

1415219 (Refugee) [2016] AATA 4167 (13 July 2016)

**DECISION RECORD**

<b>DIVISION:</b>	Migration & Refugee Division
<b>CASE NUMBER:</b>	1415219
<b>COUNTRY OF REFERENCE:</b>	Afghanistan
<b>MEMBER:</b>	Filip Gelev
<b>DATE:</b>	13 July 2016
<b>PLACE OF DECISION:</b>	Melbourne
<b>DECISION:</b>	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Statement made on 13 July 2016 at 5:40pm

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

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Afghanistan, applied for the visa [in] 9 January 2013 and the delegate refused to grant the visa [in] August 2014.
3. The applicant appeared before the Tribunal on 16 May 2016 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Pashto and English languages.
4. The applicant was represented in relation to the review by his registered migration agent.

### RELEVANT LAW

5. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.

### Refugee criterion

6. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
7. 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.
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)). Examples of 'serious harm' are set out in s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it

is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

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 '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.

#### **Section 499 Ministerial Direction**

16. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

#### **CONSIDERATION OF CLAIMS AND EVIDENCE**

17. The issue in this case is whether Australia has protection obligations in respect of the applicant. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

## Country of reference and identity

18. The applicant claims to be a national of Afghanistan. He was born in [his home town in] Helmand province, but he has been residing in Pakistan since approximately 2002, except for a period of about 6 months in Kabul in 2009-2010. He said that he resided in Pakistan illegally.
19. The applicant provided some identity documents to the Department of Immigration in support of his identity claims. First, he provided together with the application a black and white copy of an Afghan identity card, known as *taskera*. At interview with the delegate he explained that he had previously provided the original to the Department and it was returned to him "heavily ...damaged".<sup>1</sup>
20. At interview, the applicant said that the *taskera* had been issued to him in Quetta, Pakistan. He had gone there with his [Relative 1]. He said "there was this person and they made it for me". The delegate suggested to the applicant that according to country information *taskeras* are not issued in Pakistan; they are issued in a person's home area.
21. In post-interview submissions, dated 13 December 2013, it was submitted on the applicant's behalf that the *taskera* had been obtained in Afghanistan and "a person who works in the Afghan consulate [in Quetta] picked up the *taskera* in Helmand and brought it to Quetta."
22. At interview with the delegate he also provided a document purporting to be an original Afghan driver's licence. The applicant explained that he went with his [Relative 1] to an office in Kabul. His [Relative 1] paid money to a man and then months later went to Kabul to get the licence.
23. According to the representative's post-interview submissions of 13 December 2013, the applicant's [Relative 1] spoke to "a person" or "individual officer working at the licence Department" who provided the licence to the [Relative 1].
24. The delegate had the driver's licence examined by the Department of Immigration's document examination unit. The examiner concluded that the document was bogus and retained the document in accordance with departmental procedure.
25. The delegate had other concerns about the document, including the fact that he was claiming to have applied for a full licence when he was [age] years old, but according to the website of the Ministry of Interior of Afghanistan a person must be at least 18 years old to get a full driver's licence (to drive a car, as opposed to, for example, a moped or a motorcycle).
26. At the Tribunal hearing the applicant said that as far as he remembered he went to the Afghan consulate in Quetta. The Tribunal said that it thought that the delegate was correct – an Afghan national has to go to their home area in Afghanistan in order to get a *taskera*. He said that he could not remember whether he obtained a *taskera* before or after he worked in Kabul.
27. In relation to the driver's licence, the applicant claimed that he had a licence before he left Pakistan for Australia. The applicant said that he admitted to the possibility that the driver's licence may be a false document. He said that was also true of the *taskera* which he obtained with his [Relative 1]. He said that he had never been to an office to get a document by himself. He always went with his [Relative 1].

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<sup>1</sup> See decision of the delegate, a copy of which was provided together with the application, at p. 2.

28. The Tribunal finds that the applicant decided to obtain and provide identity documents to the Department of Immigration, because he was asked for ID documents.
29. Based on the applicant's written and oral evidence and in the absence of evidence to the contrary, the Tribunal gives him the benefit of the doubt and finds that the applicant is a national of Afghanistan and that his identity is as claimed.
30. The Tribunal has therefore assessed the applicant's claims for protection in relation to s.36(2)(a) against Afghanistan.
31. There is no evidence before the Tribunal that the applicant has the right to enter and reside in a third country for the purposes of s.36(3). The Tribunal accepts that the applicant does not have the right to enter and reside in Pakistan or any other third country.

### **Background and Claims**

32. The applicant is [an age] year old Afghan national of Pashtun ethnicity. He claims that he was born in [his home village in] Lashkar Gah district, Helmand Province, but his family moved to Quetta, Pakistan, in 2002.
33. The Tribunal accepts the applicant's evidence that he is uneducated and has limited work skills. In Pakistan he worked in a [shop], and as a person [servicing other products]. In Australia he has been working as [an occupation] with the same employer, [named], for the last three years and two months.
34. The applicant claims that around 2002 his father was killed by the Taliban and that was the reason the rest of the family moved to Pakistan.
35. At the hearing the Tribunal pointed out that in 2002 the Taliban were no longer in power, the applicant said he could not remember whether the family moved before or after the US led invasion of Afghanistan. He said he was too young to remember it. When the Tribunal pointed out that the Taliban are Sunni by religion and Pashto by ethnicity, the same as the applicant, he said he did not know about that. He said had no idea why the Taliban killed his father. He said he did not know if it was because of land or something else.
36. The time and cause of death of the applicant's father are not relevant to the Tribunal's ultimate conclusions. The Tribunal accepts that the applicant's father is deceased and that the applicant lived in Pakistan from 2002 until he left for Australia in 2012.
37. The applicant claims that in July 2009 he travelled from Quetta in Pakistan to Kabul where he commenced work at [Agency 2]. The applicant's [Relative 1] had found this job for him. He worked as [occupation]. On several occasions the applicant was approached and told to stop working for "infidels" (the [westerners]) and to join the Taliban. Out of fear he left the job in January 2010 and returned to Pakistan. The applicant's [Relative 1] was approached by some men in Quetta who said that they will kill the applicant for not joining the Taliban.
38. At the Tribunal hearing it transpired that for about two years the applicant has been in a relationship with an Australian citizen and has had a [child] with her (born on [date]).
39. The applicant's wife has [children] from a previous relationship, aged [ages]. [One] child, [named], was admitted to [a hospital] for approximately 10 days with [a medical condition].
40. The applicant claims to fear harm from the Taliban because of his imputed political opinion as a person who worked for [westerners], who has sought asylum in Australia and who is married to an Australian citizen.

### **The applicant's credibility**

41. The delegate had significant concerns in relation to the applicant's identity and his claims.
42. So does the Tribunal.
43. In support of the claim that he was employed by [Agency 2], the applicant provided a letter purportedly from that organisation and purportedly signed by [a senior manager] for Afghanistan [Mr A].
44. The delegate exchanged several emails with [Agency 2]. He was advised, among other things that
  - (1) the NGO's [services] were outsourced to a company so the applicant would not have been an employee of [Agency 2];
  - (2) [Mr A] was not the NGO's [senior manager] when the letter was allegedly signed ([in] January 2010);
  - (3) The signature on the letter is not that of [Mr A];
  - (4) [Mr A] does not know the applicant and has never signed anything for him.
45. At the Tribunal hearing the applicant continued to insist that he travelled to Kabul and worked for [Agency 2]. The applicant said that maybe [Agency 2] were scared to tell the Australian government that he worked for them.
46. Further, he pointed out that he could identify [Mr A] in a photograph. The Tribunal noted that he may have researched the topic and may have seen photos of [Mr A].
47. Eventually, later during the hearing the applicant acknowledged that the letter from [Agency 2] may not be genuine. He explained that it was his [Relative 1] who had procured it. However, the applicant continued to maintain that even if the letter was not genuine, he did work for that [Agency].
48. The Tribunal observed that it was strange that the applicant left [Agency 2] around [a date in] January 2010 in fear of his life, but then only a few days later his [Relative 1] travelled to Kabul and picked up a letter which would have been very dangerous if he was caught with this letter in his possession on the Kabul to Kandahar Highway. The applicant said that his [Relative 1] may have obtained the letter some time later, not immediately after the letter was written on [date in] January 2010.
49. The Tribunal does not accept that the applicant worked for [Agency 2]. The entire claim is rather implausible. If the applicant has lived in Pakistan since he was about [age range] years old, he would have virtually no knowledge of Kabul and he would be quite vulnerable. While a job is better than being unemployed, the Tribunal does not accept that the applicant would have travelled hundreds of kilometres, along a notoriously dangerous road, to a city he had never been to, in order to work as [occupation].
50. Furthermore, the Tribunal places considerable weight on the correspondence from [Agency 2] to the delegate that the applicant did not work for [Agency 2] and that the letter provided by the applicant to the Department of Immigration was not written by [Agency 2].
51. The Tribunal finds that since about 2002 the applicant has not returned to Afghanistan and has not worked in Kabul or anywhere else in the country.

52. It cannot be said that the applicant has lied in relation to a peripheral issue. The claim relating to [Agency 2] has been the central claim advanced by the applicant.
53. The Tribunal rejects the applicant's claims that he was ever asked to join the Taliban, that he was of adverse interest to them or any other anti-government elements at any time for any reason.
54. Nevertheless, the Tribunal observes that this is a case where the objective circumstances of the applicant are such that he faces a real chance of persecution, even though he has not told the truth about the reasons why he left Pakistan in 2012.

#### **Well-founded fear of persecution**

55. The applicant has not been back to Afghanistan for some 14 years. He spent the first ten years of his life in the district of Lashkargah in Helmand. He has not lived anywhere else in Afghanistan and according to his evidence has no connection to any other part of the country. Therefore, the Tribunal finds that Lashkargah is the applicant's home area.
56. Helmand province is one of the most volatile provinces in Afghanistan. The Taliban are actively operating in many districts and frequently carry out insurgent attacks. Hundreds of military personnel and civilians have been killed.<sup>2</sup> In 2014, there were over 1,600 attacks in Helmand with 144 attacks in Lashkargah, the applicant's home district.<sup>3</sup> In 2015 the violence increased further and in the period 1 January to 31 August 2015 there were 1,785 security incidents.<sup>4</sup>
57. The European Asylum Support Office states the following about the security situation in Helmand in 2015:<sup>5</sup>

In May 2015, approximately 30 insurgents were killed and 11 others wounded during a military attack on a Taliban training centre in Sangin district of Helmand province. In a separate incident approximately 14 policemen and seven ANA soldiers were killed after intense fighting with the Taliban in the Nawzad district of Helmand province. In May 2015, approximately 400 Taliban insurgents besieged Musa Qala district of southern Helmand province and residents were asked to leave the area for their own safety. In June 2015, approximately 38 militants were killed and 10 others wounded in military operations in southern parts of the province. In a separate incident in Kajaki district clashes were ongoing and 20 security force members were killed while 15 were captured by Taliban insurgents. Armed insurgents stormed several police posts which resulted in heavy clashes with the ANP. In these clashes approximately 17 policemen were killed and reports suggest that 10 Taliban also died in the district of Musa Qala.

In July 2015, Nawzad district of Helmand province fell to the Taliban after intense fighting but it was recaptured by ANSF during an operation. During the recapture operation approximately two Afghan security force members were killed and 31 others wounded; 50 Taliban insurgents were killed according to initial reports. A military operation was launched from the Musa Qala district to clear the area of anti-government insurgents. According to the Ministry of Defense at least 13 insurgents were killed while there were no civilian or military casualties.

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<sup>2</sup> European Asylum Support Office, 2015, *EASO Country of Origin Information Report Afghanistan Security Situation*, January

<sup>3</sup> European Asylum Support Office, 2015, *EASO Country of Origin Information Report Afghanistan Security Situation*, January

<sup>4</sup> European Asylum Support Office, 2016, *EASO Country of Origin Information Report: Afghanistan - Security Situation*, January.

<sup>5</sup> European Asylum Support Office, 2016, *EASO Country of Origin Information Report: Afghanistan - Security Situation*, January.

In August 2015, the Taliban seized the district of Musa Qala for a few days. The insurgent fighters reportedly outnumbered the ANSF in the district centre, which had been under attack in 2014 and in May and June 2015. It was reported that the district of Baghran had been under sustained control of the Taliban for nearly a decade and they imposed their social rules on the population, such as a ban on music, instructions on dressing and appearance, a ban on girls education etc. Also in the district of Kajaki, the Taliban controls large parts of territory and in these areas the main highway was blocked from June to September 2015 due to fighting. According to the Afghanistan Analysts network, eight of Helmand's districts were under full or significant Taliban control in September 2015.

The district of Sangin has also been heavily contested.

58. More recently there have been alarming reports that the Taliban have "sharply increased pressure on the beleaguered capital of Lashkar Gah". In early May 2016 the Taliban killed at least 15 Afghan policemen after they overran two checkpoints.

After briefly capturing the northern city of Kunduz last year, the insurgents, who control more territory than at any time since 2001, appear determined to gain control of a province to use as a base for their campaign.<sup>6</sup>

59. In December 2015 the *New York Times* reported on the deteriorating security situation in the capital. In an article with the self-explanatory title "Last Refuge From Taliban for Afghans May Prove No Refuge at All", the newspaper describes how thousands of internally displaced persons have gone to the capital from other parts of the province, but now they fear that the capital itself may fall. A local official told the reporters that only two of the 10 provincial districts were free from Taliban; four were under Taliban control and four under threat.<sup>7</sup>

60. DFAT in its Country Information Report on Afghanistan (15 September 2015) states the following:

3.34 Insurgent and terrorist groups, including the Taliban, openly target government officials and people associated with the international community. These individuals are often subject to intimidation, threats, abduction and killing. These attacks occur throughout Afghanistan, including Kabul.

61. The most recent UNHCR Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan, state the following:<sup>8</sup>

AGEs (anti-government elements) reportedly target individuals who are perceived to have adopted values and/or appearances associated with Western countries, due to their imputed support for the Government and the international community.<sup>9</sup> There are reports of individuals

<sup>6</sup> "Afghan Taliban tighten squeeze on Helmand capital", *Reuters*, 10 May 2016, accessed at <http://www.reuters.com/article/us-afghanistan-taliban-idUSKCN0Y11EM> on 12 July 2016.

<sup>7</sup> M. Mashal and T. Shah, "Last Refuge From Taliban for Afghans May Prove No Refuge at All", *NY Times*, 27 December 2015, accessed at [http://www.nytimes.com/2015/12/28/world/asia/taliban-battle-lashkar-gah-helmand-province-afghanistan.html?\\_r=0](http://www.nytimes.com/2015/12/28/world/asia/taliban-battle-lashkar-gah-helmand-province-afghanistan.html?_r=0) on 12 July 2016.

<sup>8</sup> "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", *UNHCR*, 19 April 2016, HCR/EG/AFG/16/02.

<sup>9</sup> Young people with Western connections and mannerisms are reportedly at risk of being mistaken for collaborators with the government and the international community. Bureau of Investigative Journalism, *From Kent to Kabul: The Former Asylum Seeking Children Sent Back to Afghanistan*, 17 July 2015, <http://labs.thebureauinvestigates.com/from-kent-to-kabul/>. See also BBC, *The Young People Sent Back to Afghanistan*, 17 July 2015, <http://www.bbc.com/news/magazine-33524193>. The Refugee Support Network (RSN), which tracked a group of young men returned from the United Kingdom to Afghanistan, found that, "In some cases, young people have been threatened or targeted as a result of issues connected to their original asylum claims, and, for a significant group, simply being identified as a returnee has put them at considerable risk of violence." RSN, *After Return: Documenting The Experiences of Young People Forcibly Removed to*



who returned from Western countries having been tortured or killed by AGEs on the grounds that they had become “foreigners” or that they were spies for a Western country.<sup>10</sup>

62. The Tribunal discussed this issue with the applicant at the hearing. The Tribunal advised the applicant that it had considered the most recent UNHCR Guidelines on Afghanistan (cited above) and one of the groups that the UNHCR says it at risk of harm are “individuals perceived as “Westernized”. However, the Tribunal checked the original sources cited in the UNHCR Guidelines. The only specific examples of people who have actually been harmed (as opposed to people who may be at risk according to various sources) are two people who were in Australia. The Tribunal advised the applicant those two men who were harmed were both Shias; one of them was a Hazara, the other a Sayed. They were also both from Ghazni and they were captured outside of Kabul, on the way to Ghazni.<sup>11, 12</sup>
63. The Tribunal also noted that DFAT had spoken to one of them, the failed asylum seeker Zainullah Naseri who claimed to have been abducted and tortured by the Taliban in Ghazni province after being deported from Australia. DFAT has stated in its most recent report from September 2015 that the DFAT has been in contact with Mr Naseri “who is not currently pursuing any action regarding this matter”.<sup>13</sup> The Tribunal noted that the DFAT report did not clarify what this means, but Mr Naseri is not currently seeking, for example, to be granted asylum in Australia on the basis that he fears harm from the Taliban.
64. The Tribunal noted that unlike those two men the applicant is not a Hazara or a Sayed and he is not a Shia Muslim. In addition, he has no need to travel to Ghazni or in the area. The applicant said that he fears forced recruitment by the Taliban.
65. The Tribunal observed that the Australian government does not track what happens to returnees to Afghanistan.<sup>14</sup> However, the Australian government contacted<sup>15</sup> other governments to ask if they had information about the fate of returnees. In the period January

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*Afghanistan*, April 2016,

[https://refugeesupportnetwork.org/sites/default/files/files/After%20Return\\_RSN\\_April%202016.pdf](https://refugeesupportnetwork.org/sites/default/files/files/After%20Return_RSN_April%202016.pdf), p. 31.

Returnees reportedly face a general assumption that they have become ‘westernized’ or ‘anti-Islamic’ in Europe. PRIO, *Can Afghans Reintegrate after Assisted Return from Europe?*, July 2015,

[http://file.prio.no/publication\\_files/PRIO/Oeppen%20-%20Can%20Afghans%20Reintegrate%20after%20Assisted%20Return%20from%20Europe.%20PRIO%20Policy%20Brief%207-2015.pdf](http://file.prio.no/publication_files/PRIO/Oeppen%20-%20Can%20Afghans%20Reintegrate%20after%20Assisted%20Return%20from%20Europe.%20PRIO%20Policy%20Brief%207-2015.pdf).

A former Afghan army soldier who applied for asylum while he attended a military training in the USA was granted asylum by the Board of Immigration Appeals (BIA). The BIA was reported to have held that the fact that the former soldier had attended training in the USA would put him at risk on return to Afghanistan, as the Taliban would likely impute pro-government opinions to him. Reuters, *Former Afghan Soldier Who Fleed U.S. Training Granted Asylum: Lawyer*, 30 June 2015, <http://www.reuters.com/article/us-usa-afghanistan-asylumidUSKCN0PA2XT20150630>.

<sup>10</sup> An Afghan asylum-seeker deported from Australia was reportedly accused of being a spy and tortured when he was captured by the Taliban and it was discovered he had pictures from Australia on his phone. The Saturday Paper, *Taliban Tortures Abbott Government Deportee*, 4 October 2014,

<https://www.thesaturdaypaper.com.au/news/politics/2014/10/04/taliban-tortures-abbott-governmentdeportee/14123448001068>.

An Afghan-Australian man travelling between Ghazni province and Kabul was reportedly killed by the Taliban after being singled out on a bus and accused of being a foreigner. The Guardian, *Sayed Habib Musawi ‘Tortured, Killed by Taliban Because He Was Australian’*, 30 September 2014, <http://www.theguardian.com/world/2014/sep/30/sayed-habib-musawi-tortured-killed-by-talibanbecause-he-was-australian>.

<sup>11</sup> “Australian man tortured and killed by Taliban in Afghanistan, family says”, *The Guardian*, 28 September 2014, accessed at <http://www.theguardian.com/world/2014/sep/28/australian-man-tortured-and-killed-by-taliban-in-afghanistan-family-says> on 1 September 2015.

<sup>12</sup> ‘Sydney man killed by Taliban because he was Australian report’, *The Sydney Morning Herald*, 29 September 2014; ‘Son of Afghan-Australian killed by Taliban denied refugee status’, *The Sydney Morning Herald*, 29 September 2014.

<sup>13</sup> Country Report Afghanistan, DFAT, 18 September 2015 at 5.22.

<sup>14</sup> See DFAT Thematic Report on Conditions in Kabul (18 September 2015) at 3.15 and DFAT Country Information Report on Afghanistan (18 September 2015) at 5.20.

<sup>15</sup> Issues Paper, Afghanistan: Returnees and Relocation, *Department of Immigration and Border Protection*, July 2015, responses to questions from the DIBP Country of Origin Information Section, at pp. 16-17.

2014 to March 2015 the UK had returned over 6,000 people to Afghanistan and Norway about 750. Norway monitors voluntary returnees, normally for 6 months after their return, and there were no reports of harm in the period 1 January 2014 to 31 March 2015. The UK does not monitor returnees, but the UK government told the Australian government that it had not received any credible reports of harm. The applicant was asked why he may suffer harm. He said that he had been threatened in the past and his father killed.

66. The Tribunal has already found that the applicant was never threatened in the past and the reasons for the applicant's father's death are unknown. The Tribunal is not satisfied on the evidence before it that the applicant faces a real chance of persecution from the same people who apparently killed his father.
67. However, the Taliban is married to an Australian citizen of [a certain] ancestry and physical appearance. Even though his [wife] appears to have converted to Islam – photographs submitted to the Tribunal show that she wears a headscarf and a statutory declaration from [her] states that they had a Muslim wedding – in terms of her appearance she is not a person of Afghan heritage who could potentially integrate into Afghan society with relevant ease. The applicant's wife and her [children] speak English. The applicant's new born [child] is an Australian citizen by birth and has only an Australian birth certificate. The applicant and the other members of the family will be highly visible as people "not from here". The applicant will not be able to convince locals, let alone the Taliban or other anti-government elements, that he had returned to Afghanistan from Quetta after a long stay in Pakistan (which is a country with a large Pashtun population and the area that the Taliban originated from).
68. If the applicant were to return to Afghanistan with his family, he will be easily identified as a person who has spent time in a country other than Afghanistan and Pakistan.
69. The applicant will be perceived as a person who has spent time in Australia and become Westernized. It will not take very long for people in the applicant's home area to learn that the applicant travelled to a Western country, married a Western woman and had a child in Australia. He will be imputed with political opinions opposed to the Taliban and other extremists.
70. The Tribunal finds that the applicant will be identified as a person who has become Westernized and by extension a person who implicitly supports the international community.
71. The meaning of the expression 'for reasons of ... membership of a particular social group' was considered by the High Court in *Applicant A's* case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...
72. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be for reasons of the person's membership of the particular social group.

73. The Tribunal is satisfied on the basis of the country information that people of Western appearance and people with known links to the international community constitute particular social groups in Afghanistan.
74. Having assessed the totality of the evidence, the Tribunal finds that in the applicant's circumstances if he were to return to his home area in Helmand province, he will face a well-founded fear of persecution for reasons of his imputed political opinion against the Taliban or his membership of the particular social group of people who are Westernized or people who are supporters of the international community.
75. The Tribunal finds that the harm faced by the applicant would amount to persecution as envisaged by s.91R(2) as it would be likely to involve a threat to his life or serious physical harassment or ill-treatment.
76. The Tribunal finds that the harm would be systematic and discriminatory as it would be selective, deliberate and non-random as it would be directed at the applicant for reason of his imputed political opinion or his membership of a particular social group. The Tribunal finds that the applicant's imputed political opinion or membership of a particular social group would be the essential and significant reasons for the harm.

#### **State protection**

77. It is clear from the country information and in particular the information about Helmand province that the government is unable to exercise effective control over parts of the country and it lacks the ability to adequately address human rights issues, protect vulnerable groups and prosecute human rights violators.
78. The available information also indicates that there is an absence of effective state protection outside major urban areas. Given this information, the tribunal finds that the applicant would not be able to access state protection in accordance with the principles in *MIMA v Respondents S152/2003*.

#### **Relocation**

79. 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.
80. The Tribunal has considered whether it is reasonable in the applicant's individual circumstances for him to relocate within the country to avoid the real chance of persecution in Helmand province.

81. The Tribunal discussed with the applicant the most recent DFAT Country Information Report on Afghanistan (18 September 2015). Relevantly it states:

5.14 According to UNHCR, there were more than 850,000 internally displaced persons (IDPs) in Afghanistan in March 2015 ...

5.15 Resettlement and reintegration in areas of origin can be difficult because of the ongoing security situation. As is commonly the case in developing countries, the bulk of internal movement within Afghanistan is from rural areas to urban areas. ... Large urban areas such as Kabul are home to mixed ethnic and religious communities, and offer relatively better opportunities for employment, access to services and state protection than rural areas. Nonetheless, Kabul remains one of the poorest and most dangerous cities in the world (see the 18 September 2015 DFAT Thematic Report on Conditions in Kabul). Goods and services, including accommodation, can be significantly more expensive in urban areas, making it difficult for some people to relocate there, particularly unaccompanied women and children. The recent slowdown in economic growth is also having an impact on the availability of employment opportunities.

5.16 ... Large groups of internal migrants often live in informal settlements in poor conditions, with high rates of unemployment and under-employment, limited access to water and a lack of basic infrastructure.

82. The DFAT Thematic Report on Conditions in Kabul (18 September 2015) states at 3.6 under the heading Internal Relocation that Kabul provides the most viable option for many people for internal relocation and resettlement in Afghanistan. This applies to those displaced by conflict and natural disasters, economic migrants and returnees to Afghanistan. Motivations for migration to Kabul include the greater level of security available as well as better employment opportunities.

83. The Tribunal noted that according to DFAT it is generally easier for single men to relocate to Kabul compared to married men or men with families. As the applicant pointed out at the hearing, he is no longer single. He is in a de facto relationship has an Australian citizen child and [step-children].

84. The applicant claimed that he resided in Kabul for about 6 months in 2009-2010 but he does not have any relatives or social networks there. The Tribunal has already found that the applicant did not live and work in Kabul during this period. The Tribunal accepts that the applicant lacks any connection to the city.

85. The applicant has no formal education and has limited employment skills. There is no doubt that he will find difficult to find work in Kabul.

86. The most recent UNHCR Guidelines state that decision makers must pay particular attention to the following factors when determining the reasonableness of relocation:<sup>16</sup>

(i) the effective availability of traditional support mechanisms, provided by members of the applicant's extended family or members of his or her ethnic group;

(ii) access to shelter in the proposed area of relocation;

(iii) the availability of basic infrastructure and access to essential services in the proposed area of relocation, such as potable water and sanitation, health care and education;

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<sup>16</sup> "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan", *UNHCR*, 19 April 2016, HCR/EG/AFG/16/02.

(iv) the presence of livelihood opportunities, including access to land for Afghans originating from rural areas; and

(v) the scale of internal displacement in the proposed area of relocation.

87. The Tribunal observes that the applicant has no support mechanisms in Kabul, he has no access to shelter, there is a very good chance that he and his new family would end up in an IDP camp with limited or no basic infrastructure and access to essential services, the applicant's employment opportunities are relatively limited; and the scale of internal displacement is enormous as millions of people have moved to Kabul since 2001.

88. The UNHCR urges decision makers to pay particular attention to the best interests of the child as primary consideration in all decision-making affecting children; due consideration is to be given to the fact that what is considered merely inconvenient for adults may constitute undue hardship for a child. As already noted, the applicant has an Australian citizen child and [Australian] citizen step-children, one of whom has been diagnosed with a serious condition.

89. The Norwegian Refugee Council Report: *Still at Risk: Security of tenure and the forced eviction of IDPs and refugee returnees in urban Afghanistan*, February 2014, found the following:<sup>17</sup>

The arrival of large numbers of IDPs and refugee returnees in Afghanistan's cities presents the government and the international community with both a protection and an urban development challenge. Informal settlements in Afghanistan can make up entire neighbourhoods. Some are now several decades old. Informal settlements are frequently characterised by insecure tenure, poor sanitation, lack of safe drinking water, high vulnerability to disasters and lack of investment in services and infrastructure.

Indeed, three quarters of Afghans affected by conflict have faced some form of displacement and in cities such as Kabul most of the urban poor have been IDPs or refugees at some point in their lives. Poverty, informality and marginalisation are a reality for the majority of urban dwellers in Afghanistan and much of the wider urban poor lack access to adequate housing and secure tenure.

90. The Oxford Refugee Studies Centre report entitled *Afghanistan's Displaced People: 2014 and Beyond*, found the following:<sup>18</sup>

Return not as successful and sustainable as hoped: Though it is unclear exactly how many Afghans have returned home (some more than once) since 2001, 5.7 million is a recent estimate.<sup>1</sup> Added to this are the 2.7 million who are still in Pakistan and Iran, and who are unlikely to return home unless there is a strong forced incentive from the host countries, namely deportation. But return has been unsustainable for many, if not a majority, due to the struggle to obtain a place to live and make a living, let alone access basic services and enjoy security and protection. Many returnees already live in secondary displacement.

Added demographic stress: With its exceptionally high birthrate (2.4%), Afghanistan's population is predicted to exceed 40 million by 2030, with ever greater competition for resources such as land, services and employment in a country that already struggles to provide for the current population of around 28 million. More stresses and vulnerabilities

<sup>17</sup> 'Still at Risk: Security of tenure and the forced eviction of IDPs and refugee returnees in urban Afghanistan', Norwegian Refugee Council, February 2014, accessed 8 July 2015 at <http://www.internal-displacement.org/publications/2014/still-at-risk-security-of-tenure-and-the-forced-eviction-of-idps-and-refugee-returnees-in-urban-afghanistan>.

<sup>18</sup> The Oxford Refugee Studies Centre, *Forced Migration Review*, Issue 46, May 2014, accessed 29 May 2015 at <http://www.fmreview.org/afghanistan>.

are likely to produce displacement and, with a larger population, any future displacement will mean larger numbers of refugees and IDPs.

Insecurity as a key driver of displacement: The recent sharp increase in violence in Afghanistan does not inspire much confidence that the push factors will be resolved any time soon. Security incidents and the killing of civilians have been steadily on the rise over the last few years, and the trend is already continuing into 2014. Civilian casualties, however, only tell us part of the story, and should be considered along with the increase in threats, intimidation and human rights violations, the rise in instances of impunity, and the lack of protection provided by the Afghan government and its security forces.

91. In his individual circumstances, particularly his lack of family and social links and his new Australian family with [children], and his very long absence from Afghanistan, the Tribunal does not consider it reasonable for the applicant to relocate to Kabul. These circumstances would also be applicable to the reasonableness of him relocating elsewhere in Afghanistan.
92. For the reasons given above, the Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

### **DECISION**

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

Filip Gelev  
Member