

1313452 (Refugee) [2015] AATA 3530 (14 October 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division
CASE NUMBER: 1313452
COUNTRY OF REFERENCE: Afghanistan
MEMBER: Amanda Goodier
DATE: 14 October 2015
PLACE OF DECISION: Perth
DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Statement made on 14 October 2015 at 3:51pm

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Afghanistan applied for the visa [in] November 2012 and the delegate refused to grant the visa [in] September 2013.
3. The applicant appeared before the Tribunal on 26 August 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Pashto and English languages. The applicant was represented in relation to the review by his registered migration agent.

CONSIDERATION OF CLAIMS AND EVIDENCE

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

Country of reference and home area

6. The applicant claims to be a citizen of Afghanistan and provided copies of various documents as evidence of his citizenship. The delegate accepted that the applicant was a citizen of Afghanistan. In the absence of any evidence to the contrary, the Tribunal accepts that the applicant is a citizen of Afghanistan and that Afghanistan is his country of nationality and receiving country.
7. The Tribunal is satisfied on the evidence before the Tribunal, the applicant does not have a right to enter and reside in any other country, therefore, the Tribunal finds that he is not excluded from Australia's protection obligations under s36(3).
8. The applicant has consistently claimed to have been born in [District 1], Paktia Province in Afghanistan where he lived until his departure in 1982, returning in December 2009. 2012. The Tribunal finds that [District 1], Paktia Province is his home area.

Assessment of claims

Summary application, delegate's decision and Tribunal hearing

9. The applicant indicates in his Form 866 and attached sworn statement that he is a Pashtun and Sunni Muslim born in [year]. He is married with [children]. His parents and brother are deceased. His [siblings] are married and reside in Peshawar, Pakistan.

10. The applicant indicates he lived in [a] Refugee Camp in Peshawar, Pakistan from 1982 to December 2009.
11. The applicant's statement was restated in the delegate's decision. He states he fled Afghanistan in 1982 to Pakistan because of the daily violence of the civil war with the Mujahadeen and other factions in the armed conflict. He returned to Afghanistan because the Pakistan authorities were denying basic work, travel and education rights to Afghanistan refugees. The police would require a bribe to give protection. He returned to his home in [District 1], Paktia Province. At first there was some danger from the Taliban but it was not so severe that they couldn't live their lives with reasonable safety. However this changed and by the end of 2011 the influence of the Taliban had increased significantly that they lives of ordinary people were often at risk because of the violence, bomb blasts and shootings. One evening as he was walking home in his village late January/early February 2012 he was confronted by 2 Taliban men who asked him what he did for a living and he responded stating he was a [salesman] selling [products] for women. They were armed with AK47 machine gun and said they wanted him to work for them distributing letters to the houses of certain government officials. They stated he was a good choice because he was a well-known [salesman] in the local area and no-one would suspect him of being a Taliban courier. They said it would be easy for him to conceal the letters in his products and they would pay him well using the term dollars which convinced him they were Taliban. On the first occasion he was told to come to their location to collect the letters and he responded that he would go later to get away from them. One night later 3 Taliban gunmen came to his house and told him about their political views, what they believed in and how he could help them achieve these things. That was by distributing letters to government officials. Three nights later 4 armed Taliban men came to his house searching it looking for him. He was expecting their visit so escaped over the back fence to his neighbour's house. His son told him that when they could not find him they became angry and accused him of being an American agent and an enemy of Islam and they would assassinate him. He stayed with his neighbour for 2 days then fled to Pakistan and then travelled to Australia arriving in July 2012. The Taliban believe he is a supporter of the west as he would not work for them.
12. The delegate did not accept on the basis of the country information that the Taliban would have forcibly recruited the applicant and that he lacked a profile of a person whom the Taliban would forcibly recruit. The delegate also referred to country information indicating it unlikely the Taliban would have condones his business of selling women's [products] given their opposition to such items during their governance and that it would be unlikely he would be able to operate such a business in a village with an established Taliban presence. The applicant also gave evidence that he returned to his home village for a year in 1988 when he married and again in 2009 to obtain his taskara which was not consistent with previous oral and written evidence given that he departed Afghanistan in 1982 and did not return until 2010. The applicant was also unable to demonstrate any knowledge regarding the Taliban's beliefs and/or propaganda or on their presence in his village despite living there for 2 years. The delegate found the applicant's testimony contained significant inconsistencies with the country information and his written submissions. The delegate found the applicant was not a credible witness and had not provided a truthful account of his experiences but rather used broad claims to enhance his application for protection.
13. A submission was received by the Tribunal prior to hearing. It was submitted that the applicant was not being forcibly recruited but was selected to unobtrusively deliver Taliban letters as he went about his daily work. Culturally older people are more trusted which would facilitate delivery of the letters. It was submitted that the delegate had misquoted the reference cited and that the UNHCR considers the Taliban also use broader coercive strategies including fear and intimidation and the use of tribal mechanisms to pressurise people into joining them. It was also submitted that the applicant operated this business for 2 years in his home village without any interference from the Taliban, plainly showing they

tolerated such a business. He did not enter the houses but called out and if women wanted to buy something sent out one of their children. He did not transact directly with the woman. The submission indicates a search of country information did not reveal whether the Taliban in fact have an ideological view against women owning [certain items] and refers to recent UNHCR guidelines indicating it is women who are perceived as transgressing social norms who are targeted. It was submitted that as the applicant spent most of his adult life in Pakistan, he has little knowledge of the Taliban and they like him are Pashtun Sunni Muslims. The applicant is a [age] year old man and refers to a notebook in relation to his travels and did not have his notebook with him during his interview with the delegate so omitted details of his travels. This was not intentional.

14. A further submission was received following the hearing referring to the deteriorating security situation in Afghanistan as well as reports as to the blocking of roads and kidnapping of people in Paktia Province by Taliban militants. The representative provided a submission as to the presence of IS in the area and that clashes between the Taliban and IS are leading to displacement in the east and south-east regions of Afghanistan. The submission also refers to the harm the applicant will face on his return to Paktia province as well as addressing the issue of relocation.
15. The applicant told the Tribunal that his wife and children moved to Peshawar about 2 months after he left for Australia. He has [siblings] who remain living in their home village. He never attended school but studied the Koran for 2 years. He owned land in his home [village] but leased it when he left. While living in the camp he sold goods at the bust stop that he purchased at the market but had difficulties with the police so opened a [shop]. He sold [products] and had some cash to pay for his travel to Australia.

Findings

Credibility

16. The Tribunal accepts that 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 he or she satisfies all of the required statutory elements. 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 Tribunal 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 169-70.)
17. In determining whether an applicant is entitled to protection in Australia, the Tribunal must first make findings of fact on the applicant's claims. This may involve an assessment of the applicant's credibility and, in doing so, the Tribunal is aware of the need and importance of being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims.
18. The Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been established. Nor is the Tribunal obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality (See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347

at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547). On the other hand, if the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true (See *MIMA v Rajalingam* (1999) 93 FCR 220).

19. The Tribunal carefully considered the applicant's written and oral claims and submissions. It took into consideration his lack of education and sophistication when giving evidence. It observed he gave clear and detailed sworn oral evidence at the hearing. It perceived no evidence of exaggeration, or fabrication of his claims. It has found the applicant's claims to be consistent over the period of his protection application process. The Tribunal also finds that the applicant's claims were generally supported by credible independent country information. For these reasons, and having regard to all of the evidence the Tribunal finds the applicant's evidence to be reliable and credible.

Imputed political opinion

20. The applicant fears returning to Afghanistan as he refused to assist the Taliban to deliver letters to nominated persons on their behalf. He claims that because he refused to assist them he is perceived as being pro-government and against the Taliban. He is unable to return to his home as it will be reported that he has returned and the Taliban will seek revenge because he did not assist them. He is unable to relocate as he has no skills, a family to support and no networks or other support to assist him.
21. The applicant claims that he [sold] female [goods] and had done this for about 2 years since he returned from Pakistan. He explained to the Tribunal how he sold the goods and the women would send out their children to take the goods back to into their homes to examine prior to deciding whether they wished to purchase. He indicated that he was approached to deliver the letters as he was able to easily travel around and no-one would suspect him because he was not Taliban. He did not know what the letters said but did not want to do it. And because he did not do what the Taliban wanted, he is considered as being opposed to them and imputed as being supportive of the government. He has now lived in Australia for about 3 years and if he returns the Taliban will perceive that he supports the government and is pro-western. He also believes that his return will be reported as there are Taliban spies everywhere and everyone in his village knows he left and travelled to Australia.
22. The country information from DFAT supports that Paktia has a substantial and active Taliban presence and that they are in conflict with government forces. The Tribunal gives weight to the 2013 UNHCR Guidelines which state that there are reports that in areas where they are in effective control, AGEs (which include the Taliban) do employ recruitment mechanisms based on coercive strategies of men of fighting age. The UNHCR state that people who resist recruitment are reportedly at risk of being accused of being a government spy and being killed and punished. The Tribunal gives weight to this information because it is more recent and the UNHCR has an authoritative and overarching role to provide protection assessment needs to international decision-makers. The UNHCR advises that depending on the specific circumstances of the case, men and boys of fighting age living in areas of effective insurgent control or in areas where government and insurgent forces are engaged in a struggle for control may be in need of international refugee protection. Though the Tribunal has not identified any specific reports of forced recruitment happening in Paktia this may not be surprising in an area where the Taliban are highly active and where there is little government presence in many areas. The Tribunal also recognises that while the applicant may not be of "fighting age" it is not inconceivable that he would be approached by the Taliban to carry out tasks for them because of the ease with which he is able to travel through villages and because he is not identifiable as a member of the Taliban. The Tribunal accepts the applicant's evidence that he has come to the adverse attention of the Taliban because of his refusal to assist them with their request.

23. The Taliban are still active in Paktia and the authoritative information from the UNHCR indicates that people who resist recruitment are at risk of being accused of being a government spy and being killed and punished.
24. The Tribunal notes the available country information of the network of informers, which provide information about the identity of travellers to the Taliban.¹ The Tribunal also accepts that the fact he is currently in Australia and has been for around 3 years will be known in his home area. The Tribunal finds that information about returnees is likely to travel fast, as noted by the UNHCR in relation to internal relocation: “[e]ven 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 or abroad may reach potential agents of persecution.”²
25. When considering the applicant’s particular circumstances, he has already come to the adverse attention of the Taliban who are aware of his identity. He would be a returnee from Australia and the Tribunal accepts that it would be known within his village that he has returned from Australia which the Tribunal considers would elevate the risk he faces.
26. Based upon his individual circumstances and the country information, the Tribunal finds that the applicant faces a real chance of serious harm in the reasonably foreseeable future at the hands of the Taliban in his home area for reasons of imputed political opinion. The Tribunal is satisfied the persecution is systematic and discriminatory and amounts to serious harm as it includes threat to life or liberty, significant physical harassment or ill-treatment.

State protection

27. The applicant primarily fears harm from the Taliban, a non-state insurgency group, however, harm from non-state agents may amount to persecution for a Convention reason if the motivation of the non-state actors is Convention-related, and the state is unable to provide adequate protection against the harm.
28. The UNHCR reported that state protection in Afghanistan is compromised by high levels of corruption, ineffective governance, a climate of impunity, lack of official impetus for the transitional justice process, weak rule of law and widespread reliance on traditional dispute resolution mechanisms that do not comply with due process standards.
29. In respect of the ability of the state to protect, the Tribunal has also considered the following DFAT advice, provided in March 2014, before the coalition forces began the pull out:

5.1 The ongoing insurgency, particularly in the south and east of Afghanistan means that the Government struggles to exercise effective control over many parts of the country. As a result, the Government lacks the ability to adequately address human rights issues, protect vulnerable groups and prosecute human rights violators in those areas.

5.2 Despite these challenges, DFAT assesses that the Government maintains effective control in major urban areas, particularly Kabul, all provincial capitals, including Herat, Mazar-e-Sharif and Kandahar, and the majority of other district centres.

¹ See for example reports such as *Nazari Foundation*, 2010, “Security Update”, 10 January <http://nazarifoundation.com/juma-post/> ; and Abdul Karim Hekmat, “Unsafe Haven: Hazaras in Afghanistan and Pakistan”, Cosmopolitan Civil Societies Research Centre, UTS, Sydney, October 2011, p.19

² UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, July 2009, Rev, <http://www.unhcr.org/refworld/docid/4a6477ef2.html> Accessed 3 October 2012

30. The more recent DFAT Report of February 2015 reports the security situation has since deteriorated and even in areas such as Kabul where there is a strong government military presence and the security situation is much better, attacks from anti-government elements are a common occurrence.
31. In view of the unstable security situation in Afghanistan, the Tribunal finds the state cannot meet the level of protection which citizens are entitled to expect, as discussed in *MIMA v Respondents S152/2003* (2004) 222 CLR 1. The Tribunal finds based on the country information, that the applicant would not be able to avail himself of effective state protection against such harm.

Relocation and Kabul

32. The applicant's feared persecution described above is linked to the risk he faces returning to his home area. There remains the question of whether the applicant can find protection from this feared persecution by relocating to a different part of Afghanistan.
33. The Tribunal has considered whether it would be reasonable for the applicant to relocate to another area of Afghanistan, and thereby avoid the harm he faces in his home area. Given the applicant's circumstances, the Tribunal considers that Kabul is the only place to which relocation could realistically be considered. DFAT assesses that the Government maintains effective control over major urban areas, particularly Kabul, although there have been an increased number of security incidents there in recent months.
34. The 2010 UNHCR *Guidelines*³ state that it is unlikely that an Afghan would be able to lead a relatively normal life without undue hardship upon relocation to an area where he or she is not fully protected by his/her family, community or tribe, including in urban areas of the country; this is because traditional extended family and community structures of Afghan society constitute the main protection and coping mechanism, and Afghans rely on these structures. The *Guidelines* state that for a person without familial or social networks and the associated support system, relocation to Kabul would be extremely difficult. The most recent 2013 *Guidelines* are in similar terms, and state that the mere presence of members of the same ethnic background in the proposed area of relocation does not mean that an applicant would benefit from meaningful support from that community; and even if an extended family network is present it cannot be assumed that they would be in a position to assist. The 2013 *Guidelines* suggest that unless a person has access to "pre-identified accommodation and livelihood options", their situation may be difficult.⁴ This assessment was shared by DFAT in its February 2015 *Country Report*, and its October 2014 *Thematic Report - Conditions in Kabul* alluded to these difficulties while assessing that there are "generally options available for members of most ethnic and religious minorities to be able to relocate from other parts of Afghanistan to relative safety in Kabul", despite constraints caused by a lack of financial resources and employment opportunities, compounded by the high cost of living, particularly housing; DFAT assesses that single men of working age are most likely to be able to successfully relocate, and notes that returnees from Australia may have access to cash assistance.⁵
35. In relation to relocation DFAT advise that "large urban areas such as Kabul are home to mixed ethnic and religious communities. Urban areas offer greater opportunities for employment, access to services and a greater degree of state protection than many other

³ The United Nations High Commissioner for Refugees, '*Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*' 17 December 2010, <http://www.unhcr.org/cgi-bin/txis/vtx/refworld/rwmain?docid=4d0b55c92&page=search>

⁴ UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 6 August 2013, Pages 74-5, <http://www.refworld.org/pdfid/51ffdca34.pdf>

⁵ DFAT *Thematic Report, Conditions in Kabul*, 3 October 2014, at 3.10 – 3.14

areas, including as a result of a higher degree of anonymity for returnees. In practice, internal relocation to urban areas can be limited by a lack of financial resources. Internal relocation to urban areas is generally more successful for single men of working age. Unaccompanied women and children are least likely to be able to relocate to urban areas without the assistance of family or tribal networks.”

36. There is other information documenting the extremely difficult conditions faced by displaced persons in Kabul, which include overcrowding and associated violent clashes over resources such as running water; inadequate housing; high unemployment and a lack of formal jobs; extremely low wages and widespread exploitation in the informal employment sector; and a lack of access to basic services such as electricity and health care.⁶ A report by Amnesty International describes conditions for displaced persons, including returning refugees, in Kabul as unrelentingly miserable.⁷
37. It is also reported by the UNHCR that there is widespread unemployment in urban areas that limit the ability of a large number of people to meet their basic needs. There is also evidence of the deaths of children in refugee camps and the inadequate response of government and aid agencies. Further, Kabul is reportedly a very expensive city to live in, outside of the slum and ghetto areas.
38. The country information emphasises given the lack of social security infrastructure in Afghanistan, people typically rely on traditional family and clan networks for support. The DFAT advice is that ethnic, tribal and family affiliations are important factors in almost every aspect of life in Afghanistan. Kinship is central to identity and acceptance in a community, including for finding shelter and employment.
39. The Tribunal finds the applicant has no family, tribal or clan ties in Kabul to assist or protect him. The country information supports a conclusion he has little prospect of being employed without family or tribal ties in Kabul. The country information also suggests that he would be unable to readily find accommodation in Kabul without such connections.
40. Given the absence of family and social links in Kabul, his lack of education and his limited employment history, the Tribunal does not consider it reasonable for the applicant to relocate to Kabul. While he has demonstrated considerable resilience during the period that he has spent in Australia, where he appears to have managed well, in Kabul he would be competing with many similarly unqualified displaced persons for limited job opportunities without a family or social network to assist him to find work. Country information indicates that work in the construction industry or selling fruit and vegetables is the recourse for many displaced persons in Kabul and obviously cannot provide a living for all of them. The Tribunal finds that as a person with no family or social network in Kabul, a limited skill base, and with a family to support, the applicant could not reasonably be expected to relocate there. In addition, the country information indicates that there is an atmosphere of generalised insecurity in Kabul, with the Taliban and other armed insurgent groups increasingly carrying out attacks in the city.⁸ While the Tribunal does not consider that this establishes that he has a well-founded fear of persecution in Kabul, it considers that it is an additional factor that renders relocating to Kabul neither a reasonable nor practicable option for this applicant. The Tribunal does not

⁶ “Sanctuary in the city? Urban displacement and vulnerability in Kabul”, V Metcalfe and S Haysom, with E Martin, Overseas Development Institute, Humanitarian Policy Group Working Paper, June 2012, <http://www.odi.org.uk/publications/6685-displacement-kabul-afghanistan-refugees-idps-urban>

⁷ Fleeing war, finding misery, The plight of the internally displaced in Afghanistan, Amnesty International, February 2012, http://www.amnesty.org.uk/uploads/documents/doc_22361.pdf

⁸ See for example, *Washington Post*, Taliban brings war to Afghan capital”, 29 November 2014, at http://www.washingtonpost.com/world/asia_pacific/in-afghanistan-taliban-fighters-attack-foreign-compound-in-capital/2014/11/29/f0aef902-77d4-11e4-a755-e32227229e7b_story.html, accessed 24 April 2015.

consider that there is any other part of Afghanistan to which it would be viable for the applicant to relocate.

41. In these circumstances, and having regard to the applicant's personal situation as set out above, the Tribunal accepts that it is not reasonable for the applicant to relocate to Kabul to avoid his risk of Convention based persecution.
42. The Tribunal is satisfied the applicant has a well-founded fear of persecution for a Convention reason if he returns to Afghanistan now or in the reasonable foreseeable future.
43. For the reasons given above, the Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

DECISION

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

Amanda Goodier
Member

ANNEXURE A

RELEVANT LAW

45. 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

46. 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).
47. 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.
48. 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.
49. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
50. 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.
51. 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.
52. 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.

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

Complementary protection criterion

56. 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').
57. '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.
58. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Section 499 Ministerial Direction

59. 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. These include DFAT Country Report, Afghanistan 26 March 2014 and the more recent report 18 September 2015 (also referred to by the applicant's representative in submissions received following hearing).

ANNEXURE B

COUNTRY INFORMATION

Paktia Province

60. DFAT have provided the following information on Paktia and the presence of the Taliban:

Demographics and Terrain

Paktia Province is located in eastern Afghanistan and shares a border with Pakistan in the east. Although the province is small, it is divided into eleven districts. The provincial capital is the city of Gardez. Most of the province is mountainous. Paktia has a population of roughly 500,000, 96 percent of which live in rural areas. The province is predominantly Pashtun, with a small Tajik population.

Security

2. Baitullah Mehsud's Pakistani Taliban is believed to operate in the districts of the province along the border with Pakistan. The Zormat District poses security concerns, as it is large, sparsely populated, and difficult to govern. The Shah-i Kot Valley, located in this district, is a historic hub of insurgent activity. In the northern districts of Jaji and Chamkani, it is estimated by interlocutors that roughly 40 percent of the population is sympathetic to the Taliban. Afghan police are sparsely deployed and continue to be targeted by the Taliban. More than half of the population in the province has received threatening letters from the Taliban in the last few years.

...

Paktia province has an established and officially recognised government, which is widely regarded as corrupt and ineffective. However, it is acknowledged that it is one of the most politically complicated provinces in the country. Some areas have militia commanders, but there are continuous shifts in alliances, and combined with frequent violence, make governance of the province problematic. The capital district of Gardez, for example, is reasonably calm and well managed. Outer districts are weaker and lack the coordinated resources to maintain such stability. The district of Ali Khel reportedly has very little Government presence. There are few essential services provided and the government is generally unable to provide adequate security. There is no well organised legal system and the tribal justice system receives little support. Coordination by the ministries of Interior and Defence in the province is not strong and many of the line ministry positions are not filled or staffed. The United Nations Assistance Mission to Afghanistan (UNAMA) and Human Terrain System (HTT) are unable to provide any comprehensive provincial assessment

R.2. Like many areas of Afghanistan, the Taliban operate in areas of Paktia with the main objective of undermining public confidence in the Government and Afghan National Security Forces (ANSF). There have been attacks against ISAF and Government of Afghanistan targets within Paktia. However, it is generally regarded as being decentralised and localised in its organisation. The Haqqani Network, an insurgent organisation affiliated with the Taliban, is the primary insurgent group in Paktia. In the past it has had close links to Al-Qaida. It has conducted most of the complex attacks (in Kabul) using suicide bombers, vehicle-borne IEDs and armed assaults in the past. Recently it has had ongoing attack planning disrupted by effective CT operations.⁹

⁹:AFG10865 Taliban presence in Paktia, Australia: Department of Foreign Affairs and Trade (DFAT), 7 December, 2010, (CX254673).

61. In respect of the security situation in Paktia, the UNAMA 2014 annual report, published in February 2015 records the following attacks on civilians in Paktia in November 2014:

On 3 November, Anti-Government Elements placed an IED close to a restaurant in the main bazaar of Gardez city, Paktya province. Its detonation caused 26 civilian casualties (four deaths including one boy and 21 injured including four boys). No party

to the conflict claimed responsibility...

On 3 November, in Gardez city, Paktya province, Anti-Government Elements planted an RC-IED inside a tea thermos that subsequently detonated. The attack caused 26 civilian casualties (four deaths, including a child, and 22 injured including five children).¹⁰

62. The DFAT Country Report – Afghanistan - 26 March 2014 states:

2.1 There are many areas of the country contested by insurgent forces and no part of the country can be considered totally free from conflict-related violence. The situation remains fluid and any categorical assessment on the security in a particular area could be rendered quickly inaccurate. Although this list is not exhaustive, contested areas are mainly in the south (including in parts of Helmand, Kandahar, Uruzgan and Zabul) and east of the country (including in parts of Ghazni, Paktika, Khost, Paktia, Nangarhar, Kunar and Nuristan). Insurgents are also present in areas of western, central and northern provinces.

63. The more recent DFAT Report of February 2015 reports the security situation has since deteriorated and even in areas such as Kabul where there is a strong government military presence attacks from anti-government elements are a common occurrence.

64. A recent analysis by the European Asylum Support Office (EASO) described Paktia province as the most volatile province in Afghanistan with anti-government armed insurgents including the Taliban and the Haqqani network actively operating across a number of districts and 466 security incidents recorded during 2014.¹¹ Hundreds of people were displaced because of the insecurity and harassment from the insurgent groups. Incidents include rocket attacks, bomb attacks, roadside bombs and fire fights between insurgents and Afghan security forces, one fight reportedly involving 500 insurgents.¹²

65. The UNHCR 2013 Guidelines on Afghanistan, published in August 2013, which confirm that there has been an increase, not a decrease, in targeting of Afghan civilians associated with the government. It cites the following extract:

“AGEs are reported to systematically target civilians who are associated with, or who are perceived to be supporting the Afghan Government and the international community in Afghanistan, including the IMF and international humanitarian and development actors. As noted above, in 2012 this campaign of systematic targeting intensified, with UNAMA documenting the deaths of 698 civilians and the wounding of 379 others in incidents of targeted killings or attempted targeted killings. The first six months of 2013 saw a further 29 increase in civilian casualties as a result of such attacks compared to the same period in 2012, with 312 civilians killed and 131 injured. Among the primary targets of such attacks are national and local political leaders, government officials, teachers and other civil servants, off-duty police officers, tribal elders, religious leaders, women in the

¹⁰ UNAMA Afghanistan (February 2015), Annual Report 2014; Protection of Civilians in Armed Conflict, pg 44 and 47

¹¹ European Asylum Support Office, 2015, *EASO Country of Origin Information Report Afghanistan Security Situation*, January

¹² Ibid

public sphere, civilians accused of spying for pro-government forces, human rights activists, humanitarian and development workers, construction workers, and persons supporting the peace process.

In light of the foregoing, UNHCR considers that, depending on the specific circumstances of the case, men and boys of fighting age living in areas under the effective control of AGEs, or in areas where pro-government forces and AGEs are engaged in a struggle for control, may be in need of international refugee protection on the ground of their membership of a particular social group. Depending on the specific circumstances of the case, men and boys of fighting age living in areas where ALP commanders are in a sufficiently powerful position to forcibly recruit community members into the ALP may equally be in need of international refugee protection on the ground of their membership of a particular social group. Men and boys who resist forced recruitment may also be in need of international refugee protection on the ground of their (imputed) political opinion. Depending on the specific circumstances of the case, family members of men and boys with this profile may be in need of international protection on the basis of their association with individuals at risk.

State protection

66. The UNHCR has stated that that State protection is on the whole not available in Afghanistan.¹³ According to the UK Home Office in a February 2012 report, state protection is compromised by corruption, ineffective governance, a culture of impunity, weak rule of law and reliance on traditional dispute resolution.¹⁴

Relocation and Kabul

67. The Danish Immigration Service in a 2012 report stated:

Regarding the security situation in Kabul, MoRR said that it is relatively safe compared to the provinces.

IPCB found that there are places in Afghanistan where Afghan National Police (ANP) is functioning well in terms of providing security, especially in Kabul and other big cities like Herat, Mazar-i-Sharif and Faizabad. In this connection, IPCB pointed out that the recent security situation in Kabul (the unrest due to Koran burnings at Bagram at the end of February 2012) had shown that the ANP had been able to secure the central city (within the ring of steel) from demonstrators entering the city.

The challenge for the ANP now is to be more preventive in their work according to IPCB. Regarding the security in Kabul, UNHCR commented that in general Kabul could be an option for safety, but to what extent the city could be a safe place for a person fleeing a conflict depends on the profile of the person and the nature of the conflict the person has fled from. Therefore, an assessment of internal flight alternative (IFA) should be made carefully and on a case by case basis.

¹³ CIS17703: UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, UNHCR, 21 July 2009, p53.

¹⁴ UK Home Office 2012, *Operational Guidance Note – Afghanistan*, 20 February, p.3 <<http://www.unhcr.org/refworld/pdfid/4f43788a2.pdf> > Accessed 2 August 2012.

Regarding security in Kabul, an international NGO informed the delegation that Kabul is one of few places in Afghanistan where the security situation is relatively good and stable even though incidents are occurring also in Kabul.

Regarding the security situation in Kabul, IOM said that there have been a number of suicide attacks which influences the lives of ordinary people. However, apart from suicide attacks, Kabul is safer than other places in Afghanistan, and the area is more under control. This is, according to IOM, due to the fact that Afghan National Army (ANA) and ANP in general are more trained in security operations in Kabul and other big cities like Herat and Mazar-i-Sharif and the situation is more under control in these cities compared to other parts of the country. In Jalalabad, however, the authorities are not yet that efficient, and the Taliban has a strong influence.

Safety is an issue in Kabul because of suicide bombings, according to AIHRC. In December 2011, 80 people were killed and 200 injured in a religious shrine in Kabul. Hospitals, hotels and shopping malls have also been targeted and AIHRC lost one of their commissioners in the bombing of the Finest Supermarket in February 2011. Contributing to the insecurity is also the increasing crime rate, but Kabul is considered safer than other places, according to AIHRC. In addition, there are social problems such as child labour and prostitutions.¹⁵

68. The 2012 DIS report also gives a number of views on the targeting of low profile individuals fleeing conflict from the Taliban and residing in Kabul:

UNAMA did not rule out the possibility that the Taliban would target high profile persons in Kabul, but it did not find it likely that the Taliban would make it a priority or have the capacity to track down low profile persons in the city. ...

UNHCR said that if a low profile person flees a conflict with the Taliban in the area of origin, it would be possible for him to seek protection within his community in Kabul. UNHCR stated that most probably the Taliban would not make it a priority to track down low profile people in Kabul. However, a thorough assessment of the claim and the IFA should be made on a case by case basis.

...According to AIHRC, a low profile person who has fled a conflict with a Taliban commander in his place of origin would in most cases not be tracked down by the Taliban in Kabul as it is not a priority for the Taliban to go after low profile people.

...Concerning presence of the Taliban in Kabul, DRC stated that the Taliban certainly is present in some settlements in Kabul, but DRC had no knowledge of the extent of their presence.

When asked whether low profile IDPs are a target for the Taliban or other insurgent groups, DRC replied that it had never heard of IDPs in the settlements complain about their security situation, and it had never heard of any low profile person fleeing to Kabul and then being targeted by the Taliban. According to DRC, security is exactly the main reason why many

¹⁵ Danish Immigration Service 2012, *Country of Origin Information for Use in the Asylum Determination Process*, March, <<http://www.nyidanmark.dk/NR/rdonlyres/3FD55632-770B-48B6-935C-827E83C18AD8/0/FFMrapportenAFGHANISTAN2012Final.pdf>> Accessed 15 June 2012.

IDPs are in Kabul, and they would not have come to Kabul if they felt that their security was in danger there.¹⁶

69. The UNHCR in its latest Eligibility Guidelines said the following:

Given the wide geographic reach of some armed anti-Government groups, a viable IFA/IRA may not be available to individuals at risk of being targeted by such groups. It is particularly important to note that the operational capacity of the Taliban (including the Haqqani network), the Hezb-e-Eslami (Gulbuddin) and other armed groups in the southern, south-eastern and eastern regions is not only evidenced by high-profile attacks, such as (complex) suicide bombings, but also through more permanent infiltration in some neighbourhoods and the regular distribution of threatening “night-letters”.

Furthermore, some non-State agents of persecution, such as organized crime networks, local commanders of irregular or paramilitary outfits and militias, as well as the Taliban and the Hezb-e-Eslami (Gulbuddin), have links or are closely associated with influential actors in the local and central administration. As a result, they largely operate with impunity and their reach may extend beyond the area under their immediate (*de facto*) control.

Whether an IFA/IRA is “reasonable” must be determined on a case-by-case basis, taking fully into account the security, human rights and humanitarian environment in the prospective area of relocation at the time of the decision. To this effect, the following elements need to be taken into account: (i) the availability of traditional support mechanisms, such as relatives and friends able to host the displaced individuals; (ii) the availability of basic infrastructure and access to essential services, such as sanitation, health care and education; (iii) ability to sustain themselves, including livelihood opportunities; (iv) the criminality rate and resultant insecurity, particularly in urban areas; as well as (v) the scale of displacement in the area of prospective relocation

The traditional extended family and community structures of Afghan society continue to constitute the main protection and coping mechanism, particularly in rural areas where infrastructure is not as developed. Afghans rely on these structures and links for their safety and economic survival, including access to accommodation and an adequate level of subsistence. Since the protection provided by families and tribes is limited to areas where family or community links exist, Afghans, particularly unaccompanied women and children, and women single head of households with no male protection, will not be able to lead a life without undue hardship in areas with no social support networks, including in urban centres. In certain circumstances, relocation to an area with a predominantly different ethnic/religious make-up may also not be possible due to latent or overt tensions between ethnic/religious groups.

In urban centres, the IDP population and growing economic migration are putting increased pressure on labour markets and resources such as construction materials, land and potable water. Widespread unemployment and underemployment limit the ability of a large number of people to meet their basic needs. The limited availability of humanitarian assistance has generally not improved this situation in a meaningful way. In addition to causing loss of life and serious injuries, mine contamination has prevented livelihood activities, including by restricting access to agricultural land, water, health care and education.

In light of the foregoing, UNHCR generally considers IFA/IRA as a reasonable alternative where protection is available from the individual's own extended family,

¹⁶ Danish Immigration Service 2012, *Afghanistan: Country of Origin Information for Use in the Asylum Determination Process: Report from Danish Immigration Service's fact finding mission to Kabul, Afghanistan, 25 February to 4 March*, May, p.7.

community or tribe in the area of intended relocation. Single males and nuclear family units may, in certain circumstances, subsist without family and community support in urban and semi-urban areas with established infrastructure and under effective Government control. A case-by-case analysis will, nevertheless, be necessary given the breakdown in the traditional social fabric of the country caused by decades of war, massive refugee flows, and growing internal migration to urban areas.¹⁷

70. Reintegration packages from the International Organisation for Migration (IOM) are available. This includes for returnees from Australia:
- Tailored reintegration assistance may include the provision for accommodation, skills training, small business creation and/or job placement
 - Additional services provided by IOM upon arrival in Kabul may include assistance through customs, medical consultations where needed, onward travel to final destination and temporary accommodation in Kabul for up to 14 days where requested.¹⁸
71. The DIAC Returns and Removals Program Support Section provided advice on 16 April 2012 that voluntary returnees to Afghanistan can obtain an assistance package of up to US\$4000 based on need. The IOM are able to consider an assistance package up to the value of US\$2000 based on need for involuntary Afghan returnees.
72. The March 2012 DIS report presents information on access to housing in Kabul:
- When asked whether it is possible for people who flee a conflict in their area of origin to move and settle in Kabul, an Afghan law practitioner explained that generally there is no legal barrier for people from other places in Afghanistan to come and settle in Kabul. The Afghan law practitioner added, however, that finding a place to live in Kabul is a major problem as rents are very high. There are though areas with lower rents such as Pol-e-Charkhi, Kotal-e-Khair Khana suburbs of Kabul. The same source added that some of the people who have come to Kabul live in tents as they cannot afford other accommodation and the government does not provide any shelters for them.¹⁹
73. The DIS also presents an overview on the access to the labour market in Kabul, noting:
- According to Ministry of Refugees and Repatriation (MoRR), the main problem in Kabul is employment for people coming from the provinces or returning from abroad.
- Afghan Independent Human Rights Commission (AIHRC) pointed out that the employment rate is very low in Afghanistan. 36% of the workforce is unemployed and another 36% is earning less than one dollar a day. Kabul has a relatively better employment rate, but people coming from the provinces will have difficulties in finding sustainable jobs.

¹⁷ UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, UNHCR, 17 December 2010, pp. 38-40.

¹⁸ Memorandum of Understanding between the Government of Australia, the Government of the Islamic Republic of Afghanistan and the United Nations High Commissioner for Refugees (UNHCR) on migration and humanitarian cooperation, DIAC, 17 July 2011 (CX256576).

¹⁹ Danish Immigration Service 2012, *Afghanistan: Country of Origin Information for Use in the Asylum Determination Process*, 25 February to 4 March, p. 12.

According to AIHRC, there are both wealthy people and poor people who have fled conflicts in their area of origin. The economic situation of most of the people has not improved by coming to Kabul. People who lived under poor conditions in their area of origin will also live in poor conditions in Kabul. There are people who had their land and were living from agriculture but who have ended up as daily labourers in Kabul.

Asked about the access to employment, UNHCR explained that it is better in the big cities than in the country side. According to UNHCR, many people come to Kabul in search of jobs because they think that there are lots of jobs in Kabul due to the presence of the international community. However, because of the rapid growth of the population of the city in recent years, the access to employment is more acute in Kabul compared to other cities, and it is difficult for newcomers to establish a livelihood there.

...Danish Refugee Council (DRC) assumed that persons with vocational skills have a reasonable chance of providing a minimal livelihood, and that is the reason why DRC has started activities with vocational training in motorbike repair, cell phone repair, tailoring and carpet weaving in some settlements. DRC also pointed out that persons with foreign language and computer skills have very good job opportunities in Kabul.

Compared to single women or families, single young males – even those with no education – have better chances to find jobs and survive in Kabul, according to DRC.

...International Organization for Migration (IOM) stated that employment in general is a big problem in Afghanistan. IOM added that the labour market in Kabul is under a huge pressure as a result of the considerable growth of the city's population within the last ten years.²⁰

²⁰ Danish Immigration Service 2012, *Afghanistan: Country of Origin Information for Use in the Asylum Determination Process*, 25 February to 4 March, pp. 13-14.