

1304208 [2013] RRTA 505 (30 July 2013)

DECISION RECORD

RRT CASE NUMBER: 1304208

DIAC REFERENCE(S): CLF2012/180310

COUNTRY OF REFERENCE: Afghanistan

TRIBUNAL MEMBER: Mara Moustafine

DATE: 30 July 2013

PLACE OF DECISION: Sydney

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependent.

STATEMENT OF DECISION AND REASONS

INTRODUCTION

1. The applicant, [name], claims to be a citizen of Afghanistan from [Village 1] in the Jaghori district of Ghazni province. He is of Hazara ethnicity and a Shi'a Muslim by religion.
2. The applicant fears that if he returns to Afghanistan he will be killed by the Taliban because he is a Hazara and a Shi'a Muslim; or by the Taliban or Shi'a mullahs because he is known to have consumed alcohol which is forbidden under Islamic law.
3. The applicant arrived in Australia as an irregular maritime arrival [in] May 2012. He applied for a Protection (Class XA) visa [in] August 2012. A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Protection visa under s.65 of the Migration Act 1958 (the Act) [in] March 2013 and he has applied to this Tribunal for review of that decision.
4. The applicant appeared before the Tribunal on 5 June 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
5. The issues in this review are whether the applicant has a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention in Afghanistan 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.

RELEVANT LAW

6. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

Refugee criterion

7. 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).
8. 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.

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

16. 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

17. 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’).

18. ‘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.

19. 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

20. 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 – to the extent that they are relevant to the decision under consideration.

MATERIALS BEFORE THE TRIBUNAL

21. I have had regard to the applicant’s written and oral evidence to the Department and the Tribunal, including those set out in Appendix A. At the start of the hearing before the Tribunal the applicant affirmed that his

claims and evidence to date was true and correct and that he did not wish to change or add anything.

22. I have also had regard to a range of independent country information about Afghanistan, including that referred to in the delegate's decision and provided by the applicant's representative.

CONSIDERATION OF CLAIMS AND EVIDENCE

Does the applicant have a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention in Afghanistan?

Applicant's claims

23. The applicant's family are farmers on their own land in [Village 1], located [in Jaghori district]. His wife and [children] still live in the village, as do his parents and [siblings]. The applicant said he also worked as a construction worker in [country] for about eight years in three intervals between 1996 and 2007.

Statutory declaration

24. In his statutory declaration, the applicant said he left Afghanistan after he was exposed in his community for consuming alcohol, which is forbidden under Islamic law. The applicant said he bought four bottles of alcohol at Afghan New Year in 2012 and drank it with three friends, including [Mr A]. However, [Mr A] 'did not keep his mouth shut' and told his uncle, who had links to the Taliban in Qarabagh, about the applicant's gift of a bottle of alcohol. After this, the applicant was labelled a 'drunk', people started calling him names and his family accused him of being an alcoholic and a heretic.
25. The applicant said another reason he left Afghanistan was that he could not move freely between Ghazni and Jaghori for fear of being killed by the Taliban. The applicant claimed that in 2011 he was among 150 people who, while forced from their cars to sit on the road at [Location 3], witnessed the Taliban behead three Hazara teenagers in Western clothes claiming they were traitors as they were working for foreigners. The applicant also claims he saw the beheaded bodies of six Hazara policemen, who had apparently been slaughtered by the Taliban at [Location 3], dumped at [location].
26. The applicant said he was afraid to return to Afghanistan because Hazara Shi'as were being persecuted and killed by the Pashtuns and Taliban and he did not want to die because of his ethnicity or religion. He said he could not relocate because he would be identified by his facial features and targeted by the Taliban anywhere he went. He did not believe that the Afghan authorities would protect him because the Government was weak and did not have the resources to protect their own people, let alone an ordinary Hazara like himself. He said he came to Australia because he wants his children to grow in peace without fear.

Evidence at hearing

27. At hearing the applicant said he and three friends bought four bottles of unidentified bitter-tasting liquid in small white bottles, which he claimed was alcohol, from a taxi driver at the nearby [bazaar] and drank it in a car. He said it was the first time the applicant and his friends drank alcohol, which they wanted to try because some of their friends drank alcohol when there was a marriage ceremony. He said he had not consumed any alcohol since that time, including in Australia.
28. The applicant said he paid for all four bottles and two friends paid him back but [Mr A] did not pay. This led to a dispute and [Mr A] informed on the applicant to his uncle, who reported him to the Taliban. The applicant said that since then, people in the community ostracised him at ceremonies and gatherings, calling him 'dirty' or 'nasty'. Asked several times to give details, the applicant said that an assistant to a mullah spat at him and left a prayer gathering organised by his uncle.
29. The applicant said there was no Taliban presence in his village, but there were Taliban around [location] and [Village 2]. Asked how he knew that [Mr A]'s uncle reported him to the Taliban, he said that a few days after the incident, [Mr A]'s uncle called him on his mobile phone; told him he had broken Islamic law and should come to him for 'trial'; and that he would help him avoid being killed by the Taliban; and that otherwise, he would be killed by the Taliban if they caught him. He said [Mr A]'s uncle was variously a Shi'a mullah and a Talib and that he lived in [Village 2]. The applicant said he did not go to see [Mr A]'s uncle as he thought this was a ruse to catch him and hand him over to the Taliban.
30. The applicant confirmed that drinking alcohol was forbidden for all Muslims, not just Hazaras and while he had not seen any consequences for people drinking alcohol in his area, he heard on the news that people were killed by the Taliban in a Kabul resort and that mullahs burned someone for drinking in Sang-e-Masha.
31. Asked why he had been singled out by [Mr A]'s uncle to be handed over to the Taliban, he said it was because he drank alcohol. Asked whether anything happened to his other two friends who drank alcohol with him, the applicant first said he did not know and that his wife told him they were not in the area; but later said he saw them two or three times before he left for Australia and that they were also in trouble, isolated from their families and people, and unable to attend social gatherings. He said he did not know if they had received calls from [Mr A]'s uncle, but then said they might have; and in not mentioning it to him, they might have lied to him or kept it to themselves.
32. The applicant said that at the time he left Afghanistan, he was afraid that if the Taliban or the mullahs caught him, they would kill, execute or burn him for the crime of drinking alcohol. He was also afraid of being killed for being a Hazara Shi'a; and because of the risks Hazaras faced when traveling on roads controlled by the Taliban. He left his village two months after the drinking incident by private taxi, travelling through [Village 2], and Ghazni to Kabul, where he made his travel arrangements for Australia. He said there were no checkpoints on this route and, while they passed through Pashtun areas, drivers chose a time when they knew the Taliban would not be on the road.
33. Asked what he thought might happen to him if he returned to Afghanistan, the applicant said his family members were all in trouble

now and he would be too. He said his wife and children could not go to the spring to bring water during the day but had to go at night because they were taunted and degraded by local people who said they were from a nasty family. Later in the hearing he said his children had been thrown out of school and that the family was thinking of leaving Afghanistan.

34. The applicant said he feared that, as the local Shi'a mullahs were aware of his drinking crime and [Mr A]'s uncle had connections to the Taliban, he would be killed, executed or burned by them if he returned to Afghanistan and they caught him. The applicant claimed his risk of being killed had been increased because he had come to a non-Islamic country as this was seen as a crime by the mullahs and Taliban.

Adviser's submissions

35. The applicant's advisers submitted that his fear of persecution was based on race (Hazara), religion (Shi'a Muslim), imputed political opinion (as someone holding pro-Western and anti-Taliban/anti-Islam beliefs); and membership of particular social groups (of failed asylum seekers from the West and Afghans who are alcoholics or perceived to be alcoholics). They elaborated on these issues in their submissions, including country information in support of the applicant's claims.

Consideration of applicant's claims

36. On the basis of the applicant's family *taskeras* and marriage certificate and in the absence of evidence to the contrary, I accept he is an Afghan national, a Hazara by ethnicity and a Shi'a Muslim, as claimed, and that Afghanistan is his country of reference and receiving country.

37. In assessing the applicant's claims, I have carefully considered and weighed a range of independent material relating to the security situation in Afghanistan and the situation of Hazaras there, including that referred to in the delegate's decision and in submissions from the applicant's advisers.

Persecution as a Hazara and Shi'a

38. I note the history of discrimination and violence suffered by Hazaras and Shi'a in Afghanistan because of their race and religion and the ongoing mistrust between Hazaras and the majority ethnic group, the Pashtuns, based, in part, on the animosity of the Pashtuns towards the Shi'a belief of most Hazaras. I have had regard to the applicant's evidence, as well as his adviser's submissions. However, as set out below, on the basis of available current and authoritative material, including that referenced in the delegate's decision, I am not satisfied that the applicant faces a real chance of persecution or will be killed or harmed by the Taliban simply because he is a Hazara and Shi'a, now or in the reasonably foreseeable future.

39. As put to the applicant at hearing, I accept that during its time in power, the Taliban targeted Hazaras for reasons of their race and religion. However, on the basis of the independent information I have considered, I am not satisfied that the Taliban now specifically targets Hazaras or Shi'as in Afghanistan on a

systematic and discriminatory basis solely by virtue of their race and religion; notwithstanding that individual Hazaras may be targeted for other reasons, or harmed in the general insurgency and Taliban attacks to which non-Hazara also fall victim.

40. I accept that the security situation in Afghanistan remains highly unstable, with continued indiscriminate attacks by Taliban in many areas. However, as put to the applicant, independent sources, including UNHCR and others referenced in the delegate's decision, generally acknowledge that the main targets of the insurgency are not people of a particular ethnicity, but those seen to be in alliance with or supportive of the Government or international community and forces. In an encounter with the Taliban, a Hazara Shi'a with such a profile would be in greater danger. However, as the applicant is a farmer, he does not have such a risk profile.

41. As put to the applicant, while I accept that security in Ghazni province deteriorated in 2012, according to reports from a range of independent sources, Hazara districts of the province, including Jaghori, remain largely protected from violence and continue to enjoy relatively good security¹. There is nothing in the information available to me to suggest that there is a real chance that the ethnic and religious composition of the province will change in the reasonably foreseeable future.

42. In terms of security for Hazaras, it is also relevant to consider the area to which an individual is returning and the prevalence of the Taliban there. The applicant's home village [Village 1] is located [in] Jaghori district, which is predominantly populated by Hazara Shi'as. The applicant confirmed that there was no Taliban presence in his village and no reports have been found of Taliban activity within Jaghori district, although they are known to operate in neighbouring districts.

43. While it is generally recognised, and I accept, that there can be the danger of Taliban attacks on the road between Jaghori and Ghazni, there is no clear evidence that any ethnic group is a particular target. Rather, the situation is equally risky for all travellers, although individuals associated with the Afghan Government or the international community may be at greater risk than others on the road.² As put to the applicant, reports also indicate that ordinary local people are able to travel between the Hazara districts and Ghazni without incident³; know at what times it is safer to travel; and have the option of safer routes between their area and Kabul.

44. This is borne out by the applicant's own evidence. I note that the people he claims were beheaded by the Taliban at [Location 3] at paragraph 25 were respectively, policemen and young Hazara men, alleged by the Taliban to have been working for foreigners. Meanwhile, by his own report, the applicant and the other 150 people who witnessed the incident, among whom there were probably other Hazara Shi'as, were told to go back to their cars and leave. By the applicant's own evidence at paragraph 32, when leaving Afghanistan, he travelled without incident from Jaghori to Kabul on a route through Pashtun areas, and one which is generally regarded as less safe than others, because taxi drivers know what time to travel to avoid the Taliban, In light of this evidence, I am satisfied that, on his return to Afghanistan, the applicant will be able to return

¹ DFAT report on security situation in Ghazni Province, 5 November 2012.

² DFAT Report, 24 October 2010; DFAT report on the Hazara Community, 12 March 2012.

³ DFAT advice on security of roads in Ghazni, September 2011

to his village in Jaghori taking the same sort of reasonable steps to avoid harm on the roads generally.

45. I have noted the submission of the applicant's advisers that the situation in Afghanistan for Hazara Shi'as remains precarious and is likely to deteriorate with the withdrawal of international forces in 2014; and their hypothesis that sectarian violence will grow under pressures from Pakistan-based extremists and the Taliban will regain a position of power reminiscent to that it had in the late 1990s. At this point, I consider that any assessment of what may happen at that time and how the applicant and his district may be affected appear to be speculative. I am not satisfied on the information available that the applicant faces a real chance of persecution after the international force withdrawal.

46. In light of the above, I am not satisfied that the applicant faces a real chance of persecution or will be killed or harmed by the Taliban simply because of his Hazara ethnicity and Shi'a Muslim religion, as claimed, now or in the reasonably foreseeable future.

Persecution as someone who holds pro-West and anti-Taliban/ Islam beliefs, in particular drinking alcohol, which is forbidden under Islamic law.

47. The applicant's central claim in this regard is that he will be killed by the Taliban and/or local Shi'a mullahs because he committed a crime against Islam by drinking alcohol with his friends; that this was reported by one of them to his uncle, who he variously described as close to the Taliban and later, a mullah and a Talib himself; and that he would be killed for this crime variously by the Taliban and/or Shi'a mullahs.

48. I accept that alcohol is prohibited in Islam and has long been illegal in Afghanistan for this reason. I have noted country information provided by the applicant's advisers that in 2009 the Afghan Parliament mandated harsh punishments for those who buy, sell or consume alcohol, including fines, imprisonment, or 60 lashes, in accordance with Sharia law; while suggesting that it would probably would not stop the 'laissez-faire attitude' to drinking in both Kabul and the provinces. I cannot rule out that, if the applicant's alleged consumption of alcohol came to the attention of the Taliban, he might be subjected to punishment in accordance with Sharia law, which according to country information referenced in the delegate's decision is lashing, rather than death, as claimed by the applicant.

49. As outlined below, in light of significant inconsistencies and embellishments in the applicant's evidence, as well as his vagueness on key aspects of his claims, I am not satisfied that the applicant has been truthful about these claims.

50. While the applicant claimed he bought and consumed alcohol, he was unable to provide details as to what it was, saying only that it was a liquid in a small white bottle that tasted bitter. This, coupled with the applicant's confused evidence as to why he among the four friends was singled out for punishment for drinking alcohol, as outlined in paragraph 31, raises doubts as to whether this happened at all.

51. At his hearing the applicant introduced for the first time critical new evidence that [Mr A]’s uncle was a mullah and a Talib and that he called the applicant on his mobile telling him to come to him for ‘trial’ over his crime of drinking. By contrast, in his statutory declaration the applicant said only that [Mr A]’s uncle had links with the Taliban in Qarabagh. When asked about this, the applicant responded variously that he told me about it because he was asked; then agreed that I had not asked, but that he had told about this before; and that he gave the information because he was told to provide any information he had at the hearing. As I put to the applicant, I find it implausible that, if the new details he had provided at hearing were true, he would not have included this critical information in his statutory declaration or in his evidence to the Department. I am not persuaded by his response that he told this information, but ‘they maybe did not write it down’.
52. Further, while the applicant stated in his statutory declaration that he gave the bottle of alcohol to [Mr A] as a gift and [Mr A] ‘did not keep his mouth shut’ and told his uncle; at the hearing, he said he expected [Mr A] to pay him back for the bottle of alcohol he gave him, as his other two friends had, but [Mr A] refused and this had led to a dispute and [Mr A] then told his uncle about the applicant drinking alcohol. When I asked the applicant about this inconsistency, pointing out that it raised doubts about his truthfulness, he confirmed that he had not given the bottle as a gift; that [Mr A] was always supposed to contribute but did not and a verbal dispute happened. Again, I am not persuaded by his explanation that everything was linked to the drinking incident, that it may not have been written down but this offence had put his life in danger.
53. As put to the applicant, I find it implausible that, if [Mr A]’s uncle was so incensed about his breach of Islamic law against alcohol that he would turn him over to the Taliban; and that the mullahs in his village took no action against him, beyond an assistant spitting at him and leaving a religious gathering, which was also new evidence introduced at the hearing. I also find it implausible that, if the applicant was at real risk of being apprehended by [Mr A]’s uncle, the Shi’a mullahs and the Taliban, he was able to live in his village for two months after the drinking episode; then travel without incident through Pashtun areas like [Village 2], where by his own evidence the Taliban were present and [Mr A]’s uncle lived – a route which, as put to him at hearing, was not regarded by reliable sources as the safest available.
54. I am not persuaded by the applicant’s various responses that this was because he was hiding at home and not moving around; that his wife told him that, after he left, the mullahs asked his father to hand him back to them; that the Taliban and mullahs were not chasing him but waiting for a suitable opportunity to catch him; but were now 100% sure that he had consumed alcohol and broke Islamic law so if he went back now they would be there to catch him within an hour and would burn him on the spot. In my view, these are further embellishments in his evidence.
55. In light of his evidence that when leaving Afghanistan, he was able to travel without incident from Jaghori to Kabul on a route regarded as less safe than others because taxi drivers know what time to travel to avoid the Taliban, I am not satisfied that the applicant would be unable to do the same on his return to Afghanistan; especially as he has given no plausible explanation as to why he would now be immediately caught and burned on the spot.

56. Further, I consider the applicant also embellished his evidence about the impact of his alcohol consumption on his family. In his statutory declaration he made no mention of any problem for the family, saying rather that they had criticised him as an alcoholic and heretic. Only in responding to the Department's negative decision, did the applicant instruct that his children had been denied school enrolment and that the family were planning to leave Afghanistan. I find it implausible that this should first emerge in his adviser's submission to the Tribunal in May 2013, a year after the applicant left Afghanistan. Given the seriousness of this new information, it is also incongruous that the applicant did not mention it early in his hearing, but spoke initially about the difficulties his wife and children faced going to the well during the day because local people degraded them as coming from 'a nasty family'.
57. For the reasons outlined above, I do not accept that the applicant has been a truthful and credible witness and find that none of his evidence regarding these claims can be relied upon. I do not accept that the applicant bought or consumed alcohol with his friends, as claimed; nor that one of them, [Mr A], reported him to an uncle who was either linked to the Taliban or a Talib himself; or that [Mr A]'s uncle reported the applicant to other mullahs or the Taliban. I do not accept that the applicant or his family were socially ostracised or degraded by local people; or that his children were thrown out of school as a result of his drinking. It follows that I do not accept that the applicant will be killed, executed or burned by either [Mr A]'s uncle, the mullahs or the Taliban because he breached the Islamic ban on alcohol.
58. It also follows that, if a particular social group of Afghans who are alcoholics or perceived to be alcoholics exists, as submitted by the applicant's adviser, I do not accept that he is a member of it or has a well-founded fear of persecution for this reason.

Persecution as a Failed Asylum Seeker returning from a Western country

59. I have had regard to the applicant's claims that his move to Australia, a non-Islamic country, will increase his risk of being killed on return to Afghanistan because it is regarded as a crime by the mullahs and the Taliban; as well as his adviser's submissions that he faces harm as a returnee or failed asylum seeker from a Western country. However, information before the Tribunal, which was put to the applicant at hearing, indicates that returnees have not been harmed solely on the basis of returning from a Western or non-Islamic country. While some returnees have suffered harm, this was usually for some other reason such as a pre-existing dispute, financial or criminal motives, not just because they have returned from a non-Islamic country. Moreover, as put to the applicant, Afghans have regularly travelled abroad, including to non-Islamic countries, to work or study and then returned, even under Taliban rule⁴. In light of the above, I am not satisfied that the applicant will be persecuted or killed on his return to Afghanistan now or in the reasonably foreseeable future as a failed asylum seeker returning from a non-Islamic or Western country..
60. Having considered the evidence before me both individually and cumulatively as outlined above, I am satisfied that the applicant

⁴ DFAT reports of October 2012; and 3 February, 2009

does not now or in the reasonably foreseeable future face a real chance of persecution arising essentially and significantly for a Convention reason or reasons.

Are there substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm?

Applicant's claims

61. In their submissions to the Tribunal the applicant's advisers submitted that, should it be found that the applicant is not a refugee, based on his claims outlined above, there are substantial grounds for believing that, if refouled to Afghanistan from Australia, there is a real risk that he will suffer significant harm – arising from the arbitrary deprivation of life; torture; cruel and inhuman treatment or punishment; and degrading treatment and punishment.

62. In this context, the advisers submitted that the likelihood of the applicant being arbitrarily killed or tortured by the Taliban as a Hazara Shi'a was heightened by his consumption of alcohol; that such torture would equate to cruel and inhuman treatment; and that, as this is a crime against Islamic law, he would be punished for it on return to Afghanistan. The advisers also submitted that, as a result of him being discovered to have consumed alcohol, the applicant and his family had suffered humiliation and mental suffering amounting to degrading treatment; including his being called a 'drunk' in the community and his children being excluded from school.

Consideration of Claims

63. Having considered the evidence before me both individually and cumulatively; and having regard to my findings of fact above, in particular that the applicant did not consume alcohol in contravention of Islamic law and that the claimed consequences of this act did not take place; I do not accept that there is a real risk that the applicant will suffer significant harm if he returns to his home in the Jaghori district of Ghazni province now or in the reasonably foreseeable future. I do not accept that he will be arbitrarily deprived of his life, suffer torture or cruel and inhuman treatment at the hands of the Taliban or the mullahs; nor that he or his family will suffer degrading treatment or punishment for this reason. I likewise do not accept that, if the applicant returns to his home in the Jaghori district of Ghazni province, there is a real risk that he will suffer significant harm as defined because he is a Hazara or because he is a Shi'a Muslim or a failed asylum seeker from a Western country.

64. I accept that, in common with other travellers, the applicant will face some degree of danger (amounting to a real risk of harm) in relation to possible attacks by insurgents or others while travelling on insecure roads. However, I am satisfied that the real risk is one faced by the population of the country generally and not one which is faced by the applicant personally and is therefore caught by the exclusion set out in paragraph 19 above.

CONCLUSIONS

65. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has

protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

66. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).

67. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a Protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

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

Mara Moustafine
Member

69.

APPENDIX A: MATERIALS BEFORE THE TRIBUNAL

70.

The Tribunal has had regard to the

following materials:

- The Protection visa application dated [in] August 2012 and accompanying papers, including the applicant's statutory declaration; an undated submission from his advisers; the *taskeras* of his family and his marriage certificate
- The recording of the applicant's Department interview held [in] August 2012
- The application for review and accompanying papers submitted [in] March 2013, including the delegate's decision dated [in] March 2013
- The submission from the applicant's representative dated [in] May 2013
- The oral evidence of the applicant at the Tribunal hearing [in] June 2013