

1311504 [2015] RRTA 299 (27 May 2015)

**DECISION RECORD**

**RRT CASE NUMBER:** 1311504  
**COUNTRY OF REFERENCE:** Afghanistan  
**TRIBUNAL MEMBER:** Gabrielle Cullen  
**DATE:** 27 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 27 May 2015 at 3:32pm

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. The applicant, a citizen of Afghanistan, originally from [District 1], claims to fear return to Afghanistan as he is a Hazara and Shia, as a person perceived to be spying on the government and as he is a failed asylum seeker from the west.
2. The applicant departed Afghanistan for Pakistan in 2009, then travelled to Iran and lived there until the middle of 2011 when he travelled back to Pakistan. He lived in Pakistan from mid-2011 until his departure to Australia in approximately February 2012 and arrived in Australia by boat [in] June 2012. His wife and child reside in Pakistan. He claims his [minor] nephews are also dependent upon him as his brother has died.
3. He claims while working for [Mr A], a Pashtu, two Taliban Mullahs were looking at him as they believed he was a government spy. He claims two days later they opened fire on him and as a result he fled Afghanistan with his family. He claims since his departure he has heard that [a certain person], a Pashtu has been asking as to his whereabouts.
4. [In] March 2013 the applicant was interviewed by the Department. The Tribunal has listened to the tape of that interview and where relevant the evidence from that interview appears in this decision. The delegate refused to grant the visa [in] July 2013.
5. The applicant appeared before the Tribunal on 27 May 2015 to give evidence and present arguments and where relevant the evidence from that hearing appears in this decision. The applicant was assisted by an interpreter in the Hazaragi and English languages. His registered migration agent attended the hearing.
6. The issues to be considered in this case are as follows.
  - Is the applicant credible as to his claim to be a citizen of Afghanistan?
  - Does he have a right to enter and reside in any other country?
  - Is the applicant credible as to his claims?
  - Does he have a well-founded fear of persecution in relation to Uruzgan?
  - Is state protection available to him?
  - Is it reasonable for him to relocate to Kabul or any other area in Afghanistan?

### RELEVANT LAW

7. 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

8. 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).
9. 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.
10. 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.
11. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
12. 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.
13. 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.
14. 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.
15. 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.

16. 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.
17. 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**

18. 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').
19. '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.
20. 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**

21. 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

22. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources. This includes, but is not limited to, the following:
- The protection visa application of the applicant dated [in] November 2012, including the applicant's statutory declaration as to his claims and identity documents.
  - Oral evidence of the applicant provided at the Department interview [in] March 2013 and at the Tribunal hearing on 27 May 2015.
  - Evidence provided at the entry interview as outlined in the written notes of the interview dated [in] July 2012.
  - Submissions from the applicant's representative made at the Department interview and Tribunal hearing.
  - Written submissions from the applicant's representative received 21 May 2015, including a copy of a letter being distributed by ISIS in Afghanistan and attached country information.
  - Department of Immigration – PAM3 Refugee and Humanitarian – Complementary Protection Guidelines and PAM3 Refugee and Humanitarian – Refugee Law Guidelines.
23. For the reasons that follow, the Tribunal finds that the applicant has a well-founded fear of persecution for a Convention reason.
- Is the applicant credible as to his claim to be a citizen of Afghanistan?
24. On the basis of the applicant's consistent evidence to the department and before me as to where he is from in Afghanistan, I accept that the applicant was born in Afghanistan and is a citizen of that country and lived, as he claimed, in [District 1], a district of Uruzgan province. The applicant was also able to provide information on the area he lived, consistent with the AIMS map "[District 1] District" of January 2004. In making this finding, I have also taken into consideration that during the entry interview, the Department interview and at the Tribunal hearing the applicant spoke fluent Hazaragi, which is one of the main languages spoken in Afghanistan.
25. I therefore find that as a citizen of Afghanistan his claims should be assessed against that country and that his home area in Afghanistan is [District 1], Uruzgan Province.
- Does he have a right to enter and reside in any other country?
26. I accept the applicant lived in Iran from approximately 2009 until mid-2011, as he has been consistent in this evidence to both the Department and Tribunal. Despite having lived in Iran

for this length of time, I accept on the basis of independent country information<sup>1</sup>, that Afghans without a valid passport and visa, regardless of prior length of stay, cannot enter Iran legally and would be subject to forcible return to Afghanistan. As there is no evidence to accept the applicant has such a visa, I find that he does not have a right to enter and reside in Iran in terms of s.36(3) – (5) of the *Migration Act*.

27. I accept that the applicant lived in Pakistan for a short time in 2009 and from mid-2011 until he departed for Australia in February 2012. Despite having lived in Pakistan for this period of time and his wife and children continuing to reside there, I accept on the basis of independent country information, outlined above, and the applicant's own consistent evidence that he lived there as a refugee and not a citizen, his family do not live there as citizens or with permits, that Afghans without a valid passport and visa, regardless of prior length of stay, cannot enter Pakistan legally and would be subject to return to Afghanistan. As there is no evidence to accept the applicant has such a visa, I find that he does not have a right to enter and reside in Pakistan in terms of s.36(3) – (5) of the *Migration Act*.
28. I therefore find he does not have a right to enter and reside in any other country in terms of s.36(3) – (5) of the *Migration Act*, other than Afghanistan.

Is the applicant credible as to his claims?

29. Due to the applicant's consistent evidence between the Department and Tribunal, particularly at the interview and hearing and his ability to provide detail about the matters below when asked, I accept the following to be true.
- The applicant is Hazara and Shia. As to his religion and ethnicity, he has been consistent at all stages of the process. He further has been interviewed in Hazaragi at the Department interview and at the Tribunal hearing. As Hazaragi is the language of the Hazaras, this adds to my finding.
  - The applicant was born in Uruzgan Province in [year] and lived there until 2009 when he left to travel to Pakistan, then lived in Iran until mid-2011, returned with his family to live in Pakistan and departed from there in February 2012 to travel to Australia.
  - He is married and his wife and [child] live in Pakistan and are dependent upon him. His [minor] nephews are also dependent upon him. It accepts his evidence that he continues to send money to them.
  - He undertook [number] years religious education from [year] to [year].

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<sup>1</sup> According to the 2009 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan, July 2009, p.62:

Afghans who depart Iran without specific permission and an exit visa would not be able to legally re-enter or be returned to Iran in the absence of both an Afghan passport and an Iranian visa, regardless of prior legal and possibly long-term stay, or even birth, in Iran. Those Afghans who attempt to enter or are returned without meeting these requirements may be subject to arrest, detention and forcible return to Afghanistan.

- He worked farming on the family land from 1996 to 2009 and worked as a [occupation] in [industry] until 2009 in Afghanistan, and worked in [industry] in Iran and undertook any work he could find in Pakistan.
- His [siblings] have fled to Pakistan and Iran and there are no relatives living in his home area, or anywhere else in Afghanistan

30. As to his claims that he was targeted while working for [Mr A], I am of the view that while he faced some difficulties as a Hazara and Shia working for a Pashtun in a Pashtun area, he has embellished the severity of the situation and that they are, six years on still personally interested in him as they suspect him of being a government spy.

31. I therefore do not accept were he to return to Afghanistan he would be personally known to the Taliban or face any difficulties resulting from the incident he claims led him to leave Afghanistan.

Does he have a well-founded fear of persecution in relation to Uruzgan?

32. The issue of whether persons of Hazara ethnicity and Shia religion are per se at risk in Afghanistan for reason of their ethnicity and religion is a complicated one.

33. 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.”<sup>2</sup>

34. 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.<sup>3</sup> 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.’<sup>4</sup>

35. The 2013 *UNHCR Guidelines for Assessing the International protection needs of Asylum Seekers from Afghanistan* indicate that being a Hazara Shia does not automatically attract serious levels of harm on ethnicity alone, but that each case needs to be assessed individually with other factors. The Guidelines note that persons may be at risk because of their ethnicity in areas where they do not constitute an ethnic majority depending on the individual circumstances of the case. The Guidelines note that the relevant considerations include the relative power position of the ethnic group in the applicant’s area of origin and the history of

<sup>2</sup> DFAT 2014, *DFAT Thematic Report: Hazaras in Afghanistan and Pakistan*, 26 March, s.4.4 and 4.5

<sup>3</sup> 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

<sup>4</sup> *DIBP*, COIS, 2015, “Afghanistan: Hazaras Issues Paper”, March, p. 49.



inter-ethnic relations in that area. The Guidelines note that consideration should also be given to whether the person exhibits other risk factors outlined in the Guidelines. They have identified a number of groups as being at risk of persecution, including those supportive or perceived to be supportive of the government or international forces.

36. Reports indicate that Uruzgan province is predominately comprised of ethnic Pashtun tribes.<sup>5</sup> DFAT advised that “Uruzgan is predominantly Pashtun.”<sup>6</sup> A 2009 report by the Liaison Office (TLO), an Afghan non-government organisation, provides a demographic chart of Uruzgan which indicates that the ethnic demography of province is 91% Pashtun tribes and 8% Hazaras, with the remaining 1% comprised of Sayed, Quraish and Tajik groups.<sup>7</sup> A 2007 report by the Afghan Ministry of Rural Rehabilitation and Development states that members of the nomadic Kuchi ethnic group also reside in Uruzgan province at times.<sup>8</sup>
37. The information before the Tribunal indicates that Uruzgan is one of the most volatile provinces in Afghanistan. In its March 2014 ‘Country Information Report – Afghanistan’, DFAT advised:<sup>9</sup>

There are many areas of the country contested by insurgent forces and no part of the country can be considered totally free from conflict-related violence. The situation remains fluid and any categorical assessment on the security in a particular area could be rendered quickly inaccurate. Although this list is not exhaustive, contested areas are mainly in the south (including in parts of Helmand, Kandahar, Uruzgan and Zabul) and east of the country (including in parts of Ghazni, Paktika, Khost, Paktia, Nangarhar, Kunar and Nuristan). Insurgents are also present in areas of western, central and northern provinces.

38. In 2014 DFAT provided this assessment for Hazaras in Uruzgan:

DFAT assesses that Hazara minorities living in Pashtun-majority areas in Uruzgan, Helmand and Kandahar are less safe than those living in Kabul or Hazara-majority areas of Hazarajat. These Pashtun-majority areas typically experience higher levels of violence, which affects all Afghanistan. Afghans in these areas, including Hazaras. Hazaras living in these areas typically avoid travel outside their immediate communities.<sup>10</sup>

39. In March 2015, the Department’s *Country of Origin Information Service*, issued its report ‘Afghanistan: Hazara Issues Paper’, which provides an analysis of desk-top research on recent reports relating to the security and human rights issues facing the Hazara community

<sup>5</sup> DIAC Country Information Service 2010, *Country Information Report No. 10/34 – CIS Request No. AFG10334: Sayyed Hazara* (Sourced from DFAT advice of 16 June 2010), 16 June

<sup>6</sup> DIAC Country Information Service 2010, *Country Information Report No. 10/34 – CIS Request No. AFG10334: Sayyed Hazara*, (Sourced from DFAT advice of 16 June 2010), 16 June

<sup>7</sup> The Liaison Office 2009, *Three Years Later: A socio-political assessment of Uruzgan Province from 2006 to 2009*, 18 September, NRC Handelsblad website, p.5  
[http://www.nrc.nl/multimedia/archive/00250/TLO\\_Uruzgan\\_Assessm\\_250835a.pdf](http://www.nrc.nl/multimedia/archive/00250/TLO_Uruzgan_Assessm_250835a.pdf)- Accessed 2 September 2010.

<sup>8</sup> Ministry of Rural Rehabilitation and Development 2007, *Uruzgan Provincial Profile*, p.2  
<http://www.mrrd.gov.af/nabdp/Provincia%20Profiles/Uruzgan%20PDP%20Provincia%20profile.pdf> - Accessed 2 September 2010.

<sup>9</sup> ‘Country Information Report - Afghanistan’, DFAT, 26 March 2014.

<sup>10</sup> Department of Foreign Affairs and Trade 2014, *DFAT Thematic Report: Hazaras in Afghanistan and Pakistan*, 26 March, s.4.14 <CIS27600>



in various parts of Afghanistan, and included the following information about the situation for Hazaras in Uruzgan:<sup>11</sup>

Uruzgan is a mainly Pashtun province, as all its Hazara districts went to the new Daykundi Province in 2004. Today only Gizab and Khas Uruzgan districts have Hazara minorities – about 25% in each case ... The security situation for Hazaras in Uruzgan province is more dangerous than in other provinces and Hazaras have been targeted by insurgents because of their ethnicity.

40. This paper indicated the security situation for Hazaras in Uruzgan province is more dangerous than in other provinces and Hazaras have been targeted by insurgents because of their ethnicity.
41. The Department's *Country of Origin Information Service* March 2015 report provided the following information:

*The Liaison Office*, an independent non-government organisation, provided an analysis in of Uruzgan following a four year assessment of the province from 2006 – 2010. It specifically highlights Uruzgan Khas as having 'greater problems with insecurity' and to be losing ground to the many insurgent groups in the district. In June 2010, 11 Hazara males were discovered beheaded in Khas Uruzgan. According to the 2011 *United States Commission on International Religious Freedom Report*, police officials stated that they were killed by the Taliban 'because they were ethnic Hazaras and Shiite Muslims.' The *Pajhwok Afghan News* reported that the bodies were 'found in the Baghchar area of Khas Uruzgan district, where a notorious Taliban commander, Juma Khan, was killed a month back during a clash with coalition troops'. Other reports indicate the Hazaras were killed to avenge the gruesome killing of seven Pashtuns by a notorious Hazara commander from Ghazni province.

In December 2011 the *Wakht News Agency* reported that the local police commander and local police in the district of Khas Uruzgan were actively helping the Taliban to kill Hazaras and seize their lands. Reports indicate that confrontations continued in 2013-4 between the Hazara Afghan Local Police (ALP) units and the Taleban. In May 2014, a group of 50 Afghan Local Police (ALP) members fled from Khas Uruzgan to ethnically-Hazara communities in Ghazni, after their commander was summoned to the provincial capital for questioning over his behaviour.

In September 2010, the *Hazaristan Times* published an article describing mass displacement forced migration of Hazaras in Uruzgan due to insecurity and also made comment on the limited amount of media attention surrounding the events against the Hazara in the area. The displacement of Hazaras was also noted in the *Afghanistan Protection Cluster 2010 Report*, published by the United Nations Office for the Co-ordination of Humanitarian Affairs. The report provided data in relation to displacement (note, not only the displacement of Hazara) from Uruzgan Khas in April 2009 and June 2010 illustrating the insecurity in the area. The report stated that in April 2009, 778 families originally from districts of Uruzgan (Khas Uruzgan, Chora and Char China) had been displaced and in June 2010, 277 Families or 1,939 individuals were displaced to Uruzgan District Centre from Khas Uruzgan due to insecurity. The report also stated that in June 2010 the area was inaccessible for government and NGOS 'due to the conflict the area'.

<sup>11</sup> See 'Afghanistan: Hazara Issues Paper', *Department of Immigration and Border Protection, Country of Origin Information Service*, March 2015, 34-37.

42. On one view, the available information indicates that, for most of the past decade, the primary motivation of the Taliban and other armed militants in attacking people traveling on the roads in between Kabul and Kandahar, and in and out of Uruzgan, appears to be political, as it has mostly been targeted against persons connected to or associated with the Afghan government or international forces, or simply criminal, in that it involves robbery, extortion, kidnapping and ransom. However, the sources consulted by the Tribunal agree that the Taliban is predominantly Sunni and Pashtun, and that the Taliban and Pashtuns have a historical hatred of Hazaras based on ethnicity and religious sect, among other things. Despite the gains made by some Hazaras in recent years, there is no evidence to indicate that the entrenched enmity towards Hazaras by the Taliban and Pashtuns has diminished, such that Hazaras would not be at some risk of harm for reason of their ethnicity or religion under an ascendant Taliban. More recent reports indicate that the Taliban and other armed insurgents, including groups affiliated with Islamic State, have increasingly targeted Hazaras on the roads in and around Ghazni, Uruzgan and Zabul, and subjected them to incidents involving serious harm. For example, the Department's recent *Country of Origin Information Service* report includes a list of reported attacks on Hazaras on the roads in Afghanistan, including the following attacks in 2014 and 2015:<sup>12</sup>

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.

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.

<sup>12</sup> 'Afghanistan: Hazara Issues Paper', *Department of Immigration and Border Protection, Country of Origin Information Service*, March 2015, p.54-57.

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.

43. As noted, 31 Hazaras travelling by bus on the highway from Kandahar to Kabul were abducted in Zabul Province on 23 February 2015. The armed men who carried out the abductions stopped the vehicles in which people were travelling and checked their identity cards before abducting the Hazara passengers.<sup>13</sup> The Taliban denied involvement in the kidnapping and, as referred to above, there have been suggestions that Islamic State was responsible.<sup>14</sup> Reports suggest that traffic on the highway from Kabul to Kandahar has decreased by a half as a result of this and other incidents.<sup>15</sup> Further, on 15 March 2015 ten Hazaras were kidnapped in the Qarabagh district while travelling from Kabul to Jaghori in two cars. Reports suggest that this was not an isolated incident.<sup>16</sup> There have been further reports of attacks on Hazaras on the roads around Ghazni, Uruzgan and Zabul since the Department's paper was published in March 2015. According to media reports, six Hazaras were abducted by armed masked men on the Herat-Farah highway in Farah province on 16 March 2015,<sup>17</sup> and five Hazaras were abducted in Ghazni as they were travelling out of their home district, and their headless bodies were found in Malistan district on or about 15 April 2015.<sup>18</sup>
44. Also in September 2014, a dual Afghan-Australian citizen who came to Australia by boat in 2000, Sayed Habib Musawi, was abducted and killed by the Taliban when he was on his way back to Kabul after visiting relatives in his village in the Jaghori district of Ghazni province.<sup>19</sup> According to the most detailed report the minibus in which he was travelling was stopped by

<sup>13</sup> 'Fear stalks Afghan minorities after rare attacks', *News24-South Africa*, 17 March 2015; 'Drivers explain how Hazara passengers were kidnapped in Afghan south', *Tolo News*, 24 February 2015.

<sup>14</sup> 'Taliban deny hand in abduction of 30 Hazara men in Zabul; Khalili says they are safe', *Afghan Zariza*, 7 March 2015, CXBD6A0DE2428; Frud Bezhan, 'Mass Abduction Of Hazaras In Afghanistan Raises Fears Of Islamic State', *Radio Free Europe/Radio Liberty (RFE/RL)*, 25 February 2015, CXBD6A0DE1904; Ali M. Latifi and Shashank Bengali, 'Afghan officials acknowledge Islamic State presence in their country', *Los Angeles Times*, 17 March 2015, CXBD6A0DE3139.

<sup>15</sup> '9 Newly Abducted Hazara Passengers Released', *Tolo News*, 15 March 2015; 'Protests in Ghazni Over 31 Hazara Hostages', *Tolo News*, 17 March 2015; 'Traffic on Kabul-Herat highway down by a half', *Pajhwok Afghan News, Afghanistan*, 18 March 2015.

<sup>16</sup> 'Gunmen free 9 kidnapped passengers in Ghazni', *Pajhwok Afghan News -Afghanistan*, 15 March 2015; '9 abducted civilians freed by kidnappers in Ghazni', *Khaama Press*, 15 March 2015.

<sup>17</sup> 'Another 6 Hazara Passengers Abducted', *The Daily (Afghanistan)*, 18 March 2015.

<sup>18</sup> 'Five abducted Hazaras beheaded in Afghanistan: officials,' *The Express Tribune (Pakistan)*, 17 April 2-15, available at <http://tribune.com.pk/story/871896/five-abducted-hazaras-beheaded-in-afghanistan-officials/>

<sup>19</sup> 'Sydney man killed by Taliban because he was Australian report', *The Sydney Morning Herald*, 29 September 2014; 'Son of Afghan-Australian killed by Taliban denied refugee status', *The Sydney Morning Herald*, 29 September 2014.



the Taliban in Larga, a village in the Muqur district, and one of the Taliban ordered him by name to get off the bus. Another passenger heard one of the Taliban asking him, 'Did you come from Australia?' They found his wallet, which had an Australian flag design, and also his driver's licence and Medicare card. His body was subsequently found in the Qarabagh district.<sup>20</sup> However, the Department's recent *Country of Origin Information Service* report indicates he was killed in the Jaghori district.<sup>21</sup> According to the most detailed Australian news report, although Mr Musawi was a Hazara his family believe that he was killed because he was an Australian citizen. The news report quotes Bashi Habib, the head of the security forces in Jaghori, as stating that the fact that Mr Musawi was an Australian citizen was reported to the Taliban by an informant in his area.

45. Moreover, recent reports suggest that Hazaras have been targeted by the Islamic State in Afghanistan, with a *New York Times* report suggesting that the Taliban are adopting a new campaign of brutality towards Hazaras in order to 'compete' with IS. The report details the kidnapping and beheading of four Hazara farmers in Ajristan District of Ghazni Province [and] the murder of six Hazaras kidnapped from Daykundi Province.<sup>22</sup>
46. With regard to what might happen in the foreseeable future in Afghanistan, the independent evidence before the Tribunal including from United Nations Secretary-General,<sup>23</sup> UNAMA,<sup>24</sup> the *International Crisis Group*,<sup>25</sup> the *Institute for the Study of War*, the *Brookings Institute*,<sup>26</sup> indicates a significant likelihood that, following the handover from international to Afghan security forces in late 2014, the Taliban will further increase its power and control over most parts of the country. It is clear that Afghanistan remains in a highly volatile and unpredictable phase, and it appears likely that insurgent activity will increase in the reasonably foreseeable future, as the Taliban seeks to expand its sphere of control. In light of the widely pessimistic outlook for Afghanistan's security situation, the Tribunal considers it prudent to adopt a cautious approach in making predictions as to the relative safety for a person in the applicant's situation. As the independent information demonstrates, areas once thought to be relatively free of Taliban influence may not necessarily be so in the future. Assessing the risks to the applicant in such volatile and uncertain conditions is a difficult task. However, in the Tribunal's view, the independent information supports the adoption of a sceptical view towards the proposition that the risk of harm to a person in the applicant's circumstances in [District 1] of Uruzgan is remote, and will continue to be so in the reasonably foreseeable future.

<sup>20</sup> Abdul Karim Hekmat, 'Hazaras face death on return to Afghanistan', *The Saturday Paper*, 8 November 2014.

<sup>21</sup> 'Programme summary of Afghan Bost Radio news in Pashto, 28 Sep 14', *BostNews (Bost Bastan)*, 28 September 2014, CX1B9ECAB7743; 'Programme summary of Afghan Sharq TV news in Pashto, 28 Sep 14', *Sharq Magazine*, 28 September 2014, CX1B9ECAB7744.

<sup>22</sup> 'Taliban Are Said to Target Hazaras to Try to Match ISIS' Brutality', *New York Times*, 23 April 2015, available at [http://www.nytimes.com/2015/04/23/world/asia/taliban-are-said-to-target-hazaras-to-try-to-match-isis-brutality.html?\\_r=0](http://www.nytimes.com/2015/04/23/world/asia/taliban-are-said-to-target-hazaras-to-try-to-match-isis-brutality.html?_r=0)

<sup>23</sup> 'The situation in Afghanistan and its implications for international peace and security: report of the Secretary-General', *UN General Assembly*, 9 December 2014, available at <http://www.refworld.org/docid/549808194.html>

<sup>24</sup> 'Afghanistan Annual Report 2014: Protection of Civilians in Armed Conflict', *United Nations Assistance Mission in Afghanistan (UNAMA)*, 18 February 2015.

<sup>25</sup> 'Afghanistan's political transition', *International Crisis Group*, 16 October 2014, available at <http://www.crisisgroup.org/en/regions/asia/south-asia/afghanistan/260-afghanistan-s-political-transition.aspx>

<sup>26</sup> 'Post-ISAF Afghanistan: The early months', *Brookings Institute*, 6 May 2015, available at <http://www.brookings.edu/research/reports/2015/05/bdc-nato-afghanistan-event-report>

47. Having carefully considered the information and evidence before it, the Tribunal is unable to dismiss the contention that the reason(s) Hazaras have, in the recent past, been subjected to serious harm in Uruzgan, is because of their race and religion and an imputed political opinion.<sup>27</sup> In considering this issue the Tribunal has taken into account information which indicates that, even if the main focus of Taliban activity is directed against perceived supporters or associates of the Afghan national government or the international forces, Hazaras are nevertheless differentially at increased risk if they come to the attention of the Taliban in the course of such activity, even if it is primarily directed at different targets; moreover, some sources suggest that Hazaras are perceived to be associated with the government and the West, or associated with government or Western institutions.<sup>28</sup> Given the evidence about the historic enmity towards Hazaras in Afghanistan, and the current targeting of Hazaras in both Afghanistan and Pakistan for reasons of their religion and ethnicity by Sunni fundamentalist groups linked with the Taliban, the Tribunal considers the weight of recent evidence indicates that, in his individual circumstances, the applicant would face serious harm amounting to persecution from the Taliban or some other Sunni insurgent group in the reasonably foreseeable future for the essential and significant reasons of his race, religion and imputed political opinion, if he returned to his home district of [District 1].
48. The Tribunal considers that, in the event he returned to [District 1], there are a number of features and attributes of his background and characteristics that would make the chance of him suffering serious harm. These include the fact he has the typical Asiatic physical features of a Hazara person, which clearly identifies him as a Shi'a Muslim, as well as his extended period outside Afghanistan, including three years in Australia, a coalition partner in the ISAF forces that were stationed in Uruzgan between 2002 and 2013.<sup>29</sup> Importantly, he has no remaining family or relatives in [District 1]. In these circumstances, in light of the indications that the Taliban is present and active in more than 80% of [District 1], the Tribunal is unable to make a confident finding that the chance of him coming to the adverse attention of the Taliban, on either the roads into or out of [District 1], or inside the district, is remote or far-fetched, or that it is based on mere speculation, and, accordingly, finds that there is a real chance of him suffering serious harm in this way in the reasonably foreseeable future.
49. I, therefore, find that there is a real chance that the applicant will suffer serious harm at the hands of the Taliban were he to return to Uruzgan in the reasonably foreseeable future. I am satisfied he will be targeted because he is a Hazara and Shia. I am satisfied that the applicant will suffer persecution for the essential and significant reasons of his ethnicity and religion. I am satisfied that the harm he fears amounts to persecution in the context of Section 91R(1) given the Taliban's and IS's record of assaults, violence and killings. I am satisfied that the persecution will involve systematic and discriminatory conduct in that it will be directed at him in a non-random way for the reasons outlined above.

<sup>27</sup> See also William Maley 'On the position of the Hazara Minority in Afghanistan', 7 December 2011; 'Afghanistan: Situation in Ghazni Province - views of Member of Parliament', DFAT, 15 July, 2010; 'Failure of Security Transition?', *Kabul Perspective*, 15 August 2012, available at <http://kabulperspective.wordpress.com/2012/08/15/failure-of-security-transition/>

<sup>28</sup> 'Thematic Report Afghanistan, Hazaras in Afghanistan and Pakistan', DFAT, 26 March 2014 at 3.40; 'Afghanistan: Hazara Issues Paper', *Department of Immigration and Border Protection, Country of Origin Information Service*, March 2015; Foschini, F, *The Social Wandering of the Afghan Kuchis*, Afghanistan Analysts Network, 1 November 2013, p.19 available at [http://www.afghanistan-analysts.org/wp-content/uploads/2013/11/20131125\\_FFoschini-Kuchis.pdf](http://www.afghanistan-analysts.org/wp-content/uploads/2013/11/20131125_FFoschini-Kuchis.pdf)

<sup>29</sup> See 'Australian soldiers pull out of Uruzgan province', *ABC News*, 16 December 2013, available at <http://www.abc.net.au/news/2013-12-16/australian-soldiers-pull-out-of-uruzgan-province/5159220>

### *State Protection*

50. 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.

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.<sup>30</sup>

51. In its most recent 'Eligibility Guidelines', UNHCR notes that state protection in Afghanistan is compromised by high levels of corruption, ineffective governance, a climate of impunity, lack of official impetus for the transitional justice process, weak rule of law and widespread reliance on traditional dispute resolution mechanisms that do not comply with due process standards.<sup>31</sup> It also stated that 'to the extent that the harm feared is from non-State actors, State protection is on the whole not available in Afghanistan'. In view of the unstable security situation in Afghanistan and potential for further deterioration in the context of the impending draw-down and the likely resurgence of the Taliban, the Tribunal finds that the applicant would not be able to access state protection from the serious harm he faces from the Taliban and other armed militants.
52. 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.

### *Relocation*

53. The Tribunal has also considered whether or not it would be reasonable for the applicant to relocate to another area of Afghanistan, and considers that, in his circumstances, Kabul is the only realistic option.
54. Reports on the economic situation for Hazaras in Kabul are mixed. The Department's March 2015 *Country of Origin Information Service* report provides a helpful 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, and that many Hazaras have been able 'embrace and create' work and business opportunities in Kabul. However, it is also stated that individual Hazaras' experiences differ greatly, and that not all Hazaras have benefited from the increased economic opportunities, that patronage and connections are still a critical element in a person's survival, and that the Hazaras are still described as amongst

<sup>30</sup> DFAT 2014, *DFAT Thematic Report: Hazaras in Afghanistan and Pakistan*, 26 March, ss.5.1-5.4.

<sup>31</sup> 'Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan', *UNHCR*, 6 August 2013, at p 23-25.



the poorest communities in Afghanistan, with an 'underclass' of Hazaras present in Kabul. UNHCR has reported of the widespread unemployment in Kabul that limit the ability of a large number of people to meet their basic needs. DFAT has also referred to unemployment being widespread in Kabul and underemployment common.

55. UNHCR Guidelines and the recent DFAT 'Thematic Report: Conditions in Kabul', advise that traditional extended family and tribal community structures are fundamentally important for successful relocation.<sup>32</sup> Both DFAT and UNHCR stress that internally displaced Afghans rely on these networks for their safety and economic survival, including access to accommodation and an adequate level of subsistence. DFAT assesses that a lack of financial resources and lack of employment opportunities are the greatest constraints on successful internal relocation. They assess that this is exacerbated by Kabul's relatively high cost of living, particularly the cost of housing. They note that relocation is generally more successful for single men of working age. Returnees generally have lower household incomes and higher rates of unemployment than established community members. Although DFAT assess that men of working age are more likely to be able to return and reintegrate successfully, UNHCR has highlighted the importance of employment skills. While the *Danish Refugee Council* has suggested that Hazaras relocating from the Hazarajat can and do access support and assistance from a large community support network, accessing that support is dependent on having a contact point from an existing network, which usually comes from the person's village or tribe, which the applicant does not have. DFAT has also stated that internal relocation to urban areas is more likely to be successful for single men of working age but this is not the situation for the applicant.
56. In addition, even though reports indicate that Kabul is safer than other parts of the country, there is evidence of a number of insurgent attacks against government institutions, political figures and Afghan National Security Forces, as well as other security services and international organisations. Though this is not sufficient, in itself, to establish a real chance that the applicant would face serious harm, the existence of these attacks and the danger that the applicant may be caught up in them, contributes to the unreasonableness of relocation. Further, in the Tribunal's view, the available information indicates that it is reasonable to assume that increased levels of insecurity and instability throughout the country will cause further large-scale displacements, with Kabul receiving increasing numbers of new residents, placing further pressure on the city's already over-stretched infrastructure.
57. In these circumstances, in light of the fact the applicant has no family or relatives or known tribal or clan ties in Kabul, has a wife, minor child and [nephews] to support, with limited financial means and employment-related skills, and limited education, in the Tribunal's view, the widespread unemployment and high costs of living in Kabul, as well as the general lack of security in Kabul and poor living conditions, mean that in his particular circumstances, relocation to Kabul is not a reasonable option for the applicant.

<sup>32</sup> 'Thematic Report: Conditions in Kabul', DFAT, 3 October 2014, at p 5-7; 'Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan', UNHCR, 6 August 2013, p 72-75. See also Majidi, N., 'Urban Returnees and Internally Displaced Persons in Afghanistan', *Middle East Institute & Foundation pour la Recherche Strategique*, 25 January 2011, available at [http://www.refugeecooperation.org/publications/afghanistan/pdf/01\\_majidi.pdf](http://www.refugeecooperation.org/publications/afghanistan/pdf/01_majidi.pdf); Saito, Mamiko, *Searching For My Homeland: Dilemmas Between Borders, Experiences of Young Afghans Returning "Home" From Pakistan and Iran*, AREU Synthesis Paper Series, July 2009, available at [http://www.areu.org.af/index.php?option=com\\_docman&Itemid=&task=doc\\_download&gid=686](http://www.areu.org.af/index.php?option=com_docman&Itemid=&task=doc_download&gid=686)

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 or anywhere else in Afghanistan 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.

Gabrielle Cullen  
Member