

1217149 [2013] RRTA 372 (28 May 2013)

DECISION RECORD

RRT CASE NUMBER:	1217149
DIAC REFERENCE(S):	CLF2012/90141
COUNTRY OF REFERENCE:	Afghanistan
TRIBUNAL MEMBER:	Sydelle Muling
DATE:	28 May 2013
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

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 (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Afghanistan, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] August 2012.
3. The delegate refused to grant the visa [in] September 2012, and the applicant applied to the Tribunal for review of that decision.

Claims and evidence

4. 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.
5. According to the protection visa application, the applicant is an ethnic Hazara male born on [date deleted: s.431(2)] in [Village 1], Jaghori District, Ghazni Province in Afghanistan. He described his religion as Shia. He lived in [Village 1] in Jaghori District, Ghazni Province from January 1977 to 1998. He was living in [Tehran], in Iran from 1998 to 2001 and returned to [Village 1] in Afghanistan in 2001 and lived there until 2004. In 2004 he returned to [Tehran] and lived there until 2007. He returned to [Village 1] in Afghanistan in 2007 and lived there until 2009. He again went to [Tehran] in 2009 and lived there until 2011, before returning to [Village 1]. In 2011 he was living in [Quetta], Pakistan until March 2012. He completed primary school from March 1985 to November 1991. He is fluent in Hazaragi and can speak Dari and English, poorly. The applicant was employed as a [labourer] in Jaghori, from 1995 to 1998 and 2001 to 2004. From 2007 to 2009 he worked in agriculture and in 2011 he was working as a taxi driver in Jaghori. In Tehran he worked as a builder for various companies. The applicant departed Afghanistan illegally in 2011. He departed Pakistan in January 2012 and arrived in Australia on 26 April 2012. The applicant's father and sister are deceased. His mother, [siblings] and dependent niece are living in Afghanistan.

1. I am a [age] year old male citizen of Afghanistan born in [Village 1], Jaghori district, Ghazni province. The actual day and month of my birth is unknown; therefore, for the purposes of this visa application, I have used the [birthdate]. Annexed hereto and marked "A" is a copy of my Afghan Taskera

COUNTRY TO WHICH I DO NOT WANT TO RETURN

2. I am afraid to return to Afghanistan.

WHY I LEFT THAT COUNTRY, INCLUDING DETAILS OF PRIOR HARM

3. In 1997 when I was about [age] years old, my [sister] passed away during childbirth. We had a very close relationship and I was distraught at her passing.

Although my sister was married to a [man], he neglected his family responsibilities. My family felt that he would not be a good influence for his newborn daughter and instead, bestowed me with the opportunity to raise and care for the baby.

4. I cared for the baby, called ("[Ms A]"), as if she was my own. I was required to provide for her financially and worked to support her. When I was away for work, my parents took over the responsibility for [Ms A], but each time I returned to Afghanistan I was grateful to see [Ms A] and take on the role of parental figure to her again.

5. Although I enjoyed my parental responsibility to [Ms A], our life in Afghanistan was very difficult. As Hazara Shias we were forced to deny our religion. We were made to pray like Sunnis, which brings shame and humiliation to me and all members of my family. Ever since I can remember, I have been unable to freely practice my religion.

6. The Taliban have threatened and terrorised me and my family for being Shia. We are forced to act Sunni and blend in so as to not draw attention to our true religious beliefs.

7. The difficulties for my family and I did not end with our religious beliefs. In 2010, my father was travelling from Kabul to Jaghori for work, as a taxi driver, and he disappeared. We have not had any contact with my father since he disappeared and fear the worst. I honestly believe that my father was robbed and killed and his taxi was stolen.

8. Unable to cope with the uncertainties surrounding my father's disappearance, in 2011 I returned to Afghanistan and commenced working as a taxi driver. I felt that this line of work would allow me find out more information and what really happened to my father. I was aware that this line of work was very dangerous however I needed the income to support my family and [Ms A] and I needed closure surrounding my father's disappearance.

9. After I had been working for a few months in the Jaghori area, my friend ("[Mr B]") who is also a taxi driver, gave me very concerning information. During the course of his employment, [Mr B] was travelling the roads Kabul and Qarabagh when he was stopped by the Taliban. The Taliban checked [Mr B]'s taxi to see if he was carrying weapons. When they realised he didn't have any weapons, they showed him a photo of a person and asked if he knew that person. The Taliban accused the person in the photo of being anti-Taliban and working for the Afghan government. The person in the photo was me.

10. [Mr B] did not allude that he knew me. Satisfied with his answer the Taliban let him continue driving along the road.

11. I have no reason to doubt the incident as [Mr B] is a true friend of mine. He also knows that I am an honest and hardworking person and that the Taliban's accusations are unfounded.

12. I do not know where the Taliban got my photo from nor why they are looking for me. I am not involved with the Afghan government and I am not actively working against the Taliban. Although I am strongly opposed to their beliefs and do not condone their actions, I would never put myself, my family and especially not [Ms A], in the dangerous position of having my opinion public knowledge.

WHAT I FEAR MAY HAPPEN IF I RETURN TO THAT COUNTRY

13. If I am forced to return to Afghanistan, I fear I will be abused and / or killed by the Taliban. I also fear that anti-Shia-Hazara insurgents and Sunni extremists would kill me.

14. If I am forced to return to Afghanistan I will be denied the freedom to actively practice my religion.

WHO I THINK WILL HARM / MISTREAT ME IF I WAS FORCED TO RETURN TO THAT COUNTRY

15. I fear the Taliban and other anti-Shia-Hazara insurgents and Sunni extremists.

WHY I THINK I WILL BE HARMED / MISTREATED IF I RETURN TO THAT COUNTRY

16. I fear I will be harmed for reasons of my imputed political opinion and the Taliban's misconception that I am working for the Afghan government.

17. I also fear I will be harmed for reasons of my race as a Hazara and religion as a Shia.

18. I also fear I will be harmed for reasons of my membership of a particular social group: failed asylum seekers.

WHY I THINK THE COUNTRY'S AUTHORITIES WILL NOT PROTECT ME IF I AM FORCED TO GO BACK TO THERE

19. The authorities do not have the capacity to protect me. The Taliban still continue to carry out their crimes with impunity.

6. On 14 March 2013, the Tribunal received a lengthy submission from the applicant's adviser which recounted the applicant's history in Afghanistan from 1985 when the applicant started attending school to the applicant's lodgement of a protection visa application in Australia and submitted the applicant faces fear of persecution on account of his race, religion, membership of particular social groups of *person who have departed Afghanistan illegally, fled to Iran/and or the West and lodged an application for asylum and Afghan taxi drivers* and political opinion. The adviser provided country information in relation to each aspect of the applicant's claims, in addition to information regarding the general situation in Afghanistan and submissions on relocation and complementary protection.

7. The applicant appeared before the Tribunal [in] March 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages. The applicant was represented in relation to the review by his registered migration agent. The Tribunal spoke to the applicant about his time in Afghanistan and Iran, the disappearance of his father and his return to Afghanistan after his father went missing. The Tribunal discussed with the applicant his claims regarding enquiries made of him by the Taliban from his friend which led to his departure from the country and the reasons he believes the Taliban were interested in him. The Tribunal also discussed with the applicant his fears of returning to Afghanistan in relation to his Hazara ethnicity and Shia religion, amongst other issues raised in the applicant's written and oral evidence and the submissions made by his adviser, particularly claims in relation to his membership of a

particular social group of *people who have departed Afghanistan illegally, fled to Iran and/or the West and lodged an application for asylum.*

8. Following the hearing, [in] March 2013, the Tribunal received a submission from the applicant's adviser addressing credibility issues raised by the Tribunal during the hearing, information regarding the general safety situation in Afghanistan and information and submissions in relation to taxi drivers as a particular social group and the harm they face.

Findings and reasons

9. The applicant travelled to Australia by boat without a travel document but provided a copy of a taskera identifying his name and place of birth. The applicant has consistently identified as a citizen of Afghanistan. In the absence of evidence to the contrary, the Tribunal accepts that the applicant is an Afghan national and has therefore assessed his claims against Afghanistan as his country of reference and receiving country.
10. The Tribunal accepts the applicant was born in Jaghori district and that he lived in the village [Village 1]. The Tribunal accepts that after completing school the applicant [worked] in Afghanistan before going to Iran where he lived and worked for three years. The Tribunal accepts the applicant subsequently returned to Afghanistan, where he remained for three years before going back to Iran to work. In the hearing, the applicant claimed he remained in Iran for almost three years, working [labouring], and then he went back to Afghanistan because he was "too tired" He claimed in the hearing he spent two years in Afghanistan doing small jobs, working on the land and building a small house, before going back to Iran for visiting and work, where he remained for two years. The Tribunal accepts he subsequently returned to Afghanistan in 2011 because his father went missing.
11. While the Tribunal accepts the applicant may have returned to Afghanistan following the disappearance of his father, given that the applicant has provided consistent evidence in relation to this aspect of his claims, the Tribunal does not accept that the Taliban subsequently had any interest in him and that they had his photograph, car registration and details and was looking for him.
12. The Tribunal notes that the applicant claimed that he learned that he was wanted by the Taliban when his friend was stopped at a checkpoint and shown a photograph of him and his friend was asked if he knew him. While the Tribunal accepts that the applicant's friend may have been stopped at a checkpoint, it does not accept that his friend was shown a photograph of the applicant and asked if he knew him, as he claimed. The Tribunal notes the applicant was asked in the hearing how long he had been back in Afghanistan when his friend was stopped and asked about him and the applicant claimed one week. The Tribunal clarified this with the applicant and he confirmed he had only been back in Afghanistan for one week when his friend was stopped and shown his photograph. In contrast, in the applicant's statutory declaration attached to his protection visa application, he claimed that this particular incident where his friend was stopped occurred after he had been working for a few months in the Jaghori area. When the Tribunal put this inconsistency to the applicant in the hearing, the applicant subsequently claimed he had been in Afghanistan a few month before this incident, consistent with his initial evidence in his statutory declaration, however he did not know exactly how long. In addition, the Tribunal notes in the applicant's adviser's oral submissions made at the conclusion of the hearing, she submitted that the applicant's friend was approached by the Taliban one week after he started working as a taxi driver and it was a

couple of months before the applicant started working when he returned to Afghanistan in 2011. However, the Tribunal notes the applicant's evidence at the beginning of the hearing regarding his past employment, in which he claimed that he worked for a taxi driver for two to three months.

13. The Tribunal has taken into consideration the submission from the applicant's adviser received following the hearing [in] March 2013 in which it was claimed that the reason for the inconsistency in the applicant's evidence in his statement and oral evidence in the hearing was because two different questions were asked of the applicant, resulting in differing answers. It was submitted that the applicant thought the question he was asked in the hearing was "How long after you received the information from your friend did you leave Afghanistan", to which he stated one week, and it was as a result of this misunderstanding that there was this "apparent contradiction" The Tribunal does not accept this explanation for the inconsistency in the applicant's evidence given that it had asked the applicant in the hearing quite clearly an entirely different question which was not remotely similar to the one which the applicant allegedly believed he was being asked. More importantly, as discussed above, the Tribunal repeated the question and the applicant's response to clarify and confirm his answer. Given these circumstances, the Tribunal does not accept that the contradiction in the applicant's evidence was the result of the applicant incorrectly interpreting or misunderstanding the Tribunal's question.
14. While the Tribunal appreciates the applicant's adviser's observations and opinions regarding the applicant's credibility and consistency which she expressed in her oral submissions at the conclusion of the hearing, for the reasons provided above, the Tribunal does not accept the applicant's friend was shown a photograph of the applicant and asked if he knew him.
15. The Tribunal also notes in the applicant's statutory declaration attached to his protection visa application, he claimed that when his friend was shown his photograph and asked if he knew that person, he also claimed that the Taliban accused the person in the photograph of being anti-Taliban and working for the Afghan government. However, in the hearing when asked if the Taliban had told his friend why they were looking for him, the applicant said no. When the Tribunal put this discrepancy to the applicant in the hearing, he explained that if he picks up clergy or brings English books to the students it is considered a crime by the Tribunal and also considered co-operating with the government. However, for the reasons discussed below, the Tribunal does not accept that the applicant engaged in such activities. Nor does the Tribunal accept that this explains the inconsistency between his evidence in his statutory declaration and in the hearing regarding what the Taliban allegedly told his friend.
16. The Tribunal also found the applicant's evidence regarding the reason why the Taliban was allegedly interested in him to have evolved over time. As the Tribunal put to the applicant in the hearing, initially in his statement of claims he claimed he did not know why the Taliban was looking for him. He also claimed he was not involved with the Afghan government and was not actively working against the Taliban. According to the delegate's decision which he provided the Tribunal with a copy of, when asked why the Taliban was looking for him, he suggested someone was trying to get him in trouble. However, in the submission from his adviser dated 14 March 2013, it was contended that the applicant's enquiries in relation to his father's disappearance may have raised issues with the Taliban. Alternatively, it was submitted that it was common for taxi drivers to be reported to the Taliban by informants due to the nature of their passengers such as police, teachers or

religious scholars. Additionally, the adviser highlighted the fact the applicant had spent significant periods of time overseas may have resulted in the Taliban's interest in the applicant. Finally, in the hearing, when asked why he believes the Taliban were looking for him, the applicant claimed he had a problem because he had a small co-operation with government, school teachers, students, clergy and bookstores; he claimed all these jobs were considered to be crimes by the Taliban.

17. As the Tribunal put to the applicant in the hearing, his evidence regarding why the Taliban are allegedly interested in him has developed over the course of processing his application and as a result the Tribunal has serious concerns regarding the credibility of these claims. While the Tribunal notes the applicant's explanation in the hearing that these were reasons he believes the Taliban might be interested in him and not **the** reasons, the Tribunal finds the applicant has embellished aspects of his claims such as taking specific passengers targeted by the Taliban and delivering English books, in an effort to bolster his profile. The Tribunal therefore does not accept the applicant had any co-operation with the government or bookstores or transported police, teachers, clergy, school students or English books.
18. The Tribunal does not accept the applicant's adviser's submissions made both orally at the conclusion of the hearing and in the submission received on 27 March 2013, that the applicant has had more time to think and evaluate events that occurred in Afghanistan between making his application and now and has been questioned more extensively by her, resulting in more detailed information and clarification of previously provided detail. Nor does the Tribunal accept her submission that the applicant's information has not changed. The Tribunal finds it implausible that if the applicant had a small co-operation with the government and other targeted individuals as he claimed in the hearing, he would have claimed in his statutory declaration outlining his claims that he was not involved with the Afghan government, or would not have identified this as a possible reason for the alleged interest in him by the Taliban prior to the Tribunal hearing. The Tribunal notes the applicant characterised his fear of returning to Afghanistan at the beginning of the hearing as the result of reports being made to the Taliban that he had co-operated and assisted the government, teachers, students and clergy. The Tribunal does not accept that if the applicant had engaged in such activity and this was a possible reason for the Taliban's alleged interest in him, he would have waited until the submission dated 14 March 2013 and the Tribunal hearing to fully articulate this.
19. On the basis of the above, the Tribunal does not accept that the applicant is or was of any interest to the Taliban. Whilst the Tribunal accepts that the applicant may have made enquiries regarding his father's disappearance, the Tribunal does not accept that this would have brought him to the attention of the Taliban as the Tribunal has already not accepted that his father's disappearance was Taliban related. As the Tribunal has also found that the applicant was not engaged or imputed to be engaged in any pro-Western/anti-Taliban activities, it follows that he would not be of any interest to the Taliban for that reason. The Tribunal further finds it implausible and therefore does not accept that the applicant would be of any interest as a person who spent time in Iran. It therefore follows that the Tribunal does not accept that the applicant's friend was stopped and shown a photograph of the applicant, as claimed.
20. Based on the above, the Tribunal does not accept the Taliban has the applicant's photograph and details including his name and car registration or that they have made any enquiries about him from his friend or anyone else. The Tribunal finds the applicant was of no interest to the Taliban in the past and therefore he would not be of any interest to them

now or in the reasonably foreseeable future for any of the reasons the applicant has speculated. The Tribunal does not accept that the Taliban have identified the applicant and actively sought him for reasons of an imputed political opinion as a supporter of the Afghan government and/or anti-Taliban because of investigations made into his father's disappearance or because he travelled back and forth to Iran.

21. The Tribunal has taken into consideration the applicant's adviser's submissions in the hearing and in writing regarding the applicant's membership of a particular social group of taxi drivers. While the Tribunal accepts that occupation groups such as taxi drivers may constitute a social group for the purposes of the Convention, the Tribunal does not accept that the applicant faces a real chance of serious harm for this reason. The Tribunal notes the adviser submitted the applicant's father's disappearance attests to the fact taxi drivers face a well-founded fear of persecution for a Convention reason. However, the Tribunal refers to the applicant's evidence and the fact that he has no knowledge of what happened to his father, including whether he is alive or dead or the circumstances of his disappearance, therefore the Tribunal does not accept that the applicant's father's disappearance is attributable to his position as a taxi driver or membership of this particular social group and not to some other random or opportunistic act of violence.
22. In any event, the Tribunal also does not accept the applicant's adviser's contention that the applicant will be compelled to return to his occupation as a taxi driver. The Tribunal notes the applicant's evidence in his protection visa application regarding his previous employment in Afghanistan as a [labourer] for several years, his evidence in the hearing regarding his work on the land and building a small house during his return to Afghanistan when he was tired and his [employment] in Iran over several years. The Tribunal also refers to the applicant's statutory declaration attached to his protection visa application and the delegate's decision which the applicant provided the Tribunal with a copy, in which he stated that he commenced working as a taxi driver when he returned to Afghanistan in 2011 as he felt this line of work would allow him to find out more information and what really happened to his father. The Tribunal does not accept that in these circumstances the applicant was compelled to work as a taxi driver in the past or that if he returns to Afghanistan he would be required to resume this particular occupation, particularly given he only engaged in this work for a period of two to three months. The Tribunal therefore does not accept that the applicant faces a real chance of persecution for reason of membership of a particular social group of *Afghan taxi drivers*, if he returns to Afghanistan, now or in the reasonably foreseeable future.
23. The applicant also claimed that he fears persecution based on his Hazara ethnicity and Shia religion. The Tribunal notes the applicant's evidence in the hearing regarding the killing of Hazaras since the time of Abdul Rahman. Although the Tribunal accepts that there is a history of Hazaras and Shias in Afghanistan suffering discrimination and violence on the basis of their religion and that whilst the Taliban was in power, Hazaras were targeted for reasons of their race and religion, the Tribunal does not accept that the Taliban now specifically targets Hazaras or Shias in Afghanistan on a systematic and discriminatory basis for the essential and significant reasons of their race and religion. As the Tribunal discussed with the applicant in the hearing, sources such as DFAT have consistently reported over the last two years that Hazaras as a group do not face systematic violence or any existential threat. In March 2012 it was stated that Hazaras continue to face societal discrimination in Afghanistan but the community was not being persecuted on any consistent basis and did not face systematic violence or an existential threat. It referred to positive and real changes for minorities over the previous decade (Department of Foreign Affairs and Trade 2012).

‘AFGHANISTAN: Hazara Community Update’, 12 March (CISNET Afghanistan CX283654). As the Tribunal noted in the hearing, the UNHCR Eligibility Guidelines 2010 does not indicate Hazaras or Shias as being a group generally subjected to persecution by reasons of their race and religion alone. (UN High Commissioner for Refugees 2010, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 17 December).

24. The Tribunal accepts that Hazara Shias are subject to discrimination in Afghanistan. The Tribunal refers specifically to the applicant’s evidence in the hearing regarding his experience of having to pay [more money] as compared to Pashtun drivers. While the Tribunal accepts that such treatment may be discriminatory, the Tribunal does not accept on the limited and somewhat vague information provided by the applicant in the hearing, that this constitutes serious harm within the meaning of s.91R(1).
25. Similarly, the Tribunal notes the applicant’s claim regarding difficulties Shias may experience praying whilst travelling in Afghanistan. However, the Tribunal found the applicant’s evidence regarding such problems to be vague and lacking in detail. The Tribunal notes in the applicant’s statutory declaration attached to his protection visa application he claimed that as Hazara Shias “we were forced to deny their religion” and “were made to pray like Sunnis” yet the applicant did not reiterate such general claims in the hearing. The Tribunal does not accept on the limited information provided by the applicant that he was denied the ability to practice his Shia religion in Afghanistan or that if he returns to Afghanistan he would not be able to practice his Shia religion or face a real chance of serious harm for reasons of his religion.
26. The Tribunal has taken into consideration the applicant’s claims in the hearing and in the submissions from his adviser regarding issues of safety travelling in Afghanistan. The Tribunal notes the applicant’s claim in the hearing that if he returns to Jaghori he could not live without work and would have to go out of the area. The Tribunal accepts that there are security issues in travelling from Jaghori district to Ghazni City or Kabul and other areas of Afghanistan. The Tribunal notes the information from DFAT it put to the applicant in the hearing regarding the safety of travel into and out of most districts in Ghazni province. The update states that travel “could still be dangerous in the context of broader security in Afghanistan” but that “the situation was equally risky for all travellers”, regardless of ethnicity (Department of Foreign Affairs and Trade 2012, *Afghanistan – Hazara Community Update*, 12 March). The Tribunal also noted in the hearing more recent information from DFAT dated November 2012 (DIAC Country Information Service 2012, *Country Information Report NO. 12/64 – CIS Request AFG13987: Security Situation for Hazaras in Afghanistan* (sourced from DFAT advice of 31 October 2012), 01 November [CISNET CX298127](#)) and a previous report from September 2011 (DIAC 2011, *CIS Request AFG12298: Road security in Ghazni Country information report No. 11/56* (Sourced from DFAT advice of 20 September 2011), 21 September (CIS CX272986) which provides that the main targets on the roads in Ghazni, and nationally, were people with links to the government and international forces. The Tribunal has had regard to the written submissions from the applicant’s adviser including information from Professor Maley regarding the Taliban targeting of the Hazara community on major roads. Although Professor Maley refers to reports he had received regarding incidents of Hazaras being killed or abducted while travelling between Ghazni and Jaghori and also other areas and routes, the Tribunal notes that these incidents are not supported by any independent information and rely on anecdotal evidence. As such, the Tribunal prefers the recent detailed information from DFAT. For the

reasons provided above, the Tribunal does not accept that the applicant has any direct or perceived links to the Afghan government or international community or that he would be carrying any documentation which pointed to a connection with the government. Based on the independent information and the Tribunal's findings above, that the applicant is not a known problematic individual to the Taliban, the Tribunal does not accept that the applicant faces a real chance of persecution for a Convention reason if he were to travel from Kabul to Jaghori upon his arrival in the country or outside of Jaghori for employment.

27. As the Tribunal has found above, the applicant's home area is [Village 1] in Jaghori district. The applicant confirmed in the hearing that on each occasion he returned to Afghanistan from Iran he returned to and resided in [Village 1]. The Tribunal also notes the applicant's evidence that all his family, except for his brother, are residing in [Village 1]. The Tribunal notes the country information it put to the applicant in the hearing regarding the situation in Jaghori district. In relation to the situation in the Jaghori area, where Hazaras are dominant, the country information provides that the area is reasonably secure and quite fine for Hazaras. In June 2012, DFAT adopted a positive view on the extent of government control in Ghazni province when it stated that "the Afghan Government had asserted effective control in the districts in Ghazni of (Malistan, **Jaghori** and Nawur) in recent years". (Department of Foreign Affairs and Trade 2012, *CIS Request AFG13440: Characteristics of Hazara militias and targeted attacks on Hazaras by Hazara militias*, 28 June) DFAT's advice was broadly consistent with an earlier update it provided in March 2012 on the Hazara community in which it stated that "[v]iolence was not noticeably worse in the predominantly Hazara districts (Jaghatu, Nawr, **Jaghori**, Malistan)" and that "the Hazara community did not face systemic violence or an existential threat" (Department of Foreign Affairs and Trade 2012, *Afghanistan – Hazara Community Update*, 12 March). An October 2012 DFAT report considered there was no greater risk to Hazaras in Jaghori over and above the risk faced by the population generally (DIAC Country Information Service 2012, *Country Information Report NO. 12/64 – CIS Request AFG13987: Security Situation for Hazaras in Afghanistan* (sourced from DFAT advice of 31 October 2012), 01 November [CISNET CX298127](#)). The Tribunal also refers to information that Jaghori district is relatively stable and secure and describing it as a "low risk" area (Monsutti, A 2012, *Comments by Professor Alessandro Monsutti on Hazaras in Afghanistan Provided to the Independent Protection Assessment Office on January 2012*, January).

28. The Tribunal has had regard to the information provided by the applicant's adviser in her oral submissions at the conclusion of the hearing and her written submissions received on 14 March 2013 and 27 March 2013 in relation to the poor security situation in Ghazni province. The Tribunal notes that the greater part of the information refers to the situation in Ghazni generally. The Tribunal has had regard to Professor Maley's opinion that no part of Ghazni is safe for Hazaras. However, the Tribunal places more weight on the sources put to the applicant in the hearing and cited above, which focus specifically on Jaghori district and not the province as a whole. The Tribunal has also taken into consideration the applicant's adviser's reference to a report in Tolo News from September 2012 regarding the capture of a Taliban facilitator being captured in Jaghori district. While the Tribunal accepts the applicant's adviser's contention that this indicates the region is not immune from infiltration by the Taliban, it does not accept that this is inconsistent with the independent information put to the applicant by the Tribunal which paint a generally positive picture regarding the situation in Jaghori. The Tribunal accepts on the country information that Ghazni province continues to experience insecurity and a strengthening in Taliban presence, however this appears to be the experience of Pashtun/mixed areas, particularly in the eastern district of the

province such as Qarabagh, as reported in the Cooperation for Peace and Unity (CPAU) report dated April 2009 which is cited in the applicant's adviser's submission received on 14 March 2013.

29. In light of this information and the fact the applicant would be returning to Jaghori, which is almost one hundred percent Hazara, the Tribunal finds that the applicant does not face a real chance of persecution for reason of his Hazara ethnicity or Shia religion.
30. Nor does the Tribunal accept that the applicant will face persecution on his return to Jaghori because of his membership of a particular social group of *persons who have departed Afghanistan illegally, fled to Iran and/or the West and lodged an application for asylum*. The Tribunal notes that the applicant did not raise this specific fear despite being asked several times during the hearing if there were any other reasons why he fears returning to Afghanistan. Even when the Tribunal referred to the applicant's statutory declaration and asked him what he believes will happen to him as a member of a group of failed asylum seekers, the applicant's response was that he does not remember what he said before and that he is not political and has no membership. The Tribunal notes the country information it put to the applicant in the hearing from DFAT, relying on advice from a number of different reputable contacts including UNHCR, the Provincial Reconstruction Team in Ghazni province and international immigration consultants operating in Afghanistan, which was that none of these contacts considered there were significant protection issues for returnees (Department of Foreign Affairs and Trade 2012, *Hazara Community Update*, 12 March). On the basis of the above, the Tribunal finds that the applicant does not have a subjective fear of harm for this reason and in any event, in light of the country information cited above, the Tribunal does not accept the applicant faces a real chance of persecution as a returnee, his illegal departure or as a failed asylum seeker (or any combination of these) now or in the reasonably foreseeable future if he returns to Jaghori.
31. The Tribunal has taken into consideration the applicant's adviser's oral submissions regarding safety in Afghanistan remaining uncertain and the likelihood of incidents of violence and worsening human rights abuses with the withdrawal of NATO forces in 2014. The Tribunal also notes the information referred to by the adviser in the submission received on 14 March 2013 which was submitted indicates that the withdrawal of troops would have an adverse impact on security. The Tribunal has taken into consideration the excerpt from the 2102 United States Commission on International Religious Freedom, Annual Report, cited by the applicant's adviser, which states that the future of Afghanistan's Shi'a Muslim minority is uncertain once international forces withdraw. The Tribunal finds on the basis of the information before it, any consideration of what will happen if and when the coalition forces leave Afghanistan is speculative. Given the unpredictability of the situation in Afghanistan including the uncertainty of the departure of the coalition forces and the form this will take, the Tribunal does not accept that the applicant would face a real chance of persecution for reason of his race, religion or any other Convention reason in the reasonably foreseeable future.
32. The Tribunal has had regard to the RRT decisions the applicant's adviser's referred to in her written submission received on 14 March 2013 and her oral submission made in the hearing but notes that RRT decisions are not binding and each case must be determined on its individual circumstances.
33. Considering the applicant's claims both individually and cumulatively, the Tribunal does not accept that the applicant faces a real chance of persecution in [Village 1], in Jaghori

district, Ghazni province because of an imputed political opinion, his Hazara ethnicity, his Shia religion or his membership of any particular social group including *Afghan taxi drivers* or *persons who have departed Afghanistan illegally, fled to Iran and/or the West and lodged an application for asylum*, now or in the reasonably foreseeable future. The Tribunal therefore finds that the applicant's fear of persecution is not well-founded.

COMPLEMENTARY PROTECTION OBLIGATIONS

34. On the basis of the applicant's claim to be a national of Afghanistan, the Tribunal finds that Afghanistan is the applicant's receiving country for the purposes of s.36(2)(aa).
35. As the Tribunal does not accept that the applicant is a refugee as defined in the Refugees Convention, the Tribunal has considered the alternative criteria in s.36(2)(aa), whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm as defined in subsection 36(2A) of the Act.
36. Having regard to the definition of significant harm in s.36(2A) of the Act as set out under the heading 'relevant law' above, and the findings of the Tribunal above, the Tribunal does not accept that what the applicant might experience upon return to his home in Afghanistan will involve a real risk of being arbitrarily deprived of his life; having the death penalty carried out on him; or being subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. The Tribunal does not accept that the applicant is a person of interest to the Taliban. For the reasons provided above, the Tribunal does not accept that the Taliban had the applicant's photograph, name and car registration details and that they made enquiries about the applicant from his friend. The Tribunal therefore does not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan, there is a real risk he will suffer significant harm, from the Taliban because he is being targeted by them for the varied reasons he assumed.
37. The Tribunal does not accept that if the applicant returns to his home in Jaghori district of Ghazni province, there is a real risk he will suffer significant harm because he is a Hazara or a Shia Muslim or any other reason. The Tribunal notes the applicant has not claimed to have experienced any harm in the past for these reasons. It also refers to the country information including information about the situation for Hazara Shias generally and particularly in Jaghori district, and does not accept the claim that the applicant faces a real risk of significant harm. The Tribunal accepts the applicant may face some degree of danger travelling from Kabul to Jaghori given some routes or parts of routes may be unsafe or insecure. However, the Tribunal notes the advice from DFAT, cited above, that no particular ethnic group is being targeted on roads in Afghanistan and that the main targets on the roads in Ghazni, and nationally, are people employed by or with direct links to the Afghan Government or the international community regardless of ethnicity or those carrying documentations which pointed to a connection with the government. However, having regard to the applicant's own experiences, travelling between Iran and Afghanistan on several occasions and working as a taxi driver for a period of months, and the fact it finds the applicant has not experienced any problems in the past and does not have any of the characteristics highlighted above, the Tribunal finds that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm as defined in subsection 36(2A) of the Act.

38. In light of the Tribunal's findings above, the Tribunal does not accept on the evidence before it, that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan that there is a real risk he will suffer significant harm. The Tribunal is therefore not satisfied that the applicant meets the alternative provisions in s.36(2)(aa).

Conclusions

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

decision

42. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Attachment A - Relevant law

43. 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of 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 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

REFUGEE CRITERION

44. 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 Refugees Convention.
45. 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.
46. 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, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.
47. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
48. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
49. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). 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.

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

COMPLEMENTARY PROTECTION CRITERION

55. 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').

56. '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.

57. 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.