

1311502 [2015] RRTA 298 (21 May 2015)

DECISION RECORD

RRT CASE NUMBER: 1311502
COUNTRY OF REFERENCE: Afghanistan
TRIBUNAL MEMBER: Christian Carney
DATE: 21 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 21 May 2015 at 4:29pm

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

1. The applicant arrived in Australia by boat [in] June 2012 without a visa or passport. He is a Hazara Shi'a Muslim and was born in [District 1] of Uruzgan, Afghanistan, in [year]. He claimed that he and his family left Afghanistan in 2000 in fear of their lives from the Taliban and lived illegally in Pakistan until 2012 when he came to Australia. He fears being persecuted in Afghanistan by the Taliban and other Sunni extremist groups because of his race and religion, and because of his long residence in Pakistan and Australia.
2. He was interviewed by a delegate of the Minister for Immigration in March 2013, who considered him to be a reliable witness who had provided a genuine and honest account of his past circumstances. However, after considering a range of independent information about the security conditions that existed at that time, the delegate did not accept he faced a real risk of being persecuted if he returned to his home village in [District 1] of Uruzgan.
3. The Tribunal must consider and decide whether the applicant has a well-founded fear of being persecuted in Afghanistan for one or more of the five reasons set out in the Refugees Convention and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm. In considering these issues, the Tribunal has applied the law set out in Appendix 1.

CONSIDERATION OF CLAIMS AND EVIDENCE

4. The applicant has presented his claims on five different occasions since he arrived in Australia, including at two interviews with Departmental officers while he was unrepresented: his 'Bio Data Interview' [in] June 2012 and his 'Entry Interview' [in] July 2012, both of which were conducted at [an] Immigration Detention Centre. Following his release from immigration detention, a registered migration agent assisted him to prepare his application for the visa, which was lodged [in] November 2012, and he attended an interview with the delegate [in] March 2013. At all times, his evidence was given through the assistance of a qualified Hazaragi-English language interpreter.
5. The Tribunal had the opportunity to observe him give evidence at a hearing on 11 May 2015, during which it was able to clarify aspects of his claims and test his reliability as a witness. Like the delegate, the Tribunal found him to be a reliable and credible witness. He presented as a withdrawn and quietly spoken man who gave most of his evidence in a direct and sincere manner. He was responsive and sought clarification when necessary, and did not give the impression he was willing to exaggerate or embellish his evidence when the opportunity to do so was available. He was able to provide specific and personal details about his claimed experiences in Afghanistan, Iran and Pakistan. Importantly, his evidence at the hearing was consistent with his evidence on each of the previous occasions he presented his claims, and the Tribunal was impressed by the spontaneous nature of his responses to questions he had not before been asked. In addition, he provided a copy of his Taskera, which supports key aspects of his claims, including his identity, nationality and home region in Uruzgan. He has consistently spoken in the Hazaragi language and the Tribunal observed him to have the typical Asiatic physical features of the Hazara people. Further, his claims are consistent with independent reports of similar events from the relevant time, which gives credence to the plausibility of his claims and evidence.

6. For these reasons, having carefully considered the information and evidence before it, the Tribunal has formed the view that the applicant's evidence about what occurred to him in Afghanistan and Pakistan, was based on his personal experience, and was a reliable account of events that actually occurred, and, accordingly, accepts that:
- (a) The applicant was born in [a village in District 1] of Urzogan province of Afghanistan in [year].¹ He is Hazara and a Shi'a Muslim and a national of Afghanistan. He was [one of a number of] children. He worked on the family farm from about 1992 until 2000.
 - (b) His family lived under the control of the Taliban from about 1996 to 2000.² In about 1999 his eldest brother was abducted by the local Taliban and his family were forced to pay a large ransom to have him released. In fear of further persecution, the applicant and his family left their ancestral lands in 1999 and travelled to Quetta, Pakistan.
 - (c) He was married in Quetta in about 2000 and his wife subsequently gave birth to his [children]. His wife and [children] remain in Quetta.
 - (d) He lived in [an] area of Quetta without permission from 2000 to about 2008, where he worked as a [occupation]. In 2008 he travelled to Iran in search of work. He lived in Iran without permission for about one year and worked as a [occupation]. He was detected by the Iranian authorities and deported to the border in 2009, and, with the assistance of a smuggler, travelled to Quetta.
 - (e) He left Quetta in 2012 because of the increasing attacks against Hazaras by the Taliban and other Sunni extremist groups.³
 - (f) Except for one sister who lives with her husband in [a certain district], all of his siblings and other relatives live in Quetta. He has never been to Kabul and has no relatives or known connections in Kabul or Uruzgan.

Is there a real chance the applicant would suffer persecution on return?

7. In light of the above findings, the Tribunal must consider whether the applicant's fears of being harmed on return are 'well-founded'. The High Court of Australia has held that a person has a 'well-founded fear' of persecution if he has a genuine fear founded on a 'real chance' of being persecuted for a Convention reason. In the leading case on the issue, the former Chief Justice of the High Court, Sir Anthony Mason stated that the expression 'a real chance':⁴

¹ See 'Uruzgan Province - Land Cover Map', *AIMS (United Nations)*, available at <http://www.boekje-piinter.nl/images/uruzgan.pdf>

² See 'Country Reports on Human Rights Practices 2000: Afghanistan', *US Department of State*, February 2001, available at <http://www.state.gov/j/dri/rls/hrrpt/2000/sa/721.htm>; 'Afghanistan: Crisis of Impunity', *Human Rights Watch*, July 2001, available at <http://www.hrw.org/reports/2001/afghan2/Afghan0701.pdf>

³ 'Thematic Report: Shias in Pakistan', *DFAT*, 18 December 2013; 'The widening specter of sectarian militancy', *Weekly Pulse*, 9 March 2012, available at <http://www.weeklypulse.org/details.aspx?contentID=2002&storylist=2>; 'Sectarian killings in Balochistan', *The Daily News*, 15 October 2011, available at <http://www.dailynews.net.pk/oct2011/15-10-2011/sectrai.asp>; 'Forced out of town by ethnic violence in Balochistan', *Policy Research Group*, 27 May 2011, available at http://policyresearchgroup.com/pakistan/forced_out_of_town_by_ethnic_violence_in_balochistan.htm

⁴ *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389.

... clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring ... If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a fifty per cent chance of persecution occurring. This interpretation fulfils the objects of the Convention in securing recognition of refugee status for those persons who have a legitimate or justified fear of persecution on political grounds if they are returned to their country of origin.

The High Court's decision in *Chan* establishes that a person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50%. Indeed, the High Court has prescribed a low threshold for determining whether an applicant's fear is "well-founded" and it can be reached even if the event feared is "unlikely to occur" and has only a "10 per cent chance" of occurring, however, the chance of it occurring must be more than "far-fetched" or "remote",⁵ and the evidence must indicate "a real ground for believing that the applicant ... is at risk of persecution"; a fear "is not well-founded if it is merely assumed or if it is mere speculation".⁶

8. The evidence before the Tribunal does not indicate that the applicant has been subjected to adverse treatment in Afghanistan that would constitute persecution. Nevertheless, the courts have made it clear that "proving persecution in the past is not an essential step in an applicant demonstrating that he or she has a well-founded fear of persecution."⁷ The issue for determination is whether, on the basis of the circumstances that exist now, his fears of future harm are well-founded, as understood in the terms set out above.
9. In considering this issue, the Tribunal has had regard to a range of independent information about a number of different matters relating to the prevailing security and human rights conditions in Afghanistan, in the context of the claims made by the applicant. As noted above, he fears that he would be subjected to serious harm by the Taliban or some other Sunni extremist groups because of his race and religion, as a Hazara Shi'a, and his long period of residence outside the country in Australia, Iran and Pakistan. In this context, the Tribunal has had regard to a range of independent information about the current and prospective security conditions in [District 1] of Uruzgan; the recent situation for Hazara and Shi'a people in [District 1] and the surrounding districts of Uruzgan province and in Kabul; the presence of the Taliban and other armed militants in and around [District 1], and throughout Uruzgan and in Kabul, including the conditions on the roads in and out of [District 1], Uruzgan and Kabul; the capabilities of the state to provide protection; and information with regards to the possibility of the applicant relocating to Kabul.
10. The information before the Tribunal from DFAT, the US State Department, the *International Crisis Group* and other reliable sources, indicates that Afghanistan's security situation has increasingly deteriorated in recent years. While the Taliban suffered a military defeat in 2001-2002 and were ousted from Kabul, the evidence indicates that they left Afghanistan with most of their resources and leadership intact and re-established operations in Pakistan. Over the past 10 years the Taliban has returned to Afghanistan and gained military momentum and is now conducting operations in more than 75% of the country. The US led invasion of Afghanistan in 2001 seems to have only dispersed the Taliban, and although ISAF attempted to rid the country and region of the Taliban over the past 13 years, it has been unable to do so. Experts consider that with the US-led coalition's withdrawal of troops

⁵ *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 429 per McHugh J.

⁶ *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 572.

⁷ See *Abebe v The Commonwealth* (1999) 197 CLR 510 at [192] per Gummow and Hayne JJ.

in December 2014, the Afghan security forces will have limited success in repelling the insurgency. The insider threat stemming from Taliban infiltration of the Afghan National Army and police has already affected Western capacity building. Attacks by the Taliban and other insurgent groups have intensified in recent years, and so have Afghan and ISAF counter-attacks, producing a mounting civilian and combatant death-toll. The available information indicates that the areas in which the Taliban has had access, influence or control, has fluctuated over the past 10 years, which is consistent with efforts by international and Afghan forces to restrict its sphere of influence. In recent years, an ascendant Taliban increased its operations in and around Uruzgan, including in [District 1], and carried out targeted attacks against ISAF forces and civilians who worked with or for the government or foreign forces, including Hazaras.⁸

11. 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:⁹

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.

12. 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 in various parts of Afghanistan, and included the following information about the situation for Hazaras in Uruzgan:¹⁰

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.

13. In March 2015 the *Institute for the Study of War* issued a detailed report ‘The Taliban Resurgent: Threats to Afghanistan’s Security’ which provides detailed analysis of the security conditions in the most volatile provinces in Afghanistan, including with regard to Uruzgan:¹¹

Significant Taliban attacks and skirmishes in nearby Uruzgan province also increased during the 2014 fighting season, particularly in September and October 2014. Uruzgan, Daikundi, and western Ghazni province comprise a remote and mountainous region east of Sangin that has historically served as sanctuary for the Taliban in central Afghanistan. This region lies between the Taliban’s southern areas of operation and eastern Afghanistan. Uruzgan lacks

⁸ ‘Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan’, *UNHCR*, 6 August 2013, page 67-68.

⁹ ‘Country Information Report - Afghanistan’, *DFAT*, 26 March 2014.

¹⁰ See ‘Afghanistan: Hazara Issues Paper’, *Department of Immigration and Border Protection, Country of Origin Information Service*, March 2015, 34-37.

¹¹ Available at <http://www.understandingwar.org/report/taliban-resurgent-threats-afghanistans-security>

major infrastructure and ANSF presence compared to Kandahar, allowing the Taliban to become entrenched over time. Security in the province improved in 2010 with the development of a robust Village Stability Operations (VSO) effort and Afghan Local Police (ALP), which helped ISAF to establish security in rural villages and promote local governance and development from 2010-2012. Provincial police commander Matiullah Khan's private army and other local powerbrokers also supplemented ISAF security operations. Over the past two years, however, many of these safeguards have gone away, particularly with the withdrawal of ISAF forces from Camp Holland in 2013, leaving local police forces on their own to repel Taliban assaults.

Local media sources reported large Taliban contingents moving through Uruzgan province toward eastern Khas Uruzgan district in August 2014. By October 19, 2014, Taliban fighters surrounded and took control of villages within Gizab district. The militant activity shut down roads leading to the provincial capital of Tarin Kot and closed down most schools across the district. The attacks also carried a symbolic value, taking place four years after ISAF-supported VSO teams had ejected the Taliban from the district. By the end of October 2014, the Taliban reportedly controlled at least eighty percent of the district, prompting civilians to request help from the ANSF.

In response to these distress calls, security forces deployed to the area and clashed with Taliban forces in Gizab district and its surrounding districts, including in Deh Rawud district near the Uruzgan provincial capital by November 5, 2014. Taliban fighters likely shifted back and forth between Uruzgan and Helmand, leveraging their established transit networks to evade decisive confrontations with the ANSF. The spread of attacks across Uruzgan and Helmand likely exceeded the operational reach of the ANSF in southern Afghanistan. The Taliban have therefore been able to re-establish influence proximate to key southern provinces and demonstrate its ability to reverse significant ISAF and ANSF successes against the insurgency.

14. In the past nine months, there have been a considerable number of security incidents in Uruzgan involving attacks by the Taliban on government institutions, including the assassination in March 2015 of the all-powerful Police Chief of Uruzgan, Matiullah Khan, who had worked with ISAF and Australian forces to repel the rising Taliban insurgency. Police stations, military barracks, schools and organisations associated with international forces, foreign governments and international NGOs, have all been targeted by the Taliban, as noted in the following selection of available reports:

- 'Insurgents kill 12 Afghan policemen in Uruzgan: official', *Dawn*, 20 May 2015;¹²
- 'Heavy fighting erupts in Uruzgan', *The Frontier Post*, 19 May 2015;¹³
- 'Afghanistan: Taliban attack on district headquarter in southern Uruzgan province kills 7', *Indian Express*, 18 May 2015;¹⁴
- 'Taliban kill second police chief from same Afghan province', Reuters, 26 April 2015;¹⁵
- 'Five aid workers killed in Afghanistan after abduction by Taliban: officials', *ABC News*, 12 April 2015;¹⁶

¹² Available at <http://www.dawn.com/news/1183134>

¹³ Available at <http://www.thefrontierpost.com/article/299469/heavy-clashes-erupt-in-uruzgan/>

¹⁴ Available at <http://indianexpress.com/article/world/neighbours/afghanistan-taliban-attack-on-district-headquarter-in-southern-uruzgan-province-kills-7/>

¹⁵ Available at <http://www.reuters.com/article/2015/04/26/us-afghanistan-attack-idUSKBN0NH05T20150426>

- ‘Powerful Afghan Police Chief killed by Taliban suicide bomber’, *The Guardian*, 20 March 2015;¹⁷
 - ‘Taliban kill 7 police officers in central Afghanistan’, *Associated Press*, 13 March 2015;¹⁸
 - ‘Taliban Return To Afghan Town That Rose Up And Drove Out Its Leaders: Insurgents Now Control About 80% Of Gizab District In Uruzgan Province Four Years After Successful Revolt’, *The Guardian*, 28 October 2014;¹⁹ and
 - ‘Nearly 900 Taliban militants launch attacks in Uruzgan province’, *Khamma Press*, 7 August 2014.²⁰
15. With regards to accessing [District 1], reports indicate that travel along key roads between Kabul and Kandahar, including in and out of and through Uruzgan and Zabul, is dangerous, as militant groups, including the Taliban, regularly set up checkpoints and have killed and harmed those who work for or support the Afghan government and international community, including Hazaras.²¹ In recent years there have been regular reports of ambushes, robberies, kidnappings and killings by the Taliban and criminal groups along these roads, and the security of roads in the region has become volatile and increasingly dangerous. In March 2014, DFAT advised that:²²

4.23 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 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.

4.24 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.

¹⁶ Available at <http://www.abc.net.au/news/2015-04-12/five-abducted-aid-workers-killed-in-afghanistan-officials/6386316>

¹⁷ Available at <http://www.theguardian.com/world/2015/mar/19/afghan-police-chief-killed-taliban>

¹⁸ Available at <http://www.ctvnews.ca/world/taliban-kill-7-police-officers-in-central-afghanistan-1.2277958>

¹⁹ Available at <http://www.theguardian.com/world/2014/oct/27/taliban-return-afghan-town-gizab>

²⁰ Available at <http://www.khaama.com/nearly-900-taliban-militants-launch-attacks-in-uruzgan-province-8396>

²¹ See ‘DFAT Report 1450 – RRT Information Request: AFG41196’, *Department of Foreign Affairs and Trade*, 5 November 2012; ‘Country Information Report No. 11/56 – CIS Request No.AFG12298: Road security in Ghazni’, *DLAC Country Information Service*, 21 September 2011; Ruttig, T, ‘Comments provided by Thomas Ruttig on travel between Kabul and Ghazni for Hazaras’, 25 May 2012; Maley, W, ‘On the Position of the Hazara Minority in Afghanistan’, 9 September 2012; ‘Kabul-Kandahar highway is a symbol of what’s gone wrong in Afghanistan’, *The Telegraph*, 9 September 2012, available at <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/9530320/Kabul-Kandahar-highway-is-a-symbol-of-whats-gone-wrong-in-Afghanistan.html>; Zeerak, M, ‘Email to RRT, Re: Request for advice on road security and ethnic targeting in Ghazni province’, 25 March 2013.

²² ‘Thematic Report Afghanistan, Hazaras in Afghanistan and Pakistan’, *DFAT*, 26 March 2014 at 4.22-25.

4.25 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 ...

16. With regard to what might happen in the foreseeable future in Afghanistan, the independent evidence before the Tribunal including from United Nations Secretary-General,²³ UNAMA,²⁴ the *International Crisis Group*,²⁵ the *Institute for the Study of War*, the *Brookings Institute*,²⁶ 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.
17. 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, in the terms prescribed by the High Court of Australia, real and not remote. 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 2013.²⁷ Importantly, he has no remaining family or relatives in [District 1], and, since he was last there in 2000, there have been considerable changes in the area, including the creation of the Daykundi province in 2004 [to] which the majority of the former Hazara population of Uruzgan now reside.²⁸ 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,

²³ ‘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>

²⁴ ‘Afghanistan Annual Report 2014: Protection of Civilians in Armed Conflict’, *United Nations Assistance Mission in Afghanistan (UNAMA)*, 18 February 2015.

²⁵ ‘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>

²⁶ ‘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>

²⁷ 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>

²⁸ See ‘Afghanistan: Hazara Issues Paper’, *Department of Immigration and Border Protection, Country of Origin Information Service*, March 2015, 34-37.

accordingly, finds that there is a real chance of him suffering serious harm in this way in the reasonably foreseeable future.

Convention nexus

18. For the applicant to meet the refugee criterion, the Tribunal must be satisfied that there is a real chance he would be singled out for serious harm in a 'systematic and discriminatory' manner for the 'essential and significant' reason of his race, religion, nationality, political opinion or membership of a particular social group. He has claimed that he is at risk of persecution because of his Hazara race and his Shi'a religion, and his membership of the particular social group of Hazara returnees, and that the Taliban or other armed Pashtun group would impute him with an adverse political opinion, based on his race, religion, lack of familial connections and their impression of him being an outsider as a Hazara who has been outside the country for over 15 years including for an extended period in Australia.
19. In its 'Thematic Report: Hazaras in Afghanistan and Pakistan', issued on 26 March 2014, DFAT advised:²⁹

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 Afghans in these areas, including Hazaras. Hazaras living in these areas typically avoid travel outside their immediate communities.

20. 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

²⁹ 'Thematic Report Afghanistan, Hazaras in Afghanistan and Pakistan', DFAT, 26 March 2014, at 4.14.

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'.

21. 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."³⁰ In a somewhat analogous assessment the Department's *Country of Origin Information Service* March 2015 report on Afghanistan states:

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. 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.'

22. 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 2015:³¹

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.

³⁰ 'Country Information Report - Afghanistan', DFAT, 26 March 2014, at 4.4 and 4.5.

³¹ 'Afghanistan: Hazara Issues Paper', Department of Immigration and Border Protection, *Country of Origin Information Service*, March 2015, p.54-57.

23 February 2015 - Masked men stopped two vehicles traveling on the highway near Zabol 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.

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.

23. As noted, 31 Hazaras travelling by bus on the highway from Kandahar to Kabul were abducted in Zabol 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.³² The Taliban denied involvement in the kidnapping and, as referred to above, there have been suggestions that Islamic State was responsible.³³ Reports suggest that traffic on the highway from Kabul to Kandahar has decreased by a half as a result of this and other incidents.³⁴ Further, on 15 March 2015 ten

³² '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.

³³ 'Taliban deny hand in abduction of 30 Hazara men in Zabol; Khalili says they are safe', *Afghan Zariza*, 7 March 2015, CXBD6A0DE2428; Frud Bezhani, '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.

³⁴ '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.

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.³⁵ 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 2015,³⁶ 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 2015.³⁷

24. 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.³⁸ According to the most detailed report the minibus in which he was travelling was stopped by 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.³⁹ However, the Department's recent *Country of Origin Information Service* report indicates he was killed in the Jaghori district.⁴⁰ 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.
25. 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.⁴¹
26. 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.⁴² In considering this issue the Tribunal has taken into account information which

³⁵ '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.

³⁶ 'Another 6 Hazara Passengers Abducted', *The Daily* (Afghanistan), 18 March 2015.

³⁷ '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/>

³⁸ '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.

³⁹ Abdul Karim Hekmat, 'Hazaras face death on return to Afghanistan', *The Saturday Paper*, 8 November 2014.

⁴⁰ '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.

⁴¹ '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

⁴² 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;

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.⁴³ 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].

State protection

27. With regard to the possibility of the applicant accessing protection from the state authorities, DFAT has advised that:⁴⁴

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.

28. 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.⁴⁵ 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 in accordance with the principles in *MIMA v Respondents S152/2003*, from the serious harm he faces from the Taliban and other armed militants.

Relocation

'Failure of Security Transition?', *Kabul Perspective*, 15 August 2012, available at <http://kabulperspective.wordpress.com/2012/08/15/failure-of-security-transition/>

⁴³ '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

⁴⁴ 'Thematic Report Afghanistan, Hazaras in Afghanistan and Pakistan', *DFAT*, 26 March 2014 at 5.1-5.4.

⁴⁵ 'Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan', *UNHCR*, 6 August 2013, at p 23-25.

29. 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. Reports indicate that there is an increasingly large community of Hazaras in Kabul,⁴⁶ with relatively few reported incidents of Hazaras being targeted in the capital.
30. 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 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.
31. 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.⁴⁷ 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.
32. 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

⁴⁶ 'Thematic Report Afghanistan, Hazaras in Afghanistan and Pakistan', DFAT, 26 March 2014 at 19.

⁴⁷ '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; 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

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.

33. In these circumstances, in light of the fact the applicant has no family or relatives or known tribal or clan ties in Kabul, has been outside the country for over 15 years, has a wife and [young] children under the age of [age] to support, with limited financial means and employment-related skills, 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 accordance with the principles established by the High Court,⁴⁸ in his particular circumstances, relocation to Kabul is not a reasonable option for the applicant.

CONCLUSION

34. For the above reasons, the Tribunal is satisfied that the applicant has a well-founded fear of being persecuted by non-state actors, from which the state would not be able to protect him, if he returned to Afghanistan now or in the foreseeable future, and that, in the circumstances, it would not be safe or reasonable for him to relocate to another part of the country. The Tribunal considers that the persecution which the applicant is at risk of suffering involves 'serious harm' as required by s.91R(1)(b) of the Act, in that it involves significant physical harassment or ill-treatment. The Tribunal finds that the applicant's race, religion and imputed political opinion, are the essential and significant reasons for his fear of persecution as required by s.91R(1)(a). The Tribunal is satisfied that the persecution he is at risk of suffering involves systematic and discriminatory conduct, as required by s.91R(1)(c), in that it is deliberate or intentional and involves his selective harassment for a Convention reason.
35. Accordingly, for all of the above reasons, the Tribunal finds that the applicant has a well-founded fear of Convention-related persecution if he returns to Afghanistan now or in the foreseeable future. There is no evidence before the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any country other than his country of nationality and the Tribunal finds that he is not excluded from Australia's protection by s.36(3) of the Act.
36. The Tribunal is satisfied the applicant is a person in respect of whom Australia has protection obligations and that he satisfies the criterion set out in s.36(2)(a) for a Protection visa.

DECISION

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

Christian Carney
Member

⁴⁸ See *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18.

APPENDIX 1 - RELEVANT LAW

38. Section 65(1) of the Act provides that a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a Protection visa are set out in s.36 of the Act. An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a Protection visa of the same class.
39. 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.

Refugee criterion

40. Section 36(2)(a) provides that a criterion for a Protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention. Generally speaking, as a party to the Refugees Convention, Australia 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.
41. The High Court of Australia has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51. Sections 91R and 91S of the Act qualify certain aspects of Article 1A(2) for the purposes of the application of the Act and Regulations to a particular person.
42. There are four key elements to the Convention definition. Firstly, an applicant must be outside his or her country. Secondly, the applicant must fear persecution, which, according to

s.91R(1) of the Act, must involve 'serious harm' and 'systematic and discriminatory conduct'. The expression 'serious harm' includes, for example, a threat to life or liberty; significant physical harassment or ill-treatment; or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2). The High Court has said 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 condoned or be incapable of being controlled 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. 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.

43. Thirdly, 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).
44. Fourthly, an applicant's fear of persecution for a Convention reason must be 'well-founded'. 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 a genuine fear founded on a 'real chance' of being persecuted for a Convention reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
45. 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.

Complementary protection criterion

46. 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').

47. 'Significant harm' for these purposes is exhaustively defined in s.36(2A). 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.
48. 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).

Credibility

49. The Tribunal's task of fact-finding may involve an assessment of an applicant's credibility. In this context, the Tribunal is guided by the observations and comments of both the High Court and Federal Court of Australia in a number of decisions including *Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* (1996) 185 CLR 259, *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510, *Randhawa v MILGEA* (1994) 52 FCR 437, *Selvadurai v MIEA & Anor* (1994) 34 ALD 347, *Minister for Immigration and Ethnic Affairs and McIlhatton v Guo Wei Rong and Pam Run Juan* (1996) 40 ALD 445, *Chand v Minister for Immigration and Ethnic Affairs* (unreported, 7 November 1997), *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 and *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220. In these and other decisions, the courts have made it clear that it is important that the Tribunal is sensitive to the difficulties faced by asylum seekers and that it adopts a reasonable approach in making its findings of credibility.
50. In *Minister for Immigration and Ethnic Affairs and McIlhatton v Guo Wei Rong and Pam Run Juan* (1996) 40 ALD 445, Foster J stated at 482 that "care must be taken that an over-stringent approach does not result in an unjust exclusion from consideration of the totality of some evidence where a portion of it could reasonably have been accepted." Numerous decisions have endorsed the principle that the benefit of the doubt should be given to asylum seekers who are generally credible but unable to substantiate all of their claims.
51. The Tribunal has also had regard to the decision of *Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* (1996) 185 CLR 259, and the comments of the High Court on the correct approach to determining findings on credibility. Kirby J observed at [25]:

First, it is not erroneous for a decision-maker, presented with a large amount of material, to reach conclusions as to which of the facts (if any) had been established and which had not. An over-nice approach to the standard of proof to be applied here is undesirable. It betrays a misunderstanding of the way administrative decisions are usually made. It is more apt to a court conducting a trial than to the proper performance of the functions of an administrator, even if the delegate of the Minister and even if conducting a secondary determination. It is not an error of law for a decision-maker to test the material provided by the criterion of what is considered to be objectively shown, as long as, in the end, he or she performs the function of speculation about the "real chance" of persecution required by Chan.

52. The Tribunal is not required to accept uncritically any or all allegations made by an applicant. Nor is it required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out, or obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. In *Chand v Minister for Immigration and Ethnic Affairs* (unreported, 7 November 1997), the Full Court of the Federal Court observed that "where there is conflicting evidence from different sources, questions of credit of witnesses may have to be resolved. The RRT is also entitled to attribute greater weight to one piece of evidence as against another, and to act on its opinion that one version of the facts is more probable than another." Nevertheless, as Burchett J counselled in *Sundararaj v Minister for Immigration and Multicultural Affairs* [1999] FCA 76, it is necessary to:

... understand that any rational examination of the credit of a story is not to be undertaken by picking it to pieces to uncover little discrepancies. Every lawyer with any practical experience knows that almost any account is likely to involve such discrepancies. The special difficulties of people who have fled their country to a strange country where they seek asylum, often having little understanding of the language, cultural and legal problems they face, should be recognised, and recognised by much more than lip service.

53. Indeed, as the Full Court noted in *Sujeendran Sivalingam v Minister for Immigration and Ethnic Affairs* (unreported, 17 September 1998) "refugee cases may involve special considerations arising out of problems of communication and mistrust, and problems flowing from the experience of trauma and stress prior to arrival in Australia." On this point, the Tribunal also takes into account the comments of Professor Hathaway in *The Law of Refugee Status* (1991, Butterworths) at pages 84-86. Nevertheless, there is no rule that a decision-maker may not reject an applicant's testimony on credibility grounds unless there are no possible explanations for any delay in the making of claims or for any evidentiary inconsistencies: *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 at 558-9. Nor is there a rule that a decision-maker must hold a 'positive state of disbelief' before making an adverse credibility assessment in a refugee case. However, if the Tribunal has 'no real doubt' that the claimed events did not occur, it will not be necessary for it to consider the possibility that its findings might be wrong: *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 per Sackville J (with whom North J agreed) at 241. In addition, if the Tribunal makes an adverse finding in relation to a material claim made by an applicant but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true: see *MIMA v Rajalingam* (1999) 93 FCR 220. The Tribunal is also mindful of the observations of Gummow and Hayne JJ in *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510 at [191]:

... the fact that an Applicant for refugee status may yield to temptation to embroider an account of his or her history is hardly surprising. It is necessary always to bear in mind that an Applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not life itself.