

1313731 [2015] RRTA 277 (7 May 2015)

DECISION RECORD

RRT CASE NUMBER: 1313731
COUNTRY OF REFERENCE: Afghanistan
TRIBUNAL MEMBER: Melissa McAdam
DATE: 7 May 2015
PLACE OF DECISION: Sydney

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

Statement made on 07 May 2015 at 5:23pm

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 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] September 2012 and the delegate refused to grant the visa [in] September 2013.
3. The applicant was represented in relation to the review by his registered migration agent.

RELEVANT LAW

4. 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

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 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).
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. 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.
8. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
9. 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.

10. 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.
11. 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.
12. 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.
13. 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.
14. 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

15. 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').
16. '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.

17. 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

18. 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.

SUMMARY OF CLAIMS AND EVIDENCE

Protection visa application

19. The following is a summary of the claims and information provided by the applicant in his Protection visa application:
 - a. The applicant was born on [date] in [District 1] in Ghazni Province, Afghanistan. The applicant submitted his Iranian refugee status card issued in [year]; an Iranian refugee status card for [City 2] valid from [date] to [date]; and his Marriage Certificate issued in 1379 [~2000].
 - b. The applicant's father, [and siblings] are living in Afghanistan. The applicant's mother is deceased.
 - c. The applicant is an ethnic Hazara and of Shia Islam religion. He is married and his wife, [and children] are residing in Iran.
 - d. The applicant left Afghanistan in about 1991 to study in Iran. He was young at the time and so cannot remember much about Afghanistan. He was not able to study in Iran so he started working there. He worked in [a certain industry] as a [occupation] for about one year. He then worked as a [occupation].
 - e. The Taliban took power in Afghanistan so the applicant did not return there. He remained in Iran.
 - f. The applicant had to leave Iran because the Iranian authorities would not renew his refugee permit card. Without the card the applicant was unable to operate a business or drive a car. He had no legal status in Iran. Hazaras in Iran are discriminated against and have no rights.

- g. The applicant departed Iran [in] December 2011.
- h. The applicant believes he will be persecuted as an Hazara and a Shia if he returns to Afghanistan. He fears the Taliban will find and kill him. He has been threatened by a man called [Mr A]. This man was in love with the applicant's wife prior to her marriage to the applicant and he has vowed to take revenge on the applicant. The man is with the Taliban and his brother is a Taliban commander.
- i. The man told the applicant that if the applicant ever goes to Afghanistan he will kill the applicant. The man also threatened to harm the applicant's wife and child. The man continued to threaten the applicant for about three years after the applicant's marriage. When the Taliban lost power in Afghanistan the man gradually stopped harassing the applicant. Now that the Taliban is regaining power in Afghanistan the man has started his threats again.
- j. The applicant fears he will be targeted by the Taliban if he returns to any part of Afghanistan. He will need to travel in and out of his village to earn a living.

Departmental Interview

20. The following is a summary of the claims and information provided by the applicant in his Departmental Interview:

- a. The applicant's father and siblings are living in Ghazni. He has contact with them there.
- b. The applicant mostly lived in [City 2] in Iran. The applicant married in [City 3] where his wife lived. The applicant's wife's mother is the applicant's [deleted].
- c. A nearby village to [the applicant's village] is [name deleted]. There are no major towns close by. His village had [a group of] houses in it at the time the applicant left Afghanistan. It was all Hazaras. Most of the families were farmers. The applicant sent money to them from Iran. The applicant did not return to visit Afghanistan while he was in Iran.
- d. Up until the year he left Iran the applicant had a white refugee card. The authorities would not re-issue the card because the applicant had his own company and his own car which is a crime for an Afghan in Iran. The applicant told his wife to say she was divorced from him so she and their children could have their white cards renewed.
- e. [Mr A] has different nick names.
- f. The applicant's business was not well known. He operated it secretly. Most Afghans run their businesses in Iran secretly, such as running them from basements. The applicant operated the [business] under the name of an Iranian.
- g. [Mr A] informed the authorities about the applicant's business and they closed down the applicant's [business].
- h. The applicant did not apply for asylum in [a certain country] because the applicant was not aware of how to do this, and his intention was to come to Australia.

- i. The applicant did not return to Afghanistan because [Mr A] wanted his Iranian card cancelled so he would be compelled to return.
- j. At the time the applicant got to know his wife [Mr A] had the intention to marry her too. However his wife preferred the applicant. This created a tension between the applicant and [Mr A] who developed a hatred for the applicant.
- k. The applicant met [Mr A] in [City 3] as he worked with the applicant's father-in-law on his farm. He is a Pashtun Sunni. He started harassing the applicant when the applicant married his wife so the applicant moved to [City 2]. When Karzai came to power in Afghanistan [Mr A] was peaceful. But lately with the Taliban becoming more powerful [Mr A] has become more threatening. To get back to his village the applicant will have to travel through [Town 4] which is controlled by the Taleban so he is fearful of being targeted.
- l. [Mr A] probably went back to Afghanistan after the applicant married his wife.
- m. Wherever the applicant went he was cautioned by people who knew about [Mr A] to be careful.
- n. [Mr A] didn't harm the applicant for ten years because he didn't know where the applicant lived. He found out the applicant was in [City 2] about 2 or 3 years ago but didn't learn the applicant's address until about one year ago. He found the [business] the applicant owned. The applicant did not see [Mr A] in [City 2].
- o. The applicant learned that [Mr A] had found him in 2010 when [Mr A] telephoned the [business] in the seventh month of 1390 and asked if the [business] belonged to the applicant. He threatened to force the applicant to return to Afghanistan where he could do what he wanted to the applicant. The applicant then took precautions such as sending his wife to the [business] instead. About one week after [Mr A] telephoned the [business], the authorities came and closed it down. The applicant was able to sell everything and organise the trip and exit Iran [in] the tenth month.
- p. [Mr A] and his brother are members of the Taliban and they are active in [Town 4]. The brother is a commander or in a high position in the Taleban. The Taleban is active in Ghazni. If the Taleban know who someone is they have more reasons to target them. [Mr A] will have informed the other Taleban about the applicant.

Delegate's Decision

21. The Delegate did not find the applicant's claims for protection credible.

Information to the Tribunal

22. The applicant appeared before the Tribunal on 21 April 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages.
23. The following is a summary of the information provided by the applicant at the hearing:
 - a. The applicant was born in [District 1], Afghanistan. He went to Iran to live when he was [young]. He did not return to Afghanistan.

- b. He stayed in contact with his family in Afghanistan by letter and telephone. The applicant's father is in poor health as he has [a health condition]. He needed to go to Kabul for treatment however the family could not pass through [Town 4] because of security incidents and had to turn back to [District 1]. It is very difficult for his family to travel in Afghanistan. The Taleban are present in [Town 4] so there are always problems there. They are unable to travel to other cities.
- c. The applicant had very limited education. He had approximately [number] or [number] years of home schooling in which he mostly studied the Koran and the Arabic language. He learned to read and write.
- d. The applicant has worked as a [occupation] but most of his work was in [another industry]. He ran his own business in Iran. [Details deleted]. He had up to twenty employees at times. [One group] he employed were Afghans and the [other group] were Iranian. His business was not registered as Afghans are not allowed to operate businesses in Iran.
- e. The applicant's family live in a village in [District 1]. Because the applicant has spent many years living in Iran he has developed differences in culture, language, dress and lifestyle from the people in his village. This will cause him problems in Afghanistan. There will be a lot of problems for the applicant in his [village] because he has been away from village society for so long. He would need to travel to other places for work.
- f. He will have problems with the Taleban if he returns to Afghanistan. The Taleban have no mercy on their own people let alone the Hazaras and Shias. The Taleban have their own intelligence, people who inform on others. As soon as the applicant arrives the Taleban will get information that the applicant came from a certain country. There are no work opportunities in [District 1], except for farming and there is not much land available in [District 1].
- g. The applicant would not be able to live in Kabul because there is no safety or security there. The applicant would not survive in Kabul. He has no relatives in Kabul and does not know anyone there.
- h. The applicant's [business] in Iran was closed down about 20 days before he left Iran. He departed Iran [in] the tenth month in 1390 [[date] December 2011]. The Iranian authorities took the applicant's refugee card about one month before he left Iran.
- i. The applicant has a copy of his refugee card from his wife who has the original of the expired card. It was put to the applicant that the card shows it is valid until the twelfth month of 1390, well after the date the applicant claimed to have departed Iran because the authorities took his card. The applicant then stated the Iranian authorities didn't take his card but they gave him three months to depart Iran.
- j. The applicant confirmed he became engaged to his wife in 1376 (approximately 1997). It was put to the applicant that his wife would have been [a child] at the time which the applicant acknowledged. He confirmed this was when the Taleban fighter wanted to marry his wife. It was put to the applicant it seemed implausible a Taleban fighter would fall in love with a [age] year old Hazara girl in [City 3]. The applicant responded that this was prior to the Taleban and marriages between Shias and Pashtuns were common then.

CONSIDERATION OF CLAIMS AND EVIDENCE

24. The applicant submitted a copy of his Iranian refugee card listing him as an Afghan refugee. On the basis of this document and the applicant's oral evidence the Tribunal is satisfied the applicant is a citizen of Afghanistan. The Tribunal assesses the applicant's claims against Afghanistan as his country of nationality and receiving country. The Tribunal is satisfied the applicant now has no right to enter and reside in Iran.

Credibility

25. The applicant gave clear and credible evidence he is a Shia Hazara originating from [District 1] in Ghazni province, Afghanistan. He also gave clear, detailed and credible evidence that he went to Iran when he was [young], in about 1991, and lived there as a refugee until late 2011. The Tribunal accepts these aspects of his claim and profile.
26. The Tribunal found the applicant's story of a Taleban fighter wanting to marry the applicant's wife before or when the applicant became engaged to her, in 1997, vague and implausible. There were numerous substantive elements about the applicant's story that, even individually, rendered his story highly unbelievable. These included his claim a Taleban fighter was working as a farmer for or with the applicant's Hazara father-in-law in [City 3]; that a Taleban fighter would have the opportunity to see and interact with a [age] year old Hazara girl in [City 3]; that a Taleban fighter, who is a Sunni Pashtun, would want to marry a [age] year old Shia Hazara girl; that he would become vengeful because the girl married the applicant; and that he did nothing to harm the applicant until about fourteen years later. When these concerns were put to the applicant he merely responded that it was a pre-Taleban time when Hazaras and Pashtuns intermarried. However this response is nonsensical as the applicant himself stated the man was a Taleban fighter at the time, and further, as available country information shows, 1997 was a time of high conflict between the Taleban and the Hazaras in Afghanistan with the Taleban then controlling much of Afghanistan. The Tribunal finds the applicant's claim that he incurred the enmity of a particular Taleban fighter who wanted to marry the applicant's wife, not credible.

Fear of Harm on Return to Afghanistan

Risk in [District 1]

27. The applicant's home area in Afghanistan is [District 1], which is an Hazara majority district of Ghazni province. According to DFAT's 2014 Thematic Report:

At least 11 Pashtun-majority districts of Ghazni Province are not considered to be safe. The threat level in these districts is high due to the presence of Taliban and other insurgent groups. However, the threat level in Hazara-majority districts of Ghazni, including Nawur, Malistan and Jaghori remains low. Security is provided by the Afghan National Police (ANP), without any Afghan National Army (ANA) deployments to these districts. DFAT assesses that there is a low risk of violence for Hazaras in these particular areas. ... The comparatively good security environment in Ghazni's Hazara districts means that government officials and the international community have relative freedom of movement in these areas. These districts therefore enjoy relatively good access to services and a permanent presence of government officials—including from the Departments of Rural Rehabilitation and Development, and Education. However,

security on roads linking Hazara-majority districts of Ghazni to Kabul and other parts of Afghanistan is less safe.¹

28. The Department's very recent COIS paper on Hazaras in Afghanistan states that "Hazaras in the Hazara dominated districts are relatively safe from Taliban attack, according to most sources, and no reports were found of insurgent attacks inside Jaghori, Malistan or Nawur."²
29. The applicant himself has not raised any claims to fear targeted harm in his home area of [District 1]. He confirmed that the danger to him in Afghanistan would arise if he needed to travel outside of [District 1], particularly in the [Town 4] area.
30. There is no indication that the applicant would face harm, apart from the lack of work opportunities, in his home area. As confirmed by the applicant the lack of work opportunity is a result of the isolated agricultural setting of [District 1] and the lack of available land, not the result of any discriminatory or systematic conduct, or any intentional harm. The Tribunal is therefore not satisfied it amounts to serious or significant harm under the Act.
31. On the information available to it the Tribunal is not satisfied the applicant is at any risk of serious or significant harm in his home area.

Hazaras in Afghanistan

32. In March 2014 *DFAT* assessed that Hazaras "are not currently at any greater risk of violence than other ethnic groups in Afghanistan" but that [t]he security situation in Afghanistan remains fluid and varies from district to district within individual provinces", noting that "any categorical assessment on the security in a particular area could be rendered quickly inaccurate."³ In a somewhat analogous assessment the Department's 2015 COIS Paper on Afghanistan states (with the internal reference footnoted below):

Although the Taliban leadership and the group as a whole has not been anti-Shia or anti-Hazara, the sporadic killings of Hazaras in remote regions since 2001 seems to indicate that a small number of Taliban commanders in various parts of Afghanistan do hold either anti-Shia or anti-Hazara views. The Taliban is made up of individuals with a wide range of motivations – some join for religious, political or ideological reasons, others join for financial reasons, others to solve local problems or pursue personal causes, such as revenge, and yet others are criminals who use the cover of the movement to prey on the population.⁴ As Van Biljert states: 'The variety within the Taliban movement also illustrates that the movement has a spectrum of enemies, and that not all Taliban fighters will attack the whole range.'⁵

Road Travel

33. *DFAT*'s 2014 Report contains the following in relation to road security in Afghanistan:
Insecurity compounds the poor condition of Afghanistan's limited road network, particularly those roads that pass through areas contested by insurgents. Taliban and criminal elements

¹ DFAT 2014, *DFAT Thematic Report: Hazaras in Afghanistan and Pakistan*, 26 March, s.4.11 and 4.13

² Department of Immigration and Border Protection, COIS, 2015, "Afghanistan: Hazaras Issues Paper", March.

³ DFAT 2014, *DFAT Thematic Report: Hazaras in Afghanistan and Pakistan*, 26 March, s.4.4 and 4.5

⁴ Biljert, M 2009, 'Unruly Commanders and Violent Power Struggles: Taliban Networks in Uruzgan' in A Giustozzi (ed), *Decoding the New Taliban: Insights from the Afghan Field*, Colombia University Press, NY, pp.160-161

⁵ *DIBP*, COIS, 2015, "Afghanistan: Hazaras Issues Paper", March, p. 49.

target the national highway and secondary roads, setting up arbitrary armed checkpoints. Official ANP and ANA checkpoints designed to secure the road are sometimes operated by poorly-trained officers known to use violence to extort bribes. More broadly, criminals and insurgents on roads target all ethnic groups, sometimes including kidnapping for ransom. It is often difficult to separate criminality (such as extortion) from insurgent activity.

Individuals working for, supporting or associated with the Government and the international community are at high risk of violence perpetrated by insurgents on roads in Afghanistan. Carrying documentation that would indicate employment or another connection with the Government is dangerous. Because Hazaras are perceived to be affiliated with either the Government or international community, those Hazaras travelling these routes who work for the Government or international community frequently take precautions to ensure that, if they are stopped, they could not be identified as such.

Hazara MPs and several credible civil society contacts have told DFAT that ‘dozens’ of Hazaras were killed on roads to and from Hazarajat in 2013. However, DFAT has no reliable evidence to indicate that insurgents disproportionately target Hazaras on roads in Afghanistan. Hazaras are often the main travellers on roads to Hazarajat, so higher numbers of victims could also reflect the higher volume of traffic.

There are two well-established routes from Kabul to Ghazni city. One is short and insecure, via Maidan Wardak. The other passes through parts of Parwan Province on the Bamiyan–Charikar Highway. This is more secure, but long and arduous.

There are three routes from Ghazni city to the Hazara-majority Jaghori district. The most frequently used road passes through Nawur district, and is considered secure. The second route through Qarabagh district is considered less secure. A third through Muqur is insecure due to a Taliban presence, with occasional checkpoints and security incidents. DFAT understands that local residents with ties to the province and knowledge of the area—including Hazaras—are generally able to travel between Ghazni City and Hazara districts without incident and thousands of vehicles use these roads daily.⁶

34. The Department’s *COIS* Paper summarises the differing views regarding the safety of road travel for Hazaras:

Most security concerns for Hazaras in the Hazara districts of Ghazni relate to travel outside the district, as most roads travel through Pashtun districts where insurgents are active. There are conflicting views among external sources consulted by the RRT on whether Hazara travellers travelling to Ghazni City or Kabul are being targeted because of their ethnicity. In 2014-5 there have been three reported incidents involving Taliban attacks on Hazaras travelling into Jaghori from Kabul. ...

There are conflicting views among external sources consulted on whether Hazara travellers travelling to Ghazni City or Kabul are being targeted because of their ethnicity. Advice by DFAT, Qayoom Suroush, of Afghanistan Analysts Network and the Afghanistan Development Association indicates that there is no evidence of ethnic targeting on roads in Ghazni. In contrast, Thomas Ruttig, Professor Alessandro Monsutti, Professor William Maley and a Ghazni based NGO, the Ghazni Rural Support Program, maintain that travel for Hazaras is dangerous on roads passing through Pashtun districts.⁷

35. The *COIS* paper also provides a list of reported attacks on Hazaras in Afghanistan. The following is the excerpt from the list of attacks occurring in 2014 and 2015, the majority of which occurred on the roads:

⁶ DFAT 2014, *DFAT Thematic Report: Hazaras in Afghanistan and Pakistan*, 26 March, ss.4.22-4.25 and 4.32-4.33.

⁷ *DIBP*, *COIS*, 2015, “Afghanistan: Hazaras Issues Paper”, March, pp. 46 & 47.

15 March 2015 A bus was stopped travelling between Ghazni and Jaghouri. Ten Hazaras were abducted. After some hours nine were released with one continuing to be held at the time of writing. Unconfirmed reports believe the remaining captive worked for the government.

23 February 2015 Masked men stopped two vehicles traveling on the highway near Zabul and identified and abducted 30 Hazaras. The Hazaras were reported to be Afghan refugees returning from Iran. Different reports identified the abductors as possibly foreign and either members of the Taliban or ISIS. As of the time of publication, the men had not been found, although one Hazara escaped on 25 February.

20 January 2015 Eight or nine Hazaras were killed in Gilan district in Ghazni when their van was exploded by a remote controlled bomb. The Hazaras were travelling from Kabul to Jaghori district. The pro-Hazara source *Kabul Press* claimed that 'These victims were civilians who were going from Kabul to Jaghori, did not work for any government offices and did not have any connection with any of Afghanistan's political parties', though other sources do not give such details about the victims.

20 September 2014 Australian-Afghan Sayed Habib Musawi, a Hazara from Jaghori district in Ghazni, was reportedly killed by the Taliban while travelling from Kabul to his home district of Jaghori. He was reportedly killed as he was an Australian, but the fact that he was also a Hazara may have been relevant.

c.16 September 2014 Zainullah Naseri, a Hazara from Jaghori district in Ghazni, was reportedly abducted and tortured by the Taliban for two days in Ghazni province after being deported from Australia. He escaped to Jaghori then returned to Kabul. DFAT was unable to confirm the report.

25 July 2014 Suspected Taliban fighters halted two minibuses in Lal-o-Sar Jangal district in the western province of Ghor, identified 14 Shia Hazara passengers, including three women and a child, bound their hands, then shot them dead by the side of the road.

28 June 2014 The Taliban killed (Hazara sources say 'beheaded') between 14 and 17 people, usually described as policemen or ex-policemen, in Gizab district of Uruzgan Province. This incident was little reported and reports do not give much detail. According to Hazara sources, the victims were Hazaras, mostly students and workers, though other sources do not mention their ethnicity. Other information tends to support the assertion that the victims were Hazaras: Hazaras comprised a disproportionately large part of the police force in Uruzgan and particularly in Gizab, according to a 2010 NGO report on Uruzgan, and one of the reports mentions that one of the victims was the nephew of Governor Amanollah Timuri who is elsewhere reported to be a Hazara.⁸

36. There have been further reports of attacks on Hazaras on the roads around Ghazni in Afghanistan since COIS published its paper. According to media reports six Hazaras were abducted by armed masked men on the Herat-Farah highway in Farah province on 16 March 2015.⁹ Five Hazaras were reportedly abducted in Ghazni as they were travelling out of their home district then beheaded on or around 15 April 2015. In its report of the incident the newspaper states their bodies were found in Malistan district.¹⁰
37. The *COIS Paper* also refers to reports of the Taleban "block[ing] all routes to Malestan, Jaghori, Nawur and Ajrestan" in or around September 2014. Similarly, *Tolo News* recently

⁸ DIBP, COIS, 2015, "Afghanistan: Hazaras Issues Paper", March, pp. 54-57.

⁹ *The Daily* (Afghanistan), 2015, "Another 6 Hazara Passengers Abducted", March 18.

¹⁰ *The Express Tribune* (Pakistan), 2015, "Five abducted Hazaras beheaded in Afghanistan: officials", 17 April, <http://tribune.com.pk/story/871896/five-abducted-hazaras-beheaded-in-afghanistan-officials/>

reported in April 2015 on residents from Malistan, Jaghori, Nawa, Nawur and Ajrestan being stranded in Ghazni City for the past month and unable to return to their home areas “due to high security threats on the roads in the area”.¹¹ A Kabul newspaper editorial wrote in 2013 about what it perceived to be the targeting of ethnic Hazaras on the roads between Kabul and Ghazni.¹²

38. The *Australian Hazara Foundation* in its website report of the killing of Australian Sayed Habib remarks on the blocking by the Taleban of the road into Nahoor, Qarabagh, Jaghatu, Malistan and Jaghori, affecting the availability and price of “food, medicine and other daily necessities” in those districts, and describes how the local Hazaras “are completely reliant on this road to obtain their food and other daily necessities from Ghazni and Kabul” and need to travel to Kabul and Ghazni for medical treatment.¹³
39. The Tribunal notes that security concerns in Afghanistan, particularly for Hazaras, have increased in recent months with the addition of a growing *Islamic State* (IS) presence in the country. The Afghan President recently acknowledged that the Islamic State is gaining influence in Afghanistan¹⁴. The *Associated Press* recently reported on not only the emergence of an IS presence in Afghanistan but also of the “Taliban spreading their own influence to areas where they have not had a significant presence in the past.”¹⁵ Some of the reported recent attacks on Hazaras have been attributed to IS fighters - foreign fighters and/or defectors from the Taleban. For example a March *RFE/RL* article states:

The mass kidnapping of members of Afghanistan's Hazara minority has raised concerns that Islamic State militants are entering a new, active, phase in the country. Details about the mass abduction, which took place in Zabol Province on February 23, remain murky, with claims that it was carried out by Islamic State militants countered by denials that the group is present in the southeastern province.

... Provincial government official Abdul Khaliq Ayubi blamed the abduction on IS, which has a strong anti-Shi'ite agenda. He said the gunmen all wore black clothing and black masks. Eyewitnesses who spoke to ToloNews said the gunmen spoke in a foreign language. Other Afghan officials have expressed skepticism about the involvement of IS in the abduction, however. Islam Gul Sayal, the spokesman for Zabol's governor, told RFE/RL's Radio Free Afghanistan that he believes the Taliban was behind the abduction. "These gunmen were antigovernment forces," he said. "It's possible that they were [Pakistani] Taliban. But the Islamic State group does not have a presence here. They are simply Taliban who have changed their flags." Nevertheless, the incident has fueled suspicions that IS militants are moving beyond the recruitment phase in Afghanistan....¹⁶

40. Reports are speaking of ‘competition’ between IS and the Taleban resulting in increasing brutality and sectarianism. The Afghan *Khaama Press*, reported in February 2015 that:

¹¹ *Tolo News*, 2015, “Insurgent Risks Leave Ghazni Villagers Stranded In City”, 21 April,

<http://www.tolonews.com/en/afghanistan/19171-insurgent-risks-leave-ghazni-villagers-stranded-in-city>

¹² *Daily Outlook* (Afghanistan)¹², 2013, “Taliban Bullying In Ghazni”, 6 July

http://outlookafghanistan.net/editorialdetail.php?post_id=7799

¹³ *Australian Hazara Foundation*, 2014, “An Australian resident has killed by the Taliban”, 24 September

<http://aushf.org/Eng/an-australian-resident-has-killed-by-the-taliban/>

¹⁴ See *Khaama Press* (Afghanistan), 2015, “ISIS promotes training camp in Logar province in Afghanistan”, 29 April.

¹⁵ *Associated Press* 2015, “Taliban Announce Their Spring Offensive In Afghanistan”, 22 April

<http://www.sfgate.com/news/world/article/Taliban-announce-their-spring-offensive-in-6215508.php>

¹⁶ *RFE/RL*, 2015, “Mass Abduction Of Hazaras In Afghanistan Raises Fears Of Islamic State”, 9 March

... Being attracted by even [more] radical group, the Taliban are continuously losing their men to ISIL. In contrast, the ISIL is rapidly maximizing its man power, ammunitions and financial resources. For example, since the announcement of the Khorosaan Province, covering modern day Pakistan, Afghanistan, India, Bangladesh, and part of neighboring central Asian countries, in January 2015, the ISIL had not only convinced commanders of Pakistani Taliban to declare their allegiance to Al-Baghdadi, the Group had also nominated the Pakistani Taliban commander Hafez Saeed Khan as the emir of the Khorosaan. Other well-known Taliban figures who had recently joined ISIL are Shahidullah Shahid, Sa'ad al Emarati, Sheikh Muhsin, Dolat Khan, Khalid Mansoor, Abdul Rauf Khadim and dozens/hundreds others. ...

... The ISIL soon began to expand their influences towards southern province of Afghanistan, mainly towards major provinces of Loya Paktia, Ghazni and Helmand. In the late September 2014, just few weeks after the release of ISIL's first propaganda message in Peshawar, the group killed about 100 people in Ajristan district of Ghazni province; among them 12 persons were women and children who were brutally beheaded. The Taliban spokesperson Zabihullah Mujahid rejected claims for such mass killing; however, local inhabitants witnessing the scene considered Taliban militants, who were carrying the black flag of ISIL with them, responsible for such murders. According to local Afghan news, Wahdat news, the Taliban militants carrying ISIL's flag not only killed dozens of people in Ajristan, they had also blocked communication roads to other districts of Ghazni province including Jaghori, [Town 4] and Nahoor.

... When the ISIL men riding on horse with black ISIL's flags on hand maneuvered in front of the cameras got attentions of Afghan local TVs and newspapers, the group was already involved in hanging Taliban's militants in Nuristan and recruiting men in east, south and Northern provinces of Afghanistan. Around the country, the ISIL commanders recruited men from eastern provinces of Badakhshan, Nuristan and Nangarhar; South and Eastern provinces of Paktia, Logar, Ghazni, Helmand and Zabul; and Northern provinces of Jawzjan, Kunduz and Parwan. By expanding their presence in almost all major provinces of Afghanistan, today the ISIL is ... considered a powerful rival against the Taliban.... According to local Afghan Medias, like Abdul Rauf Khadim, dozens and hundreds other Taliban fighters are joining ISIL to make new align with a group that is notoriously growing in the country and region.¹⁷

41. According to a recent *New York Times* article there is speculation the Taleban is becoming increasingly brutal to Hazaras to try to combat the growing popularity of IS and the defection of its fighters to IS.¹⁸
42. The Tribunal notes the opinion of DFAT in its March 2014 reports that Hazaras are not deliberately targeted or at greater risk than any other group in Afghanistan. However the Tribunal considers the situation in Afghanistan has changed significantly since the publication of that report. The Tribunal considers that recent information of the increase in targeting of Hazaras on the roads in or around Ghazni gives rise to a substantial ground for the applicant's fear of serious harm on return to Afghanistan.
43. The Tribunal notes that to return to his home area in [District 1] the applicant will necessarily have to travel along roads where Hazaras have been singled out and abducted or killed. The Tribunal also observes that even if the applicant can safely make it back to his home in [District 1] there would still be a need for him to travel outside of [District 1] to work or find work and for health, education and civic administrative purposes.

¹⁷ *Khaama Press*, 2015, "Clash between radicals: ISIL vs Taliban in Afghanistan", 26 February. See also *Oslo Times*, 2015, "Taliban, ISIS announce war against each other in Afghanistan", 20 April.

¹⁸ *The New York Times*, 2015, "Taliban Are Said to Target Hazaras to Try to Match ISIS' Brutality", 22 April.

44. The Tribunal considers that there are additional aspects to the applicant's profile, namely his years in Iran and also in Australia, which increase the risk to him as a Shia Hazara travelling on the roads to [District 1]. The applicant described how he has developed different cultural, dress and language ways from his years in Iran. The Tribunal observed at hearing that the applicant had a modern dress and appearance style. He also spoke Dari with a noticeable accent which he confirmed was an Iranian one.
45. The Tribunal notes further that the applicant has lived in Australia for almost three years now. The Tribunal notes the reports cited above that Hazaras from Australia have been particularly targeted in Afghanistan in the past twelve months.
46. The Tribunal considers these aspects of the applicant's profile increase the risk the Taleban will target him if he travels on the roads into or out of [District 1]. The Tribunal notes the available country information of the network of informers, including amongst the Hazara population itself,¹⁹ which provide information about the identity of travellers to the Taleban.
47. The Tribunal considers that reports of the growing IS presence in Afghanistan further adds to the current risk of harm to the applicant in Afghanistan as a Shia Hazara, from Iran and Australia. The Tribunal notes available information that the Iranian forces are fighting in support of the Syrian regime, including against IS forces. This information also refers to that the Iranian state using Afghan Shia Hazaras living in Iran to fight with their forces for the regime in Syria²⁰. In the applicant's circumstances the Tribunal acknowledges that the enmity and suspicion of IS forces towards him could be heightened.
48. In view of the available evidence and the applicant's particular circumstances the Tribunal is satisfied there is a real chance of him being abducted and killed by either Taleban or IS forces in Afghanistan. The Tribunal is satisfied this amounts to serious harm involving systematic and discriminatory conduct and therefore amounts to persecution under the Act. The Tribunal is satisfied that the essential and significant reason for the harm the applicant fears is a combination of the applicant's religion and race as a Shia Hazara and imputed political opinion of being aligned with the west because of his ethnicity and provenance.

State Protection

49. DFAT has noted that the ability of the Afghan security forces to maintain effective state protection outside of the major cities is a source of concern in the post-2014 environment. DFAT gave the following outline of state protection for Hazaras in Afghanistan in its March 2014 thematic report:

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

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

²⁰ See for example *The Washington Institute*, 2014, "Iran's Afghan Shiite Fighters in Syria", 3 June – this article also refers to a claim that a pictured Afghan fighter in Syria is an "Afghan Shiite refugee who had been granted asylum in Australia"; and *France 24*, 2014, "Afghan migrants offered \$500 by Iran to fight for Syrian regime", 4 June.

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

Many Afghans, including Hazaras, have expressed their concern about security in Afghanistan post-2014. In the absence of effective state protection outside of major urban areas, DFAT assesses that many local communities, including Hazaras, maintain their own militias to protect themselves from criminals and insurgents.²¹

50. Reports cited above have commented on the deteriorating security situation in Afghanistan. DFAT has also referred to the ongoing dangers in road travel and the lack of security on the highways between Kabul and Ghazni.
51. In view of these reports and the number of attacks that continue to occur the Tribunal is not satisfied there is protection available to the applicant while travelling on the roads into or out of [District 1].

Relocation

52. The Tribunal considers that the threat of serious harm to the applicant is while travelling on the roads into and out of [District 1]. The Tribunal therefore needs to assess whether or not the applicant could live safely elsewhere in Afghanistan. Given the spread of the Taleban presence and the lack of security on the roads throughout much of Afghanistan the Tribunal is focussing its assessment on Kabul, the capital and place of likely initial return for the applicant.
53. There is reportedly a very large community of Hazaras living in Kabul.²² While Kabul is said to be somewhat insecure there are very few reported incidents of Hazaras being targeted there. Reports on the economic situation for Hazaras in Kabul are mixed. The Department's recent *COIS Paper*²³ provides a useful presentation of a range of views and analyses. Most commentators appear to agree that the overall socio-economic situation for Hazaras in Afghanistan has improved significantly. They also remark on Hazaras' initiatives to embrace and create work and business opportunities, including in Kabul. However it is also stated that individual Hazaras' experiences differ greatly; that not all Hazaras have benefited from the increased economic opportunities; that *wasita*, or patronage/connections, is still a critical element in a person's survival; and that the Hazaras are still described as amongst the poorest communities in Afghanistan, with an 'underclass' of Hazaras present in Kabul.
54. The applicant has given evidence which is accepted that he has no relatives or connections in Kabul and has never been there. He has had almost no formal education. He has not had paid work in Afghanistan having left there while still a teenager. However he has work experience, skills and aptitude comprised of unskilled [occupation], [occupation] and operating a [business] in Iran. While the applicant's work skills and experiences would assist him in trying to find work in Kabul, his lack of connections, lack of familiarity with cultural norms in Kabul, differences he has developed living in Iran and Australia, long absence from Afghanistan, and lack of education are likely to prove initially prohibitive in the reportedly

²¹ DFAT 2014, *DFAT Thematic Report: Hazaras in Afghanistan and Pakistan*, 26 March, ss.5.1-5.4.

²² DFAT Country Report, 2014, Afghanistan, 26 March, page 19.

²³ *Department of Immigration and Border Protection, COIS*, 2015, "Afghanistan: Hazaras Issues Paper", March, passport 10 – 13.

over-saturated job market in Kabul where unemployment is high. Further, Kabul is reportedly a very expensive city to live in, outside of the slum and ghetto areas.

55. In such circumstances the Tribunal considers that the applicant will likely find no employment or reasonable level of accommodation in Kabul, at least in the short term. Without income he would have great difficulty subsisting.
56. The Tribunal also notes reports of continuing insecurity and violence in Kabul²⁴. The Tribunal considers that the applicant's lack of connections and familiarity with the city are likely to add to his vulnerability in such an environment.
57. Further the Tribunal observes that if the applicant does live in Kabul he will be unable to leave Kabul to visit other places in Afghanistan, including his family in his home area due to the insecurity in road travel and the potential targeting of the applicant on the roads.
58. Having regard to all the particular circumstances and in view of the available general information before it the Tribunal is not satisfied it is reasonable, in a practicable sense, for the applicant to relocate to Kabul to avoid the harm he fears. The Tribunal finds that the applicant does not have a reasonable relocation option in Afghanistan.

Refugee Criteria

59. For the reasons given above the Tribunal is satisfied the applicant has a well-founded fear of persecution for a Convention reason in Afghanistan. The Tribunal is satisfied the applicant does not have a right to enter and reside in any other country therefore he is not excluded from Australia's protection by s.36(3) of the Act.

CONCLUDING PARAGRAPHS

60. 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

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

Melissa McAdam
Member

²⁴ See for example the Danish Immigration Service's 'Fact Finding Mission to Kabul, Afghanistan, 25 February to 4 March 2012', published May 2012, and Michael O'Hanlon, 'How Not to Squander Hard-Won Gains in Afghanistan', *Wall Street Journal*, 5 February 2015.