

1309664 [2014] RRTA 157 (28 February 2014)

DECISION RECORD

RRT CASE NUMBER: 1309664
COUNTRY OF REFERENCE: Afghanistan
TRIBUNAL MEMBER: Sydelle Muling
DATE: 28 February 2014
PLACE OF DECISION: Melbourne
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) 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 (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 [in] November 2012 and the delegate refused to grant the visa [in] July 2013.
3. The applicant appeared before the Tribunal [in] November 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi 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.

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.

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): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
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.

Section 499 Ministerial Direction

19. 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

20. The applicant claims to be a citizen of Afghanistan who was born in [Village 1], Jaghori in [Ghazni]. He departed Afghanistan legally [in] January 2012 and arrived in Australia as an irregular maritime arrival [in] June 2012.
21. The applicant presented his claims in his protection visa application [in] November 2012 (folios 34 to 66 of the Department [File]) and a Departmental interview he attended [in] March 2013 (folio 140 of the Department [File]) and at his Tribunal hearing [in] November 2013. The following is the statement of claims made by the applicant attached to his protection visa application:

Summary of my claims

1. The following is only a summary of my claims for protection. It is not an exhaustive statement of the reason or reasons why I cannot return to my country of origin. I will provide further information in relation to my Protection claims during my interview with the DIAC officer.

Background:

2. I was born in the village of [Village 1], in the district of Jaghori in the Ghazni Province of Afghanistan. I am an Afghanistan citizen. Both my father and mother were also born in the village of [Village 1 which] is a Hazara village.

3. I am not a citizen of any other country. I do not have the right to reside in any other country.
4. I am of Hazara ethnicity and am of the Shi'a Muslim faith. I actively practice my Shi'a Muslim faith and observe festivals and other religious observances such as Muharram and Ramadan, Shabe Qadar. I sometimes attend a mosque to worship and other times worship at home.
5. I lived in [Village 1] most of my life, until I departed (around January 2011) for this journey to Australia. I had however, spent two years from 2009 to 2011 in [Country 2], working as a construction worker. Other than for this journey (to Australia) and my two years working and living in [Country 2], I have not lived in any other country.
6. I am not married and lived with my mother and [siblings] at our family home on family farm in [Village 1]. My father went missing around five years ago when he travelled to [country] and then onto [Country 2]. I have not heard from my father since he embarked on that journey and we presume that he may have been killed.
7. When I lived in [Village 1], I earned a living as a farmer on the family farm. In [Country 2], I worked as a construction worker on various building sites. I have not undertaken any other types of work.
8. I have only received a brief informal education at the local Mosque for around three years, from age seven until age ten. I have not attended a formal school and have no further education.
9. [Village 1] is surrounded by high mountains that can be seen in the distance and is close to a river. There are around [number] houses in [Village 1].
10. [Village 1] is in a farming district and the village is surrounded by fields and orchards. The local villagers farm [crops].
11. The nearest town to [Village 1] is [name] which is a ten minute walk from [Village 1 which] is around four hour's drive from the city of Ghazni.

The country I fear returning to

12. I fear returning to Afghanistan.

The reasons I left Afghanistan

I am in danger from the Taliban for driving a minibuss

13. My family owns a large plot of land in [Village 1] that we use as family farm. When I was younger, there was a dispute over my father getting permission to build a house on part of our family land. The land at the centre of the dispute is neighbouring a property owned by a man called [Mr A].
14. [Mr A] objected to the building of the house near his property as he also has a claim to ownership of that particular parcel of land and the building of a permanent structure on the land would affect his claim to the land. [Mr A now] has a lot of influence in our district.

15. Twice I wanted to commence building a house on our parcel of land and each time I was stopped with threats of violence from [Mr A]'s son, [Mr B who] told me that if I build the house, I will be killed.
16. I received the last threat late in 2011, just after I returned to Afghanistan from working in [Country 2]. I reported the threats made against me by [Mr B] to the local police station.
17. Shortly after I reported these threats to the police, [Mr B] came to my house with two other people. [Mr B] demanded that I come out of the house. I saw [Mr B] from the window. [Mr B] and his accomplices were carrying AK-47s automatic weapons and batons. I was sure that they had come to kill me so I ran away through the back of the house.
18. [Mr B] told my mother, who answered the door to our house, that he will kill me if I return home. I am sure that if I did not run away when I did, I would have been killed.
19. I went to a nearby [village] to hide. I stayed with [Relative C]. I telephoned back to my house and my mother told me that [Mr B] and his accomplices returned twice more to my home and told me her that If they find me, they will kill me.
20. I was scared for my life and decided to flee Afghanistan. [Mr B], through his father, [Mr A] has considerable power in our district and there is nowhere that I can hide. I cannot get protection from the police against [Mr A] or his family because of his [influence].

What I fear may happen to me if I return to Afghanistan

21. I am sure that the [Mr B] will kill me if I return to Afghanistan. [Mr B] is seeking to harm me because I reported him to the local police for threatening me. [Mr B] wants the parcel of land that my family owns and killing me will make it easier for him and [Mr A]'s family to take ownership if I am killed.

Who might harm me if I return

22. [Mr A], through his son, [Mr B], will kill me if I return to Afghanistan. [Mr B] will kill me over the dispute concerning the land and because I reported him for making the threats he made against me to the police.

Do I think the authorities can protect me if I return?

23. The authorities will not protect me. I have already reported [Mr B] to the local police for making death threats against me and this information was immediately relayed back to [Mr B]. Instead of protecting me the police alerted [Mr B] to my report who now wants to kill me.
24. [Mr A] is an influential [person] in Afghanistan and has considerable power in our district. The authorities are not willing to protect me from his family over a land dispute.
25. I cannot move to any other part of Afghanistan because the authorities in Afghanistan are not able to or willing to protect Hazara and Shi'a Muslims. Many Taliban or former Taliban are in positions of power in the government of Afghanistan.

Can I go anywhere else in my country, apart from where I used to reside?

26. I cannot move to another district in Afghanistan. It is not safe for Hazara and Shi'a people to leave Jaghori.
 27. Hazara and Shi'a Muslim people are constantly targeted by the Taliban and in danger of being attacked, seriously harmed or even killed, simply for being Hazara and a follower of the Shi'a Muslim faith.
 28. If I try to practice and follow my faith as I need to as a Shi'a Muslim I will be attacked by local Pashtu people.
 29. There is no place in Afghanistan I could safely reside including in Kabul. I do not know anyone in Kabul or a city like that in Afghanistan. The cost of living is prohibitive in Kabul and I need access to a social network such as close family members in order to gain employment and housing. I don't know anyone in a city like Kabul and in any case, I would be attacked in Kabul by local Taliban or Pashtun Taliban sympathisers.
22. The delegate of the Minister for Immigration refused the applicant a protection visa [in] July 2013 and he applied to this Tribunal for review of that decision [in] July 2013. Attached to the review application was a copy of the delegate's decision.
 23. [In] October 2013, the Tribunal received a submission from the applicant's adviser outlining the applicant's claims that he fears a real chance of persecution throughout Afghanistan because of his Hazara race, Shia Muslim faith, his imputed political opinion of opposition to [Mr A] and his associates as a result of a land dispute and imputed political opinion as a result of being a failed asylum seeker. The adviser summarised the findings of the delegate and responded to the delegate's decision. The adviser made submissions that the applicant faces serious harm through physical violence and denial of social and economic rights on the basis of his profile as a Shia Hazara. The adviser made submissions on the issue of complementary protection and also provided country information on the security situation in Jaghori District and Ghazni Province, availability of state protection, systematic violence against Hazaras in Afghanistan, persecution by Hezb-e-Wahdat, discrimination against Shia Hazara in Afghanistan, failed asylum seekers in Afghanistan and relocation.
 24. The primary issue in this review is whether there is a real chance that, if he returns to Afghanistan, the applicant will be persecuted for one or more of the five reasons set out in the Refugees Convention for the purpose of s.36(2)(a) of the Migration Act and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm for the purpose of s.36(2)(aa) of the Migration Act.
 25. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
 26. The applicant claimed that he experienced problems in relation to his family's land when he returned from [country 2] in late 2011 and decided to build a new house. The applicant claimed that when he was younger his father was involved in a dispute with their neighbour, [Mr A], over their land. The Tribunal notes in the applicant's statutory declaration attached to his protection visa application, he claimed that the dispute was in relation to his father getting permission to build a house on a part of their land which was near [Mr A]'s property. The

applicant explained in his statutory declaration that [Mr A] objected to the building of a house because he was claiming ownership of that particular parcel of land and having a permanent structure on it would affect his claim. In contrast, the Tribunal notes in the submission from the applicant's adviser it was stated that the applicant's father had attempted to build a wall, as opposed to a house, on the contested part of the land. However, in the hearing the applicant claimed that the dispute over the land began a very long time ago when [Mr A] took some of the applicant's family's land to build a house; a metre onto his family's property. The Tribunal finds the applicant's evidence regarding the basis of this alleged dispute to be inconsistent and as a result it does not accept that the applicant's family have been involved in any such dispute with [Mr A] for a significant number of years.

27. The Tribunal also has some doubts about this alleged land dispute with [Mr A] and the applicant's claim that either [Mr A] and/or his son [Mr B] will kill or harm if he returns to Afghanistan because they want the parcel of land his family owns and killing him will make it easier for [Mr A's] family to take ownership of it. The Tribunal finds it implausible that if [Mr A] or his son wanted the applicant's family's land as he claimed in his statutory declaration, that they would not have done something in the past, particularly since the applicant's father went missing in 2007 and the applicant subsequently went to [Country 2] for a period of two years between 2009 and 2011. The Tribunal notes the applicant's evidence that [Mr A has] a lot of influence in his district and in these circumstances, the Tribunal does not accept that if [Mr A's family] had wanted possession of the applicant's family land since the applicant was young, as he has claimed, they would not have done something prior to the end of 2011. The Tribunal notes the applicant's adviser's submission dated [in] October 2013 in which it was stated that the applicant claimed that [Mr A's family] would not physically harass or threaten his mother or very young brother and as such they were unable to pursue their ambitions for the contested land during this time and they resumed their attempts to extend their influence over the land when he returned from [Country 2]. However, the Tribunal has taken into consideration the adviser's reference in the same submission to country information which purportedly suggests that land disputes are common throughout Afghanistan, often involve powerful actors with connections to the government and are of a violent nature, and in light of this information, the Tribunal is further satisfied that if the applicant's father had been in a long running dispute over this land and [Mr A's family] wanted to take a portion of it for themselves, they would have done something earlier, particularly when the applicant's father went missing, and would have no concern about the welfare of either the applicant's mother or his younger brother as suggested.
28. The Tribunal therefore does not accept that the applicant was stopped with threats of death and violence from [Mr B] when he commenced building a house on his family's parcel of land by moving some stones from his farm to this particular location. The Tribunal found the applicant's evidence in the hearing regarding these alleged threats to be somewhat lacking and inconsistent. As the Tribunal put to the applicant in the hearing, at one stage he claimed that he was threatened once when he was taking the stones to his land and told to stop, and nothing had happened before this, and after this incident he went to the district office to report it. However, earlier in the hearing he claimed he had tried building the house on two occasions and had been threatened. Further, the applicant claimed that during this incident/s he was just threatened and left scared as they had sticks and knives when they came towards him. The applicant confirmed that they did not beat him. Yet, according to the delegate's decision, which the applicant provided the Tribunal a copy, it states that when asked how he was prevented from building, the applicant stated that 'he' started to threaten and beat him.

29. As the Tribunal does not accept the applicant's claims regarding this land dispute, the Tribunal does not accept that the applicant reported the alleged threats made against him by [Mr B] to the local police station. The Tribunal notes according to the applicant's evidence in the hearing he went to the district office, as opposed to the local police station as he initially claimed, and made a complaint to the district officer. While the Tribunal notes the applicant stated that the police were also located at the district office and that he had also made a complaint to the police, when asked specifically if he had gone to the police and reported this incident, the Tribunal observes that the applicant's evidence in the hearing focused on him reporting this incident to the district officer and not the police. In these circumstances, the Tribunal is concerned that the applicant did not make any mention in his statutory declaration attached to his protection visa application about attending the district office and making a complaint to the district officer. The Tribunal notes that in the submission from the applicant's adviser dated [in] October 2013, there is also mention of the applicant seeking the assistance of a village elder, however the applicant did not raise this either in his statutory declaration or in the hearing.
30. It therefore follows the Tribunal does not accept that shortly after reporting these alleged threats to the police, [Mr B] came to his house with two other people and demanded he come out of the house. The Tribunal notes in the applicant's statutory declaration attached to his protection visa application the applicant claimed that he saw [Mr B] from his window, and that he and his accomplices were carrying AK-47s, automatic weapons and batons so he ran away through the back of the house. He also claimed that when his mother answered the door, [Mr B] told her that he will kill him if he returned home. However, in the hearing the applicant claimed that [Mr B] came and kicked the door and he saw him from the window and then ran away. In contrast, according to the delegate's decision, which the applicant provided the Tribunal a copy of, it states the applicant claimed that [Mr B] broke into his home at night with two armed men, he realised they were armed and fled the house. Given the discrepancies in the applicant's evidence regarding the circumstances of this alleged incident, the Tribunal is further satisfied that it did not take place.
31. As the Tribunal does not accept the applicant's claims regarding any dispute with [Mr A] and his family, the Tribunal does not accept that the applicant went to [Relative C]'s place in a nearby [village] to hide for a period of more than two weeks. Nor does the Tribunal accept that while the applicant was allegedly hiding at [Relative C]'s house, his mother advised him that [Mr B] and his accomplices returned twice to his home and told his mother that if they find him, they will kill him.
32. The Tribunal also does not accept the applicant's claims made for the first time in the hearing that after his departure from Afghanistan, while he was in [another country, Mr A's family], used part of his family's land to widen their road. The Tribunal finds it implausible that if this had occurred the applicant would fail to mention this in his statutory declaration attached to his protection visa or prior to his review hearing. The Tribunal does not accept the applicant's claim that he thought he raised this during his interview with the delegate. The Tribunal notes that there is nothing in the delegate's decision regarding the alleged widening of this road. The Tribunal has also taken into consideration the applicant's responses that the delegate might not have questioned him about this and later, did not ask him about this, which somewhat contradicts the applicant's evidence that he might have mentioned this during his interview. The Tribunal finds that the applicant has embellished this aspect of his claims in an effort to bolster his case.

33. Based on the above findings, the Tribunal does not accept that the applicant will be harmed or killed by [Mr A], through his son [Mr B], over any alleged dispute concerning his family's land or because the applicant allegedly reported [Mr B] to the police for making threats against him. The Tribunal therefore does not accept the applicant will be persecuted by Hezb-e-Wahdat, the Hazara party [Mr A] presumably is affiliated with, as contended by the applicant's adviser. The Tribunal has considered the applicant's adviser's submissions that the applicant has only completed three years religious education and that there may be many reasons why there may be inconsistencies in testimony such as the applicant's lack of education and the use of interpreters which may lead to misinterpretation of information provided. However, the Tribunal does not accept that the discrepancies in the applicant's evidence as discussed above can be adequately explained by the applicant's limited education or the result of any unidentified issues regarding the use of interpreters. The Tribunal finds the differences in the applicant's evidence, as discussed above, are such that cannot be explained by raising unspecified concerns related to interpretation and the applicant's limited education as they are essentially variations of the same claim. The Tribunal does not accept the applicant's educational background would affect his ability to recount his personal experiences in Afghanistan. For the reasons provided above, the Tribunal does not accept that the applicant faces a real chance of persecution, now or in the reasonably foreseeable future, if he returns to Afghanistan from [Mr A] or his family or anyone associated with him such as Hezb-e-Wahdat, including for reasons of an imputed political opinion of opposition to [Mr A] and his associates, as a result of an alleged land dispute.
34. The Tribunal has considered the applicant's claims that as a Hazara Shia he faces harm if he returns to Afghanistan. The Tribunal does not accept the applicant's claims regarding an incident which occurred after the election in 2009, when he was travelling from Jaghori to Kandahar, on his way to [Country 2], and the Taliban stopped his vehicle. The Tribunal does not accept that in this incident the applicant was questioned and beaten by the Taliban for voting in the election and was told if he voted again he would be killed. The Tribunal does not accept, as it put to the applicant in the hearing, that if he had been threatened and beaten by the Taliban as claimed, that he would not have mentioned this incident before the hearing, particularly given its significance in light of his claimed fears based on his Hazara ethnicity and Shia religion as explained in his statutory declaration attached to his protection visa application. Apart from this alleged incident, the applicant claimed that he had not had any further contact with the Taliban and had not experienced any other problems as a result of his Hazara ethnicity or Shia religion.
35. The Tribunal notes the country information it put to the applicant in the hearing regarding the situation of Hazaras in Afghanistan from sources such as UNHCR and DFAT which indicates that despite serious security problems and generalised violence affecting the population generally in Afghanistan, Hazaras are not targeted solely because of their ethnicity and religion. The Tribunal finds that the country information does not suggest that the Hazara Shia community is being persecuted on any consistent basis or that Hazaras as a group face systematic violence or existential threat. Based on the country information put to the applicant in the hearing, the Tribunal does not accept that the Taliban now specifically targets Hazaras or Shias in Afghanistan on a systematic and discriminatory basis for the essential and significant reasons of their race and religion.
36. Nor does the Tribunal accept the applicant's assertions that in any part of Afghanistan Hazaras cannot walk or go independently. The Tribunal has had regard to the country information concerning the situation for Hazara Shias in the applicant's home of Jaghori,

which is predominantly inhabited by Hazaras. As the Tribunal put to the applicant in the hearing, the independent information provides that the area is reasonably secure and quite fine for Hazaras. In June 2012, DFAT adopted a positive view on the extent of government control in Ghazni province when it stated that “the Afghan Government had asserted effective control in the districts in Ghazni of (Malistan, **Jaghori** and Nawur) in recent years”. (Department of Foreign Affairs and Trade 2012, *CIS Request AFG13440: Characteristics of Hazara militias and targeted attacks on Hazaras by Hazara militias*, 28 June) DFAT’s advice was broadly consistent with an earlier update it provided in March 2012 on the Hazara community in which it stated that “[v]iolence was not noticeably worse in the predominantly Hazara districts (Jaghathu, Nawr, **Jaghori**, Malistan)” and that “the Hazara community did not face systemic violence or an existential threat” (Department of Foreign Affairs and Trade 2012, *Afghanistan – Hazara Community Update*, 12 March). An October 2012 DFAT report considered there was no greater risk to Hazaras in Jaghori over and above the risk faced by the population generally (DIAC Country Information Service 2012, *Country Information Report NO. 12/64 – CIS Request AFG13987: Security Situation for Hazaras in Afghanistan* (sourced from DFAT advice of 31 October 2012), 01 November [CISNET CX298127](#)). In November 2012 DFAT advised that although security in Ghazni province deteriorated during the first half of 2012, the Hazara districts of Ghazni province remained largely protected from violence and Jaghori district continued to enjoy relatively good security. The Tribunal notes that in July 2013, DFAT provided an update on the security situation for Hazaras in Afghanistan consistent with earlier advice it provided on Hazaras in Afghanistan in 2012 and noted that the key Hazara districts in Ghazni province which included Jaghori continued to experience relatively low levels of violence.

37. The Tribunal has also had regard to the applicant’s claim in the hearing that there is peace in Jaghori but outside Jaghori, in all the other areas which belong to Pashtuns, Hazaras are at risk on the road. The Tribunal notes the information from DFAT it put to the applicant in the hearing regarding the safety of travel into and out of most districts in Ghazni province. The update states that travel “could still be dangerous in the context of broader security in Afghanistan” but that “the situation was equally risky for all travellers”, regardless of ethnicity and there is no clear evidence that any ethnic group was a particular target (Department of Foreign Affairs and Trade 2012, *Afghanistan – Hazara Community Update*, 12 March). Further information from DFAT dated November 2012 (DIAC Country Information Service 2012, *Country Information Report NO. 12/64 – CIS Request AFG13987: Security Situation for Hazaras in Afghanistan* (sourced from DFAT advice of 31 October 2012), 01 November [CISNET CX298127](#)) provides that the main targets on the roads in Ghazni, and nationally, were people with links to the government and international forces. The Tribunal notes the advice it received in 2013 from a range of locally based NGOs and other organisations on road security for Hazara travellers in Ghazni province, which it put to the applicant in the hearing, that the majority of these organisations indicated that whilst road travel between Kabul and Ghazni, and between Ghazni city and Jaghori was dangerous they were not aware of any instances where by Hazara travellers were targeted by the Taliban because of their ethnicity. According to advice provided by the Chairman of the Cooperation for Peace and Unity (one of the largest human rights groups in Afghanistan) Hazara travelers on these roads are not under ‘particular threat’ from the Taliban – although killing and torture of individuals accused of working with the government or the international forces is ‘common place’. Similarly, the Afghanistan Development Association, a Ghazni based NGO, maintains that security for Hazaras has significantly improved in Ghazni province and the NGO is not aware of any instances of ethnic targeting. The Tribunal has had regard to the written submissions from the applicant’s adviser including information from Niamatullah

Ibrahimi regarding the safety of travel on the roads. The Tribunal notes that the information is largely consistent with other sources regarding the safety and security on the roads between Hazarajat and urban centers like Kabul and the particular danger for those people who work with NGOs or with other organisations working with the international community. The Tribunal does not accept on the applicant's evidence that he fits within the profile of those who have been identified as being the main targets on the road. The Tribunal also does not accept the applicant's unsupported assertion that every day Hazara people are killed by the Taliban and this is not reported by the media or that if the road to Jaghori was closed by the Taliban for one or two weeks everyone will die from starvation. On the basis of the available country information discussed above, and having regard to the applicant's circumstances, the Tribunal does not accept the applicant faces a real chance of being seriously harmed whilst travelling on the roads.

38. The Tribunal has taken into consideration the applicant's claims that with the departure of the foreign forces in 2014 Hazara people will face a lot of difficulties. As the Tribunal put to the applicant in the hearing, any consideration of what will happen if and when the coalition forces leave Afghanistan is speculative. As it noted, although some troops are leaving Afghanistan, some are remaining, particularly from specific countries. The Tribunal refers to the country information it put to the applicant which provides that while the security transition in Afghanistan was completed in June 2013 with the Afghan National Security Forces (ANSF) taking the lead for security throughout the country, the International Security Assistance Force (ISAF) is reported to still have about 97,000 troops remaining in the country which are scheduled to depart by the end of 2014 and no decision has yet been made on how many ISAF forces will remain in Afghanistan after 2014. According to SIGAR's quarterly report to the US Congress, ISAF will continue to engage in combat operations, as needed, until the end of 2014, and remain committed to helping the ANSF by providing enablers such as air, aviation, medical support, intelligence, counter-IED, signals, and logistics. As the Tribunal put to the applicant in the hearing, given the amount of time and money that has been invested by the international community into the country, it does not accept that Afghanistan will be left completely or that the situation will descend to civil war now or in the reasonably foreseeable future. The Tribunal does not accept on the evidence before it that the expected withdrawal of international forces from Afghanistan in 2014 will result in the applicant facing a real chance of persecution for reason of his Hazara race or his Shia religion.
39. In light of the information cited above and the fact the applicant would be returning to Jaghori, which is predominantly Hazara, the Tribunal finds that the applicant does not face a real chance of persecution, for reason of his Hazara ethnicity or Shia religion. The Tribunal accept the applicant will be denied social and economic rights as a result of his profile as a Hazara Shia. The Tribunal finds the applicant has not suffered such problems in the past and does not accept in light of this and the fact he has family support and connections in his home area and he has work experience and skills gained in both Afghanistan in [Country 2], that he will suffer significant economic hardship, the denial of access to basic services or the denial of a capacity to earn a livelihood of any kind, that threatens his capacity to subsist.
40. The Tribunal also does not accept the applicant will face persecution on his return to Jaghori because he is returning from a Western country and the Taliban will consider him to be a spy or will arrest him if they find any documents or if he says words in English because they do not like foreigners. The Tribunal notes the country information it put to the applicant in the hearing from DFAT, relying on advice from a number of different reputable contacts

including UNHCR, the Provincial Reconstruction Team in Ghazni province and international immigration consultants operating in Afghanistan, which was that none of these contacts considered there were significant protection issues for returnees (Department of Foreign Affairs and Trade 2012, *Hazara Community Update*, 12 March). Other DFAT advice from 2010 stated that “interlocutors did not believe Hazaras would be targeted because they had sought asylum in the west”. The Tribunal notes that in January 2012 the UK Border Agency’s Appeals and Litigation section advised the Department of Immigration that they had no specific information of failed asylum seekers being targeted on their return. A similar view regarding the safety of returned asylum seekers from the West was expressed by DFAT in October 2012 when they advised it was not aware of returnees experiencing harm after returning from a Western country. The Tribunal finds the independent information does not suggest that persons who have returned to Afghanistan after spending time in the West are targeted for this reason or because they are identified as failed asylum seekers. On the information before it, the Tribunal does not accept the applicant faces a real chance of persecution for reason of his membership of a particular social group of Afghan failed asylum seekers or an imputed political opinion as a result of being a failed asylum seeker, a returnee or returnee from the West, now or in the reasonably foreseeable future.

41. The Tribunal notes the claim in the applicant’s statutory declaration attached to his protection visa application that he is in danger from the Taliban for driving a minibus. The applicant has not since raised that claim and considering all his evidence, the Tribunal does not accept that he has such fear.
42. Considering the applicant’s claims both individually and cumulatively, the Tribunal does not accept that the applicant faces a real chance of persecution in Jaghori district, Ghazni province because of his Hazara ethnicity, his Shia religion, an imputed political opinion as a result of being a failed asylum seeker, a returnee or returnee from the West or an imputed political opinion of opposition to [Mr A] and his associates as a result of an alleged land dispute. The Tribunal therefore finds that the applicant’s fear of persecution is not well-founded.

Complementary protection obligations

43. On the basis of the applicant’s claim to be a national of Afghanistan, the Tribunal finds that Afghanistan is the applicant’s receiving country for the purposes of s.36(2)(aa).
44. As the Tribunal does not accept that the applicant is a refugee as defined in the Refugees Convention, the Tribunal has considered the alternative criteria in s.36(2)(aa), whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm as defined in subsection 36(2A) of the Act.
45. Having regard to the definition of significant harm in s.36(2A) of the Act as set out under the heading ‘relevant law’ above, and the findings and reasons of the Tribunal above, the Tribunal does not accept that the applicant will face a real risk of being arbitrarily deprived of his life; having the death penalty carried out on him; or being subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment from the Erfani’s or anyone connected to them, including Hezb-e-Wahdat, or the Taliban. For the reasons discussed above, the Tribunal does not accept the applicant’s claims regarding the dispute between [Mr A’s family] and his family over a plot of their land and therefore it does

not accept the applicant faces a real risk of significant harm as a result of this alleged dispute.

46. Similarly, the Tribunal does not accept the applicant's claim in his statutory declaration regarding driving a mini bus and his alleged fear of harm from the Taliban as a result. As such, the Tribunal does not accept that there are substantial grounds for believing that as a necessary and foreseeable consequence of the review applicant being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm for that reason.
47. The Tribunal does not accept that if the applicant returns to his home area in Jaghori district of Ghazni province, there is a real risk he will suffer significant harm because he is a Hazara or a Shia Muslim or any other reason. The Tribunal refers to the country information discussed above, including information about the situation for Hazara Shias generally and particularly in Jaghori district and the withdrawal of the international forces, and does not accept the claim that the applicant faces a real risk of significant harm on the basis of his ethnicity and religion or an imputed political opinion based on his ethnicity and religion. The Tribunal accepts the applicant may face some degree of danger travelling outside of Jaghori given some routes or parts of routes may be unsafe or insecure. However, the Tribunal notes the advice from DFAT, cited above, that no particular ethnic group is being targeted on roads in Afghanistan and that the main targets on the roads in Ghazni, and nationally, are people employed by or with direct links to the Afghan Government. However, having regard to the fact the applicant does not have any of the characteristics highlighted above, the Tribunal finds that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm as defined in subsection 36(2A) of the Act.
48. The Tribunal is also not satisfied on the country information before it and discussed above, that as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan the applicant would face a real risk of significant harm as a failed asylum seeker, returnee or returnee from the West.
49. Having regard to the applicant's claims both individually and cumulatively, in light of the Tribunal's findings above, the Tribunal does not accept on the evidence before it, that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan that there is a real risk he will suffer significant harm. The Tribunal is therefore not satisfied that the applicant meets the alternative provisions in s.36(2)(aa).
50. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
51. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
52. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

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

Sydelle Muling
Member