spokesman for Zabul's governor, told RFE/RL's Radio Free Afghanistan that he believes the Taliban was behind the abduction. "These gunmen were antigovernment forces," he said. "It's possible that they were [Pakistani] Taliban. But the Islamic State group does not have a presence here. They are simply Taliban who have changed their flags." Nevertheless, the incident has fueled suspicions that IS militants are moving beyond the recruitment phase in Afghanistan....<sup>21</sup>

62. Reports are speaking of 'competition' between IS and the Taliban resulting in increasing brutality and sectarianism. The Afghan *Khaama Press*, reported in February 2015 that:

... Being attracted by even [more] radical group, the Taliban are continuously losing their men to ISIL. In contrast, the ISIL is rapidly maximizing its man power, ammunitions and financial resources. For example, since the announcement of the Khorosaan Province, covering modern day Pakistan, Afghanistan, India, Bangladesh, and part of neighboring central Asian countries, in January 2015, the ISIL had not only convinced commanders of Pakistani Taliban to declare their allegiance to Al-Baghdadi, the Group had also nominated the Pakistani Taliban commander Hafez Saeed Khan as the emir of the Khorosaan. Other well-known Taliban figures who had recently joint ISIL are Shahidullah Shahid, Sa'aad al Emarati, Sheikh Muhsin, Dolat Khan, Khalid Mansoor, Abdul Rauf Khadim and dozens/hundreds others. ...

... The ISIL soon began to expand their influences towards southern province of Afghanistan, mainly towards major provinces of Loya Paktia, Ghazni and Helmand. In the late September 2014, just few weeks after the release of ISIL's first propaganda message in Peshawar, the group killed about 100 people in Ajristan district of Ghazni province; among them 12 persons were women and children who were brutally

<sup>19</sup> See *Khaama Press* (Afghanistan), 2015, "ISIS promotes training camp in Logar province in Afghanistan", 29 April.

<sup>20</sup> *Associated Press* 2015, "Taliban Announce Their Spring Offensive In Afghanistan", 22 April <http://www.sfgate.com/news/world/article/Taliban-announce-their-spring-offensive-in-6215508.php>

<sup>21</sup> *RFE/RL*, 2015, "Mass Abduction Of Hazaras In Afghanistan Raises Fears Of Islamic State", 9 March

beheaded. The Taliban spokesperson Zabihullah Mujahid rejected claims for such mass killing; however, local inhabitants witnessing the scene considered Taliban militants, who were carrying the black flag of ISIL with them, responsible for such murders. According to local Afghan news, Wahdat news, the Taliban militants carrying ISIL's flag not only killed dozens of people in Ajristan, they had also blocked communication roads to other districts of Ghazni province including Jaghori, Qarabagh and Nahoor.

... When the ISIL men riding on horse with black ISIL's flags on hand maneuvered in front of the cameras got attentions of Afghan local TVs and newspapers, the group was already involved in hanging Taliban's militants in Nuristan and recruiting men in east, south and Northern provinces of Afghanistan. Around the country, the ISIL commanders recruited men from eastern provinces of Badakhshan, Nuristan and Nangarhar; South and Eastern provinces of Paktia, Logar, Ghazni, Helmand and Zabul; and Northern provinces of Jawzjan, Kunduz and Parwan. By expanding their presence in almost all major provinces of Afghanistan, today the ISIL is ... considered a powerful rival against the Taliban.... According to local Afghan Medias, like Abdul Rauf Khadim, dozens and hundreds other Taliban fighters are joining ISIL to make new align with a group that is notoriously growing in the country and region.<sup>22</sup>

63. According to a recent *New York Times* article there is speculation the Taliban is becoming increasingly brutal to Hazaras to try to combat the growing popularity of IS and the defection of its fighters to IS.<sup>23</sup>

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<sup>22</sup> *Khaama Press*, 2015, "Clash between radicals: ISIL vs Taliban in Afghanistan", 26 February. See also *Oslo Times*, 2015, "Taliban, ISIS announce war against each other in Afghanistan", 20 April.

<sup>23</sup> *The New York Times*, 2015, "Taliban Are Said to Target Hazaras to Try to Match ISIS' Brutality", 22 April.