

1410810 (Refugee) [2015] AATA 3339 (20 August 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division
CASE NUMBER: 1410810
COUNTRY OF REFERENCE: Afghanistan
MEMBER: Filip Gelev
DATE: 20 August 2015
PLACE OF DECISION: Melbourne
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 20 August 2015 at 5:06pm

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] December 2012 and the delegate refused to grant the visa [in] June 2014.
3. The applicant appeared before the Tribunal on July 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages.
4. The applicant was represented in relation to the review by his registered migration agent.

RELEVANT LAW

5. 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

6. 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).
7. 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.
8. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the Regulations to a particular person.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). 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.

11. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
12. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
13. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
14. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
15. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Complementary protection criterion

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Section 499 Ministerial Direction

19. 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. The Tribunal has considered the most recent DFAT Country Information Report on Afghanistan (dated 26 March 2014), the DFAT Thematic Information Report – Conditions in Kabul (3 October 2014) and the DFAT Thematic Information Report – Hazaras in Afghanistan and Pakistan (26 March 2014).

CONSIDERATION OF CLAIMS AND EVIDENCE

20. The issues in this case are as follows:
 - a) Whether the applicant is an Afghan national, a Hazara Shi'a Muslim originally from the Jaghori district of Ghazni Province;
 - b) Whether Kabul is a 'home area' for the applicant;
 - c) Whether there is a real chance he will suffer persecution for a Convention reason, or real risk of significant harm for any reason.
21. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

Country of nationality and identity

22. The Tribunal has had regard to the copies of the applicant's national ID (taskera) card provided to the Department of Immigration and sighted by the Tribunal, the applicant's ability to speak the Hazaragi language fluently, and his written and oral evidence.
23. The applicant has consistently maintained since his arrival that he is a Hazara Shi'a and he has provided detailed oral and written evidence about his village in Jaghori district of Ghazni province.
24. At interview and at the hearing, the applicant's evidence in relation to his place of birth and issues relating to his identity, was consistent, and given with little or no hesitation, except for one aspect. At interview with the delegate the applicant claimed that prior to an ill-fated trip to Jaghori in 2012, he had not been to Jaghori since about 2006-7. The delegate advised the applicant that during his identity interview he had claimed to have travelled back and forth between Jaghori and Kabul. The applicant strenuously denied saying so. As the Tribunal has not been provided with a copy of the identity interview, it cannot comment. However, at the hearing, the applicant explained that he had been going from Kabul back to Ghazni on a relatively regular basis.

25. He told the Tribunal that he would go whenever there was something “going on” such as a funeral or a wedding or a big celebration such as Eid every 2-3 years. He said that before the incident when he was kidnapped in 2012 he went back to Ghazni in 2011 for one of his [relative]’s weddings. Prior to that he travelled back around the time of his father’s disappearance.
26. The delegate was of the view that the applicant may be an [Country 1] or [Country 2] national. In light of the applicant’s knowledge of Afghanistan, the Tribunal has no doubt that the applicant has lived in Afghanistan for a considerable length of time given his knowledge of the country. The Tribunal can see no logical reason why an applicant would travel *from* [Country 1]/[Country 2] *to* Afghanistan.
27. There is evidence, referred to by the delegate, that the applicant and his [sibling] claim to speak [Language 3] or [language], the language spoken in [Country 1]. The delegate also observed that the applicant’s [other sibling] has been living in [Country 1]. The Tribunal notes that Hazaragi is closely related to [Language 3]¹ and Farsi. The close linguistic and religious links between Hazaras and the majority of the Persian population of [Country 1] – most Hazaras and most [Country 1 citizens] are Shi’a Muslims – easily accounts for the applicant’s [sibling]’s decision to move to [Country 1] with [the spouse]. There is no evidence before the Tribunal that the applicant is a national of [Country 1] or that he has the right to enter and reside in that country.
28. In relation to [Country 2], the Tribunal gives the applicant the benefit of the doubt and accepts that he is from Afghanistan, not [Country 2]. He has consistently denied ever being to [Country 2] and there is no evidence before the Tribunal that he has ever been to [Country 2], that he is a [Country 2] national or that he has the right to enter and reside in [Country 2].
29. The applicant has provided two different names – [Name 4] (name on his taskera, number [deleted]) or [Name 5] (name used to the Department of Immigration, name used on certificate of appreciation from his employer [Company 6], respectively). There is no evidence before the Tribunal that the taskera is a bogus document.
30. At the hearing the Tribunal asked him to confirm his name. The applicant said that his name was [Name 5]. [Name 5] is a name from one of his forefathers. The Tribunal asked why the taskera did not use [Name 5]. He said that the taskera does not record a last/family name; it records one’s first name, as well as father’s and grandfather’s name. The Tribunal accepts that as an adequate explanation for the two different names – [Name 4] and [Name 5].
31. Based on the above, the Tribunal finds that the country of reference for the assessment of his claims in this case is Afghanistan.
32. The Tribunal further accepts the applicant’s identity is as claimed.
33. On the evidence before it, the Tribunal finds the applicant does not have a present right to enter and reside in any other country than Afghanistan. The Tribunal therefore finds the applicant is not excluded from protection in Australia by s.36(3) of the Act.

The applicant’s background

34. On the evidence before it, including the evidence at the hearing, the Tribunal finds that:
 - (a) He is Hazara by ethnicity and a Shi’a Muslim;

¹ [Source deleted].

- (b) The applicant was born in (and raised) in [a] village, in the Jaghori district of Ghazni province [on date];
- (c) Between 2004, when the applicant was [a child], and 2012, when he left for Australia he lived in Kabul with this family;
- (d) He obtained informal education in Ghazni and went to school, up to [a stated level], in Kabul;
- (e) He is single and has no children;
- (f) His father has been missing since 2010, his mother and [siblings] remain in Afghanistan while [one] [sibling] lives in [Country 1];
- (g) The family had to sell some land to finance the applicant's trip to Australia. However, they still own a block of [land] with a two [house] built on the land;
- (h) Apart from the alleged harm he suffered on a trip to Ghazni in 2012 the applicant has not suffered any harm in Kabul in the past.

Home area

- 35. At the hearing, the applicant said that he would go back to his village whenever there was something "going on" such as a funeral or a wedding or a big celebration such as the festival of Eid, once every 2-3 years. He said that before the incident when he was kidnapped in 2012 he went back to Ghazni in 2011 for one of his [relative]'s weddings. He said that he travelled back around the time of his father's death as well. He said that he had difficulty remembering this when he was being interviewed by the delegate and gave an incorrect answer. He said he had not had any problems on the roads to Ghazni prior to 2012. He said he had not been stopped, either by extremists or criminals.
- 36. The Tribunal asked whether he considered Ghazni or Kabul to be his home area. He said that his home area was Ghazni because he still had land and extended family there.
- 37. The Tribunal explained to him the concept of home area and relocation. The Tribunal noted at the hearing that the courts have held that if an applicant has more than one place that could be characterised as their 'home area', in this case Ghazni and Kabul, the question of reasonableness of relocation to Kabul would not arise.²
- 38. In *SZQEN v MIAC* (2012) 202 FCR 514, the Federal Court held that the concept of home region or home area is not a narrow one:

I propose to apply the statement of principle in *Randhawa* by Black CJ (at 440-441) which plainly proceeds on the basis that the relocation principle concerns relocation from a claimant's home region to another place in the claimant's country of nationality that is not the claimant's home region. This position is supported by the United Kingdom authorities to which I have referred. In proceeding on this basis I do not think that the reference in the cases to "home region" or "home area" (or similar expressions) is to be given a narrow or restrictive meaning to refer, for example, only to the place where

² *SZQEN v MIAC* (2012) 202 FCR 514 at [38]-[40]. Whether a place is an applicant's home region or home area is a question of fact, but is not necessarily limited to one location if similar and substantial ties exist at another location: *SZQEN v MIAC* (2012) 202 FCR 514 at [38]; also see *SZRBA v MIBP* [2013] FCCA]. The question would only arise if, on the material before the decision-maker, there appears to be more than one place capable of being classified as a 'home region'.

the claimant happens to be living at the time of the feared persecution, or that a “home region” or “home area” is necessarily limited to one location if similar and substantial ties exist at another location that would also appropriately characterise that location as a “home region” or “home area” of the claimant. Whether such ties exist and whether a particular location can be appropriately characterised as a “home region” or “home area” are matters of fact.³

39. In light of the fact that the applicant lived in Kabul since [childhood], that he regularly but infrequently visits his place of birth in Ghazni, that his immediate family members are in Kabul, that Kabul is the only place where he has received formal education and been employed, and Kabul is the place where he has accommodation, the Tribunal finds that Kabul is his home area, or a home area.

Claims of past harm

40. The applicant has claimed that he completed a [course] and worked as an [occupation] [in] 2010-2012 and as a translator for an Afghan company called [Company 6] in 2011-2012. According to the applicant’s statutory declaration of 16 December 2012, [Company 6] runs different projects all over Afghanistan, including translation services to various government agencies. The applicant was involved in a translation project of [a national body].
41. At the hearing, the applicant said that he heard that about a 1000 people had applied for work there and only 140 were hired. The applicant confirmed that it seemed strange that the company would pay 140 people, who did not have any qualifications in [the relevant industry] to do translation work. But he pointed out that the pay was only \$500 a month and the company could not have found 140 [professionals]. He said that the people the company found were the best they could possibly find.
42. The aspect of the evidence the Tribunal cannot accept is in relation to the type of work the applicant did at [Company 6]. The claim in the statutory declaration of 16 December 2012 was that the “translation project” was in relation to [details deleted]. The Tribunal asked how it was possible that [details deleted]. He said he did not know what had been translated in the past. He insisted that he had done the work and offered the Tribunal to contact his supervisor at [Company 6]. He said that he and others at [Company 6] translated 50,000 pages worth of documents.
43. When the Tribunal asked the applicant to name some of the [manuals] that the applicant translated, he said they were not [details deleted]. After some hesitation, he said they translated manuals in relation to [details deleted]. When the Tribunal expressed its surprise that this was the only work they did, he referred to [deleted]. He was asked to confirm that he did not translate any manuals to do with [certain items]. Finally, he clarified that he was not referring to [details deleted] (he showed photo from an article he had submitted to the Tribunal, at folio 134).
44. The Tribunal said might find it hard to believe that there would have been 50,000 worth of pages relating to [certain] manuals. The applicant said that a manual would be 150 up to 200 pages. The Tribunal said that added up to at least 250 manuals if the total number of pages was 50,000. He explained that there were graphs and photographs in the manuals. He claimed that there different manuals for different [categories]. He said that this was more than 3 years ago and he could not recall what in detail exactly what he did. He then claimed that some manuals were up to 1,000 pages each. Finally he said that some manuals were even more than 1,000 pages long.

³ SZQEN v MIAC (2012) 202 FCR 514 at [38]

45. [Details deleted]. The applicant has consistently claimed that he worked at [Company 6] until May 2012. The project was supposed to be finished in January 2012, but ran over time. The Tribunal finds that the applicant did work for [Company 6] but the work was not related to [details deleted] of any kind. The Tribunal has decided not to contact the applicant's former employer as suggested by the applicant, because ultimately the exact nature of the translation work which the applicant did until May 2012 is not determinative of the issues the Tribunal needs to decide. Furthermore, the applicant claims that the Taliban detained him (see immediately below) and found that he worked for foreigners – see, for example, paragraphs 60 and 64 of the applicant's statutory declaration of 15 July 2015, not that they knew that he translated [manuals].
46. In his initial statutory declaration the applicant said that while he was working in Kabul, a family dispute involving land arose. The applicant's uncle asked him to go back to Jaghori to "represent" his family as his father was by then deceased. On the way to Jaghori he was captured by the Taliban at [a location] (or, according to the entry interview, [a location] in Qarabagh district of Ghazni). He had taken with him all the papers he needed for the land negotiations and the Taliban "identified" him. He was taken to an unknown place, tortured, called an infidel and told that his entire family deserves to die.
47. The Taliban forced the applicant to go to one of their (Sunni) mosques to pray together with them as punishment. He was to be killed after prayer. He "faked and fainted" in the mosque and while they continued to pray he managed to escape. He managed to get to the Kabul Highway, he stopped a truck driven by a Hazara man and got a lift to Kabul. Once he reached home, he discussed with his family what he should do and decided that the country is not safe for him.
48. The notes from his entry interview set out the applicant's story in more detail than his 2012 statutory declaration. Before starting the journey from Ghazni to Jaghori the driver had advised the passengers, the applicant and a man and wife, to hide or throw away any important documents. The applicant gave his documents, which included a document mentioning his occupation, to the wife of the couple travelling with him in the taxi, because the Taliban did not search women. When some Taliban stopped the car and asked everyone to get out, the woman panicked and threw the documents on the ground telling the Taliban that the documents were not hers.
49. The Taliban picked up the documents and realised what the applicant does for a living, they detained him and released everybody else. They tied his legs and hands and they put him on a motorbike; after 20 a minute ride on the motorbike they put him in the back of a truck. On which he travelled for a further 45 minutes to a stable. When his blindfold was removed, he realised behind him there were 3 armed people, and in front of him there was one man who had a beard and spoke [Language 3].
50. They forced him to give them the address of the company that he worked for as a translator and they wanted his address and his colleagues' names. He told them the address of the company, but made up his own address and some names of colleagues. If he could not answer questions they would beat him with the Kalashnikov's butt. Three times he fainted.
51. They took him to their mosque where he was going to be executed. He pretended to be unconscious and they put him in a room and left him there. He managed to run away while his captors were praying. He managed to get to an area with some houses and hid by putting branches over a hole he found in an orchard. He stayed until midnight and when the only sound he could hear was of dogs barking, he ran for 1-2 hours until he reached a place that was familiar. From there he knew how to get to the Kabul-Kandahar road. He tried to hail down a passing car but nobody would pick him up. Eventually a Hazara driver stopped his truck, picked up the applicant and drove him to Kabul.

52. The applicant provided very similar evidence in his statutory declaration of 15 July 2015 in terms of the manner in which he was stopped by the Taliban and kidnapped and how he escaped.
53. At the hearing, the Tribunal found the applicant's evidence in relation to the alleged kidnapping and escape to be unconvincing. The applicant repeated his claim that he was taken to a Sunni mosque by his captors at the time of the sunset prayer. He pretended to faint and he was taken to a room, unattended and not tied. He said that he had been tied previously and he had been bleeding; he was very weak and they did not suspect that he could run away. The Tribunal does not accept that if his captors planned to kill him, they would have untied him (or take off the handcuffs) as well as left him unsupervised in a room by himself, especially if the applicant's claim is true that his captors were so religious that they devoted all their attention to praying and not a single person kept an eye on him.
54. The Tribunal asked how he knew in which direction to run when he escaped. He replied that when he escaped there were two possible directions. In one direction he could see children playing. Hence, he ran in the opposite direction. He said he did not know where he was running to. He hid in a hole or a "trench" in a house backyard, where he covered himself with leaves and branches.
55. After things quieted down and he could no longer hear the Pashto speaking voices of people looking for him, he got out of the orchard and started running in the same direction as before. He ran for about 2-2.5 hours through "desert" until he reached [the] place where he had been kidnapped. He could not explain what the Tribunal considers to be a highly unlikely coincidence, that is, that after running for a long time through a completely unfamiliar area he somehow returned to the exact same place where he had been captured by the Taliban the day before.
56. The applicant confirmed at the hearing his claim that when he reached the main road, he started hitch hiking. After a few minutes a truck stopped to pick him up and the driver happened to be a Hazara man. The Tribunal expressed surprise that a Hazara man, driving along a road where the Taliban are active, would stop in the middle of the night to pick up a stranger covered in blood. The applicant changed his evidence and said that while previously he had claimed that this had happened in the middle of the night (when it was dark), this was incorrect. It was early in the morning by that stage, it was maybe 4am.
57. As the Tribunal conceded during the course of the hearing, an applicant cannot be expected to remember the exact timeline of events when he is fleeing for his life, running or hiding in the dark and he does not have a watch. Further, these events took place more than 3 years ago. Nevertheless, the Tribunal finds that the applicant changed his story in one significant aspect – initially he claimed that a truck stopped to pick him up in the middle of the night; later on that this must have happened around sunrise.
58. The Tribunal does not accept that the applicant was stopped by the Taliban or anyone else, and harmed on the road from Kabul to Ghazni in 2012.
59. At the hearing, while discussing the situation in Kabul, the applicant said that a job was not guaranteed for him in Kabul and he might have to go to Jaghori, which is a pretty unsafe area. The Tribunal observed that indeed many roads in Afghanistan, including the Kabul-Kandahar highway, are not safe. However, the Tribunal suggested that the applicant could return to Kabul and live there.
60. The Tribunal accepts that there has been some violence in Kabul, but notes that a recent assessment by the DIBP stated that:

Although the reports note a high level of attacks in and around Kabul, most target government and international personnel and no reports suggest that Hazaras and Shias are being disproportionately targeted by these attacks.

In 2014, analysis of attacks in Kabul by insurgents⁴ found that insurgents targeted Afghan military personnel, police officers, political figures and foreigners, as well as government buildings, hotels and embassies.⁵

61. The Tribunal does not accept the applicant's claim that he might not be able to find work in Kabul and therefore he might have to go to Ghazni. As a person who has post-school qualifications and some experience as a [occupation]/translator, the applicant is much more likely to find work in Kabul than in rural Afghanistan.
62. The Tribunal has considered the guidance as provided by the High Court in the case of *MIBP v SZSCA* [2014] HCA 45 (SZSCA). This case is relevant as it discusses the reasonableness of expecting the applicant to remain in Kabul, with the majority of the Court determining that the same considerations as are relevant to relocation apply when the Tribunal identifies an area where the visa applicant may be safe, so long as he or she remains there. The applicant's personal circumstances can be distinguished to the circumstances of the applicant in SZSCA, in that in the SZSCA case the applicant had some claim to be a truck driver, which potentially could require the applicant in that case to be required to drive outside of Kabul. In the present case, his employment history suggests that he will be able to return to being a [occupation] or doing translating/interpreting work in Kabul, as he did before he came to Australia.
63. The Tribunal considers that the applicant's employment would mean that he would be able to live and work in Kabul without the need to leave the city for employment purposes. The Tribunal considers that the applicant will be able to work and live within the city of Kabul, and would not require the applicant to travel outside of Kabul, where he might be at risk of harm. The Tribunal cannot guarantee that the applicant will be able to find employment, but that is not its task. It is to be expected that the applicant might experience a period of adjustment on his return to Kabul, but he will have a place to live and the support of relatives and friends, and with his knowledge of English and experience in [a certain] field he is much better placed to find a job in Kabul than in rural Afghanistan.

Well-founded fear of persecution

64. The Tribunal discussed with the applicant the situation in Kabul and whether he can return there. The applicant claimed to fear harm because of his actual and imputed anti-Taliban political opinion, his work (both past and prospective) as a [occupation] and translator, and his stay in Australia, as well as his Hazara ethnicity and Shia religion.
65. The applicant confirmed that in Kabul he had not suffered harm in the past. At the hearing the applicant confirmed that his family in Afghanistan have not had any problems and they have not had to move since the applicant left Afghanistan. The applicant correctly pointed out that the fact that nothing happened to him in the past is no guarantee of future safety.

⁴ see European Country of Origin Information Network 2015, General Security Situation in Afghanistan and Events in Kabul, 12 January
<http://www.ecoi.net/news/188769::afghanistan/101.general-security-situation-in-afghanistan-and-events-in-kabul.htm>

⁵ European Country of Origin Information Network 2015, General Security Situation in Afghanistan and Events in Kabul, 12 January,

66. He also explained that people had been harmed on the road from Kabul to Ghazni. He said that he had provided evidence of people being targeted, including reports he provided on the day of the hearing.
67. The Tribunal observed that since the US led military operations in Afghanistan removed the Taliban from power, the international community has spent tens of billions of dollars in order to maintain the government in Kabul. The Tribunal expressed the view that terrorist attacks in Kabul will likely continue to occur from time to time, but a fall of Kabul to the Taliban is extremely unlikely based on the information it has.
68. The Tribunal referred specifically to the recent DFAT advice on Kabul and to a report by UNOCHA (United Nations Office for the Coordination of Humanitarian Affairs).

On a UNOCHA map showing the level of civilian casualties by district from 1 September 2013 to 31 August 2014, Kabul city is ranked highest, with from 151 to 234 civilian casualties (killed and injured respectively).

Although Kabul district has a high number of victims compared to most other districts in the province, and the country as a whole, according to UNOCHA the risk to a civilian in Kabul province is relatively low. This is because Kabul has a very high population; UNOCHA estimates there are about 4 million inhabitants in Kabul province, more than double the second most populated province, Herat, and almost triple that of the third province, Nangarhar.⁶

69. The Tribunal pointed out that the country information submitted by the applicant and his representative relates to attacks on important government buildings such as the Justice Ministry (attack on 4 May 2015),⁷ the national Parliament (on 22 June 2015),⁸ a NATO convoy (on 30 June 2015),⁹ and a European Union mission (17 May 2015).¹⁰
70. The applicant “agreed with that perspective that the Americans will not let Afghanistan go back to the 90s [when there was a civil war, followed by Taliban rule]. Whatever it costs, they will keep the situation just as it is now”. Immediately afterwards though he insisted that the situation was constantly deteriorating and that tens of people were being killed every day.
71. It was conceded that not every Hazara and Shia person who lives in Kabul has a well-founded fear of persecution for reasons of their ethnicity or race or both. The applicant’s representative accepted that simply being Hazara by ethnicity is not sufficient for a person to have a well-founded fear of persecution in Kabul. The Tribunal considers that the situation is the same in relation to persons of Shia religion in Kabul. Without a personal profile or a link to a targeted group (foreign troops), a person who is Hazara or Shia or both does not have a well-founded fear of persecution.
72. In terms of future harm, the Tribunal noted that on return, the applicant would not be working for [Company 6] any longer, because the project he was involved in ended in [year]. He said that if he were to go back he would be a target, because the only type of job he could find would be related to foreigners or the Afghan government.
73. The applicant asserted that the Taliban know his details – they have a copy of his taskera and the land title after they seized documents from him on the road in Ghazni. He would be known as someone who has worked for foreigners in Afghanistan. However, when asked

⁶ UNOCHA, 2015 Humanitarian Needs Overview Afghanistan, November 2014 (<https://docs.unocha.org/sites/dms/Afghanistan/humanitarian-needs-overview> pp36-37)

⁷ See at folios 131-132 of Tribunal file.

⁸ See at folio 128 of Tribunal file.

⁹ See at folios 133-134 of Tribunal file.

¹⁰ See at folios 129-130 of Tribunal file.

whether he would be personally targeted, because of his background, he said that at present he accepted that the Taliban do not have the capacity to enter Kabul, go to his house, drag him out and kill him. He expressed the view that the situation is deteriorating all the time in Kabul and the government is unstable. If the government were to fall and the Taliban were to come to power, they would have the means to locate him and harm him. They would know his background, including that he has been to Australia.

74. The representative argued that the situation has deteriorated since the withdrawal of international forces in 2014. In addition, the Taliban are interested in a power sharing agreement and it is certainly foreseeable that the Taliban can gain significant power in Afghanistan. If the Taliban were to gain significant influence or power in Kabul, it is clear that would mean that the applicant is at risk as someone who has [done occupation], worked as a translator, and lived in Australia.
75. The representative referred to a decision made by me as the presiding member in May 2013 (case [deleted]) in relation to a person whose home area was found to be Kabul. The representative urged the Tribunal to adopt the same cautious approach as to what might happen in the reasonably foreseeable future. He submitted that looking forward into 2016 and beyond, it is possible that not only the Taliban will join the government, but there may be elements of the Taliban who would join forces with ISIS.
76. In his submission it is not far fetched for the Tribunal to find that this particular applicant is at risk of harm, because of his personal circumstances, that is, his "history" with the Taliban. In that case, the Tribunal said at paragraph 60:

Based on the country information and in particular the bleak picture painted by many commentators about the likely downwards trajectory of an already fluid security situation following the withdrawal of ISF troops during 2013 and 2014, and the applicant's own evidence and personal circumstances, the Tribunal finds that there is a real chance of persecution – significant harassment or ill-treatment and threats to life as per s.91R(1)(b) – facing Hazara Shias, including the applicant, by the Taliban or other Sunni extremists in the reasonably foreseeable future.

77. The Tribunal notes that 2014 is no longer the reasonably foreseeable future. It is August 2015 and the bleaker predictions of commentators in relation to Afghanistan have not come true even though the international troops have been largely withdrawn.
78. The Tribunal further notes that the case in which it found that an applicant, who was a resident of Kabul was owed protection, case number [deleted], was a person with personal circumstance very different to those of the applicant in the present case. That applicant did not have close family members, no place to live in Kabul and bleak employment prospects.
79. The European Asylum Support Office in its report on the security situation in Afghanistan published in January 2015 referred to two studies suggesting that, following the withdrawal of the international forces, the insurgents had made territorial gains but they had been unable to capture major towns and cities:

According to Ruttig and Münch, the withdrawal of foreign troops has had an impact on the areas that they used to secure. In those areas, which are now left to the ANSF [Afghan National Security Forces], insurgents increasingly take control of territory, and attack administrative centres and security installations. The International Crisis Group (ICG) described how the transition initiated a new phase in the war, characterised by fighting between the ANSF and insurgent groups. The latter have failed to capture major towns and cities and some areas are even more secure due to the withdrawal of IMF [International Military Forces].

However, the overall trend is one of decreasing government control outside the larger towns and cities, escalating violence and more insurgent attacks.

Ruttig and Münch reported that since 2013, insurgents have made increasing territorial gains and cut off major highways, especially in the north. They sometimes symbolically capture abandoned ISAF [International Security Assistance Force] bases, such as Kejran, Daykundi in October 2013 and ANSF bases, such as Omna district, Paktika, in late May 2014 and Ghaziabad, Kunar, in February 2014. The insurgents launch major assaults around the country on administrative centres and security checkpoints. The aim is to capture territory and hold it, such as at Yamgan, Badakhshan, and Qaisar and Ghormach districts of Faryab. They operate in fronts of several hundred fighters. So far, the ANSF has repelled most attacks and regained control over district administrative centres and security installations, but the UN Secretary General reported that ANSF have not been able to curtail insurgents' presence and freedom of movement, especially in remote districts. However, the expansion of the ALP [Afghan Local Police] and local uprisings have pushed them back from other areas, for example in Ghazni province.

UNAMA [United Nations Assistance Mission in Afghanistan] confirmed that the closure of ISAF bases and transfer of responsibilities to the ANSF caused changing dynamics in the conflict. In the second half of 2013 and the first half of 2014, AGEs [Anti-Government Elements] challenged the ANSF by conducting attacks in larger groups of fighters and more civilians were caught in crossfire and ground engagements. However, in some areas, ANSF succeeded in holding the territory after the closure of an ISAF base, which resulted in fewer civilian casualties in those respective areas.

Between 1 March and 15 August 2014, the UN recorded a total of 11,320 security incidents relevant to the work, mobility and safety of civilians in Afghanistan. This was an increase compared to 2012 and 2013, but the number was still lower than in 2011.¹¹

80. UNAMA said that, as the withdrawal of international military forces and combat air support had continued in 2014, it had observed more frequent and larger ground operations by both the Afghan National Security Forces and Anti-Government Elements, notably in Helmand, Kunar and Faryab provinces, with fighting often occurring near district centres. It said that civilian deaths and injuries were caused when civilians were caught in the crossfire between insurgent and Afghan security forces fighting in and around civilian-populated areas. UNAMA said that the use of improvised explosive devices (IEDs) by Anti-Government Elements had also increased in 2014 as had the number of civilian victims of suicide and complex attacks. It said that the targeted killing of civilians had fallen five per cent from 2013 and that victims had included tribal elders, civilian government officials, mullahs and civilian justice officials.¹²

81. The UN Secretary-General stated in his most recent report on the situation in Afghanistan that:

Since the end of the summer period, the Government has faced a sustained and determined challenge in securing key districts that remained under insurgent pressure. The post-elections political impasse and the delayed signing of the security agreements with the United States and NATO created an environment of

¹¹ European Asylum Support Office, *EASO Country of Origin Information Report: Afghanistan - Security Situation*, January 2015, CISEC96CF1191, pages 22-23, omitting footnotes.

¹² United Nations Assistance Mission in Afghanistan (UNAMA), *Afghanistan Annual Report 2014: Protection of Civilians in Armed Conflict*, 18 February 2015, CISEC96CF1205, pages 4, 6-7.

uncertainty, which appeared to embolden anti-Government elements in their actions across the country to undermine public confidence in the Government and its security forces. During the reporting period, multiple attacks took place on district administrative centres, security force checkpoints and major roads. Apart from their apparent intent to project insurgent strength and generate media attention, none of the attacks succeeded in permanently capturing the intended targets.¹³

82. The UN Secretary-General said that the most significant attacks had been in Helmand and Kandahar provinces in the south, Ghazni, Paktia and Paktika in the south-east, Nangarhar in the east, Kunduz in the north-east, Faryab in the north and Herat, Farah and Ghor in the west.¹⁴ There are reportedly now 13,500 foreign troops, mostly from the USA, in Afghanistan, and the withdrawal of the foreign forces has had a significant impact on foreign investment along with the political impasse.¹⁵
83. Recent reports have suggested that the United States will drop plans to cut the number of its troops in Afghanistan to 5,500 by the end of 2015.¹⁶ In an opinion piece published in the *Wall Street Journal* at the beginning of February, Michael O'Hanlon of the Brookings Institution provided the following overview of the current situation:

...[T]he recent news coverage of America's longest war is depressingly violent and familiar. Suicide bombings and insider attacks in Kabul, Taliban comebacks in parts of Helmand and Kunduz provinces (in the south and northeast respectively), continued insurgent activity throughout much of the east, and high casualties to Afghan soldiers and police.

But after my systematic survey in consultation with the U.S. command in Afghanistan, unclassified reporting and other information, I would argue that the security situation is on balance stressed but generally holding. It has deteriorated somewhat over the past couple of years, as NATO forces have dramatically downsized, from a high of nearly 150,000 in 2010-11 to about 15,000 today. But thanks largely to the hard work and sacrifices of Afghan security forces as well as recent political compromise in Kabul, Afghanistan is by no mean a failing state.

...

While Afghanistan's woes are well known, its strengths are often forgotten. The country has a security force of 350,000 that, unlike the Iraqi army in 2014, has not dissolved in the face of battle or split along ethnic lines. President Ashraf Ghani and Chief Executive Abdullah Abdullah have fashioned a workable political compromise out of last year's tortured election process, bridging major ethnic and power-broker divides and this January beginning to forge a cabinet.

This political reconciliation makes it likely that the security forces will continue to respect central-government authority. The nation's citizenry remains strongly anti-Taliban, partly due to a much-improved quality of life since 2001, and evinces much greater political awareness and participation.

¹³ UN General Assembly, *The situation in Afghanistan and its implications for international peace and security: report of the Secretary-General*, 9 December 2014, A/69/647-S/2014/876, available at: <http://www.refworld.org/docid/549808194>, paragraph 17.

¹⁴ UN General Assembly, *The situation in Afghanistan and its implications for international peace and security: report of the Secretary-General*, 9 December 2014, A/69/647-S/2014/876, available at: <http://www.refworld.org/docid/549808194.html>, paragraph 18.

¹⁵ 'Afghan Economic Crisis Looms as Foreign Aid Dollars Depart', *The New York Times*, 26 January 2015, CXBD6A0DE2545.

¹⁶ 'Afghanistan Welcomes US Move to Drop Drawdown Plan', *Voice of America (VOA)*, 17 March 2015, CXBD6A0DE3138.

Most major cities remain safer for Afghan citizens than they were even four or five years ago. There has been some worsening on balance over the past one to two years, in Kabul particularly, and some smaller cities in the south and northeast. But on balance the country's largest cities after Kabul—Kandahar, Herat, Mazar-e-Sharif—are not becoming more violent or anarchic. Kandahar, where the Taliban movement originated, is probably safer than at any time in the past seven or eight years. Of the country's 34 provinces, no capital cities are inaccessible to the government.

Many rural areas remain contested and not in government hands. Most have not benefited in a lasting way from the "clear, hold, build" paradigm recommended by standard counterinsurgency logic and advocated by Gens. Stanley McChrystal and David Petraeus. Yet there are only a few significant swaths of territory where the central Taliban organization truly controls an area, as in parts of Helmand, Kunduz, Wardak, Kunar, Nangahar and Khost provinces.¹⁷

84. The Tribunal considers that there is a violent situation in Afghanistan, and the withdrawal of troops has led to an increase in fighting. However the Tribunal does not accept that the withdrawal has led to the deterioration of security to such an extent that the government has lost control of Kabul to the Taliban, to Daesh (ISIS) or to any other extremist groups.
85. In post hearing submissions, dated 29 July 2015, the applicant's representative further referred to the possibility of a peace deal that would pave the way for the Taliban to join the central government in Afghanistan. As a result, it was argued that the Taliban would be able to "target individuals imputed to be anti-Taliban like the applicant". The Tribunal finds that the prospect of a power sharing agreement involving the Taliban is rather speculative as is the claimed next step in this process, that is, that even after the Taliban have joined the government the Taliban would still persecute individual political opponents. More importantly, the Tribunal does not consider that the applicant has a profile of a person with an actual or imputed anti-Taliban political opinion and therefore the Tribunal finds that he would not be at risk of harm.
86. The Tribunal considers that the country information demonstrates that it is the targeting of certain high profile individuals and locations, and not, as the applicant – and a few independent observers claim, civilians. The Tribunal does not accept that the applicant, as a civilian in Kabul, has a real chance or a real risk of being harmed by the Taliban or any other insurgent group.
87. There is country information that supports the contention that certain government officials are at risk of harm in Afghanistan. The most recent, albeit not new, UNHCR Eligibility Guidelines on Afghanistan identify this group as requiring further analysis. The European Asylum Support Office (EASO) published a report in December 2012 which stated:

High ranking officials and government employees face a real risk of being intimidated or targeted by insurgents in all parts of Afghanistan. Low ranking officials and government employees also face a real risk of being intimidated or targeted in peripheral unsafe areas and a low risk of being targeted in safer areas in Afghanistan which are not under the insurgents' control, for example the cities of Kabul, Herat and Mazar.¹⁸

¹⁷ Michael O'Hanlon, 'How Not to Squander Hard-Won Gains in Afghanistan', Wall Street Journal, 5 February 2015, CX1B9ECAB9629.

¹⁸ European Asylum Support Office (EASO) Insurgent strategies - intimidation and targeted violence against Afghans (Executive summary), December 2012. http://easo.europa.eu/wp-content/uploads/192143_2012_5967_EASO_Afghanistan_II.pdf

88. The Tribunal notes that the applicant's [occupation]/translation employment was in Kabul, a location that DFAT assesses is firmly under the control of the Afghan Government. In a report of October 2014 on the conditions in Kabul, DFAT made the following assessment.

3.1 Overall, DFAT assesses that the Government maintains effective control of Kabul, due to a range of counter-measures put in place to prevent and respond to insurgent attacks. The relatively high level of state protection available in the city, including in formal, informal and illegal areas, has been an important driver of large-scale urban migration to Kabul since 2001.¹⁹

89. Importantly, the applicant has never been a government employee.

90. At the hearing, the applicant claimed that he knew of people who had been targeted for working with foreigners (doing translation work) or for [occupation]. He said that he knew of someone who was doing translation work who was shot in Helmand province on his way to Kabul. Once again, the Tribunal notes that this person was targeted outside of Kabul.

91. The country information also does not identify that [occupation] or translating from English has been a reason for the Taliban to target a person. The Tribunal has not seen any country information to show that [these] [occupation]s have a real chance of serious harm or real risk of significant harm than other [occupation]s because of this responsibility. The Tribunal does not accept that the applicant has a real chance of serious harm or a real risk of significant harm arising from his past employment as an [occupation] or as a translator in the private sector.

92. The Tribunal notes there is ample country information, including information provided by the applicant, that insurgents have targeted foreign interests, and that accommodation compounds, restaurants and places of work of foreigners. There is also information that certain Afghan employees are at risk of harm, in particular interpreters working for foreign military personnel. A Danish Immigration Service's report of May 2012 agreed, stating:

People working for US military or ISAF run a higher risk than other groups, according to IOM. Translators are more at risk than other employees such as cleaning staff, which IOM explained by the fact that translators are more in contact with the military staff.²⁰

93. However, as already noted, the Tribunal does not accept that the applicant did any translation work in relation to [military] and furthermore he has never claimed to have worked as an interpreter in *direct* contact with foreign military personnel. His association with "foreigners" was indirect.

94. The Tribunal does not accept that the applicant will be harmed because of his employment as a [occupation] or translator. The applicant on return to Kabul may seek to return to his previous employment in education or interpreting/translation. The country information indicates that the threat to [occupation]s has been in locations mostly under Taliban control or influence, which does not include the applicant's home region of Kabul. The Tribunal considers that should the applicant return to his employment in this field, in Kabul, the chance that he would be harmed one that is speculative only, and does not constitute a real chance, or a real risk, of occurring. The Tribunal does not accept that the applicant will be

¹⁹ DFAT Thematic Report Conditions in Kabul 3 October 2014

²⁰ Danish Immigration Service - Afghanistan; Country of Origin Information for Use in the Asylum Determination Process; Report from Danish Immigration Service's fact finding mission to Kabul, Afghanistan, 25 February to 4 March 2012; published May 2012 (p 17)
<http://www.nyidanmark.dk/NR/rdonlyres/3FD55632-770B-48B6-935C-827E83C18AD8/0/FFMrapportenAFGHANISTAN2012Final.pdf>

face a real chance of serious harm, or a real risk of significant harm, if he was to return to Kabul to be a [occupation] or translator.

95. At the hearing the applicant pointed out that the Taliban target vehicles which transport government workers. The Tribunal is prepared to concede that there may have been such incidents in the past and something similar may occur in the future; however, the applicant has never been a government worker as such and he does not have to become a government worker on his return to Kabul.
96. The Tribunal considers that the applicant's connections to the government or to the international community in Afghanistan to be tenuous and limited. He was employed [in occupation] and he did translation work up until the first half of 2012. The Tribunal does not accept that these roles in the private sector would lead the Taliban to impute that the applicant is pro-Afghan government, or would lead them to seek to harm the applicant because of his employment.
97. The Tribunal is not satisfied on the evidence that the Taliban are such a well-organised and efficient organisation that they would file away personal data about a low-profile person with whom they had dealings in the past (2012 in this case), and use that information to harm such a person in a different part of Afghanistan more than 3 years later. The Tribunal does not accept on the evidence before it that members of the Taliban, who operated in Ghazni in 2012, would learn of the applicant's return to Kabul in late 2015 and then seek to harm because of his work up until 2012 or his residence in Australia.
98. The Tribunal finds that the applicant's claims that he would be harmed because of an imputed pro-Government political opinion because of his employment, or that he would be harmed because he has been a [occupation] or translator, is not made out. The Tribunal finds that the applicant does not face a real chance of persecution harm for these reasons, now or in the reasonably foreseeable future. The Tribunal finds that the applicant does not have a well-founded fear of persecution for these reasons.
99. The applicant has claimed that as a returnee from the West, he would be readily identified, which would lead to him being harmed by the Taliban. Essentially, this was a different aspect of his claim to fear persecution for reasons of his imputed political opinion in support of the foreign interests in Afghanistan.
100. The Tribunal notes the following country information about returnees from outside of Afghanistan.

Since 2002 an estimated 5.8 million Afghan refugees—25 per cent of Afghanistan's population—have returned to Afghanistan, predominantly from Pakistan and Iran; 4.7 million of those with the assistance of the UNHCR. The rate of returns slowed in 2013 compared to previous years. The UNHCR estimates 40 per cent of these returnees have been unable to reintegrate in their home communities due to a lack of internal security and problems with access to land, shelter, services and livelihoods. Approximately a third of returnees have chosen to settle in new locations, mostly in urban areas.

Returnees generally have lower household incomes and higher rates of unemployment than established community members. Those returnees who receive cash or in-kind reintegration assistance on return to Afghanistan are therefore more likely to resettle successfully. Men of working age are more likely to be able to return successfully than unaccompanied women and children without the assistance of family or tribal networks. Returnees who have obtained foreign language and computer skills (often as a result of their time in another country) may be best placed to find well-paid employment, including in major

urban areas. Those who have not obtained useful skills whilst seeking protection outside Afghanistan often seek to depart Afghanistan again.

At present, all involuntary and most voluntary returnees from Western countries are to Kabul. A high proportion of returnees choose to remain in Kabul rather than return to other places of origin. DFAT assesses that because of Kabul's size and diversity, returnees would be unlikely to be discriminated against or targeted on the basis of ethnicity or religion.²¹

101. Specifically regarding returns from the West, DFAT in March 2014 stated:

DFAT assesses that there is no evidence to indicate that low-profile individuals are subject to discrimination or violence as a result of them having spent time in western countries.

More broadly, many Afghans—including Hazaras—regularly travel abroad, to Iran, Pakistan and also to Europe and other western countries to seek work and greater economic or educational opportunities. Even under the Taliban regime, Afghans continued to travel abroad to work or study, and then returned to the country. Representatives of the several European countries that regularly conduct involuntary returns to Afghanistan have told us they are not aware of any returnees having suffered harm due to a prior claim for asylum²²

102. The Tribunal also notes information about civilians who are accused of being spies. The UK Home Office in a report on those perceived to be supporting the government or international forces²³ provided the following information about civilians accused of spying.

2.2.37 The EASO report provided the following information about people accused by the Taliban of being spies:

Civilians accused by the Taliban of being a spy face a high risk of being targeted in areas under the sustained control of the Taliban, which will very often result in the death of the victim. This risk is low in the cities of Kabul, Herat and Mazar. However, individual and specific circumstances might lead to an increased risk. If a low profile civilian accused of being a spy can flee the area and resettle in a safer area, he can normally escape targeting by insurgents, unless there are specific individual circumstances which would preclude this possibility.²⁴

103. The Tribunal notes more recent reports of men being harmed after returning to Afghanistan from Australia. The Tribunal noted that these men were harmed outside of Kabul, travelling back to their home region in Jaghori. The Tribunal notes that in Kabul, where the Tribunal was assessing the prospect of being harmed, the country information was available that the applicant would not be targeted for harm because of his living in the West, his failed asylum claim or any imputation that he is a Western spy.

104. The Tribunal does not accept that the applicant faces harm because of any of the above reasons. The Tribunal considers that the applicant will be able to reside in Kabul, a location where the applicant has resided for many years, and would not be targeted because of his

²¹ Department of Foreign Affairs and Trade, DFAT Country Report Afghanistan, 26 March 2014

²² Department of Foreign Affairs and Trade, DFAT Thematic Report Afghanistan, Hazaras in Afghanistan and Pakistan, 26 March 2014

²³ Country Information and Guidance Afghanistan: persons supporting or perceived to support the government and/or international forces February 2015

²⁴ European Asylum Support Office (EASO) Insurgent strategies - intimidation and targeted violence against Afghans (Executive summary), December 2012. http://easo.europa.eu/wp-content/uploads/192143_2012_5967_EASO_Afghanistan_II.pdf

residence in the West or outside of Afghanistan. The Tribunal finds that the applicant does not have a real chance of serious harm for because of his living in the West, his failed asylum claim or any imputation that he is a Western spy (or any combination of the above), now or in the reasonably foreseeable future. The Tribunal finds that the applicant does not have a well-founded fear of persecution for these reasons.

105. The Tribunal accepts that the applicant has a highly visible [physical condition]. While the Tribunal accepts that the applicant has suffered discrimination in the past because of this, he has managed to finish high school and obtain further education and subsequently he was able to find work. On the evidence before it the Tribunal finds that the applicant does not have a well-founded fear of persecution for reasons of his [physical condition].
106. Having assessed the applicant's claims individually and cumulatively, the Tribunal finds that the applicant does not have a well-founded fear of persecution by the Taliban, Daesh (ISIS) or other extremist group for reasons of his actual or imputed political opinion, his Hazara ethnicity or Shia religion, his past and possible future employment as a [occupation]/translator, his failed bid for asylum in Australia, his residence in a Western country, his [physical condition] or any combination of the above circumstances and attributes.
107. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

Complementary protection

108. Further to the claimed Refugees Convention fears analysed above, the applicant raised the issue that he may be significantly harmed in the generalised violence in Kabul. It was argued that because of the particular circumstances of the applicant he was a greater risk of harm than the general population.

109. Subsection 36(2B)(c) of the Act provides:

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

...

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

110. In *SZSFF v MIBP* [2013] FCCA 1884 the presiding judge considered the qualification in s.36(2B)(c) to the complementary protection criterion. The Judge stated:

...s.36(2B)(c) contemplates that a risk may be faced by a section of the population and by the applicant personally, as the applicant states at particular (e). Properly construed, the complementary protection provisions and, specifically, s.36(2B)(c) emphasise the requirement that the real risk of significant harm must be a personal risk. That is, it must be a risk which is faced by the individual personally in light of the individual's specific circumstances.

The prevalence of serious human rights violations (in the context of generalised violence) in the destination country will not, of itself, be sufficient to engage a non-refoulement obligation for all people who may be returned to that country. However, where serious human rights violations in a particular country are so widespread or so severe that almost anyone would potentially be affected by them, an assessment of the level of risk to the individual may disclose a

sufficiently real and personal risk to engage a non-refoulement obligation under the ICCPR and/or CAT. As such, s.36(2B)(c) does not necessitate in all cases that the individual be singled out or targeted for any particular reason. What is ultimately required is an assessment of the level of risk to the individual and the prevalence of serious human rights violations is a relevant consideration in that assessment.²⁵

111. The Tribunal has considered the applicant's circumstances with respect to this point. For the reasons provided under the heading "Well-founded fear of persecution", the Tribunal has not accepted that the applicant will be specifically targeted for harm in his personal circumstances by the Taliban or other insurgent groups in Kabul. The Tribunal notes that there is a level of violence in Kabul, but as discussed with the applicant at the hearing, the country information shows that the Taliban are at present targeting individuals and locations that are associated with government and foreign related interests. The most recent attacks, on 8 August 2015 are no exception: the targets were said to be NATO troops and contractors, a police academy and another government target.²⁶
112. The Tribunal accepts that there has been violence against the civilian population in Kabul, that there have been a number of civilian casualties (deaths and injuries) of people caught up in the targeted attacks.
113. While the Tribunal accepts that terrorist attacks do occur in Kabul from time to time, the Tribunal considers that this is a risk that is faced by the population generally, and that the applicant is not personally at greater risk in this generalised violence context than the general population in Kabul. The Tribunal does not accept that there is any particular attribute of the applicant that would lead him to be at a greater risk of harm in the generalised violence in Kabul, now and the reasonably foreseeable future.
114. Having considered the country information detailed above, and the information as provided by DFAT regarding the level of security in Kabul, including the risk of deterioration in the security situation, the Tribunal does not accept that the level of generalised violence in Kabul, now and in the reasonably foreseeable future is so widespread that the applicant faces a real risk of significant harm, as defined in the Act.
115. The Tribunal finds that the applicant does not face a real risk of significant harm arising from the generalised violence in Kabul.
116. Having considered the individual and cumulative effects of the applicant's background, claims and circumstances, the Tribunal does not accept that there is a real chance that the applicant will be persecuted for one or more of the Convention reasons if he returns to Afghanistan. The Tribunal does not accept on the evidence before it that the applicant has a well-founded fear of being persecuted for one or more of the Convention reasons if he returns to Afghanistan now or in the reasonably foreseeable future.
117. Having regard to the findings of fact above, the Tribunal does not accept on the evidence before it, that there is a real risk that the applicant will suffer significant harm from the Taliban or any other person in Afghanistan, because of his race and religion, actual or imputed political opinion, his being in Australia and seeking asylum, or his [physical condition].

²⁵ *SZSFF v MIBP* paras 33 - 34

²⁶ G. Toppo, 'Afghan capital hit by wave of deadly terror attacks', *USA Today*, 8 August 2015, accessed at <http://www.usatoday.com/story/news/world/2015/08/08/kabul-military-base-attack-foreign-contractors/31331351/> on 17 August 2015.

118. The Tribunal has considered these claims individual and cumulatively. The Tribunal is satisfied that there would not be a real risk that the applicant will suffer significant harm as defined in subsection 36(2A) of the Migration Act if returns to his home region of Kabul. The Tribunal therefore find that there is taken not to be a real risk that he will suffer significant harm in Afghanistan in accordance with paragraph 36(2B)(a) of the Act.
119. The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa) of the Migration Act.
120. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

Filip Gelev
Member