

071246761 [2007] RRTA 147 (9 July 2007)

DECISION RECORD

RRT CASE NUMBER: 071246761

COUNTRY OF REFERENCE: Afghanistan

TRIBUNAL MEMBER: David B. Mitchell

DATE DECISION SIGNED: 9 July 2007

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies subsection 36(2)(a) of the *Migration Act* 1958, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship (the delegate) to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Afghanistan, arrived in Australia and applied to the then Department of Immigration and Multicultural Affairs (the Department) for a Protection (Class XA) visa. The applicant was granted a Subclass 785 (Temporary Protection) visa on the basis that he was assessed to be a person to whom Australia has protection obligations under the Refugees Convention.
3. The applicant applied for a further Protection (Class XA) visa. The delegate decided to refuse to grant the visa. The applicant sought review of the delegate's decision and the Tribunal (differently constituted) affirmed the delegate's decision.
4. The applicant was granted a Return Pending (Temporary) (Class VA) visa.
5. *[information about the applicant's visa deleted in accordance with s.431 as it may identify the applicant]*.
6. The applicant lodged an application for a different visa.
7. *[information about the applicant's visa deleted in accordance with s.431 as it may identify the applicant]*.
8. The applicant applied for a further Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by registered post.
9. The delegate refused the further visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
10. The applicant applied to the Tribunal for review of the delegate's decision.
11. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

12. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
13. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under 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).

14. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the *Migration Regulations* 1994.

Definition of ‘refugee’

15. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

16. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

17. 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.

18. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

19. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

20. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

21. 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.

22. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

23. 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.

24. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Convention ‘cessation’ – Article 1C

25. The definition of a refugee in Article 1A of the Convention needs to be read in the context of the succeeding sections of Article 1, including section C, which sets out the circumstances in which the Convention ceases to apply to a person who has previously been recognised as a refugee under Article 1A.

26. Paragraphs (5) and (6) of Article 1C provide for cessation of refugee status due to changed circumstances in the refugee’s country. Article 1C(5) applies to nationals who, because the circumstances in connection with which they were recognised as refugees have ceased to exist, can no longer continue to refuse to avail themselves of the protection of their country of nationality. Article 1C(6) applies to stateless refugees who, because the circumstances in connection with which they were recognised as refugees have ceased to exist, are able to return to the country of their former habitual residence.

27. Thus, Articles 1A(2) and 1C(5) and (6) turn upon the same basic notion: protection is afforded to persons in relevant need, that is, persons who have a well-founded fear of being persecuted, for Convention reasons, in the country or countries in respect of which they have a right or ability to access: *NBGM v MIMA* (2006) 231 ALR 380 at [44] citing *NBGM v MIMIA* (2004) 84 ALD 40 per Emmett J.

28. If a non-citizen, before entering Australia, suffered persecution or had a well-founded fear of it in their country, unless there have been real and ameliorative changes

that are unlikely to be reversed in the reasonably foreseeable future, then the person will probably continue to be one to whom Australia has protection obligations: *MIMIA v QAAH of 2004* (2006) 231 ALR 340 at [39]; see also *Chan* at 391, 399 and 406.

CLAIMS AND EVIDENCE

29. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

30. In its decision, the Tribunal (differently constituted) summarised the applicant's evidence and claims to date. The Tribunal (as presently constituted) accepts that the summary is an accurate account. It reads as follows:

[information about the applicant's history amended in accordance with s.431 as it may identify the applicant].

The Applicant is middle aged. He comes from a village called Village A in Jaghori District in Ghazni. He is from the Hazara ethnic group and a Shia Muslim. He has no formal education. Until he began his military service he worked in Kabul. The Applicant began his military service following the Communist coup. Military service usually lasted a number of years but as a result of changes in the regime some conscripts, including the Applicant, were asked to serve extra time. The interpreter at the interview in relation to the Applicant's original application confirmed that the Applicant's *taskera* indicates that he served a number of years and extra time. The Applicant's rank was that of an ordinary soldier and he was not involved in any fighting. He worked during the day but he says that he did guard duty at times at night. After completing his military service the Applicant ran a business in City N together with his sibling until the Taliban took control of that city. He then returned to Village A where he lived off his savings and where his family also had a small piece of land.

The Taliban took control of the Applicant's local area and they arrested and tortured the Applicant's sibling. The Applicant says that his sibling was detained when the Taliban came to search his home for weapons. The Applicant says that his sibling was detained for a period of time. He says that he himself was stopped by the Taliban when he had gone to the market in Village B to purchase food. He says that the Taliban asked him why he had long hair and why he did not have a beard. He says that the Taliban beat him, shaved his head and told him he had to grow a beard or he would be in trouble. He says that after that he did not go to the market but his sibling still went to the market.

The Applicant says that having seen how his sibling had been tortured he thought that if they took him they would kill him because he had done one thing more than his sibling, namely his military service. He says that he left his home and walked to Village B. From there he travelled in a vehicle to Town X where he crossed the border into Country R. In the statement accompanying his original application he said that he feared that if he returned to Afghanistan he would be imprisoned and executed or otherwise harmed by the Taliban because he was a Hazara and a Shia Muslim and he had done his military service under the Communist regime.

In the decision granting the Applicant a Subclass 785 (Temporary Protection) visa the delegate of the Minister referred to information about the massacre of Hazaras by the Taliban following their capture of Mazar-e-Sharif in August 1998 and to the Taliban's persecution of the Hazara minority. She referred in particular to the

assessment of the Australian Department of Foreign Affairs and Trade (DFAT) in April 1999 that 'it would be unsafe for Hazaras to return to Afghanistan for fear of persecution' (DFAT Country Information Report No. 107/99, dated 7 April 1999, CX34514). She found that the Applicant's fear of being persecuted for reasons of his race (Hazara) and his religion (Shia Muslim) was well-founded.

The Applicant says that he continues to fear that, if he returns to Afghanistan, he will be persecuted because he is a Hazara and a Shia Muslim and because he will be accused of being a Communist (as a result of having done his military service under the Communist regime).

31. In submissions made on behalf of the applicant in support of his application it was stated in part:

[information about the applicant's statement amended in accordance with s.431 as it may identify the applicant].

[The applicant] is a middle aged Shi'a Hazara from Jaghori District in Ghazni in Afghanistan. He is married with a number of dependent children. His family is to the best of his knowledge, residing illegally in Country R.

[The applicant] has no formal education. He has worked as a self-employed person since the late 1990s. He undertook compulsory military service under the Communist regime, where he was trained and practiced in his trade. He did not engage in fighting. Following military service, [the applicant] returned to operate the business with his sibling in City N. This is an area dominated by Pashtuns, and this caused [the applicant] to support the Harakat Party to ensure his own protection.

[The applicant] began experiencing persecution from the Taliban. The Taliban entered and searched [the applicant's] house when he was not present, and arrested his sibling. His sibling was subsequently detained for a period of time and tortured. [The applicant] was harassed by Taliban members in the marketplace in relation to his race, religion and service in the army. He was also derided for the length of his hair and not having a beard. The Taliban then publicly shaved his head and ridiculed him as an example of what happens to people of his background and appearance. These incidents caused [the applicant] to fear for his life and liberty and were the impetus for his decision to leave Afghanistan.

...

As outlined above, [the applicant's] sibling has been arbitrarily detained and tortured by the Taliban. [The applicant] has himself been publicly humiliated and harassed for his race, religion and for serving in the military during the Communist regime. [The applicant's] fear has also been heightened by the fact that the Wahdat (Khalili) has, since [the applicant's] departure from Afghanistan, searched his house and obtained written documentation of his support to Harakat Islami. They asked [the applicant's] wife where he was and the Wahdat officer in Jaghori District told her that the next time they came they would take her child if [the applicant] was not there. This last incident caused [the applicant's] wife to believe that the family may be targeted for further persecution and ultimately caused her to flee Afghanistan with her family for Country R. [The applicant] fears that members and supporters of the Taliban remain in his home district of Jaghori District, and that having previously identified him for public ridicule, will do so again, and perhaps cause him physical harm. [The applicant's] preparedness to remain apart from his wife and children for years is indicative of his strong subjective fear of persecution. [The applicant] fears

retribution from the Khalili faction that presently controls the Jaghori District area because of the support he gave to Harakat Islami, of which he was a member. [The applicant] joined and began supporting Harakat Islami after he returned from military service. Harakat Islami fought against the Taliban when they were in power and is an opponent of the Hezb-e-Wahdat (Khalili) faction which now controls Jaghori District. [The applicant] fears that he will be a target for retribution face [sic] if he returns to Afghanistan as the Khalili obtained written records of [the applicant's] support of Harakat Islami when they raided his house, [the applicant's] fear of retribution on these grounds has not previously been claimed as he claims that some people told him not to mention his membership of any Wahdat Party Australian authorities.

...

The applicant has been in Australia for several years. Since attaining his TPV, the applicant has been engaged in employment in two different industries. He has been working in a business in Town Y since. He has been employed apart from brief periods of unemployment between jobs. Whilst unemployed between jobs he did not draw on Centrelink monies but relied on his savings to support himself.

The current protection visa application

32. The applicant lodged an application for a further protection visa. He confirmed details contained in his previous visa application such as his date and place of birth, his citizenship and ethnicity, and his employment in Afghanistan. He stated that he received a number of years of school education. He stated that his parents are deceased, and that his wife and children, a sibling, and some relatives are living in Country R. He stated that he is in regular telephone contact with his wife and family in Country R. He described his religion as "Nil".

33. The applicant stated that he left Afghanistan because he feared persecution from the Taliban. In answer to the question *What do you fear may happen to you if you go back to that country?* the applicant stated:

[information about the applicant's history amended in accordance with s.431 as it may identify the applicant].

1. [Information deleted: s.431].
2. I am a Hazara. I fear persecution by resurgent Taliban and by other Pashtun.
3. I no longer believe in religion. The villagers of Village A are Shia Muslim and are religious. I would be seen as an apostate and I could be killed for this.
4. I refer to my previous applications for a protection visa and I rely on statements I made and documents provided in support of my claims.

34. In answer to the question *Who do you think may harm/mistreat you if you go back?* the applicant stated:

1. Wahdat members from my village and elsewhere in Jaghori District.
2. Taliban and other Pashtun.
3. Fundamentalists from my village who may regard me as an apostate.

35. In answer to the question *Why do you think this will happen to you if you go back?* the applicant stated:

1. My wife and children were forced to flee our village because of conflict and persecution against Harakat members and supporters.
2. The Taliban are getting stronger and will kill Hazaras when they can.
3. Once it becomes known that I am no longer a Shia Muslim and do not believe, I will be treated as an apostate and killed.

36. In answer to the question *Do you think the authorities of that country can and will protect you if you go back? If not, why not?* the applicant stated:

No. The government of Afghanistan does not have any authority in my village.

37. The applicant also provided a number of documents, including an original and translated extract of his military service record showing when he commenced service, that he was stationed at City N where he served until discharged.

38. The delegate refused the application for a further protection visa. The delegate did not accept that there is more than a remote chance that the applicant would be targeted as a Hazara in Ghazni simply because of his ethnicity. The delegate accepted that if the applicant was identified as a poor Moslem in Ghazni, it is possible that fundamentalists might harm him. Noting that state protection is of limited efficacy in Ghazni, the delegate found that the applicant may be at more than a remote chance of harm due to his religious views if he returned to Ghazni. However, the delegate found that the applicant could reasonably be expected to relocate to Kabul.

The application for review

39. The applicant applied to the Tribunal for review of the delegate's decision, and he provided the Tribunal with a copy of the delegate's decision record.

40. The application for review was listed for a hearing.

41. After normal business hours, the applicant's migration agent sent to the Tribunal facsimile submissions, together with an unsigned statement by the applicant. Also provided were news and other reports from various sources concerning the current situation in Afghanistan, and a document containing a few lines written in a language other than English which the agent stated was a letter from the applicant's family.

42. In his submissions, the agent referred to the continuing presence of the Taliban in Ghazni and Kabul provinces, and attacks on Hazaras, persecution in rural areas by reason of apostasy, persecution against former members or supporters of the by the Hezb-e-Wahdat warlords, and continuing persecution and lawless acts directed by warlords and militia against the civilian population and with no protection from the State.

43. In his unsigned statement, the applicant said:

[information about the applicant's history amended in accordance with s.431 as it may identify the applicant].

1. I make this statement in addition to previous statements that I have made to Department and/or to the previous Tribunal. I am middle aged. I fled the Taliban from my home village of Village A in Ghazni district and came to Australia. My wife and children subsequent fled from the village with the assistance of my sibling and went to Country R where they have since lived.
2. My village is in the vicinity of the Pashtun villages.
3. I fear to return to Afghanistan for 2 primary reasons, firstly in recent years the Taliban have become increasing aggressive and dangerous in rural Afghanistan. *[information about the applicant's history deleted in accordance with s.431 as it may identify the applicant].*
4. I am aware that with Australian troops fighting the Taliban in Afghanistan any Afghan who has lived in Australian [sic] or in other involved Western Countries for an extended period is easily identified and become a target along with Police officers for attack by the Taliban. Of course an ordinary Afghan such as myself has no protection from such an attack.
5. I also fear returning to my Village because I no longer believe in Islam. I have lived in Australia for several years and I have been able to compare the way of life here and the way of life in Afghanistan, where people are constantly being killed in the name of religion. I believe that Islam as practised by both Sunni and Shia in Afghanistan has done a great deal of harm to the people of Afghanistan and although I still believe in a God I totally reject the teachings of Islam or of any organised religion. I do not attend any mosque or any other religious place and I do not pray either publicly or privately.
6. My village remains a fundamentalist Shia Hazara village and if it were known that I did not believe I would be regarded as an apostate and I would be at risk of being killed by the Hazara militants or denounced to the Taliban and targeted by them.
7. I also fear returning to my Village because I was a supporter of the Harakat party and the area is now controlled by the supporters of Hezb-e Wahdat and Harakat members and supporters are targeted by Hezb-e Wahdat.
8. It is stated by the DIAC delegate that I am adaptable and could live in Kabul. I am not a single man. I have a wife and children and relatives who I am responsible for who are in City P. My sibling died several years ago and I have totally supported my wife and children and my relatives since my sibling died. The children are students. I am the sole source of support. It is unreasonable to expect that I and my family could move to Kabul. We have no money and no means of accommodation and no employment in Kabul. We have no relatives there and no one to take us in. We would not be able to survive there. I lived in Kabul for a short period as a young man. It was well before the Communist revolution and the subsequent civil wars. There was no conflict and Afghanistan was relatively prosperous. However since the conflicts of the last 20 years Afghans have become very suspicious of strangers and it is both difficult and dangerous to move to an area where you have no family and other contacts. To survive it is essential to have an extended family network or at least be known.

9. Further Kabul is from what I have heard is [sic] now a very expensive place to live except at subsistence level, some Afghans have prospered including those involved in the drug trade or if they have special skills and our [sic] employed by the Western agencies or companies or if they have key businesses. There is also great poverty in Kabul if you do not have the right contacts or skills. I have no means of surviving and supporting my family.
10. Hazaras are mainly centred in a part of Kabul where most live in abject poverty and where they have continued to suffer discrimination and attacks from Pashtun warlords and their militia who still have effective power in many parts of Kabul. The mainly Pashtun police are not interested in protecting Hazaras or pursuing complaints of atrocities against Hazaras.

The hearing before the Tribunal (as presently constituted)

44. A hearing was held at which the applicant was represented by his migration agent. The applicant gave oral evidence on affirmation via video link with the assistance of an interpreter in his first language. A summary of his evidence is as follows.

45. The applicant confirmed the details of his name, date and place of birth, level of education, country of nationality and citizenship, and ethnicity as set out in the current protection visa application. He said that he used to be a Shia Muslim, but he now follows no particular religion. He said that his village of Village A is located close to Village B, and that Town Z, in Jaghori District, is located in the vicinity of his village. He said that he speaks, reads, and writes in Dari, and that he has learnt how to speak, read, and write in English since his arrival in Australia.

46. In relation to his employment history in Afghanistan, he stated that he first worked in Kabul when he was a teenager, and he worked there for several years. In the army he used his trade, and then he opened a business in City N where he worked for a number of years. He said that after the Taliban came, he left City N and returned to his village where he worked in agriculture.

47. The applicant told the Tribunal that he is married with several children and he also regards the children of his deceased sibling, as his own children. He said several years ago, after his arrival in Australia, his wife and children fled to Country R with his sibling. He said that they fled Afghanistan because they were being harassed owing to his membership of the Harakat Party. He said that he sends his wife and children financial support in Country R. He said that his parents are deceased, he has no other immediate family members in Afghanistan, and to his knowledge he has no family members in Australia. He said that he has a number of Hazara relatives who live in Jaghori District. They live in Village B, and Village D. The applicant said that he last saw his wife and children in Village A several years ago when he fled Afghanistan to travel to Australia.

48. The applicant said that he arrived in Australia. He lived in one State for some time before returning to different State when he obtained full-time work with company in Town Y. He said that he currently lives in rental accommodation in Town Y which he shares with the owner, and he works.

49. The applicant said that he is in regular telephone contact with his wife and children in Country R, and that he is not in contact with anyone in Afghanistan. He said

that he would like to be able to contact his relatives in Jaghori District, but there is no mobile telephone network in the district. He said that he receives news of current events in Afghanistan from a group of Afghani workmates at the factory who are in contact with relatives in Afghanistan. He stated the date when he lodged his current protection visa application.

50. The applicant stated that he fled Afghanistan owing to his fear of being persecuted by the Taliban. He said that he fears returning to Afghanistan because the remnants of the Taliban are in the village, and they threaten and kill people. He said that he is aware that the Taliban killed a number of family members of Person F, a Hazara, in the Hazara village of Village C near the town of Village B where he was harassed by the Taliban before he fled Afghanistan. He said that the nearest Pashtun areas are in Village E, close to his home village, close to Village C in Jaghori District. He said that a friend of a friend who lives in Village C had said that they are distributing flyers threatening Hazaras with death unless they do certain things. The applicant said that his relatives live in strong Hazara areas, further away from the Taliban areas. They have sent their children to school in Kabul, and they are at risk if they travel to visit the children, or the children return home to visit their parents.

51. The applicant stated that he also fears harm from members of the Wahdat Party, because he is a member of the Harakat Party. He said that he became a member of the Harakat Party in in the late 1990s when he was in the military in City N. He used to contribute, because it appeared to be a popular party with good plans for the future and he wanted to have an orderly situation in Afghanistan. When asked to elaborate, he said that after the Russians invaded Afghanistan in about 1977, one had to be a member of a militia group. He later said that while in City N, he was expected to either make financial contributions to the Harakat Party, or to join the militia. He said that he made payments of from his earnings. He said that he did not make a note of the payments that he made, and that Harakat Party would just send someone to him, and he would pay.

52. When asked why being a member or supporter of the Harakat Party would put him at risk, he said that the groups have been committing atrocities against each other, Wahdat Party is dominant in the district, and as soon as they know that he is a member of Harakat Party, he would be subject to persecution. When asked how people in the village would know that he was a member of Harakat Party, he said that everyone in the village knows each other's business. He said that one of the enemies of Harakat Party is a former head of Wahdat Party, who is currently a government official of Town W. He is the head of the district, not the provincial official, but the provincial town government official. The applicant stated that his relatives in Jaghori District are not at risk, because they are not members of Harakat Party. He said that he only joined Harakat Party because he was then living in City N. He said that he remained a member of Harakat Party after he returned to his village, and that a small number of the villagers who were also members of Harakat Party had kept in touch with him while he was in City N. He said that he did not have to continue his support of Harakat Party after he returned to his village, because they did not have anyone who came to the village to collect contributions.

53. The applicant stated that he had not previously mentioned his membership of Harakat Party in any of his protection visa applications, because some of the interpreters were Pashtuns, and they told him that if he revealed that he was a member of Harakat

Party, the Australian authorities will think that he had killed someone, and it would affect his prospects of remaining in Australia.

54. The applicant stated that he also fears harm because he has been in Australia for many years, and he has left his religion, he is no longer a religious person. He said that someone who is secular or has no religion cannot live among strongly religious people. He said that while he was living in Afghanistan, he practised his religion as a Shia Muslim. He prayed five times per day, at home in private in the morning, and at the local mosque at lunch and dinner times. He paid religious taxes, he observed Ramadan by fasting for 30 days each year, and he observed the major festival of Ashura which commemorates the martyrdom at Karbala of Hussein, a grandson of the Prophet Mohammad. The applicant stated that after his arrival in Australia, he prayed and attended the mosque. However, he has not practised his religion since he was released from the detention centre.

55. The applicant said that he has not attended a mosque while living in one State or since he has returned to the different State. He is aware that there is a mosque in Town Y, but he has not attended. He does not pray or fast. He has had intimate relationships with women to satisfy his needs, which is abhorrent to his religion. He initially said that he does not drink alcohol, then he said that he has a glass of wine regularly. He said that he has not gambled, as he has a wife and children in Country R to support.

56. The applicant stated that he no longer believes in religion because it has been used as a pretext for conflict and killings between Sunnis and Shias, and he does not want to be part of that. He said that Jews and Muslims are sons of the same Adam, and that the house of the Lord should belong to everyone.

57. When asked why renouncing of his religion was not mentioned in submissions made to the Minister on his behalf, he said that his case officer who had prepared the submissions did not ask him if he had turned away from his religion, and he did not think to volunteer that information. He said that if he returned to Afghanistan, he would not practise his religion, because he is tired of all the fighting in the name of religion.

58. When asked if there is any other basis upon which he is claiming persecution, the applicant stated that if he returned to Afghanistan after many years in a Western country, people in Afghanistan would think that he is rich, and that may be another incentive for them to want to harm him. He said that his child in Country R has told him that someone told him that the applicant must be rich because he is in Australia, and the applicant has told his child to seek protection from his neighbours if need be.

59. The applicant stated that he does not agree with the delegate's view that he could safely relocate to Kabul. He said that the issues he would face in Kabul are the same as if he returns to his home village. There are Wahdat Party members in Kabul, and he would be in danger because he has been in Australia for many years. He added that he has no family in Kabul, and nowhere to live there. He said that he has no connections in Kabul, because it has been many years since he worked there.

60. The applicant said that he has read the unsigned statement that was sent to the Tribunal after the close of business on the evening before the hearing. He read it in the week prior to the hearing, and to his mind its contents are true and correct. He said that

he has not signed it, because there were some issues regarding his membership of Harakat Party that his agent wanted to include. He said that while he was living in City Q, he received a letter from a relative. However, he has only received part of the letter from his previous advisors, and he does not think that it is sufficiently important to provide the Tribunal with a translation of the partial document.

61. The applicant's agent noted that the country information he had provided to the Tribunal regarding the recent Taliban attack on police chief Person F's family did not identify the village in which the attack occurred. He suggested that the Tribunal should ask the applicant the source of his information. The applicant stated that one of his workmates told him that the attack occurred in Village C, and from the applicant's own knowledge Village C is a Hazara village. The agent also told the Tribunal that no decision has been made regarding the applicant's application for another Class of visa.

Post-hearing submissions and evidence

62. Pursuant to liberty granted at the hearing, the agent provided the Tribunal with a signed statement from the applicant in identical terms to the unsigned statement, as well as originals of the country information documents previously sent by fax to the Tribunal.

63. The agent provided the Tribunal with an extract from the AIMS Ghazni map on which the applicant had marked the location of his village. The agent stated that the applicant had advised that the village of Village C actually comprises a number of sub-villages which the applicant had also marked on the map, located near Village A. The agent stated that he was instructed that the Pashtuns villages adjoin Village C. The agent also stated that the applicant's relative referred to at the hearing lives in Village D.

INDEPENDENT COUNTRY INFORMATION

64. In assessing the applicant's claims against the Convention grounds, the Tribunal has considered information from external sources. Some general aspects of the country information are dealt with in the following paragraphs, and the country information concerning specific claims will be considered in the Findings and Reasons section below.

Background to current events in Afghanistan

65. The US Department of State Report on Human Rights Practices, *Afghanistan 2002* (released March 2003) provides background information regarding current events in Afghanistan. It noted that:

During most of 2001, the Taliban, an ultra-conservative Islamic movement, controlled approximately 90 percent of the country. On October 7, 2001, OEF, a U.S.-led coalition, began military action aimed at toppling the Taliban regime and eliminating the al-Qa'ida network in the country. U.S. forces worked in concert with anti-Taliban forces of the Northern Alliance as well as others in the southern part of the country. By mid-November 2001, the Taliban had been removed from power.

U.S. military operations continued during the year, especially in southern and eastern regions, to capture and detain remaining Taliban and al-Qa'ida fighters.

The International Security Assistance Force (ISAF), established on December 20, 2001, was responsible for the security of Kabul under the command of the United Kingdom and later Turkey. Outside the capital, regional commanders and warlords maintained local militias. ...

...The remnants of the Taliban and rogue warlords sometimes threatened, robbed, attacked, and occasionally killed local villagers, political opponents, and prisoners. During the year, some efforts were made to bring to justice those persons responsible for serious abuses.

Resurgence of the Taliban

66. Initially the reports from government and non-government bodies describing the human rights situation indicated an improving social and political situation since the US led invasion. However, the situation started to significantly deteriorate around mid 2003, especially outside of Kabul. It appeared that the improvements implemented in Kabul could not be sustained or replicated outside of Kabul: UK Home Office *Afghanistan Country Assessment*, Country Information and Policy Unit, October 2003.

67. According to a recent UN Security Council report, insurgent activity is being conducted largely unchecked in Afghanistan. While previous reporting periods have been marked by progressive and significant deteriorations in the security situation, the recent upsurge of violence represents a watershed. At no time since the fall of the Taliban in late 2001 has the threat to Afghanistan's transition been so severe. In addition to a quantitative spike in their activities, a qualitative shift has been detected in the operations and coordination of the insurgent forces' intent on overthrowing the Government through violent means (UN Security Council 2006, *The situation in Afghanistan and its implications for peace and security*, A/61/326-S/2006/727, 11 September).

The Hazaras

68. Historically the Hazaras, who make up almost 100% of the population of Jaghori district, (the applicant's place of origin) did not support the largely Pashtuns Taliban and the Taliban were only able to enter Hazara areas against the opposition of the populace. By contrast, the Taliban have traditionally been able to operate more easily in Pashtuns areas, where they have been able to gain the support of the Pashtuns population. This appears to still be the case, with increasing Taliban activity reported in the Pashtuns districts close to Jaghour district: in Zabul, Ghazni and Uruzgan provinces.

69. As was observed in 2001, it is difficult to be clear as to whether the periodic atrocities conducted by Pashtuns, including the Taliban, against the Hazaras, are a consequence of the long-standing intolerance felt by many Sunni Afghans towards this Shi'a ethnic and religious group. Clearly, the active opposition of the Hazaras to the Taliban conquests of Mazar and the Hazarajat was a factor in the strength of the Taliban reaction when they retook these areas. It is, nonetheless, possible that the anti-Shi'a disposition of the Taliban and of some of the volunteers from other parts of the Islamic

world fighting with the Taliban was an important element in the action taken against Hazaras and other Shi'as (Marsden, P., 2001, *Afghanistan: Minorities, Conflict and the Search for Peace*, Minority Rights Group, London, November, pp. 25, 30, also 17-25, p.25).

State Protection

70. The UK Home Office operational guidance note on Afghanistan dated 20 April 2007 includes the following information regarding Afghanistan's security forces and the extent to which the public can rely on the protection of the police:

Afghanistan's security forces comprise the army and air force, police forces including national, border, highway and counter-narcotics, and the intelligence service. These forces are moving towards a more professional approach with the assistance of the international community, and the power of warlords and commanders has been reduced accordingly. However, in many, possibly most areas, these figures continue to exert influence, often because commanders have been appointed to official positions in the police force in the very areas where they have their power bases. The Government is seeking to address this but in many cases allegiances are to ethnic and local leaders rather than to the policies of the Government and the security services are unable to control the warlords, local commanders, drug cultivation and trafficking, common criminality and human rights abuses. Therefore, the extent to which the public can rely on the protection of the police depends to a large extent on the loyalties of the particular police officers they approach for help. There are police who are loyal to the Government and who will uphold the law to the extent that they are able, but they are often constrained by a lack of resources.

71. In relation to the situation in Kabul, the operational guidance note indicates that:

A judicial and legal system with limited function exists in Afghanistan. In Kabul, the police authorities are generally willing to enforce the law, although their ability to do so is limited by inadequate resources and dependent to some extent on the loyalties of individual officers. The International Security Assistance Force (ISAF) works alongside the Afghan Security Forces to maintain security in and around Kabul and as a result the general security environment there is much better than in other areas (UK Home Office 2007, *Operational Guidance Note – Afghanistan*, 20 April, pp. 3 & 22).

72. The US Department of State human rights report on Afghanistan for 2006 indicates that “[t]he ANP [Afghan National Police], under the MOI [Ministry of Interior] had primary responsibility for internal order; however, some local and regional commanders maintained considerable power since the government did not control security nationwide. During the year, the government attempted to expand its reach through the use of auxiliary police in some areas.” The performance of the ANP “engendered mistrust among the local population, and reports of corruption and mistreatment of citizens in custody were widespread. In response, this year the MOI assigned General Atmar as the new head of its Human Rights Unit in an effort to re-energize efforts to ensure the ANP was compliant with human rights standards.” It is also stated in the report that:

The government continued to develop and professionalize its army and police force. Increased monitoring of police by internal and external monitors helped to prevent abuses. Human rights training became a normal aspect of training and education for most police. Extensive reporting of human rights abuses led to increased arrests and prosecutions of abusers. The government continued to make strides towards

upholding human rights standards and took action to remove corrupt officials. In some areas of concern, even where there was commitment from the government, resources restricted the ability to uphold those standards.

73. The report also notes that “[t]he shortage of effective and trained police, poor infrastructure and communications, instability, and insecurity hampered investigations of unlawful killings, bombings, and civilian deaths” (US Department of State 2007, Country Reports on Human Rights Practices for 2006 – Afghanistan, March, Introduction, Sections 1(a) & (d)).

FINDINGS AND REASONS

74. Although the applicant has previously been recognised by Australia as a refugee, the question for the Tribunal is whether it is satisfied that the applicant has a presently existing well-founded fear of being persecuted, for Convention reasons, in Afghanistan and is thereby entitled to continuing protection: see *MIMIA v QAAH of 2004* (2006) 231 ALR 340 and *NBGM v MIMA* (2006) 231 ALR 380.

75. The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is “well-founded” or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is not required to make the applicant’s case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-170).

What is the Applicant’s Country of Nationality and is he outside it?

76. The Tribunal accepts that the applicant is from Afghanistan. There is no suggestion that the applicant is not from Afghanistan, and the delegate accepted that the applicant is from Afghanistan. The Tribunal accepts that the applicant is outside his country of nationality. Therefore, for the purposes of the Convention, the Tribunal has assessed his claims against Afghanistan as his country of nationality. The Tribunal accepts that the applicant is a Hazara from Ghazni Province.

Does the Applicant have a well-founded fear of persecution for a Convention related reason?

77. The applicant claims that he fears persecution for a number of reasons if he returns to Afghanistan. First, that he is a Hazara and he fears persecution by a resurgent Taliban and other Pashtuns. Secondly, that he no longer believes in religion, and he would be killed by Shia Muslims in his village as an apostate. Thirdly, that Wahdat Party currently controls Jaghori, and he was a member of the Harakat Party. Fourthly, that as a Western returnee, people in Afghanistan would harm him because they would think he must be wealthy.

Treatment of Hazaras in Afghanistan

78. In 2005 Dr Jonathan Goodhand provided the Tribunal with the following information regarding the treatment of Hazaras:

[Hazaras] are the third largest ethnic group after the Pashtuns and the Tajiks. They are Shias, so they are from a minority, they are minority numerically and they are a minority in terms of religious affiliation and in many ways, they are politically and socio-economically marginalised. They have historically occupied, if you like, a subaltern position in Afghan society. Now the war changed a lot of those things quite dramatically.

It brought a new political assertiveness amongst the Hazara population and certainly Hazaras were very prominent in the Jihad in the anti-communist fighting the 1980s and they coalesced politically around Hizbi Wahdat by the end of that period; and certainly they have come out in the post Taliban context as in many ways in a strengthened position politically in terms of the constitution reflecting minority concerns and having some representation in the cabinet. They certainly have a position at the table.

Now there are concerns that the gains made during the war years are going to be undermined as Pashtuns re-assert their traditional dominance. Also another thing that needs to be remembered is the history of enmity that was produced as a result of massacres and counter massacres during the war years. In particular, two incidents stand out. In Kabul in 1993, when the Hazaras – there was a massacre in Kabul at the hands of Jamiat-e Islami and Ittehad-e Islami and then subsequently by the Taliban in Hazarajat (in 2001) in retaliation for the Taliban defeat in Mazar-e Sharif (in 1998)
....

Although the Hazaras have probably advanced their position politically they are still seen in many ways a marginal group, as for example they are underrepresented in the armed forces and the police, and also in Hazara areas of Kabul there has been limited reconstruction and city planning compared to other areas.

... it is difficult to talk in generalised terms about whether Hazaras returning will be victimised because they are Hazaras or because of their allegedly communist or westernised background. These issues have to be seen in an individual context. These things can become major problems or they can be used as pretexts, for instance, to prevent returnees from coming back and claiming their land (Goodhand, Dr Jonathan 2005, *Transcript of Video Conference on Afghanistan between RRT Melbourne, RRT Sydney and Dr Jonathan Goodhand*, 13 April).

79. The US Department of State reports that “there was continued social discrimination against Hazaras” during 2005:

The Shi’a religious affiliation of the Hazaras historically was a significant factor contributing to their repression, and there was continued social discrimination against Hazaras.

...During the year claims of social discrimination against Hazaras and other Shi’as continued. The Hazaras accused President Karzai, a Pashtun, of providing preferential treatment to Pashtuns and of ignoring minorities, especially Hazaras (US Department of State 2006, *Country Reports on Human Rights Practices 2005 – Afghanistan*, 8 March, Section 2d & National/Racial/Ethnic Minorities).

80. On the basis of this evidence, the Tribunal is satisfied that Hazaras generally face discrimination in Afghanistan. However the Tribunal does not consider that merely

being a Hazara from Afghanistan is sufficient to give rise to a well-founded fear of persecution.

Recent Taliban activity in Ghazni

81. The country information before the Tribunal indicates that there has been a recent upsurge in Taliban-related violence in Afghanistan. The UNHCR has been unable to provide detailed information about the area of Ghazni where the applicant lived since they closed their office in Ghazni city. As Jaghori District is relatively remote and access to the district is through areas where the Taliban are active and fighting is occurring, there have been few reports of the situation inside the district. There are news reports of a Taliban attack on a in the Village B area of Jaghori District, and of an attack on the family of a security official in Jaghori District. They are as follows.

82. An article on an Afghan News website, indicates that “the Taleban have stormed a police checkpoint in Jaghori District”. A “[l]ocal militia official said policemen were killed in the attack while assailants took hostages, including security personnel.” According to the article, “A person, who said he was a regional Taleban commander in Ghazni,” had “said some kidnapped suspects were released following an investigation while others were still being questioned.” The article also indicates that “[t]he police chief of Ghazni” had said that policemen had been killed and others wounded when “the Taleban attacked a police checkpoint in an area of District E [in Ghazni] late Friday night ” However, “[a]n eyewitness claimed that several law-enforcers had been killed in the attack and another person... gave the same casualty figure” (‘Taleban attack Ghazni in Afghanistan’, *BBC Monitoring South Asia*, source: an Afghan News website).

83. There are some differing details provided in articles regarding an attack on the family of a local police chief in in Jaghori District. An *Afghan News* article refers to “[s]uspected Taliban militants” attacking “the house of a local police chief” in Jaghori District. The attackers gunned down the spouse, two sons and as many nephews of the police officer, who was away from home at the time of the attack.” A “[p]urported Taliban spokesman ” had “admitted injuries to two fighters in the incident” (‘Five of a family among seven killed in Ghazni, *Afghan News*). Another article that reports on the attack indicates that the Taleban had attacked the home of “police commander Person F” in Jaghori District in Ghazni. Ghazni’s governor had said that “Person F had fought back and killed 10 of the militants.” According to the article, “[t]he BBC’s Bilal Sarwary in Ghazni says Person F was probably targeted because he supports the Afghan authorities” (‘Afghan policeman’s home attacked’ *BBC News*). This appears to be the same incident referred to by the applicant in his evidence when he identified the police chief as a Hazara, and the village in which he lived as a Hazara village.

84. The US Department of State human rights report on Afghanistan for 2006 indicates that:

The Taliban and antigovernment elements continued to be responsible for threatening, robbing, attacking and killing villagers, government officials, foreigners, and nongovernmental organization (NGO) workers. While the government expanded its authority over provincial centers, a few areas remained under the control of regional commanders or the Taliban following insurgent offensives. During the year, over 1,400 civilians died as a result of terrorist activities, including suicide attacks, roadside bombs, and gun assassinations.

85. The report refers to incidents involving the Taliban, including attacks in Helmand, City N, Province K, Ghazni and Paktika provinces during 2006. The report also notes that “in some parts of the country”, the “Taliban and other extremists threatened or physically attacked schools, officials, teachers and students, especially in girls’ schools. The majority of school-related violence occurred in 11 provinces in the south (Helmand, Farah, Province K, City N, Uruzgan, Ghazni) and the border region (Paktia, Paktika, Khost, Kunar, Logar)” (US Department of State, *Country Reports on Human Rights Practices for 2006 – Afghanistan*).

The proximity of the applicant’s village to the nearest Pashtuns areas

86. The UN AIMS map of Jaguri district indicates that the nearest adjoining districts to the southern part of Jaguri where the applicant’s home village is located, are in Ghazni district and in Zabul (Afghanistan Information Management Service (AIMS) 2002, *Jaghori District, Located in Ghazni*, May). A UN AIMS map of Ghazni indicates that Gelan district also adjoins the southern part of Jaghuri district (Afghanistan Information Management Service (AIMS) (Undated), *Ghazni*). In relation to the location of the nearest Pashtuns areas, the UNHCR district profile of Jaghuri District indicates that the ethnic composition of that district is “100% Hazara” (UNHCR 2002, *UNHCR Sub-Office Central Region District Profile: Jaghori District, Ghazni Province*). A compilation of country of origin information in relation to Afghanistan from UNHCR dated 22 March 2004 also indicates that Jaghuri District is “exclusively populated by Afghans of Hazara ethnic origin”. The UNHCR advice also notes that “[t]he district is bordered by Hazara districts, mixed district Hazara-Pashtun, Pashtun districts (Moqur, Zabul province)” (UNHCR, *Compilation of Country of Origin Information on Afghanistan Relevant in the Context of Refugee Status Determination in Australia*).

87. In relation to the adjoining districts, the UNHCR district profile of Moqur district in Ghazni indicates that the ethnic composition of the district was “99% Pashtoon; 1% Hazara & Tajik” (UNHCR 2002, *UNHCR Sub-Office Central Region District Profile: Moqur district, Ghazni province*). The UNHCR district profile of Gelan district in Ghazni dated 15 October 2002 (UNHCR 2002, *UNHCR Field Office Ghazni District Profile: Gelan district, Ghazni province*), and the UNHCR district profile of Arghandab district in Zabul province dated 30 June 2003 (UNHCR, *UNHCR Sub-Office District Profile: Arghandab district, Zabul province, 30 June*), refer to the ethnic composition of those districts as being 100 per cent Pashtun.

88. A UNHCR advice indicates that Village B was amongst “villages that are fairly close to the Pashtuns villages of Gilan district” (UNHCR, *Afghanistan: Geographic details of Village F in Ghazni (CISQUEST)*).

89. Having regard to the above country information, the Tribunal accepts that the area in which the applicant’s home village is located is effectively encircled by Taliban forces, and that to reach it in order to return home, he would have to traverse some part of this area. As regards the Taliban’s current treatment of individuals traveling through the area, the Tribunal notes an article stating that “[s]everal vehicles on the way to Jaghuri District have been looted and seven passengers have been taken hostage by the Taleban.” It is stated in the article that:

Ghazni and Wardag provinces have recently started to experience turmoil as Taleban forces have tried in different parts of these provinces to expand war and insecurity. Several vehicles on the way to Jaghuri District have been looted and seven passengers

have been taken hostage by the Taleban. Heavy fighting has also raged in Andar District, which is considered a Taleban local base. Fighting is also going on in District of Ghazni and an air raid has killed at least 30 Taleban in this mountainous region (*BBC Monitoring South Asia*).

Westernised returnees to Afghanistan/apostasy

90. The Tribunal accepts that the applicant arrived in Australia more than several years ago. It has been claimed, and the Tribunal accepts as likely, that he ceased being a practising Muslim after living within the Australian community, that he has had intimate relationships with women, and that he drinks alcohol. The Tribunal notes that the applicant's appearance is western, and accepts that he has been greatly influenced by his life in Australia.

91. Professor William Maley, in a seminar on Afghanistan for the Tribunal held on 30 September 2005, provided the following comments regarding the situation of people who were "not practising their religion to the same extent in Australia" and then returned to Afghanistan:

QUESTION: On the subject of Westernisation some people say that they are not practising their religion to the same extent in Australia. If they went back they had forgotten some of it or - can that cause people problems too?

PROF MALEY: It could, yes. There is an expression that is used in Afghanistan, "gharbzadeh", which means "son of the West" and it is applied to people who seemed to have lost an element of their Afghan identity. And the area in which it is potentially most problematical would be in the area of religion. If people began to be suspected of having ceased to be good Muslims in the sense in which some group within Afghanistan might use that term.

QUESTION: Do you think that would be more of a problem with the Shiites or the Sunnis?

PROF MALEY: It could be the same. There are extremists within both the Shiite and the Sunni community if you scratch hard enough. The Sunni extremists tend to regard the Shia as heretics in any case so, they are beyond the pale, but they are very devout (Maley, Professor William 2005, *Transcript of Seminar on Afghanistan*, 30 September, p. 28).

92. Professor Maley also made the following observations concerning the subconscious effect of exposure to western lifestyle:

... I suspect that the greatest danger for young people who have been here for quite some time and being sent back to Afghanistan is not that they would be consciously offensive to Afghan norms but that they would by this stage have assimilated Australian ways of behaviour to the extent that their grasp of Afghan norms would be fragile and in that way they would end up offending somebody very dangerous without even realising that they were in the process of doing it.

It is quite a complex story. But even Afghans who came to Australia as adults who are going back after 10 or 20 years are finding that they are instantly recognised as people who lived outside the country even though they speak fluent Persian, they are not unfamiliar with the layout of cities and that kind of thing, but there is just something about them that the locals pick up.

93. Similarly, in 2005 Dr. Jonathan Goodhand expressed the view that there was strong pressure to conform in Afghan society in many ways. So “not conforming” was “frowned upon and could be dangerous for the person”. He also observed that this would be particularly so in “rural Ghazni” where it would “certainly be frowned upon for somebody to kind of say that they were an atheist and to be un-Islamic in their practices”. He added that he believed it would be “dangerous for people to go back into that kind of a context and be openly, if you like, ‘un-Islamic’”, particularly in rural areas where it would be “extremely difficult”. He added of people returning from Australia that:

In Ghazni, I think that certainly there would be a much more profound question around adjustments and because the difference between the lifestyle the person would have experienced in Australia and they would come back to in rural Ghazni would be much more profound and certainly that person is likely to stand out more ...
(Goodhand 2005).

94. On the basis of the current country information, the Tribunal considers that, although the Taliban are no longer formally in power, the deterioration in the security situation in and around the applicant’s area in Jaghori District in Ghazni as a result of the recent intensification in violence by the Taliban means that they are effectively in control of much of that area. The Tribunal is also satisfied that individuals such as the applicant, who the evidence from Professor Maley indicates would be readily identifiable as a returnee from a Western country, would be assumed to continue to hold views antithetical to those of the fundamentalist Taliban. Having regard to the country information, the Tribunal accepts that a reasonably effective and impartial police force and justice system is not available to the citizens of Afghanistan (see *MIMA v Respondents S152/2003* (2004) 205 ALR 487 at [26]). Consequently the Tribunal is satisfied that adequate state protection in accordance with international standards would not be available to the applicant as a Hazara and a Western returnee.

95. The Tribunal considers the chance far from remote that the applicant might come to the attention of the Taliban on roads entering his region of Ghazni province. The Tribunal considers reliable the evidence about the volatility of the security situation, the Taliban’s recent assaults on individuals travelling to and in this area, and the Taliban’s “anti-Shi’a disposition”. The Tribunal considers there is a real chance that, because he is a Hazara who has clearly been living in a Western country and whose behaviour and appearance are those of a person with opinions at odds with those of the Taliban, the applicant may be assaulted. As Professor Maley’s observation illustrates, a person with the applicant’s characteristics risks inadvertently “offending somebody very dangerous”. In the Tribunal’s view, given the Taliban’s propensity to violence and the unpredictability inherent in an encounter between the applicant and the Taliban, there is a real chance that any assault may involve significant physical ill-treatment, so as to amount to persecution within the meaning of section 91R(1)(b) of the Act.

96. In these circumstances, the Tribunal is satisfied that the applicant would have a well founded fear of persecution for the combined Convention reasons of his race, religion (or lack of it), and imputed political opinion if he were to attempt to return to his home area in Ghazni province. Given this finding, it is not necessary for the Tribunal to consider the other claims regarding his fears of Shia Muslims in his village, his fears as a member of Harakat Party in a district controlled by Wahdat Party, and his fears arising from perceptions that he is wealthy.

Can the Applicant relocate within Afghanistan?

97. The Tribunal has considered whether in all the circumstances the applicant could reasonably relocate to some other part of Afghanistan where he would be safe from the persecution which he fears. The independent evidence available to the Tribunal suggests that relocation is not a practical option in Afghanistan unless one has support in the new location to which it is proposed one should relocate. In June 2005, UNHCR advised:

Given the fragmented nature of power and control in parts of Afghanistan, an examination of the availability of internal flight or relocation alternatives may appear to be warranted. UNHCR however continues to recommend against the application of the internal flight or relocation alternative in the context of Afghan claims, for reasons noted below.

The assessment of whether or not there is a relocation alternative in the individual case requires two main sets of analysis – its relevance and its reasonableness. For both, the personal circumstances of the individual applicant and the conditions in the area to which the internal flight or relocation alternative is proposed must be examined. With regard to the ‘relevance’ of an internal flight or relocation alternative, it is of particular importance to assess the willingness and the ability of the State to protect from risks emanating from non-State agents. Local commanders and armed groups act as agents of persecution in the Afghan context that have set themselves above the law, both at the local and central levels. In some cases, they are closely associated to the local administration while in others they may be linked to and protected by more powerful and influential actors, including at the central level. As a result, they largely operate with impunity, with the State authorities being unable to provide protection against risks emanating from these actors. In most instances, the State is still unable to provide effective protection against persecution by non-State actors. The links to other actors may, depending on the circumstances of the individual case, expose an individual to risk beyond the zone of influence of a local commander, including in Kabul. Even in a city like Kabul, which is divided into neighbourhoods (gozars) where people tend to know each other, the risk remains, as news about a person arriving from elsewhere in the country travel fast.

Additional to the ‘relevance’ of internal relocation to the individual case, it must also be ‘reasonable’ for a claimant to relocate to that location in order to overcome his or her well-founded fear of persecution elsewhere in the country of origin. It is particularly with regard to this ‘reasonableness analysis’ that UNHCR continues to advise against resort to the notion of an internal flight or relocation alternative in the Afghan context, considering elements of safety and security, human rights standards as well as options for economic survival during the relocation journey and upon arrival at the destination of relocation. The traditional family, extended family and community structures of Afghan society continue to constitute the main protection and coping mechanism in the current situation. It is these structures and links on which Afghans rely for their safety as well as for economic survival, including access to accommodation and an adequate level of subsistence. The protection provided by families, extended families and tribes is limited to areas where family or community links exist and without them, a relatively normal life without undue hardship at another location than one’s place of origin or residence is unlikely. As documented in studies on urban vulnerability, the household and the extended family remains the basic social network in Afghanistan and there are indications that existing traditional systems of sharing and redistribution function less in the extended urban family. It would therefore, in UNHCR’s view, be unreasonable to expect any Afghan to relocate to an area to which he or she has no effective links, including in urban areas of the country. (Cited in the UK Home Office Afghanistan Country Assessment, Country Information and Policy Unit, April 2006)

98. Apart from some extended family members, there is no evidence which suggests that the applicant has connections in Ghazni Province, as his wife and children have left the Province and are currently living in Country R. There is also no evidence that the applicant has any connections outside Ghazni Province. The Tribunal is therefore of the view that in these circumstances there is no part of Afghanistan to which the applicant could reasonably be expected to relocate where he would be safe from the persecution which he fears.

Does the applicant have the right to enter and reside in a safe third country?

99. There is no other information before the Tribunal to suggest that the applicant has a right to enter and reside in a safe third country. Accordingly, the Tribunal is satisfied that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act, in respect of either Afghanistan or any other country.

CONCLUSIONS

100. The Tribunal is satisfied that there is a real chance that the applicant would be persecuted if he returned to Afghanistan now or in the reasonably foreseeable future for reasons of his race, religion (or lack of it), and imputed political opinion. The applicant's fear of persecution is well founded and for a Convention reason, and therefore he is a refugee within the meaning of the Convention.

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

DECISION

102. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies subsection 36(2)(a) of the *Migration Act* 1958, being a person to whom Australia has protection obligations under the Refugees Convention.

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

Sealing Officer's I.D. Iward