

060906453 [2006] RRTA 218 (8 December 2006)

DECISION RECORD

RRT CASE NUMBER: 060906453

DIMA REFERENCE(S): CLF2001/22225 CLF2005/99434

COUNTRY OF REFERENCE: Afghanistan

TRIBUNAL MEMBER: Philippa McIntosh

DATE DECISION SIGNED: 8 December 2006

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Multicultural Affairs to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of Afghanistan, arrived in Australia and applied to the Department of Immigration and Multicultural Affairs for a Protection (Class XA) visa. He was assessed to be a person to whom Australia has protection obligations under the Refugees Convention and was granted a Subclass 785 (Temporary Protection) visa. He applied for a further Protection (Class XA) visa. The delegate decided to refuse to grant the visa. The applicant sought review of the delegate's decision and the Tribunal, differently constituted, (the "first Tribunal") affirmed the delegate's decision. The applicant sought review of the Tribunal's decision by the Federal Magistrates Court and the Court set aside the decision and remitted the matter to the Tribunal to be determined according to law.

The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act and that the Tribunal has jurisdiction to review the delegate's decision under s.411(1)(c) of the Act.

RELEVANT LAW

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied.

Subsection 36(2) of the Act relevantly provides that a criterion for a Protection (Class XA) visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. 'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994. The two subclasses have some criteria in common but in several respects the criteria for the permanent protection visa are more onerous than the criteria for the temporary visa.

Australia is a party to the Refugees Convention and the Refugees Protocol and subject to certain statutory qualifications, has protection obligations to people who are refugees within the meaning of Article 1A(2) of the Convention: *NAGV & NAGW of 2002 v MIMIA* (2005) 213 ALR 668 at [42].

Convention definition of 'refugee' – Article 1A

Article 1A(2) of the Convention 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.

The High Court 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 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act now qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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)). 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) 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.

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. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

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).

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 persecution for a Convention stipulated 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.

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.

Whether an applicant is a person to 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.

The definition of a refugee in Article 1A of the Convention is qualified by the succeeding sections of Article 1, including section C.

Convention ‘cessation’ – Article 1C

Article 1C of the Convention sets out the circumstances in which the Convention ceases to apply to a person who has previously been recognised as a refugee under Article 1A. Paragraphs (5) and (6) of Article 1C provide for cessation of refugee status due to changed circumstances in the refugee’s country. Article 1C(5) provides that the Convention shall cease to apply to any person falling under the terms of Article 1A if:

(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.

(Article 1C(5) contains an exception to cessation where there are compelling reasons arising out of previous persecution, but the exception only applies to refugees recognised under previous refugee instruments and not refugees recognised under Article 1A(2): see *R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063.)

Thus, if a person has previously been recognised as a refugee in Australia, Australia has protection obligations to that person, by force of the Convention, unless and until Article 1C has caused cessation of that obligation: *QAAH of 2004 v MIMIA* [2005] FCAFC 136 at [65].

The central issue presented by Article 1C(5) is whether an individual can no longer continue to refuse to avail him or herself of the protection of his or her country, because the circumstances in connection with which he or she was recognised as a refugee have ceased to exist. The phrase ‘in connexion with’ is generally of wide import, and should be so understood in Article 1C: see *QAAH* per Madgwick J at [109]. UNHCR has expressed the view that cessation of refugee status may be understood as, essentially, the mirror of the reasons for granting such status under Article 1A(2), that cessation based on ‘ceased circumstances’ only comes into play when changes have taken place which address the causes which led to the recognition of refugee status, and that such changes must be ‘profound and enduring’, or ‘fundamental, stable and durable’: see, for example, UNHCR’s *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the [Convention] (the “Ceased Circumstances” Clauses)*, 10 February 2003 and its Note published in April 2001 entitled *The International Protection of Refugees: Interpreting Article 1 of the [Convention]*; see also JC Hathaway, *The Law of Refugee Status*, 1991 at 200-203 and G Goodwin-Gill, *The Refugee in International Law*, 1996, at 84. While these statements should not be regarded as rules of law, to the extent that they are not inconsistent with the Act or the Convention they should be taken into account: *QAAH* at [46].

Where an applicant makes new claims to be a refugee for reasons unrelated to the circumstances in connection with which he or she was recognised as a refugee, those claims will fall to be assessed under Article 1A(2) of the Convention.

A decision maker may reach the state of satisfaction required by s.36(2)(a) either because he or she is satisfied, as a result of a *de novo* enquiry, that the applicant falls within Article 1A(2) of the Convention or because he or she is satisfied that the applicant has already been recognised by Australia as a refugee under Article 1A(2), and is not satisfied that that status has ceased under Article 1C of the Convention: *QAAH* at [86].

Subsection 36(3) of the Act

Subsection 36(2) is qualified by subsection (3). Read with subsections (4) and (5), subsection 36(3) provides that Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in any country apart from Australia, including countries of which the non-citizen is a national, unless the non-citizen has a well-founded fear of being persecuted in the relevant country for one or more of the five Convention reasons, or of being returned to another country where they may be persecuted.

The stated purpose of subsections 36(3) to (5) was to prevent the use of Australia's asylum processes by 'forum shoppers'. They were intended to ensure that persons who are nationals of more than one country, or who have a right to enter and reside in another country where they will be protected, have an obligation to avail themselves of the protection of that other country: Supplementary Explanatory Memorandum to the Senate amendment to the Border Protection Legislation Amendment Bill 1999, at [1]-[2], [5].

There is conflicting authority as to whether subsection (3) can operate in relation to an applicant who has been granted a protection visa: contrast *NBGM v MIMIA* (2004) 84 ALD 40 at [55]-[58], *MZWLH v MIMIA* [2005] FMCA 1200 at [26]-[30], *SZDOL v MIMIA* [2005] FMCA 1404 at [38]-[49].

CLAIMS AND EVIDENCE

The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources. In light of recent evidence regarding the resurgence of the Taliban in the area from which he originates in Afghanistan, and elsewhere, the Tribunal has made this decision without taking oral evidence from him. That evidence relates in particular to the period since the decision by the first Tribunal was made earlier on.

The applicant was represented in relation to the review by a registered migration agent.

First Interview with DIMA officer

The applicant claimed to be in his teens when he arrived in Australia as an unauthorised boat arrival without a travel document. Through a Dari-speaking interpreter, he stated that he had left Afghanistan and travelled via South East Asia. As to why he had left Afghanistan, he said there was cruelty in Afghanistan. He had no appropriate beard and, for this reason, prior to leaving he was beaten by Taliban. Taliban took people to fight for them. A family member, FM, had sent him away the day after he was beaten. Neither he nor any member of his family had been associated or involved with any political group or organisation.

Application for protection visa

The applicant claimed that he was from Village V in a region of the Jaghoori district of the province of Ghazni, was a Hazara and a Shi'a Muslim, and had worked as a tradesperson in a relative's shop (the first Tribunal identified this as Village V, near a neighbouring village in Jaghori).

Shortly before he left Afghanistan (that is, a number of years ago) he was praying at the mosque. Some Taliban came and he was beaten and asked why he prayed that way (in the Shi'a fashion). Later that day other Taliban came to the shop where he worked (at a time when his relative was not there) and demanded money. He told them he could not give them the money and that they had been there several days earlier and had taken money from his relative. He told them to come back when his relative was at the shop. They beat him and pushed him to the ground. When a family member protested they slapped her face. The Taliban took him to their superior and he was again threatened to pay the money or he would be sent to the war. He was detained at the government building with a group of others but after some hours managed to escape.

He later stayed with another relative for a few months until FM, his family member, arranged for him to leave Afghanistan, via other countries.

He claimed he was afraid to return to Afghanistan because he was a Hazara and Shi'a and the Taliban persecuted Hazaras and Shi'as.

The Department's file contained a Skandinavisk Sprakanalys AB language analysis, which stated that the applicant spoke Dari with a strong Hazaragi dialect, his "prosody is typical for Afghan-Hazaragi", and that his accent was that of central parts of Afghanistan. It concluded that he "most probably has his language background in Afghanistan".

The Delegate accepted that the applicant was an Afghan citizen of Hazara ethnicity and noted that country information suggested that Afghan Hazaras had been subject to persecution by the ruling Taliban. She accepted that his fear of persecution was well founded "on the basis of "imputed political opinion, race and religion".

Further application for protection visa

The applicant lodged a further application for a protection visa together with a copy of the earlier statement. Some time later the Department wrote to him, noting that he was the holder of another type of visa who had held that visa for some time and who had lodged an application for a further protection visa. He submitted to a further statement soon after this.

In it he stated that he still feared returning to Afghanistan as the remnants of the Taliban were still there - the bulk of the Taliban were still free and capable of persecuting and killing people like himself. In January 2004 they had killed 12 Hazaras, three of whom were from Jaghori. They had also been targeting civilians associated with foreigners and had killed more than 26 aid workers since March 2003 as well as a returnee from Nauru who went back to Malistan district. He said that hundreds of Taliban captured in northern Afghanistan, and involved in the massacre of Hazaras, were going to be released from prison.

He stated that he also feared current government members, who were mostly the same Pashtuns and Tajiks who massacred Hazaras in the Afshare district of Kabul in 1995. Two Hazaras had been killed in Kabul by government soldiers. Ongoing fighting and attacks on Hazaras from every faction was still a major source of fear for him.

He also stated that Hazara factions were fighting among themselves in Hazara areas. Recently four people had been killed in Daikundi (a district of Zabul province) in fighting between different factions of Hezbe Wahdat. In Jaghori members of the (Hazara) Nasr faction were in power and were persecuting supporters of other factions. He claimed that his family member, FM was financially supporting the Sepah faction before Hezbe Wahdat was formed.

He claimed that, after he left Afghanistan, FM was taken by the Taliban and questioned about the applicant. When FM told them that he had sent him away, the Taliban forced FM to work for them, using him to help them enter people's homes and assault people. For this reason, once the Taliban left the people from the area had assaulted the applicant's family members. His family had left for the Middle East soon after the fall of the Taliban, and were currently in a large city there. People were accusing his family of siding with the Taliban and he would be persecuted if he returned.

He claimed that he would also be persecuted because he had spent some years in Australia so he would be accused of association with foreigners and even conversion to Christianity. He also now stated that he did not believe in religion, did not go to the mosque and did not pray or fast, and he drank alcohol. He referred to the problems brought upon Hazaras by religion. He believed that this would give the fundamentalists reason to kill him.

In the further interview with the Delegate, he said his FM was not a member of any political party. However, after his own departure the Taliban had used FM to assist them to gain entry to the homes of Hazaras. He was forced to do this during a period prior to the fall of the Taliban in late 2001.

The Taliban belonged to the Sepah faction, and Hezbe Wahdat was now in control of his area. His family did not have problems with Wahdat in the past, only with the neighbours. The applicant said that he feared the Taliban who were still present in Afghanistan and in Jaghori, and he feared neighbours because FM had helped the Taliban.

First Review application

The applicant stated that his parents and other family members were still in the Middle East. He thought they had left Afghanistan in the period shortly after the fall of the Taliban. His first contact with them in the Middle East had been later that year. He had spoken to FM several times since then, and FM had told the applicant what had happened after he left Afghanistan. He claimed that FM had told him that he had to leave Afghanistan for two reasons: the help he was forced to give to the Taliban, and his support for Sepah.

The applicant stated that that FM had given financial support to Sepah, prominent members of which had joined the Taliban while less prominent members had used extortion and became like thugs. After he had left Afghanistan, the Taliban had taken FM and forced him to work for them. He had to gain entry for the Taliban into Hazara homes: he would introduce himself and then the Taliban would enter and assault women and so on. He was threatened that if he did not work with the Taliban his family would be harmed. The local people had found out about FM's forced assistance to the Taliban and had therefore turned against the family. Family members had been harassed and were also scared of harm by the Taliban. FM feared Sepah, who would not help him against the Taliban.

The applicant claimed that while in Afghanistan he was a practising Shi'a Muslim, in Australia he did not care about Islam anymore and did not pray or fast and he drank alcohol.

If he returned he would be called an infidel because he had been in a Western country and people knew we do not pray here. However the main problem was FM's forced assistance to the Taliban against Hazaras, who were therefore now his enemy. Also, in his area there were Pashtuns who in the past had demanded taxes/money. He could not live in Kabul because he had no family there and had never been there.

He submitted an "extract translation" from a letter from FM, and which was dated. In it, FM stated that after the applicant's escape the Taliban had forced him to work for them, "everything from loading vehicles to sweeping". Some nights when they went to people's homes, he was forced to knock at doors and introduce himself so they would open: the Taliban would do this whenever they wanted to assault the women, as they did not want to attract attention by creating noise. After the fall of the Taliban, people started to harass family members and eventually they had to leave. "The financial assistance which I was providing for my protection to Sepah didn't do us any good", and local Sepah members would not help.

The applicant submitted a copy of a map indicating the approximate location of his village. Later his adviser provided further submissions, including in relation to Article 1C, and s.36(3), Convention grounds, country information (including in relation to the Taliban, Hazaras, religious persecution, returnees, lack of security) and relocation.

First Tribunal hearing

Asked what he feared may happen if he now returned to Afghanistan, the applicant stated that firstly he feared local Hazaras because FM had assisted the Taliban and the Sepah faction. Secondly, he had been in Australia some years where he had drunk alcohol and had not followed his religion, and if he returned the local Hazaras would say he had abandoned his religion and was non-observant and they would kill him. Thirdly, he had no family members in Afghanistan to live with. Asked who would actually harm him because of FM's situation, he replied the Sepah faction and the local Hazaras in his village. He would be beaten and killed by them because FM helped the Taliban. Asked if he was saying that the Sepah faction of Wahdat controlled his district, not the Khalili faction, he stated that it did and then said that he had no idea about the other faction but expressed certainty that if he returned he would be killed by Sepah and local Hazaras because FM helped Taliban to enter the homes of local people. He confirmed that this would be in his village where FM was known.

The applicant said that FM had financially supported Sepah; if people did not make a contribution the Sepah sent them to fight for them. He then confirmed that FM was not a member of, or involved with, Sepah but was among the local people who paid money to Sepah to avoid such difficulties.

The applicant confirmed that he had fled Afghanistan because he was threatened and detained by the Taliban after they had unsuccessfully demanded money at his relative's business where he worked and because he was a Shi'a and a Hazara, who had been pressured and harassed by the Taliban. There was no other reason at that time.

He confirmed that, for some months during this period, the Taliban used FM to enter Hazara houses because when they saw him people would open their doors to him because he was Hazara. Taliban could then enter the house and assault the occupants. He stated that the Taliban did not want to make any violence and noise to enter Hazara houses. He confirmed that this was in the local area where the people would recognise FM and open the door. The first Tribunal suggested that if over a period of some months FM had been knocking on doors

so that the Taliban were able to enter, people would have stopped opening the door to him. The applicant stated that if the door was not opened, the Taliban went to another house, because the Taliban did not want to make any noise and violence to enter the houses.

He agreed that it would be clear to the local community that FM was being coerced by the Taliban. The first Tribunal put to him that it would be known in the village that he himself had been detained by the Taliban and that he had escaped and fled in order to avoid them. This would be known locally and it therefore did not seem plausible that he would now be suspected of being a Taliban supporter or that he would be harmed on return for that reason. He replied that they would harm him because of FM. He agreed that this would not be because he himself was suspected of being a Taliban supporter but because of persons who had been harmed as a result of FM's activities. The Tribunal noted that if it was because of what FM had done, and not because he or the applicant were regarded as having some political opinion, then it was not necessarily for a Convention reason.

As to how people in Jaghori would be aware whether or not the applicant had been attending the mosque or drinking alcohol while in Australia, he said that that they would know because he had lived here for a period of time and uses some English words when he talked. It had been a long time and he had forgotten how to pray and if he could not pray they would know.

The applicant's adviser provided post-hearing submissions. She noted that he had stated at hearing that his main fear stemmed from assistance FM had given to the Taliban to enable them to gain entry into homes without too much noise or violence. She stated that the applicant would be imputed with a political opinion by Hazaras as he was perceived to be a Taliban supporter and therefore an opponent and traitor to his own ethnic Hazara group. She submitted country information in support of the claim that Taliban supporters risked persecution. She enclosed a statement by Dr. William Maley dated 5 November 2004, who stated that the security situation in Afghanistan was fragile and uncertain "and so is the situation in Jaghori". Dr. Maley offered the view that he did not find implausible the claims that the applicant's FM had been forced to assist the Taliban in the way described. Dr. Maley also commented that, depending on the extent of harm arising from such assistance, "the result could be the activation of a 'norm of revenge'". Other material about Jaghori was submitted by the adviser, which it was stated showed how Jaghori was different to other districts in its attitude to the Taliban, that the Taliban was still present and could remerge as an organised force, that control of Jaghori was with Wahdat-Khalili, whereas the applicant's FM supported Sepah and could not get other support, that the situation in Jaghori was highly unstable and volatile and that local commanders were suspicious of the locals for their support of the Taliban and the applicant's FM had (by force) assisted the Taliban.

Current claims

In a submission from the migration agent to the present Tribunal, it was confirmed that the applicant's claims were variously that he feared the Taliban, that he feared harm arising from being a Hazara, that his FM's enforced assistance to the Taliban would put him at risk from other Hazaras, that he feared local Pashtuns, that he was secularised and would be regarded as *kafir* (an infidel) and that returning to Afghanistan after several years absence would lead to his being perceived to be wealthy and add to the risk to him. Detailed material was submitted citing evidence from various sources about the current security situation in Afghanistan, the position of Hazaras and the issues of returnees and relocation. As it was consistent with, and in some cases from the same sources as, the material on which the Tribunal has relied in this decision, it is not set out here.

Evidence from other sources

According to a recent UN Security Council report, insurgent activity is being conducted largely unchecked in Afghanistan. While previous reporting periods have been marked by progressive and significant deteriorations in the security situation, the recent upsurge of violence represents a watershed. At no time since the fall of the Taliban in late 2001 has the threat to Afghanistan's transition been so severe. In addition to a quantitative spike in their activities, a qualitative shift has been detected in the operations and coordination of the insurgent forces' intent on overthrowing the Government through violent means (UN Security Council 2006, *The situation in Afghanistan and its implications for peace and security*, A/61/326-S/2006/727, 11 September).

Historically the Hazaras, who make up almost 100% of the population of Jaghourai district, (the applicant's place of origin) did not support the largely Pashtun Taliban and the Taliban were only able to enter Hazara areas against the opposition of the populace. By contrast, the Taliban have traditionally been able to operate more easily in Pashtun areas, where they have been able to gain the support of the Pashtun population. This appears to still be the case, with increasing Taliban activity reported in the Pashtun districts close to Jaghourai district: in Zabul, Ghazni and Uruzgan provinces.

As was observed in 2001, it is difficult to be clear as to whether the periodic atrocities conducted by Pashtuns, including the Taliban, against the Hazaras, are a consequence of the long-standing intolerance felt by many Sunni Afghans towards this Shi'a ethnic and religious group. Clearly, the active opposition of the Hazaras to the Taliban conquests of Mazar and the Hazarajat was a factor in the strength of the Taliban reaction when they retook these areas. It is, nonetheless, possible that the anti-Shi'a disposition of the Taliban and of some of the volunteers from other parts of the Islamic world fighting with the Taliban was an important element in the action taken against Hazaras and other Shi'as (Marsden, P., 2001, *Afghanistan: Minorities, Conflict and the Search for Peace*, Minority Rights Group, London, November, pp. 25, 30, also 17-25, p.25).

Village V is a village located near another village, which the applicant refers to by a similar name. According to the Encarta map, Village V is near a large centre in Jaghourai district, and close to another larger village. Village V is near to a main road which runs from the large centre in Jaghourai district through the other larger village and into a Zabul province's district. The provincial border is close to Village V (the larger village is shown on most maps as being in Zabul although most reports list it as part of Jaghourai, and, as a Hazara village, it is more closely connected to Hazara populated Jaghourai than Pashtun populated Zabul). There is a subtribe of the Jaghourai Hazaras called the *Pashai* (Mousavi, S.A. 1997, *The Hazaras of Afghanistan: An Historical, Cultural, Economic and Political Study*, New York p.42) who occupy a neighbouring region in a nearby district which may extend to the village which neighbours Village V and which the applicant refers to by a similar name. Both Village V and the nearby village are very close to the border of the next district (p.54).

In 2003 the UNHCR reported that the area was in control of local commanders of the Nasr faction of Hezb-i Wahdat, who were targeting returnees, particularly members of other factions (UNHCR 2003, *Returnee Monitoring Report: Afghanistan Repatriation: January 2002 – March 2003*, March, p.11). UNHCR advice in relation to the larger village states that it was under the control of Hussein Ali Muradi in 2003 (UNHCR Kabul 2003, *Reply to RRT Request from Field Officer, Ghazni*, 26 September). Two very recent reports place this man as fighting against the Taliban in neighbouring Zabul province ('Taliban militants assault 2

district centers in S. Afghanistan' 2006, People's *Daily Online*, 26 August http://english.people.com.cn/200608/26/eng20060826_297059.html – accessed 4 December 2006; 'Afghan official confirms fall of southern district to Taleban' 2006, BBC Monitoring South Asia (Source: Pakistan-based Afghan Islamic Press news agency), 7 September).

FINDINGS AND REASONS

The applicant was recognised by Australia as a refugee some years earlier on the basis of circumstances then prevailing in Afghanistan. The question for the Tribunal is whether it is satisfied that, at the date of its decision, he is a person to whom Australia has protection obligations under the Refugees Convention. As he has already been recognised by Australia as a refugee, the Tribunal may reach that state of satisfaction either because it is not satisfied that his refugee status has ceased under Article 1C of the Convention or because it is satisfied, as a result of a *de novo* enquiry, that he falls within Article 1A(2).

In this case, the Tribunal is satisfied, as a result of a *de novo* assessment of the applicant's claims overall, that he falls within Article 1A(2) of the Convention. I have found it convenient to approach the matter in this way, rather than considering the various aspects of his case separately under Article 1C and 1A(2) of the Convention because, notwithstanding the changes that have occurred in his country, it is difficult to isolate the circumstances in connection with which he was recognised as a refugee from the circumstances that now prevail.

The applicant has no passport. However I consider reliable the Skandinavisk Sprakanalys AB language analysis, which stated that he spoke Dari with a strong Hazaragi dialect, his "prosody is typical for Afghan-Hazaragi", and that his accent was that of central parts of Afghanistan. It concluded that he "most probably has his language background in Afghanistan". There is no evidence before the Tribunal that he is not a national of Afghanistan, a Hazara or a Shi'a Muslim. I accept that he is.

I accept that there have been periodic atrocities conducted by Pashtuns, including the Taliban, against the Hazaras, and that there is a long-standing intolerance felt by many Sunni Afghans towards this Shi'a ethnic and religious group. I accept that Hazaras actively opposed the Taliban at times, resulting in a strong Taliban reaction. I also accept that the Taliban are "anti-Shi'a" (Marsden 2001). It is not implausible, and I accept, that at the time stated the applicant was beaten up by local Taliban because of these general factors, and that he left there in fear of further harm.

I have considered the applicant's claims that around this time his FM was taken by the Taliban and questioned about the applicant, that FM told them that he had sent him away, and that the Taliban then forced FM to help them enter people's homes, as a result of which, after the Taliban left, local people assaulted the applicant's family. The applicant claims that consequently local people accused his family of siding with the Taliban and for that reason he feared being harmed by these local Hazaras if he returned. However it is apparent that all of the information about the events of that time has been received by the applicant in Australia through FM, who has been in the Middle East for several years. The applicant himself left Afghanistan many months before these events occurred. It is likely to be unknown to FM, and so to him, what the current attitude of local people might be towards either the applicant or his family as a result of the actions of FM earlier. Given the dearth of any reliable evidence on this matter about the present situation, the Tribunal cannot be satisfied that local Hazaras bear the applicant any ill will.

Of Hazaras in Afghanistan, I note that Prof. William Maley has said that the marginalisation of the Hazaras is a product of a range of deep-rooted cultural prejudice coming together. There is prejudice amongst some Sunni Muslims against Shi'ite Muslims. The Hazaras are overwhelmingly Shi'ite, and tend to be "quite distinctive in their appearance ...".

And this over time has morphed into a sense amongst the most extreme of the Sunnis that the Hazaras are virtually Untermenschen in the sense in which the Nazis used the terms in the 1930s. ...

Get to lower rungs on the ladder in Afghanistan and people have no qualms about talking about Hazaras in terms that would make your hair stand on end. ... (Maley, Professor W. 2005, *Transcript of Seminar on Afghanistan*, 30 September).

In 2005 Dr Jonathan Goodhand provided the Tribunal with the following information:

[Hazaras] are the third largest ethnic group after the Pashtuns and the Tajiks. They are Shias, so they are from a minority, they are minority numerically and they are a minority in terms of religious affiliation and in many ways, they are politically and socio-economically marginalised. They have historically occupied, if you like, a subaltern position in Afghan society. Now the war changed a lot of those things quite dramatically.

It brought a new political assertiveness amongst the Hazara population and certainly Hazaras were very prominent in the Jihad in the anti-communist fighting the 1980s and they coalesced politically around Hizbi Wahdat by the end of that period; and certainly they have come out in the post Taliban context as in many ways in a strengthened position politically in terms of the constitution reflecting minority concerns and having some representation in the cabinet. They certainly have a position at the table.

Now there are concerns that the gains made during the war years are going to be undermined as Pashtuns re-assert their traditional dominance. Also another thing that needs to be remembered is the history of enmity that was produced as a result of massacres and counter massacres during the war years. In particular, two incidents stand out. In Kabul in 1993, when the Hazaras – there was a massacre in Kabul at the hands of Jamiat-e Islami and Ittehad-e Islami and then subsequently by the Taliban in Hazarajat (in 2001) in retaliation for the Taliban defeat in Mazar-e Sharif (in 1998)

Although the Hazaras have probably advanced their position politically they are still seen in many ways a marginal group, as for example they are underrepresented in the armed forces and the police, and also in Hazara areas of Kabul there has been limited reconstruction and city planning compared to other areas.

... it is difficult to talk in generalised terms about whether Hazaras returning will be victimised because they are Hazaras or because of their allegedly communist or westernised background. These issues have to be seen in an individual context. These things can become major problems or they can be used as pretexts, for instance, to prevent returnees from coming back and claiming their land (Goodhand, Dr Jonathan

2005, *Transcript of Video Conference on Afghanistan between RRT Melbourne, RRT Sydney and Dr Jonathan Goodhand*, 13 April).

The US Department of State reports that “there was continued social discrimination against Hazaras” during 2005:

The Shi’a religious affiliation of the Hazaras historically was a significant factor contributing to their repression, and there was continued social discrimination against Hazaras.

...During the year claims of social discrimination against Hazaras and other Shi’as continued. The Hazaras accused President Karzai, a Pashtun, of providing preferential treatment to Pashtuns and of ignoring minorities, especially Hazaras (US Department of State 2006, *Country Reports on Human Rights Practices 2005 – Afghanistan*, 8 March, Section 2d & National/Racial/Ethnic Minorities).

On the basis of this evidence I am satisfied that Hazaras generally face discrimination in Afghanistan. However I do not consider that merely being a Hazara from Afghanistan is sufficient to give rise to a well-founded fear of persecution.

With regard to the Taliban, the country information before the Tribunal indicates that there has been a recent upsurge in Taliban-related violence in Afghanistan. I note that the UNHCR has been unable to provide detailed information about the area of Ghazni where the applicant lived since they closed their office in Ghazni city in 2004. As Jaghour district is relatively remote and access to the district is through areas where the Taliban are active and fighting is occurring, there have been few reports of the situation inside the district. News reports indicate that people have been killed by insurgents travelling to or from the district but there has been little news of the situation within the district. While not currently present in Jaghour district, the Taliban are reportedly operating at an increasingly effective level in the Pashtun-populated districts which neighbour Jaghour, such as Day Chopan and Arghandab districts in Zabul province and Qarabagh, Moqor and Gelan districts in Ghazni province, as well as other parts of Ghazni and Zabul, to the extent that they claim to control a number of districts in these provinces. Evidence on this point from various sources including UNHCR was submitted by the applicant’s migration agent in her submission.

In 2006 the International Crisis Group reported that “High risk” areas were just a few islands on UN Risk Maps as recently as the start of 2003. Joined by a new “extreme” risk category, they had since “steadily expanded to cover nearly all the east and south, including the length of the border with Pakistan, slicing the country almost in half on a diagonal slant”. This report observed that “A qualitative and quantitative change” in the violence dated to around the final months of 2005. In mid-July 2006 the Taliban gained control over the district centres of Garmser and Naway-i-Barakazayi in Helmand, which international and local security forces recaptured a few days later. District centres in Zabul, Uruzgan and Farah were later claimed by insurgents and again retaken. There was “talk of insurgents running a court system and naming their own provincial ‘officials’”. “Within southern and eastern Afghanistan, the insurgents have continually demonstrated that swathes of territory outside the district centres are largely under their sway” (International Crisis Group 2006, *Countering Afghanistan’s insurgency: No quick fixes*, 2 November, pp.5 & 6).

A number of reports indicated that the Taliban are operating in, and at times controlling, many of the Pashtun districts of Ghazni. They are also acting to close roads through these

districts to Hazara districts. The Institute of War and Peace Reporting recently reported “A fierce Taleban-led insurgency in recent months has placed Ghazni, ... among the most volatile provinces in southern Afghanistan (Younus, B. 2006, ‘Taleban call the shots in Ghazni’, Institute of War and Peace Reporting , *ARR*, No. 213, 15 May, CX153501)

The International Crisis Group’s recent report describes the current situation of the insurgency in Ghazni province:

The conflict is not just in far-flung, remote areas. The southern districts of Ghazni, just two hours drive from Kabul, are now considered off-limits to outsiders, with Taliban and government authorities vying for control of the roads. International humanitarian workers are not to be seen in even the provincial centre, Ghazni city, and local staff of aid agencies have taken down their signs.

One such worker was a passenger in a taxi stopped by a group of men in dark turbans at a check post in the Qarabagh district of Ghazni on 27 August 2006: “They told us we should not play or listen to music. They were searching for NGO cards or any documents that showed a relationship to the government”. The district head of education had been kidnapped and killed just days earlier (International Crisis Group 2006, *Countering Afghanistan’s insurgency: No quick fixes*, 2 November, pp.5-6).

I accept that the area in which the applicant’s home village is located is currently effectively encircled by Taliban forces, and that to reach it in order to return home he would have to traverse some part of this area. As to the Taliban’s current treatment of individuals travelling through the area, I note that in September 2006 a UN agency stated that access to Jaghuri was difficult due to deteriorating security and threats of insurgent attacks (UN World Food Programme 2006, *World Food Programme Emergency Report 2006: Report No. 35/2006*, 1 September <http://www.reliefweb.int/library/documents/2006/wfp-emergency-01sep.pdf> - accessed 5 December 2006, p.18). On 1 September 2006 the Taleban reportedly closed Jaghuri District road to traffic where it passed through neighbouring Qarabagh District. This report indicates that the Taliban assaulted people, among whom were some who appeared to be people they perceived to be “unIslamic”:

According to a security official in Ghazni who wished to remain anonymous, the Taleban had closed the Jaghuri District road to traffic ... but the security officials reopened it on Saturday morning. According to eyewitnesses, the Taleban beat those people who shaved their beards or had government officials' phone numbers, on charges of cooperating with the government. The Taleban also warned taxi drivers of the Jaghuri-Ghazni highway not to listen to music on their car radios unless they want to be punished in accordance with Shari'ah law (‘Taleban up to their old tricks regarding beards, music in east Afghan province’ 2006, *BBC Monitoring South Asia* (Source: Afghan independent Aina TV), 4 September).

Another report notes that the Taliban had stopped cars on this road many times, including in November 2006 (‘Gunmen display Taleban behaviour on Afghan highway’ 2006, *BBC Monitoring South Asia* (Source: Afghan independent Aina TV), 4 November). In August 2006 four people travelling on the road from Jaghouri to Ghazni were kidnapped and a soldier and an Afghan aid worker later killed (‘Bodies of kidnapped Afghan soldier, ex-NGO employee, discovered’, 2006, *BBC Monitoring South Asia* (Source: Afghan independent

Pajhwok news agency website), 30 August). In May 2006 three doctors working at Jaghori hospital were kidnapped ('Afghan interior minister sees cautious progress on improving security' 2006, BBC Monitoring South Asia (Source: Afghan newspaper Anis), 9 May). Also in May a policeman from Jaghori was killed by Taliban insurgents in neighbouring Qarabagh district - they alleged he was spying for American forces against the Taleban. This report observed that attacks on government targets and employees had become rampant in recent weeks in Ghazni province ('Taleban kill two Afghan policemen in Ghazni Province' 2006, *BBC Monitoring South Asia* (Source: Afghan independent Pajhwok news agency website), 26 May).

I accept that the applicant arrived in Australia while still in his teens, and that he is now an adult. In other words, his formative years as a young adult have been in the west. It has been claimed, and I accept, that he is "secularised", is no longer a practising Muslim, that he drinks alcohol, and has generally been greatly influenced by his life in Australia. It has been submitted by his migration agent that he would not be possible for him to be "discreet" so as to "blend in" to a "highly conservative and traditional society". On this point I consider Dr. Maley's observations about such young men salient:

... I suspect that the greatest danger for young people who have been here for quite some time and being sent back to Afghanistan is not that they would be consciously offensive to Afghan norms but that they would by this stage have assimilated Australian ways of behaviour to the extent that their grasp of Afghan norms would be fragile and in that way they would end up offending somebody very dangerous without even realising that they were in the process of doing it.

It is quite a complex story. But even Afghans who came to Australia as adults who are going back after 10 or 20 years are finding that they are instantly recognised as people who lived outside the country even though they speak fluent Persian, they are not unfamiliar with the layout of cities and that kind of thing, but there is just something about them that the locals pick up.

In response to a query on the subject of Westernisation as to whether people who were not practising their religion to the same extent in Australia could face problems in Afghanistan on return, Professor Maley responded:

It could, yes. There is an expression that is used in Afghanistan, "gharbzadeh", which means "son of the West" and it is applied to people who seemed to have lost an element of their Afghan identity. And the area in which it is potentially most problematical would be in the area of religion. If people began to be suspected of having ceased to be good Muslims in the sense in which some group within Afghanistan might use that term ... (Maley, Prof. William 2005).

Similarly, in 2005 Dr. Jonathan Goodhand expressed the view that there was strong pressure to conform in Afghan society in many ways. So "not conforming" was "frowned upon and could be dangerous for the person". He also observed that this would be particularly so in "rural Ghazni" where it would be "certainly be frowned upon for somebody to kind of say that they were an atheist and to be un-Islamic in their practices". He added that he believed it would be "dangerous for people to go back into that kind of a context and be openly, if you like, 'un-Islamic'", particularly in rural areas where it would be "extremely difficult". He added of people returning from Australia that

In Ghazni, I think that certainly there would be a much more profound question around adjustments and because the difference between the lifestyle

the person would have experienced in Australia and they would come back to in rural Ghazni would be much more profound and certainly that person is likely to stand out more ... (Goodhand 2005).

Previously, the applicant was found to be a refugee on the basis of “imputed political opinion, race and religion”. Although the Delegate did not specify the political opinion which she considered may have been imputed to him, I am satisfied that it was, broadly speaking, a political opinion antithetical to that of the fundamentalist Taliban. On the basis of the country information I consider that, although the Taliban are no longer formally in power, the deterioration in the security situation in and around the applicant’s area in Ghazni province as a result of the recent intensification in violence by the Taliban means that they are effectively in control of much of that area.

I am also satisfied that individuals such as the applicant, who the evidence from Professor Maley indicates would be readily identifiable as a returnee from a Western country, would be assumed to continue to hold views antithetical to those of the Taliban. On the basis of the country information I am satisfied that there is an absence of effective protection for people falling into these categories. I consider the chance far from remote that the applicant might come to the attention of Taliban on roads entering his region of Ghazni province. I consider reliable the evidence about the volatility of the security situation (Younus 2006), the Taliban’s recent assaults on individuals travelling in this area (International Crisis Group 2006, BBC 2006), and the Taliban’s “anti-Shi’a disposition” (Marsden 2001). I consider there is a real chance that, because he is a Hazara Shi’a Muslim who has clearly been living in a Western country and whose behaviour and appearance are those of a person with opinions at odds with those of the Taliban (such as being *kafir*), the applicant may be assaulted. As Professor Maley’s observation illustrates, a person with the applicant’s characteristics risks inadvertently “offending somebody very dangerous”. Whether or not the applicant’s FM did assist the Taliban some years ago (albeit under pressure), that would be unlikely to be known to Taliban at checkpoints in Ghazni today, and unlikely to make the applicant any safer from harm during such a confrontation. In my view, given the Taliban’s propensity to violence and the unpredictability inherent in an encounter between the applicant and the Taliban, any assault may involve significant physical ill-treatment, so as to amount to persecution.

Under these circumstances I am satisfied that the applicant would have a well founded fear of persecution for the combined Convention reasons of his race, religion and imputed political opinion if he were to attempt to return to his home area in Ghazni province. Given this finding, I do not propose to consider the other claims regarding his fears of Pashtuns generally, and his fears arising from perceptions that he is wealthy.

I have considered whether the applicant could relocate to some part of Afghanistan other than that village, where he might be safe from the persecution which he fears. However the available evidence indicates that relocation is not a practical option in Afghanistan unless one has support in the proposed new location. The applicant’s only community and social support network is in the village in Ghazni where he lived all his life in Afghanistan. UNHCR in its ‘Update of the Situation in Afghanistan and International Protection Considerations’ advised against “resort to the notion of an internal flight or relocation alternative” because of the importance for an individual’s survival of traditional family and tribal structure (pp. 28-29). This advice is consistent with that from the Danish Immigration Service (2003, *The Political, Security and Human Rights Situation in Afghanistan*, Copenhagen, March, pp. 39-40), which

similarly highlights the importance of family and social networks. In these circumstances, I do not consider it reasonable for the applicant to relocate in Afghanistan.

The Tribunal is satisfied that the applicant has a well-founded fear of persecution in Afghanistan.

For completeness, I have considered whether he might be excluded by s.36(3) of the Act. As explained above, it provides that Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in any country apart from Australia, including countries of which the non-citizen is a national, unless the non-citizen has a well-founded fear of being persecuted in the relevant country for one or more of the five Convention reasons, or being returned to another country where they may be persecuted. While he has a right to enter and reside in Afghanistan, his country of nationality, the Tribunal has concluded that the applicant has a well-founded fear of being persecuted that country. The applicant passed briefly through other countries, with the help of a smuggler, en route to Australia and claims never to have had a passport in his possession. There is no information before the Tribunal to suggest that he has a right to enter and reside in these or any other “safe third country”. Therefore, on any view of the scope of operation of s.36(3) of the Act, I am satisfied that the applicant is not excluded from Australia’s protection by that provision, in respect of either Afghanistan or any other country.

CONCLUSIONS

The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore he satisfies the criterion set out in s.36(2) for a protection visa.

DECISION

The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act* 1958.

Sealing Officers ID: PRRTIR