

1316262 (Refugee) [2016] AATA 3691 (8 April 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1316262
COUNTRY OF REFERENCE:	Afghanistan
MEMBER:	Mara Moustafine
DATE:	8 April 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 08 April 2016 at 3:36pm

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, [named], claims to be a citizen of Afghanistan, of Sayed (or Sadaat) ethnicity, identifying as a Tajik and a Shia Muslim. He claims he was born in [year], although the Department's Age Determination Unit have assessed him to be older.
3. The applicant arrived in Australia by boat [in] June 2012 and applied for the visa [in] November 2012. A delegate of the Minister for Immigration refused to grant the visa [in] September 2013 and the applicant has applied to this Tribunal for review of that decision, providing a copy of the decision. A summary of the relevant law is set out at Appendix A.
4. The applicant appeared before the Tribunal on 21 October 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Dari and English languages, although at various times, he addressed the Tribunal in English. The applicant was represented in relation to the review by his registered migration agent.
5. The issues in this review are whether the applicant has a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention in Afghanistan and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm.

CONSIDERATION OF CLAIMS AND EVIDENCE

Materials before the Tribunal

6. The Tribunal has had regard to the applicant's written and oral evidence to the Department and the Tribunal, including as set out in Appendix B. At the start of the hearing before the Tribunal the applicant affirmed that his evidence to date was true and correct.
7. The Tribunal has also had regard to a range of independent country information about Afghanistan, including that referred to in the delegate's decision and provided by the applicant's representative.

Country of reference

8. The applicant stated that he was born in [City 1], Kurram Agency, Federal Autonomous Tribal Area, Pakistan, but was not a citizen of Pakistan as his parents are from [home town in] [District 1], Logar province, Afghanistan and came to Pakistan illegally.
9. While the applicant was born in Pakistan and lived there all his life, there is no evidence before the Tribunal that indicates that he has a legal right to enter and reside in Pakistan or any other third country. On the basis of his father's *taskera* and in the absence of evidence to the contrary, the Tribunal accepts that the applicant is a national of Afghanistan and has assessed his claims against Afghanistan as his country of nationality and his receiving country.

Background

10. In his protection visa application, the applicant indicated that his family fled from [District 1], Logar province in Afghanistan to [City 1] in Pakistan some time before he was born. Although the applicant claimed he was born in [year] ([age] years old when he arrived), he was assessed by the Department's Age Determination Unit as being over 18 years old and was assigned a nominal birthdate of 31/12/[year].
11. The applicant claimed to be of Sayed ethnicity, identifying as a Tajik, a Shia Muslim by religion and a Dari speaker. He is unmarried. His mother and [siblings] remain in [City 1], while [his] sister lives in Kabul with [her family]. His father died some years ago. He had [number] years' primary school education in [City 1] ([specified years]) and studied English for a year ([specified years]). He worked in his father's [business] ([specified years]) and as [an occupation] in [another business] in Peshawar ([specified years]).

Applicant's Claims

12. Based on the statement submitted with his protection visa application, the applicant's claims can be summarised as follows:
 - a. He cannot go back to Afghanistan because of war. The Taliban is there and they attack and kill the Shia people. The general safety of the environment is not good. There is not a good education system so he does not have the opportunity to study.
 - b. He went to Kabul to visit his sister for about four days in about 2007, escorted from Pakistan by his [sister's husband]. 'Despite being very young at the time', he 'clearly recalls the situation being very dangerous', with explosions occurring daily.
 - c. While in Kabul, he obtained a taskera stating that he was born in Logar Province, which he later lost in Pakistan. Since arriving in Australia, he has made attempts to get a new *taskera*, which his sister's husband in Kabul got for him by visiting the authorities.
 - d. His sister and her family live in fear of attack because of their Shia religion and the general violence. They only have a small house and much of their earnings go towards supporting his parents in [City 1] and her sister's husband's parents in Kabul. Were it not for her husband's need to stay in Kabul with his family, his sister would be residing with the rest of her family in Pakistan.
 - e. The applicant is afraid that, as he has no familial or tribal connections in Logar Province, he will be persecuted as a Shia or deprived of his basic needs to the point that it would affect his ability to subsist. His parents have told him that the land their family once owned in Logar Province has since been occupied by 'other people'. He fears that if he went back to Logar Province and attempted to reclaim the land, he would be targeted by the current occupants.
 - f. He is afraid of relocating to another place like Kabul because of the dangerous security situation. He has extremely limited work and education experience, and fears he will become destitute.
 - g. Having spent so much time outside Afghanistan, he is immediately perceived as a Pakistani because of his accent and is immediately recognisable as a Shia because of his scars from self-flagellation.
 - h. The situation in [City 1] has got progressively worse over the past few years, with the Taliban constantly blocking the road, the Pakistani Government failing to protect people and Shias regularly being slaughtered on the roads.
 - i. The applicant cannot safely return to Afghanistan and cannot stay in Pakistan.
 - j. The applicant fears that if forced to return to Afghanistan, he will be arrested, detained, abused and/or killed by the Taliban and anti-Shia groups because of his Tajik ethnicity and Shia religion.

- k. He also fears he will be harmed/mistreated because of his membership of any one or more of the following particular social groups: minor males in Afghanistan; minor Shia males in Afghanistan; minor Shia Tajik males in Afghanistan; and/or failed Afghan asylum seekers.
13. In her pre-hearing submission the representative outlined the background to the applicant's case; and, noting that the delegate found that the applicant faced a real chance of persecution in his home area of Logar province, addressed two issues: whether it was reasonable for the applicant to relocate to an area of Afghanistan where there was no appreciable risk of harm; and whether he was entitled to complementary protection. In the context of relocation, the submission addressed the issues of traditional support mechanisms, employment and safety in Kabul, including excerpts of relevant country information, to conclude that relocation to Kabul was not reasonable. With regard to complementary protection, the representative concluded that, country information and the experiences of the applicant in Afghanistan supported the finding that the mistreatment or harm, which the applicant would face if removed from Australia, would amount to 'torture, cruel or inhuman treatment or punishment and degrading treatment or punishment'.
 14. Attached to the submission was a copy of a document and translation purporting to be the applicant's *taskera*, issued [in] 2012, which stated that he was [under 18] years old in 2012, and born in [home town] in Logar province.
 15. Relevant points from the applicant's hearing before the Tribunal were as follows:
 - a. As it had been three years since his interview, he could not remember things.
 - b. His mother told him last time he spoke to her that his [relative's] house in [District 1], Logar province was recently attacked and his [family members] were killed in the bomb explosion. She also told him that, when his [sibling] visited [District 1] to express condolences, [the sibling] was beaten by people who had taken over his family's land.
 - c. He was born in [City 1], although his family was originally from Logar. He does not know when they moved to Pakistan. He is now [number] years old.
 - d. His older sister is married and living in Kabul with her husband and [number] children. Her husband, whose family had always lived in Kabul, has his own [business].
 - e. His mother and [siblings] are in [City 1]. His father died around 2007. He previously had a [business].
 - f. He could not remember when he went to school but thought he completed five years. He also went to English classes at [name] English centre for about 6 months.
 - g. He could not remember what he did after that but thought he just stayed home in [City 1] and did not work because he was young. He gave no response when asked why he did not go to school.
 - h. The applicant left [City 1] for Peshawar when fighting started between Sunnis and Shias to escape recruitment into the Shia militias. This was about three and a half years before he came to Australia, around 2009.
 - i. He stayed in Peshawar for a month, working in a restaurant. One day a customer, to whom he told him his story, said he was taking people to Australia and that he could be safe there. The applicant's mother thought this was a good idea and she and his sister's husband gave the man money to take the applicant to Australia.
 - j. Asked what he did during the two and a half years between the time he went to Peshawar and came to Australia, the applicant said he spent about a year in Indonesia but was not sure about the rest of the time. He said he worked in the restaurant either for one or three months, but could not remember.
 - k. The applicant said he attended his sister's wedding but could not remember when it was and that perhaps he was 12 years old at time.

- l. He said he also went to Afghanistan once with his father and obtained an Afghan *taskera* in [District 1], although he could not remember how old he was at the time and why they made him a *taskera*.
 - m. He initially said he could not remember if he had been to Afghanistan on any other occasion, but later said he also went to Kabul (Qualacha) once after his sister got married, together with her and his brother-in-law a week after their marriage in [City 1]. He did not remember how many times he had been to Afghanistan, or when he was last there.
 - n. Asked what he thought might happen if he went to Afghanistan now, the applicant said he would be killed, though he did not know by whom. He asked rhetorically who had killed his [relatives] in Afghanistan and that the Taliban killed anyone. This was why he came to Australia in order to be safe.
 - o. Asked why he would be killed, the applicant said variously because he was a Shia, because his land in [District 1], Logar had been taken and if he went to ask about his land, 'they' would kill him, just as they attacked his [sibling] when [visiting] Afghanistan recently for the funeral of his relatives; and because there was fighting, danger and poor security everywhere in Afghanistan. Why else had he taken the dangerous boat journey to Australia?
 - p. He spoke to his mother every three weeks and to his sister in Kabul 2-3 times per month, most recently 3 weeks ago at Eid.
 - q. In a discussion as to whether he could live in Kabul, the applicant said he could not live anywhere in Afghanistan as there was fighting everywhere and no one knew when the Taliban might come looking for them. He was not saying that the Taliban would target him in particular, but that they were going to kill everyone. Therefore his life would be in danger and he would be killed. If he had been safe, he would not have needed to come to Australia.
 - r. Another reason he could not live in Kabul was that the people who took his family's land would find him anywhere and would kill him if they found him. Asked who these people were, the applicant said they were 'Afghans from Afghanistan and Sunni Muslims'. Asked if he ever had contact with these people, the applicant said he had not seen them or been threatened by them.
 - s. The applicant added that sometimes he had come under attack, though he did not know where and from whom. He showed the Tribunal a scar across his back, saying he did not see who attacked him or when and where the attack took place – Afghanistan or Pakistan. Maybe he was injured in fighting between Sunnis and Shias in Pakistan; or by the people who took his land in Afghanistan.
 - t. Asked about the document he submitted to the Tribunal at the start of the hearing, the applicant said it was his father's *taskera* and he had given it when asked if he had any identity documents.
 - u. As for his own *taskera*, he said he got it in Afghanistan when he went there with his father. His brother-in-law had sent it to him when he was on Christmas Island. As the original had been lost, his brother-in-law went from Kabul to Logar and got a second copy, based on their records.
16. In her post-hearing submission, the applicant's representative addressed issues raised by the Tribunal at hearing, in particular the applicant's credibility, including his failing to remember, inconsistent information regarding fear in Logar and his *taskera*; and the situation of Shias in Afghanistan in the context of the current security situation in the country generally, in Kabul and in the foreseeable future. She concluded that the Tribunal should find that there is a real chance the applicant would be subject to serious harm in the reasonably foreseeable future for reason of his religion.

Consideration of applicant's claims

17. In assessing the applicant's claims, the Tribunal has carefully considered and weighed a range of independent material, including that referred to in the delegate's decision and in submissions from the applicant's adviser. The Tribunal has given weight to a number of reports prepared by the Australian Department of Foreign Affairs and Trade (DFAT),¹ as these are authoritative, very recent and prepared expressly for protection status determination purposes.
18. The Tribunal accepts that the applicant is a Shia Tajik born in [City 1] whose family originally came from Logar province in Afghanistan. Tajiks are the second largest ethnic group in Logar after Pashtuns [deleted]. [deleted].² In Logar province as a whole, the majority of the population are Sunni Pashtuns and the majority of the Tajik population are also Sunni.
19. At hearing the Tribunal discussed with the applicant a number of inconsistencies in his evidence on issues including, whether he obtained his *taskera* in Kabul with his sister (paragraph 11.c) or [District 1] with his father (paragraph 14.l); whether his family's land was taken over by relatives from whom he now fears harm (as stated in his Department interview, as recorded in the decision) or 'other people'/Pashtuns/Afghans (as stated in his statement of claims and at hearing). The Tribunal has noted the representative's submission that the applicant's age at the time of these events and the fact that his fears in [District 1] are derived from those of his parents may have resulted in his confusing the facts of the matter. Under the circumstances, the Tribunal is prepared not to attach weight to these inconsistencies.
20. The applicant's key claims are that if he returns to Afghanistan he will be harmed by the Taliban and anti-Shia groups because of his Tajik ethnicity and Shia religion; as a failed Afghan asylum seeker; and because of his membership of any one or more of the following particular social groups: minor males in Afghanistan; minor Shia males in Afghanistan; and minor Shia Tajik males in Afghanistan.
21. The Tribunal finds that, whether the applicant was born in [year], as claimed by him, or on [nominal birth date], as assessed by the Department (paragraph 10 refers), he is now between [age range] years old and is not a 'minor'. Therefore, the Tribunal is not satisfied that he is a member of the particular social groups listed above, as claimed.
22. With the exception of a vague claim at paragraph 14.r that sometimes he had come under attack, though he did not know where and from whom, the applicant has not claimed that he personally suffered harm for reasons of his Tajik ethnicity or Shia religion when he was in Afghanistan in the past. In assessing whether the applicant faces the risk of serious harm for these reasons in the future, the Tribunal notes that the most recent UNHCR guidelines state that:

UNHCR considers that individuals who belong to one of Afghanistan's (minority) ethnic groups, particularly in areas where they do not constitute an ethnic majority, may be in need of international refugee protection on the basis of their nationality or ethnicity/race, depending on the individual circumstances of the case³.

¹ These include DFAT, Country Information Report Afghanistan, 18 September 2015 and DFAT, Thematic Report: Conditions in Kabul, 18 September 2015, both of which were discussed with the applicant at hearing and are cited in his representative's post-hearing submission. The Tribunal has also had regard to the more recent, DFAT Thematic Report; Hazaras in Afghanistan, 8 February 2016, whose substance on issues including the security situation, ethnicity, Shias, Kabul is consistent with the earlier reports.

² [Deleted]

³ UNHCR, 2013, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan, 5 August.

23. As a Dari speaking Tajik/Sayed Shia, the applicant has a minority ethnic/religious status in Logar, a highly insecure area controlled by the Taliban, where other insurgent groups, including Daesh are active⁴ and the government has little influence or support outside the district centres. The Tribunal further notes that the applicant has very tenuous links to his family's place of origin, where he has only travelled once as a child, and does not have direct family living there. It is prepared to accept that were the applicant to go to [District 1], the current occupants of his family's land may seek to harm him. In light of this, the Tribunal accepts that there is a real chance that the applicant will suffer serious harm for a Convention reason if he returns to Logar province, as did the Department in its primary decision.

State Protection

24. Given that the Afghan government and security forces are struggling to exercise effective control over large parts of Afghanistan, including Logar province, the Tribunal finds that state protection will not be effective or available to the applicant in that place.

Relocation to Kabul

25. In view of its finding above, the Tribunal has considered whether the applicant could live safely in a different part of Afghanistan and whether it would be reasonable for him to relocate.
26. Country information, including the latest DFAT report, indicates that large urban areas in Afghanistan with mixed ethnic and religious communities offer greater opportunities for employment, access to services and a greater degree of state protection than many other areas. Kabul, the largest urban centre, with an estimated population of over 4 million, is considered to provide the most viable option for many people for internal relocation and resettlement. This applies to those displaced by conflict and natural disasters, economic migrants and returnees to Afghanistan. Better employment opportunities and greater levels of security are important motivations for migration to Kabul, where ethnic and sectarian-based violence is rare.⁵ It is significant that the Tajiks are the largest ethnic group in Kabul at 45%, with Hazara and Pashtun people each making up a further 25% of the Kabul city population⁶.
27. The Tribunal has considered the applicant's claims that he could not live anywhere in Afghanistan, including Kabul, because there is fighting, danger and poor security everywhere and the Taliban, while they may not target him in particular, are going to kill everyone.
28. As discussed with the applicant at hearing, while the ongoing insurgency and deteriorating security situation across the country mean that the government does not exercise uniformly effective control over all parts of the country, government control tends to be better in major urban centres where government forces maintain strong control, such as Kabul. The Tribunal has had regard to the representative's submission, which lists a series of security incidents in Kabul, noting DFAT's comment that 'whilst the primary targets of high profile attacks in Kabul are government institutions, military and security facilities or personnel, political figures and international organisations, these have caused significant civilian casualties'.⁷
29. In the Tribunal's view, these attacks need to be seen in the context that Kabul has a population of four million and that the government maintains effective control over Kabul and has a range of counter-measures in place to prevent and respond to insurgent attacks.⁸ The available country

⁴ European Asylum Support Office, 2015, EASO Country of Origin Information Report Afghanistan Security Situation, January.

⁵ DFAT, Thematic Report Conditions in Kabul, 18 September 2015.

⁶ Katzman, K 2012, *Afghanistan: Post-Taliban Governance, Security, and U.S. Policy*, 21 September, p.90 <<http://www.fas.org/sgp/crs/row/RL30588.pdf>

⁷ DFAT, Thematic Report Conditions in Kabul, 18 September 2015.

⁸ *ibid.*

information considered as a whole indicates that the chance or risk of the applicant being seriously or significantly harmed in such a circumstance would be best described as remote, and not a real chance or real risk. Further, the Tribunal does not find it plausible the applicant's claim that he will be targeted and killed in Kabul by the 'other people', 'Afghans from Afghanistan and Sunni Muslims' who took his family's land but with/by whom he has never had contact or been threatened.

30. Notwithstanding that there have been some incidents where Shias have been targeted, DFAT has indicated that there is no credible evidence that ordinary Shia Muslims are systematically targeted on the basis of their religious affiliation. DFAT also advises that ethnic based violence in Kabul is rare.⁹ The Tribunal accepts that the applicant is a Shia Tajik and will attend mosque and religious events; however, given the country information viewed overall, it finds that the chance or risk he will be seriously harmed or significantly harmed for reasons of his ethnicity or religion is remote, his alleged self-flagellation scars notwithstanding.
31. The Tribunal has considered the DFAT have also reported that the number of active ISIS (Daesh) militants remain low and that they assessed that ISIS currently has limited capacity and influence in Afghanistan and that civilians in Afghanistan face a low risk of violence from groups affiliated with ISIS compared to the risk of violence generally in the country.¹⁰
32. The applicant has claimed that he will be immediately perceived as a Pakistani because of his accent and the long time he has spent outside Afghanistan. However, the Tribunal is not satisfied that this will result in harm to him, given that millions of Afghan refugees have returned to Afghanistan since 2002 from Pakistan or Iran, many of whom were either very young when their families fled Afghanistan or who were born outside of Afghanistan. In February 2012, the *United Nations News Service* stated that '5.7 million Afghan refugees have returned from Pakistan and Iran, representing nearly a quarter of Afghanistan's population'. According to the International Organization for Migration (IOM), more than 70,000 undocumented Afghans (some of whom were born in Pakistan and have never been to Afghanistan) returned from Pakistan, either voluntarily or involuntarily, in the first four months of 2015 alone¹¹.
33. Nor does the Tribunal accept that the applicant faces a real chance or real risk of serious harm or significant harm in Kabul as a failed asylum seeker returning from the West. There is no recent information before the Tribunal that returnees or failed asylum seekers or those who have spent time outside Afghanistan have been seriously or significantly harmed in Kabul. DFAT have stated that because of Kabul's size and diversity returnees are unlikely to be discriminated against or subjected to violence on the basis of ethnicity or religion.¹² While they have noted occasional reports of returnees from western countries alleging that they have been kidnapped or otherwise targeted on the basis of having spent time in a western country, they assess that in general returnees from western countries are not specifically targeted on the basis of their being failed asylum seekers.¹³
34. Having regard to the country information concerning the overall situation for Tajiks, Shias and failed returned asylum seekers from western countries and the country information that indicates that the Government maintains effective control of Kabul and the applicant's individual circumstances, the Tribunal is not satisfied that the applicant faces a real chance of persecution in the reasonably foreseeable future in Kabul on account of being a Tajik Shia or as a failed returned asylum seeker from the West from the Taliban, other insurgent groups, Sunnis, the state or anybody else.

⁹ *ibid.*

¹⁰ DFAT Country Information Report Afghanistan, 18 September 2015.

¹¹ *ibid.*

¹² *ibid.*

¹³ *ibid.*

35. The UNHCR has indicated that the reasonableness of relocation in Afghanistan depends on the availability of traditional support structures such as family and tribal support networks, access to shelter, the availability of infrastructure and access to essential services such as sanitation and health care, livelihood opportunities and the scale of internal displacement in the area.¹⁴
36. The Tribunal has considered the information contained in the representative's submissions and in DFAT's recent report on Conditions in Kabul¹⁵, suggesting that relocation to Kabul may be unreasonable because unemployment is widespread and underemployment is common, the cost of living is relatively high, particularly for housing and there are difficulties with utilities in what is one of the poorest cities in the world.
37. At the same time, the DFAT report notes that Kabul's size and diversity means that there are large communities of almost all ethnic, linguistic and religious groups in the city; and that given the growth of Kabul's population since 2001, many individuals have members of their extended family in Kabul who can assist with their relocation. It is widely recognised that traditional extended family and tribal community structures 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 subsistence¹⁶.
38. The DFAT report also notes that internal relocation to urban areas is generally more successful for single men of working age, provided they are able to make use of family or tribal networks as a lack of financial resources and employment opportunities, compounded by Kabul's relatively high cost of living, particularly for housing, are the greatest constraints on successful internal relocation. The report states that:

Because of the city's size and growth, Kabul offers a greater range of employment opportunities than other areas of Afghanistan. Over the last decade, employment growth has been strongest in Kabul's service sector, including small businesses such as family-owned markets, and in the construction industry...

...Those who have foreign language and computer skills tend to be best placed to find well-paid employment in Kabul¹⁷.

39. The Tribunal notes that the applicant is a young single man of working age. While the applicant may have had limited education and work experience, he has shown himself to be enterprising enough to find work as [an occupation] in a [business] in Peshawar before coming to Australia and, as demonstrated at the hearing, speaks reasonable English, which he studied for about six months in [City 1]. Importantly, the applicant has established family links in Kabul, through his older sister who has been living there with her husband and children for almost a decade. The applicant has visited them in Kabul on at least one occasion and stays in touch with his sister by telephone every two to three weeks. The applicant's brother-in-law, who is from a Kabul family, owns his own [business] there. By the applicant's evidence, his brother-in-law, has shown him considerable support in the past, including providing some of the money for his travel to Australia (paragraph 12.i) and travelling to Taliban-controlled Logar province to obtain a copy of the applicant's *taskera* to send to him at Christmas Island (paragraph 14.u).
40. In the Tribunal's view, with such ties to family in Kabul and his own initiative and experience, the applicant will have support in finding accommodation and employment in Kabul, perhaps

¹⁴ UNHCR, 2013, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan*, 6 August

¹⁵ Department of Foreign Affairs and Trade, DFAT Thematic Report, Conditions in Kabul, 18 September 2015.

¹⁶ DFAT, Thematic Report Conditions in Kabul, 18 September 2015.

¹⁷ *ibid.*

with his brother-in-law or elsewhere, including in the service sector, and building a new life for himself. While the applicant may experience a degree of economic hardship, the Tribunal does not accept that the applicant will become 'destitute', as claimed, and that the chance that he will suffer discrimination or treatment amounting to either serious harm or significant harm is remote.

41. Under these circumstances, the Tribunal considers it reasonable for the applicant to relocate to Kabul in order to avoid the real chance of persecution in his home area.
42. Having regard to its findings of fact above, the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm for any of the reasons which have been advanced in support of his application. The Tribunal has considered the totality of the applicant's circumstances as a young Tajik and Shia returning to Kabul, where he has supportive family after spending some time seeking asylum in a western country, Australia. However, even taking into account the cumulative effect of these circumstances, the Tribunal does not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm as defined in subsection 36(2A) of the Migration Act.
43. Having considered all of the applicant's circumstances and relevant country information, the Tribunal finds that it would be reasonable for the applicant to relocate to Kabul to avoid the localised threat of serious harm that he faces in his home area, Logar province and that his fear of persecution in Afghanistan is not well founded.
44. Having also considered the independent country information and the applicant's individual circumstances in the context of complementary protection, the Tribunal finds that it would be reasonable for the applicant to relocate to an area of the country (Kabul) where there would not be a real risk that he will suffer significant harm and that 36(2B)(a) applies in his case.

CONCLUSIONS

45. 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).
46. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
47. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

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

Mara Moustafine
Member

APPENDIX A: RELEVANT LAW

49. 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

50. 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).
51. 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.
52. 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.
53. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
54. 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.
55. 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.
56. 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.

57. 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.
58. 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 gives rise to the fear is persecution.
59. 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

60. 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

61. 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 MILGEO* (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

62. 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').
63. 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').
64. '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.
65. 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.

State protection

66. Under s.36(2B)(b) of the Act there is taken not to be a real risk that an applicant will suffer significant harm in a country if the tribunal is satisfied that 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. That is, the level of protection must be such to reduce the risk of the applicant being significantly harmed to something less than a 'real risk': *MIAC v MZYLL* [2012] FCAFC 147.

Relocation

67. Under s.36(2B)(a) of the Act, there is taken not to be a real risk that an applicant will suffer significant harm in a country if the tribunal is satisfied that 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. That relocation must be 'reasonable' is also a requirement when considering the definition of 'refugee' and the tribunal draws guidance from the judgments of the High Court in *SZATV v MIAC* and *SZFDV v MIAC* which held that whether relocation is reasonable, in the sense of 'practicable', must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within

his or her country: SZATV v MIAC (2007) 233 CLR 18 and SZFDV v MIAC (2007) 233 CLR 51, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.

Section 499 Ministerial Direction

68. 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.

Credibility

APPENDIX B: MATERIALS BEFORE THE TRIBUNAL

69. The Tribunal has had regard to the following materials:
- The applicant's Protection visa application dated [in] November 2012 and accompanying papers, including the applicant's statement dated [in] November 2012;
 - The applicant's entry interview record dated [in] August 2012;
 - The recording of the applicant's Department interview held [in] September 2013
 - The application for review and accompanying papers submitted on 30 October 2013, including a copy of the delegate's decision record dated [in] September 2013;
 - A pre-hearing submission from the applicant's representatives dated 31 January 2014;
 - The oral evidence of the applicant at the Tribunal hearing on 21 October 2015;
 - A post-hearing submission from the applicant's representatives dated 16 November 2015.