

1219618 [2013] RRTA 149 (27 February 2013)

DECISION RECORD

RRT CASE NUMBER: 1219618

DIAC REFERENCE: CLF2012/183434

COUNTRY OF REFERENCE: Afghanistan

TRIBUNAL MEMBER: Wendy Boddison

DATE: 27 February 2013

PLACE OF DECISION: Melbourne

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

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] November 2012, and the applicant applied to the Tribunal for review of that decision.

RELEVANT LAW

4. 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

5. 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.
6. 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.
7. 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.

8. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). 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.
11. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
12. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
13. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 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.
14. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

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

Complementary protection criterion

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

CLAIMS AND EVIDENCE

19. 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.
20. The applicant appeared before the Tribunal [in] February 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages.
21. The applicant was represented in relation to the review by his registered migration agent.
22. The applicant is [age deleted: s.431(2)] and was born in [village deleted: s.431(2)], Jaghori district, Ghazni province Afghanistan. He was [married] and his wife was residing in Kabul.
23. In his entry interview the applicant stated that in 1385 (2006) he was [profession deleted: s.431(2)] at a school and was travelling with a number of documents from the school. They were travelling from Jaghori to Ghazni when their vehicle was stopped and searched by the Taliban. The Taliban asked who the documents belonged to and no one spoke for a few minutes until somebody pointed to the applicant and said the bag belonged to him. The applicant was taken from the car to a house where he was held for two hours. Then there was a battle between the Taliban and possibly the Afghan National Army. They used this

opportunity to get out of the house and run away. The applicant then returned to Jaghori. After that the applicant went to live in Kabul. Although his family lived in Jaghori it was difficult for him to travel back and forth. This was because the Taliban had kept the documents that they had obtained from him. The applicant believed that if he travelled in the area of spies would tell people that he was there.

24. It was put to the applicant that this event occurred six years ago and he was asked what had happened since then that had made him want to leave Afghanistan. The applicant responded that during the six years he had remained in Kabul and studied. He lived in [University 2] and earned his living by [Profession 1]. After he graduated from university he could not go to the provinces for work and he could not find work in Kabul. The applicant could not remain in Kabul because he could not work freely and he could have been harmed. There were Taliban in Kabul and they controlled an area between Qarabagh and Ghazni. The applicant believed that he would be handed over to the Taliban because he was [Profession 3] and also because he had been [Profession 1] in the area and the Taliban had taken documents from him.
25. The applicant believed that if he returned to Afghanistan there was a lot of insecurity for him. Primarily because the Taliban were against Shia and Hazaras and secondly because he was [Profession 1] and thirdly because he was [Profession 3].
26. In a statutory declaration dated [in] August 2012 accompanying his Protection visa application, the applicant stated that he left Afghanistan because he was threatened by the Taliban. In 2006 he was working as [Profession 1] in Jaghori district and one of his responsibilities was to take the students' academic transcripts from the school to the [organisation deleted: s.431(2)] which was located in Ghazni city. In November 2006 when he was taking these documents to Ghazni city in a taxi they were stopped by 10 armed Taliban men. The applicant was with three other Hazara men. The Taliban told them to get out of the car and they searched it. They found a package with the school documents and some of the applicant's own documents and they started physically abusing him and took him to a house in [location deleted: s.431(2)] was well-known for being occupied and controlled by the Taliban. The applicant was taken to a room and beaten up. He was then locked in a room with a window and was guarded by armed Taliban. After about four hours they heard gunshots as the Afghan National Army had come to the area and attacked the Taliban. The Taliban who were guarding the applicant left their posts to fight and the applicant took this opportunity to escape. They went to the main road where they saw some Afghan soldiers who took them to Ghazni city.
27. The applicant passed the university entrance exam and went to [University 2] and lived on campus. He rarely left the University for fear of his life. He did not return to Jaghori for fear of being killed by the Taliban.
28. In 2010 the applicant's father died and he went home to see his family. He stayed in Jaghori for about a week. One of his relatives warned him that the Taliban was looking for him and he should be careful. The applicant took a different route on his return to Kabul and went through [location deleted: s.431(2)]. The taxi was stopped in [location deleted: s.431(2)] by five armed Taliban men who ordered the applicant out of the taxi. Three of them started searching the taxi but at that stage someone called them on their radio and they suddenly took off.
29. The applicant returned to Kabul and continued his studies and lived at the university. When he graduated from university he was no longer allowed to live in the University College and

he feared living anywhere else because he would be targeted by the Taliban. In addition to being accused of supporting the foreigners and being [Profession 1] the Taliban would now also target the applicant for having graduated from university. The Taliban deemed university graduates and intellectuals to be more useful to the government and therefore they were targeted.

30. The applicant said that he could not relocate anywhere in Afghanistan because the Taliban would find him wherever he went. The applicant was fearful that he would be killed by the Taliban because he escaped from them on one occasion and he now had the additional profile of being an educated intellectual. Also if he returned he would be accused of being a spy as he travelled to a foreign country. The applicant believed the Taliban would harm him for being [Profession 1] and educated person. They had also accused him of transferring documents which they deemed to be illegal and finally they would target him because he was a Hazara and Shi'a. The Afghan authorities did not have the ability to protect the applicant.
31. The applicant's agent submitted that the applicant's fear of harm fell within the Convention definition of a refugee and also there were substantial grounds for believing that there was a real risk that the applicant would suffer significant harm if "refouled" from Australia. It was submitted that relocation was not an option.
32. It was submitted that the applicant could not be protected by a weak government against a powerful Taliban. Hazaras were easily recognizable by their distinctive features and as such could be recognized and harmed throughout Afghanistan. They referred to an extract from the United States Commission on International Religious Freedom Annual Report 2011. They also referred to Professor Maley's paper On the Position of the Hazara minority in Afghanistan dated December 2010, The US Department of State, Human rights report 2009, and Amnesty International report 2011.
33. It was submitted that the US Department State in its 2010 Report highlighted discrimination and exploitation aimed at Shia Hazaras. They submitted that there were clear concerns with returning people to Afghanistan given the country's volatile state. Returnees were considered outsiders even by other Hazaras and were seen as having been westernised. There was discrimination against returned Hazaras as they were often regarded as having lost their ethnic and religious identities. Reference was made to an attack in Kabul in 2010 and the shooting down of US helicopter in Wardak province and it was submitted that relocation was not a viable option for the applicant and should not be considered.
34. The applicant was interviewed by the delegate [in] August 2012. The delegate accepted that the applicant was a credible witness and accepted his claims. However the delegate found that the applicant would be safe if he resided in Kabul.
35. In a submission dated [in] February 2013 it was claimed that the applicant feared that he would be targeted by the Taliban because he would be accused of supporting the government and foreigners as a graduate and [Profession 1]. His profile was compounded because he had fled to a Western country and was now at risk of being accused of being a spy. Reference was made to country information regarding the treatment of Hazaras in Afghanistan.
36. It was submitted that the applicant feared persecution on the basis of his membership of a particular social group. He could be considered a member of several particular social groups, namely physically identifiable Hazara, highly educated Hazara, persons who worked for government as [Profession 1] and failed asylum seekers returned from a Western country.

Reference was made to country information regarding attacks on [groups deleted: s.431(2)] by the Taliban.

37. It was submitted that the applicant could not relocate to Kabul as there was a present threat from the Taliban. It was submitted if the applicant was “refouled” from Australia there was a real risk that he would suffer significant harm.

Evidence at the hearing

38. The applicant stated his wife had just finished the first year of her [qualification deleted: s.431(2)] and returned home to Jaghori for the three-month winter break to help the applicant's mother.
39. The applicant's wife was living with his mother, two brothers and one sister in Jaghori. The applicant explained that his family did not have any land or house in the village. They were using the house of somebody who was away. Prior to his father passing away his father worked in Iran as a labourer for two or three years at a time. He would return to the village for two to three months and go back to Iran. Since his father had died the applicant's family had lived on savings and now he was sending them some money from Australia.
40. The applicant described the procedure for sitting the entrance examinations to university in Afghanistan. He explained that they had three opportunities to sit the university test. If they were not admitted to the university of their choice after they sat the first test they could come back and try again the following year. When the applicant first sat the entrance examination to university he gained entry to the [university deleted: s.431(2)]. He did not want to study in this area as he had always wanted to be [Profession 3]. As he had not received his preferred course and as his family was in an economically difficult situation and the area which he lived in needed [Profession 1], he decided to [work] for a year before re-sitting the exam.
41. When the applicant was stopped by the Taliban in 2006 after they escaped he went to Ghazni City and then immediately went on to Kabul. He did not remaining Ghazni City and he did not return to his home village until his father passed away in 2010. In Kabul the applicant stayed with distant relatives until he sat the exam and was accepted into the [Profession 3] course at [University 2].
42. The applicant left Afghanistan one and a half months after he finished his [Profession 3] degree. He remained living at the University until he left Afghanistan because there was a short delay until he received his degree. As a Hazara he had to wait longer because he did not have the connections that the other students did. He also explained that there was a three month period during his final year when they had to move out of the university because a Jirga was being held there. At that time he rented accommodation with other students and then they returned to university for one month before the course finished.
43. When the applicant commenced university he wanted to graduate and get a job as [Profession 3] to assist to rebuild his country. However whilst he was the university studying he realised that things were getting stricter and that there was more pressure on him. He was facing further uncertainty and his life was becoming more insecure. He never left the university grounds as he was too afraid to venture out into Kabul. He felt safe and secure in the university but not outside.

44. The routes the applicant took when he travelled to Ghazni were discussed with him. His village was close to [location deleted: s.431(2)].
45. There was some discussion with the applicant about what sort of employment his qualifications would lead to. He said that he had wanted to work in [Profession 3]. He said that the employment prospects in this field were either with NGOs who were constructing buildings and building roads or with the government who was building schools. There were no job prospects in private enterprise in Kabul for [Profession 3]. As a junior [Profession 3] who had just graduated he would be required to travel to distant areas as part of his employment. These areas were insecure and he heard that they often travelled as discreetly as possible so not to draw the attention of the Taliban.
46. The applicant lived and worked in [location deleted: s.431(2)] for three months. This was part of the practical part of his course and was organised by the University. He worked for the [company deleted: s.431(2)] which was a joint government to private enterprise.
47. The applicant believed that because he was living in Australia this would cause him additional problems if he returned to Afghanistan. He was asked how anyone would know and he responded that everybody in his village, all his acquaintances would know that he had been in Australia. He said that as he was an educated person the Taliban would remember him and would know that he had been to Australia. He said that the Taliban were against educated people and were against Western people. They targeted people who worked with foreigners in Afghanistan and if he returned from a Western country he would be regarded as having worked with foreigners and he would also be suspected of being an agent for foreign countries.
48. The applicant said that whilst he was living at [University 2] he was feeling safe but then he realised that the situation in Afghanistan security wise was getting worse and worse. The Taliban was against educated people and targeted [graduates]. The only employment available to him as [Profession 3] would be with NGOs or the government and as a junior [Profession 3] he would be required to travel to dangerous places. The applicant would not be able to work freely in Afghan society and look for a proper job.

Independent country information

49. According to the Department of Foreign Affairs and Trade (DFAT)¹ Hazaras as members of an easily identifiable ethnic group, and mostly followers of Shi'a rather than the more prevalent Sunni Islam, have always been a distinct community in Afghanistan. They claim to be indigenous to large parts of the country but were pushed in the 17th century, (mostly) into the central highlands - an area often described as "Hazarajat" which encapsulates Afghanistan's Hazara dominated-region - by the Tajiks and Uzbeks from the north and by the Pashtuns from the south. It is estimated that 60 percent of the Hazara population was killed or displaced in the late nineteenth century under the reign of the Emir Abdur Rahman Khan. Mistrust between Hazaras and Pashtuns (and the central government usually associated with them) has been strong ever since. They experienced windows of opportunity during Afghanistan's experiment with constitutional monarchy and under the Communist regime, although higher education, foreign service and army service were all closed to them. During the Mujahedin era the Hazaras experienced attacks from both sides of the conflict. The

¹AFGHANISTAN: Situation of the Hazara Minority 21 February 2010

Taliban regime with its anti-Shi'a attitudes, severely restricted their movements by keeping them contained in Hazarajat and committed atrocities against them.

50. *On the Position of the Hazara Minority in Afghanistan* by Professor William Maley, 7 December 2011 notes that Hazaras have been subject to discrimination and persecution at least since the 'Hazara Wars' of 1891-1893, and there was no reason to believe that the underlying factors (both ethnic and sectarian) fuelling hostility towards Hazaras had dissipated.
51. The U.S. Department of State reported in 2011 that during 2010 ethnic tensions between Pashtun and non-Pashtun groups resulted in conflict and occasional killings, and that social discrimination against Shi'a Hazaras continued along class, race and religious lines. Discrimination against Hazaras and other Shi'as continued in the form of extortion of money through illegal taxation, forced recruitment and forced labour, physical abuse and detention. It observed that the UNHCR had reported that (among others) Shiite Muslims – “particularly those from the Hazara ethnic group” - faced official obstacles and discrimination by the Sunni Muslim majority (2010 Human Rights Report: Afghanistan, U.S. Department of State, Bureau Of Democracy, Human Rights, and Labor, 2010 Country Reports on Human Rights Practices, 8 April 2011).
52. Kazem-Stojanovic (Researcher, Asia Pacific Programme, Amnesty International, International Secretariat, Presentation to IMR, Sydney, 8 October 2010) noted that Hazaras were “[a]lways more at risk because their ethnicity can be observed by their facial features. ... [T]his makes them susceptible to violent attacks on a daily basis and widespread daily discrimination. Their accent is also very easily identifiable which puts them at greater risk when moving around the country”. She went on to say that Hazaras were “more at risk than other ethnic groups” in Afghanistan. They were “treated more violently” and were “more at risk of death when involved in confrontations with Taliban or other militia forces”, apart from where Hazara militias had control. She stated that Hazaras were “likely to be attacked or killed by Taliban at checkpoints” Majority-Hazara areas were considered relatively safe but Hazaras were at risk outside these, currently shrinking, safe areas. They had “no safe passage”. Their movements were limited because of the danger of travelling, for example, to market. Such protection as there was in predominantly Hazara areas was afforded by a local warlord, a protection which she suggested was unreliable.
53. In 2010 a social anthropologist and specialist in Afghan migratory networks (Monsutti) wrote on the situation in Ghazni province and other parts of the country, having visited many rural regions that were current strongholds of the Taliban, and working primarily in Ghazni province itself.² He observed that Hazaras were still currently constantly under threat of being harmed by the Taliban. They were “much more at risk from the Taliban in Afghanistan than Uzbeks or Tajiks” Even though the Taliban were not currently in power, they considered the Hazaras were “against them”. Hazaras returning to Afghanistan were being “killed on the roads because they are considered potential enemies” Currently this was occurring on the “extremely unsafe” road through Ghazni between Kabul and Kandahar, and on roads “especially around Ghazni”, a province strategically important for the Taliban. He added that “The Taliban use the uncertainty of whether or not they will attack to further intimidate and restrict Hazaras. Sometimes a Taliban will harm or even kill an [sic] Hazara and sometimes not. Hazaras can never be sure if a Taliban will turn on them or not”. He

² The Situation of Hazaras in Afghanistan, Associate Professor Alessandro Monsutti 19 August 2010

stated that in recent times the most dangerous areas for Hazaras had become around the Pashtun/Hazara ethnic boundaries in Uruzgan, Ghazni province, Wardak and toward Kabul. Jaghori in Ghazni was “rather safe” but the Taliban’s presence was noted from time to time there and “all the surrounding areas (West, South, East) are possibly among the most dangerous in the country”. He also observed that creating a dangerous environment was an intentional Taliban tactic. They promoted theft on the roads for this purpose. Hazaras were “particularly at risk in these conditions”. They were also “at risk of being robbed, attacked or killed by criminals encouraged by the Taliban”.³ On this point Monsutti observed that using the main roads from Kabul it would be possible to travel to Jaghori in “half a day”. However being forced to use alternative routes through the mountains (he gave the examples of Behsud and Nawur) could take up to one week. He also observed that the mountain routes were rough and in some places trucks could not get through. At times of seasonal extremes “most vehicles cannot travel on these routes”. Monsutti reported that at the time of writing (August 2010) the Taliban were following a systematic strategy, including the use of random violence, “particularly against Hazaras” to maintain instability. The author expressed the view that Hazaras were “right to fear they would again be systematically targeted”, and with “renewed vengeance”, if the Taliban regained sufficient power in Afghanistan.

State Protection

54. The UNHCR guidelines note that protection in Afghanistan generally 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, all of which contribute to a deteriorating human rights situation in the country.
55. The ineffectiveness of the police is also a factor with the UK Home Office stating that the force is beset by inadequate training, illiteracy, corruption, involvement in drug trafficking, and high levels of desertion.⁴ The US Department of Defense adds that the high percentage of assigned but untrained Afghan Uniformed Police negatively impacts on Government objectives and supports insurgent influence.⁵ Most police are said to be under-equipped, and lack ammunition and vehicles. Corruption is also a problem with equipment being illegally sold off and the proceeds being pocketed by officers.⁶
56. Concern has also been expressed in relation to police willingness to provide protection. The US Department of State claimed that official impunity was pervasive with many observers believing that ANP personnel were largely unaware of defendants’ rights under the law and their responsibilities.⁷ Concerns also existed with regard to the Afghan Local Police (ALP) – a force established in 2010 to deter infiltration of police by armed opposition groups. UNAMA cites interlocutors who suggest that there are fears that the ALP may abuse their power and enact human rights violations against civilians as a result of: a history of past negative experiences with similar local defence groups which were abusive to local

³ Monsutti, A. 2010, “The Situation for Hazaras in Afghanistan”, 19 August.

⁴ UK Home Office 2011, *Operational Guidance Note: Afghanistan*, March
<http://www.unhcr.org/refworld/docid/4d8b3a232.html> – Accessed 4 April 2011.

⁵ Inspector General, US Department of Defense 2011, *Assessment of U.S. Government Efforts to Train, Equip, and Mentor the Expanded Afghan National Police*, 3 March.

⁶ UK Home Office 2011, *Operational Guidance Note: Afghanistan*, March
<http://www.unhcr.org/refworld/docid/4d8b3a232.html> – Accessed 4 April 2011.

⁷ US Department of State 2010, *Country Reports on Human Rights Practices for 2009 – Afghanistan*, March, Sections 1(d) (e) & 2(c).

communities; weak oversight and recruitment mechanisms; and limited training for recruits (two to three weeks).⁸

FINDINGS AND REASONS

57. The applicant's interviews have been conducted with the assistance of a Hazaragi interpreter and it is clear that he is fluent in this language. He has the distinctive physical facial features of a Hazara. The delegate was of the view that the information he provided in relation to Afghanistan was consistent with having lived there. The applicant provided copies of a number of identity documents including a Taskera and educational qualifications to the Department.
58. Based on this information the Tribunal accepts that the claimant is ethnically Hazara and national of Afghanistan and that Afghanistan is his receiving country. Based in his evidence and the country information the Tribunal accepts that he is a Shia Muslim.
59. The applicant was able to describe in considerable detail his experiences in Afghanistan. The Tribunal accepts that after finishing high school he sat the University entrance exam and gained entry to the faculty of [university deleted: s.431(2)]. As this was not the course he wished to undertake he then worked for a year as [Profession 1]. The Tribunal accepts that in 2006 whilst working as [Profession 1] he was travelling from Jaghori to Ghazni when his vehicle was stopped and searched by the Taliban. The Tribunal accepts that as the applicant had documents relating to the school he was detained by the Taliban and only released when they came under attack by the Afghanistan army.
60. The Tribunal accepts that the applicant then sat the university entrance exam on a second occasion and gained entry to [Profession 3] course at [University 2]. The applicant then moved to Kabul and lived at [University 2].
61. The Tribunal accepts that in 2010 when the applicant's father died he returned to his village in Jaghori. The Tribunal accepts that whilst returning to Kabul he was stopped by the Taliban who ordered him out of the car. He then returned to Kabul and never returned to his village in Jaghori.
62. The Tribunal accepts that the applicant has graduated with [Profession 3] degree and that his interest is in constructing roads and buildings. The Tribunal also accepts that he has previously worked as [Profession 1]. The Tribunal accepts that the employment opportunities that would be open to the applicant as [Profession 3] would mostly involve either working for the government building roads or for various NGOs and foreign companies who are operating in Afghanistan.⁹ The Tribunal accepts that applicant's evidence that most of this kind of work would require travel outside of Kabul particularly as a junior [Profession 3] he would be required to travel to remote insecure places.

⁸ UNAMA 2011, *Afghanistan Annual Report 2010, Protection of Civilians in Armed Conflict*, March, p40 http://www.humansecuritygateway.com/documents/UNAMA_AfghanistanAnnualReport2010_ProtectionofCiviliansinArmedConflict.pdf – Accessed 25 May 2011.

⁹ AFGHANISTAN: Costly Afghanistan road project is marred by unsavory alliances, *New York Times*, The, 1 May, 2011, , <http://www.nytimes.com/2011/05/01/world/asia/01road.html?pagewanted=all>; AFGHANISTAN: Wasted aid, *Afghanistan Today*, 4 December, 2011, , <http://www.afghanistan-today.org/article/?id=186>

63. The Tribunal must look at whether the applicant would be seriously harmed in the reasonably foreseeable future if he returned to Afghanistan.
64. In relation to his home district of Jaghori the Tribunal accepts that the roads between Kabul and Jaghori are unsafe and that there are checkpoints people are stopped by armed insurgents and the Taliban. As noted in the delegate's decision country information indicates that travel on the roads to and from Jaghori is a serious security concern with many of the roads, including large stretches of the strategic Kabul to Kandahar highway, reportedly under Taliban control. There are regular reports of ambushes robberies kidnappings and killings by the Taliban and criminal groups along this road.
65. In September 2011 DFAT advised:
- Levels of risk on roads in Ghazni depend on the individuals involved. Contacts agreed that people with links to the Afghan Government or IC [International Community] were targeted, regardless of ethnicity. Carrying documentation which pointed to a connection with the Government was dangerous. According to Hazara contacts, Hazaras tended to receive more scrutiny and were at greater risk of harassment and violence on the roads outside Hazara districts. Other Afghan and IC contacts noted that locals - who had ties to the province and knowledge of the area - were generally able to travel between Ghazni and Hazara districts without incident. They were not aware of targeting of any particular ethnic group on the roads.¹⁰
66. When asked to update this information DFAT advised in October 2012 that:
- Security in Ghazni province deteriorated during the first half of 2012, in the context of a broader deterioration of security across the south and east of Afghanistan. Targeting of government officials - both Hazara and Pashtun - continued. Increased ISAF troop deployments in the region resulted in increased engagements with the insurgency, but in Ghazni this tended to be confined to the (Pashtun/mixed) eastern districts of Ghazni, Andar, Qarabagh and Ab Band.
- ... The poor condition of Afghanistan's limited road network is added to by insecurity. Taliban and criminal elements target the national highway, setting up arbitrary armed checkpoints. Official ANP and ANA checkpoints designed to secure the road are sometimes operated by poorly-trained officers who are known to use violence to extort bribes. Vehicles are routinely stopped and harassed, and occupants occasionally abducted or killed.
- ... Contacts unanimously agreed the main targets on the roads in Ghazni, and nationally, were people employed by or with direct links to the Afghan Government or international community - regardless of ethnicity. Carrying documentation which pointed to a connection with the government remained dangerous. Nobody we spoke to was aware of targeting of any particular ethnic group on the roads. Several interlocutors pointed out the most significant threats to life safety on these routes were traffic accidents and IEDs - neither of which discriminated according to ethnicity
67. The Tribunal also refers to the evidence from Kazem-Stojanovic (2010) that Hazaras are treated more violently and are more at risk of death when involved in confrontations with Taliban than other ethnic groups, including at Taliban checkpoints. There is similar evidence from Monsutti (2010) that Hazaras are currently under threat of being harmed or killed by the

¹⁰ AFGHANISTAN:CIS Request AFG12298: Road security in Ghazni, Australia: Department of Foreign Affairs and Trade (DFAT), 21 September, 2011

Taliban, more so than some other ethnic groups, in part because the Taliban consider the Hazaras to be “against them” or their “potential enemies”. There is also the evidence from an Afghan MP (DFAT 2010) that there continues to be historical animosities and anti-Shi’a feeling by the Sunni Taliban towards Shi’a Muslim Hazaras (Maley December 2011).

68. UNHCR 2010 Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan. 17 December 2010 (UNHCR Guidelines) note:

Marginalized during the Taliban rule, the Hazara community continues to face some degree of discrimination, despite significant efforts by the Government to address historical ethnic tensions. Notwithstanding the comparatively stable security situations in provinces and districts where the Hazara constitute a majority or a substantial minority, such as Jaghatu, Jaghori and Malistan districts in Ghazni province, the security situation in the remainder of the province, including on access routes to and from these districts, has been worsening. Although not able to launch widespread operations in Jaghori, there are some reports of Taliban attacks in the district. Jaghori district is increasingly isolated given that some access routes to and from the district, including large stretches of the strategic Kabul-Kandahar road, are reportedly under Taliban control. There are regular reports of ambushes, robberies, kidnappings and killings by the Taliban and criminal groups along these roads. The Taliban have also intimidated, threatened and killed individuals, including Hazaras, suspected of working for, or being supportive of, the Government and the international military forces. It has also been reported that in the Kajran District of Daykundi province, armed anti-Government groups engage in propaganda against Hazaras and Shia Muslims allegedly on the ground of religious differences.

69. The Tribunal finds that it is not a remote or far-fetched possibility that the applicant would be seriously harmed in the reasonably foreseeable future in the context of travel to Jaghori from Kabul. There is a real chance that due to a combination of his qualifications, connections to the government and ethnicity (and religion) that the Taliban would inflict serious harm amounting to persecution under s.91R(1) of the Act on the applicant in the reasonably foreseeable future. Based on the country information set out above the Tribunal is satisfied that the authorities in Afghanistan are unable to protect him from this risk of harm. The Tribunal finds that the applicant does have a well-founded fear of persecution for a Convention reason in the district of Jaghori.
70. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: *Randhawa v MILGEA* (1994) 52 FCR 437 per Black CJ at 440-1. Depending upon the circumstances of the particular case, it may be reasonable for a person to relocate in the country of nationality or former habitual residence to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. Thus, a person will be excluded from refugee status if under all the circumstances it would be reasonable, in the sense of ‘practicable’, to expect him or her to seek refuge in another part of the same country. What is ‘reasonable’ in this sense must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country. However, whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense: *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51, per Gummow, Hayne & Crennan JJ, Callinan J agreeing

71. The applicant lived from 2006 to 2012 in Kabul and the Tribunal must consider whether he faces a real chance of persecution in Kabul for a Convention reason. The claimant stated that he did not think that Kabul was safe. The applicant claimed that the only reason why he remained safe in Kabul was because he was studying and living at the university and rarely left the university which had comparatively good security and he said that the Taliban and other groups did not come into the university. He was able to stay there during the holidays.
72. If the applicant returned to Kabul it would be likely that he would work in the field he qualified to work in namely [Profession 3]. This would mean that he would be employed by the government or foreign companies who are constructing roads and building on behalf of the government¹¹. Alternatively as the applicant has worked as [Profession 1] in the past he might be employed as [Profession 1].
73. The UNHCR Guidelines note:

There is a systematic and sustained campaign by armed anti-Government groups to target civilians associated with, or perceived as supporting, the Afghan Government or the international community, particularly in areas where such groups are active.

Attacks by armed anti-Government groups, which have ranged from intimidation, assassinations, abductions and stand-off attacks, to the use of improvised explosive devices (IEDs) and suicide attacks, increasingly target civilians associated with or perceived as supportive of the Government and the international community/ISAF. Targeted civilians include Government officials and civil servants, Government-aligned tribal leaders, Ulema Council (a national clerics' body) members, religious scholars, judges, doctors, teachers, and workers on reconstruction/development projects.

The majority of targeted attacks on civilians by armed anti-Government groups have occurred in those groups' strongholds. However the number of targeted assassinations and executions of civilians has also increased in other parts of the country previously considered more secure. In the south-eastern and central regions, the number of assassinations and executions allegedly committed by armed anti-Government groups in 2010 has increased in comparison to 2009. Such targeted attacks rose dramatically in parts of the southern region, particularly in Kandahar, where the Taliban have been conducting a systematic and targeted assassination campaign since the beginning of 2010. ...

UNHCR considers that persons associated with, or perceived as supportive of, the Government and the international community and forces, including Government officials, Government-aligned tribal and religious leaders, judges, teachers and workers on reconstruction/development projects, may, depending on the individual circumstances of the case, be at risk on account of their (imputed) political opinion, particularly in areas where armed anti-Government groups are operating or have control.

Furthermore, teachers, pupils and educational facilities are increasingly the target of threats and direct attacks by the Taliban and other anti-Government groups, in areas where such groups are active, but also increasingly in parts of the country previously

¹¹ AFGHANISTAN:Costly Afghanistan road project is marred by unsavory alliances, New York Times, The, 1 May, 2011, , <http://www.nytimes.com/2011/05/01/world/asia/01road.html?pagewanted=all>;
AFGHANISTAN:Wasted aid, Afghanistan Today, 4 December, 2011, , <http://www.afghanistan-today.org/article/?id=186>

considered more secure; attacks by conservative elements opposed to girls' education are also reported

A recently intercepted message from Mullah Omar, the spiritual leader of the Taliban movement, ordered Taliban members to capture and kill any Afghan who is supporting or working for Coalition forces or the Government of Afghanistan, as well as any Afghan women who are helping or providing information to Coalition forces. The message, which departs from his previous instructions to minimize civilian deaths, has fuelled fears of Taliban retaliation among ISAF civilian support personnel, such as Afghan interpreters.

The increased targeting of civilians is perceived as part of an effort by armed anti-Government groups to gain control over territories and populations. Local inhabitants are reportedly coerced into supporting anti-Government groups through threats or the use of force. These intimidation tactics are compounded by the reduced public confidence in the capacity of the Afghan Government and international forces to maintain security and provide basic services. Intimidation tactics used by armed anti-Government groups against the civilian population reportedly include: individual or community warnings or threats, often in the form of "night letters" (*shab nameha*), to stop working for, or supporting, the Government or international forces, upon pain of death; as well as setting up road blocks. It is also reported that individuals, including children, suspected of "spying" on behalf of the Afghan military or international forces have been summarily executed by armed anti-Government groups.

74. [Details deleted: s.431(2)]

75. Most reports of killings by the Taliban or other insurgent groups in Kabul involve bomb explosions targeting government and foreign troops or police.¹² Other reported attacks by the Taliban on civilians in Kabul involve high profile people connected to the government or government employees. Some recent examples:

- Arsala Rahmani, a former high-ranking Taliban official who was a member of an Afghan council whose goal is to get the insurgency to lay down arms and accept the elected government, was shot in May 2012. He was riding in his car in one of the capital's most secure areas, near Kabul University, when an assassin with a silencer-equipped pistol pulled alongside him and shot him.¹³

¹² For example 'Six killed in Kabul suicide bombing' 2012, *Reuters*, 8 September <<http://www.ft.com/intl/cms/s/0/d4b1a45e-f9da-11e1-9f6a-00144feabdc0.html#axzz2AMcECusB>> Accessed 26 October 2012; '12 killed in Kabul bombing claimed by militants in retaliation for anti-Islam film' 2012, *Al Arabiya*, 18 September <<http://english.alarabiya.net/articles/2012/09/18/238652.html>> Accessed 26 October 2012; 'Afghan peace council head killed in Kabul' 2011, *Reuters*, 20 September <<http://www.reuters.com/article/2011/09/20/us-afghanistan-attack-idUSTRE78J3Y820110920>> Accessed 26 October 2012; Nordland, Ron 2011, '12 Americans Die as Blast Hits Bus in Afghanistan', *New York Times*, 29 October <http://www.nytimes.com/2011/10/30/world/asia/deadly-attack-strikes-nato-bus-in-kabul.html?pagewanted=all&_r=0> Accessed 26 October 2012

¹³ 'Ex-Taliban officer assassinated in Kabul drive-by shooting' 2012, *USA Today*, 13 May <<http://usatoday30.usatoday.com/news/world/afghanistan/story/2012-05-13/kabul-assassination-Rahmani-Taliban/54944006/1>> Accessed 26 October 2012 <Attachment>

- Burhanuddin Rabbani, a former president of Afghanistan who had been given the task of seeking peace with the Taliban, was assassinated in Kabul in September 2011 by a suicide bomber wearing explosives in his turban.¹⁴
- Jan Mohammad Khan, one the president's close confidants who hailed from the same Popolzai tribe as Karzai, was assassinated in Kabul in July 2011, most likely by the Taliban.¹⁵
- Six foreign UN employees were killed and nine wounded in an attack in Kabul in October 2009. Taliban spokesman Zabiullah Mujahid claimed responsibility for the attack in a telephone call to the Associated Press. He said three Taliban militants with suicide vests, grenades and machine guns had carried out the assault.¹⁶ This report listed other attacks in Kabul in 2009:
 - 24 Oct: Six UN staff and three Afghans killed in attack on UN guesthouse
 - 8 Oct: Suicide bomber attacks Indian embassy, killing at least 17
 - 17 Sept: Six Italian soldiers and 10 Afghans die in bomb attack on military convoy
 - 18 Aug: Suicide car bomber kills 10 in attack on convoy of Western troops
 - 11 Feb: Assault on three government buildings kills 27, including eight attackers

76. These attacks demonstrate that despite the better security situation in Kabul the Taliban is present and able to carry out attacks. The Tribunal finds that it is not a remote or far-fetched possibility that if the applicant was working as [Profession 3 or Profession 1] that he would be seriously harmed by the Taliban in the reasonably foreseeable future. The essential and significant reason for the harm feared is a combination of his imputed political opinion (a pro-government, pro-foreign forces opinion), race and religion. The risk that he would be harmed would be increased because he is a Hazara Shia. Based on the country information set out above the Tribunal is satisfied that the authorities in Afghanistan are unable to protect him from this risk of harm. The Tribunal finds that the applicant does have well-founded fear of persecution for a Convention reason in Kabul and indeed throughout Afghanistan. The applicant would be unable to relocate to avoid the risk of harm and he is a refugee within the meaning of the Convention.

CONCLUSIONS

77. 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).

¹⁴ 'Taliban peace talks have failed: ex-Afghan minister' 2011, *Agence France Presse (AFP)*, 18 November <CX276797>

¹⁵ Graham-Harrison, E. 2011, 'Jan Mohammad Khan, Top Afghan Advisor, Killed In Kabul', *Reuters*, 17 July <http://www.huffingtonpost.com/2011/07/17/jan-mohammad-khan-killed_n_901058.html> Accessed 26 October 2012 <Attachment>; Felbab-Brown, Vanda 2011, 'Implications of the assassinations of prominent politicians in Afghanistan', *Huffington Post*, 21 July < CX270526>

¹⁶ 'UN staff killed in Kabul attack' 2009, *British Broadcasting Corporation (BBC)*, 28 October < CX235689>

DECISION

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