

1604829 (Refugee) [2016] AATA 4054 (5 July 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1604829
COUNTRY OF REFERENCE:	Afghanistan
MEMBER:	David Corrigan
DATE:	5 July 2016
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Statement made on 05 July 2016 at 12:10pm

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Afghanistan, applied for the visa [in] November 2012 and the delegate refused to grant the visa [in] July 2013. On 21 February 2014, the Refugee Review Tribunal (differently constituted) affirmed the decision.
3. [In] March 2016, the Federal Circuit Court by judgment quashed the Tribunal's decision and ordered it determine the matter according to law.

RELEVANT LAW

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

Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the Regulations to a particular person.
8. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
9. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). Examples of 'serious harm' are set out in s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may

be enough that the government has failed or is unable to protect the applicant from persecution.

10. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
11. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
12. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
13. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
14. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

State protection

15. Harm from non-state agents may amount to persecution for a Convention reason if the motivation of the non-State actors is Convention-related, and the State is unable to provide adequate protection against the harm. Where the State is complicit in the sense that it encourages, condones or tolerates the harm, the attitude of the State is consistent with the possibility that there is persecution: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [23]. Where the State is willing but not able to provide protection, the fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify an unwillingness to seek their protection: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [28]. In such cases, a person will not be a victim of persecution, unless it is concluded that the government would not or could not provide citizens in the position of the person with the level of protection which they were entitled to expect according to international standards: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [29]. Harm from non-State actors which is not motivated by a Convention reason may also amount to persecution for a Convention reason if the protection of the State is withheld or denied for a Convention reason.

Relocation

16. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: *Randhawa v MILGEA* (1994) 52 FCR 437 per Black CJ at 440-1. Depending upon the circumstances of the particular case, it may be reasonable for a person to relocate in the country of nationality or former habitual residence to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. Thus, a person will be excluded from refugee status if under all the circumstances it would be reasonable, in the sense of 'practicable', to expect him or her to seek refuge in another part of the same country. What is 'reasonable' in this sense must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country. However, whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense: *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.

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 has taken account of policy guidelines prepared by the Department of Immigration –PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

21. The applicant's claims can be summarised as follows. He is a Hazara Shia who was born in [his home town in] Jaghori district, Ghazni province, Afghanistan in [year]. He and his family moved to Quetta, Pakistan illegally in [year] due to fighting in their area. His family does not have any property in Afghanistan and he does not know anyone there. He fears the Taliban and other Sunni extremist groups.

Country of reference

22. The applicant has been consistent in his claims that he was born in Jaghori, Afghanistan and then lived illegally in Pakistan. He has submitted a copy of his taskera. He speaks Hazaragi and there is no evidence before me that he is not an Afghan citizen or that he is the citizen of another country. Accordingly, I find that he is a national of Afghanistan for the purposes of the Convention.

Assessment of claims

23. In making my findings, I have given considerable weight to a number of reports by the Australian Department of Foreign Affairs and Trade (DFAT) as these are authoritative, very recent and the Department has been specifically charged with the provision of this advice to the Australian government. In its September 2015 report, DFAT have stated that they are not aware of any credible evidence that everyday Shia Muslims are systematically targeted on the basis of their religious affiliation and that they assessed that Sunni-Shia sectarian violence is infrequent, although occasional violence does occur. They also stated that Hazaras had made significant gains (albeit from a small base) since the Taliban were removed from power in 2001. They stated that while conditions for Hazaras had greatly improved since 2001, they still face some societal discrimination. They stated that they had no evidence to suggest that Hazaras are systematically targeted in insurgent attacks on the basis of their ethnicity alone and that with the exception of kidnappings, Hazaras are not currently at any greater risk of violence than other ethnic groups in Afghanistan.¹ This view of the level of general threat posed to the Hazara community is supported by Professor Amin Saikal of ANU.²
24. DFAT have also reported that the number of active ISIS (Daesh) militants remain low and that they assessed that ISIS currently has limited capacity and influence in Afghanistan and that civilians in Afghanistan face a low risk of violence from groups affiliated with ISIS compared to the risk of violence generally in the country.³
25. DFAT have also commented:
- 2.23 Pashtun-majority districts in Ghazni Province are not safe. The threat level in these districts is high due to the presence of the Taliban and other insurgent groups. According to the US Department of State Country Report on Terrorism 2014, Ghazni was one of the most violent provinces in Afghanistan in terms of attacks on defence forces, international forces and civilians. Insurgent attacks, community violence and kidnappings are common throughout large parts of the province. While limited credible information is available, the security situation in Ghazni appears to have deteriorated since the beginning of 2014—coinciding with the decline in security more generally across Afghanistan—including in some of the majority-Hazara areas

¹ Department of Foreign Affairs and Trade, DFAT Country Information Report Afghanistan, 18 September 2015.

² Saikal, Amin 2012, 'Afghanistan: The Status of the Shi'ite Hazara Minority', *Journal of Muslim Minority Affairs*, March, Vol.32, No.1, pp.80-87.

³ Department of Foreign Affairs and Trade, DFAT Country Information Report Afghanistan, 18 September 2015.

such as Jaghori district. Credible sources have reported that the Hazara-dominated Ajristan district is extremely unsafe. Roads linking Hazara-dominated areas in Ghazni with Kabul also suffer from a high level of insecurity (see 'Road safety' below).⁴

26. Whilst DFAT have reported that there has been a decline in security in Jaghori, no recent reports have been found of Taliban or other insurgent incursions into Jaghori. Based on country information and the applicant's individual circumstances, I therefore do not accept that the applicant in his home area of Jaghori faces a real chance of persecution, now or in the reasonably foreseeable future from the Taliban or any other insurgent group on account of being a Hazara Shia or any imputed political opinion.

Road travel

27. In October 2012 DFAT commented that there is a need of residents to travel outside areas such as Jaghori to access health services. Although the government and international community have been committed to improving health service delivery, relatively simple procedures still require patients across the country to travel to provincial capitals or to Kabul. In terms of employment in Ghazni, DFAT noted:

... close to 80 per cent of employment is reliant on small-scale agriculture. We do not have detailed information on employment in Jaghori specifically, but seeking employment and improved economic opportunities remains a key motivator for the many Afghans moving every day from rural areas to provincial centres, to Kabul, and abroad.⁵

28. It is clear that the applicant would need to travel on the road from Kabul to return to his home area of Jaghori. I find that it is likely that he will have to travel outside Jaghori on a more than infrequent basis to find work to help support himself and his family. Ghazni City is the closest provincial capital and it would also on occasions have to be visited to obtain necessary medical care for himself and his family given the DFAT information set out above concerning the lack of medical care in district areas and that relatively simple procedures still require patients across the country to travel to provincial capitals or to Kabul at significant expense.

29. The Department's March 2015 *Country of Origin Information Service* report summarises the differing views regarding the safety of road travel for Hazaras:

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

There are conflicting views among external sources consulted on whether Hazara travellers travelling to Ghazni City or Kabul are being targeted because of their ethnicity. Advice by DFAT, Qayoom Suroosh of Afghanistan Analysts Network and the Afghanistan Development Association indicates that there is no evidence of ethnic targeting on roads in Ghazni. In contrast, Thomas Ruttig, Professor Alessandro Monsutti, Professor William Maley and a Ghazni based NGO, the Ghazni

⁴ Department of Foreign Affairs and Trade, DFAT Thematic Report Afghanistan, Hazaras in Afghanistan, 8 February 2016.

⁵ Department of Foreign Affairs and Trade 2012, *Security Situation for Hazaras in Afghanistan*, 31 October (CISNET CX298127).

Rural Support Program, maintain that travel for Hazaras is dangerous on roads passing through Pashtun districts⁶

30. DFAT has made the following comments about road security:

2.25 Afghanistan's road network, particularly in the mountainous central highlands, is generally poor. Travel in winter is even more difficult, and roads at higher altitudes can be cut by snowfalls for long periods during winter. Speeding and unsafe driving further aggravate these problems—the majority of deaths on Afghan roads are caused by traffic accidents.

2.26 Insecurity compounds the poor condition of Afghanistan's limited road network, particularly those roads that pass through areas contested by insurgents. The Taliban, other anti-government groups and criminal elements target the national highway and secondary roads, and unofficial checkpoints manned by armed insurgents are common. Official checkpoints—operated by Afghan National Army (ANA) or Afghan National Police (ANP) with the aim of improving the security on the roads—can be operated by poorly-trained, poorly-paid personnel, and corruption is common. There are reports that, in some cases, Hazara truck drivers are prevented from passing through these checkpoints; only Pashtun drivers are allowed to pass.

2.27 Criminals and insurgents on roads tend to target people who appear wealthy or are associated with the government or the international community in attacks that can include kidnapping for ransom. People from all ethnic groups are vulnerable to these attacks. It can be difficult to ascertain the motivation for attacks, and to separate criminal attacks from insurgent activity.

2.28 There have been a series of reported incidents of Hazaras being kidnapped since late 2014, including the February 2015 kidnapping of 31 people—almost all Hazaras—while travelling on two buses through Zabul province (see also the 18 September 2015 DFAT Afghanistan Country Information Report). According to the UNAMA 2015 mid-year report on the protection of civilians in Afghanistan, of the 196 conflict-related abduction incidents country-wide in the first six months of 2015, only ten incidents involved Hazaras. All but one of the kidnappings of Hazaras occurred in areas of mixed Hazara and non-Hazara communities. A total of 97 Hazaras were reported as being abducted, 67 of whom have been confirmed as being subsequently released. The motivations for the abductions reportedly included financial gain, intimidation and extracting concessions from other parties to the conflict such as a hostage exchange. For example, on 14 April 2015 anti-government elements abducted 14 Hazaras in Ghazni province, reportedly to exchange them for insurgents held by pro-government forces. Four of these abductees were reportedly killed when the insurgents' demands were not met. The remaining ten hostages were later released. DFAT notes that the UNAMA reports only covers abduction incidents that are perpetrated by parties to the conflict, and excludes incidents perpetrated by criminals and tribal or other groups that do not have a connection with the conflict. Incidents of kidnap and ransom tend to be under-reported.

2.29 There were several incidents of Hazaras being kidnapped in Ghazni Province in the second half of 2015, including a group of seven Hazaras (four men, two women and a nine-year-old girl) who were kidnapped in Ghazni Province in October and later murdered, their bodies being found in neighbouring Zabul Province in early November. The killings led to thousands of people—mostly Hazaras but also Pashtuns, Uzbeks and Tajiks—marching in the streets of Kabul to protest the killings and call for the perpetrators to be punished. There was speculation that the killings were carried out by Da'esh, and local Taliban leaders claimed to have tried and immediately hanged the perpetrators. However, authorities from the Afghan National Directorate of Security (NDS) were reported in the media as suggesting that the

⁶ 'Afghanistan: Hazara Issues Paper', *Department of Immigration and Border Protection, Country of Origin Information Service*, March 2015, p.46-47.

Taliban were responsible—it is unclear which faction may have been involved. DFAT notes that the Dadullah-aligned faction of the Taliban is based in Zabul province, but it was effectively destroyed in Taliban inter-factional fighting in November, during which Dadullah himself was killed.

2.30 The killings of the seven Hazaras followed a number of other kidnappings involving Hazaras in recent months, coinciding with a further deterioration of the general security situation across Afghanistan in the second half of 2015. DFAT concurs with the assessment of other organisations—such as UNAMA in its mid-year report on the protection of civilians in conflict—that the primary motivations for these abductions can include holding hostages for ransom, prisoner exchanges, and a perception that the abductees have links with the government or the international community. For example, four people (three Hazaras and one Pashtun) were kidnapped in Ghazni Province in August 2015, and later killed after the perpetrators were unable to organise a prisoner swap. These four people were reportedly targeted because of their links to the government—officials claimed they were contractors working on a government-funded construction project—rather than ethnicity. In a separate incident, 12 Hazaras were kidnapped from Ghazni Province earlier in August 2015. Two of the victims escaped, while the remaining prisoners were reportedly released following negotiations led by local tribal elders.

2.31 While ethnicity is rarely the primary motivating factor in these incidents, DFAT assesses that ethnicity can be a contributing factor, particularly in the choice of victim, in some circumstances. For example, in November 2015, militants stopped a number of buses travelling through Zabul Province on their way to Kandahar from Kabul. The gunmen reportedly asked passengers for identification documents, and only took away the Hazara passengers. Some of the passengers were later released, although around nine remain unaccounted for.

2.32 Multiple credible sources informed DFAT that some bus companies are refusing to sell tickets to Hazaras because of the risk to their vehicles and drivers of being stopped by insurgents or criminals because of the possibility of Hazaras being on board. There are also credible anecdotal reports of ‘spotters’ being used at bus stations to call ahead and alert insurgents as to which buses are carrying Hazara people. It is unclear whether this targeting is being conducted because of the Hazaras’ ethnicity, because of a perceived association with the government or international community (see below), or because Hazaras can often appear wealthy, making them an attractive target for kidnap and ransom. Furthermore, Pashtun kidnappers may be less likely to kidnap other Pashtuns, partly due to the risk that this could create a cycle of inter-tribal violence and retribution; Hazaras may represent a lower risk target from the kidnappers’ perspective.

2.33 While no ethnic group is immune from kidnappings, DFAT assesses that Hazaras travelling by road between Kabul and the Hazarajat face a greater risk than other ethnic groups. It is unclear whether this is due to ethnic targeting or is a result of the high numbers of Hazaras travelling on this route. On the basis of consultations in Kabul with government authorities, international agencies and civil society organisations, DFAT assesses that, if a bus with a mixture of ethnic groups on board is stopped in these areas, ethnic Hazaras (and other non-Pashtuns) are more likely to be selected for kidnapping or violence than are Pashtun passengers. While ethnicity may not be a primary motivation for an abduction incident, it may have an influence on the selection of victims.⁷

31. The Department’s Country of Origin Information Service (COIS) report from March 2015 on ‘Afghanistan: Hazara Issues Paper’, refers to reports of the Taliban ‘block[ing] all routes to

⁷ Department of Foreign Affairs and Trade, DFAT Thematic Report Afghanistan, Hazaras in Afghanistan, 8 February 2016.

Malestan, Jaghori, Nawur and Ajrestan' in or around September 2014.⁸ Similarly, *Tolo News* recently reported in April 2015 on residents from these districts being stranded in Ghazni City for the past month, unable to return to their home areas 'due to high security threats on the roads in the area'.⁹

32. Reports indicate that travel along key roads is dangerous, as militant groups, including the Taliban, regularly set up checkpoints and have killed and harmed those who work for or support the Afghan government and international community, including Hazaras.¹⁰ In recent years there have been regular reports of ambushes, robberies, kidnappings and killings by the Taliban and criminal groups along these roads, and the security of roads in the region has become volatile and increasingly dangerous. In March 2013 the director of the *Ghazni Rural Support Programme* advised the Tribunal that:

... all residents of Jaghori, Malestan, Qarabagh and other Hazara-Populated districts of Ghazni, like all other Hazara-populated districts of other provinces, are entirely dependent on highways and other roads crossing the Taliban controlled/dominated districts and areas of Ghazni; like Gilan, Moqor, Qarabagh in Ghazni province, and other districts in Wardak province, to the East, and to the West on Kabul-Kandahar highway. These areas are Taliban-dominated, if not entirely controlled, areas ...

The Afghan Security Forces (ASF) including the Afghan National Army (ANA) and the Afghan National Police (ANP) has failed to provide security for these travellers. Based on numerous accounts by the travellers and also by some reporters, in many instances the insurgents have established their checkpoints just a few hundred meters from the ASF security check points, and have searched vehicles for hours with no interruption from the ASF. It is said that in many places, particularly in the remote areas whether the ASF is existent or if non-existent Taliban operate with total freedom. The ASF in many places can barely defend their own posts. They do not walk away from their own checkpoints unless accompanied by the larger group of forces, which rarely comes across.

In such areas the Taliban insurgents have their checkpoints. They stop all cars, and pull off the passengers ... It implies that the Taliban have publicly announced that all those people who work with the Afghan government, the international forces, and with national and international NGOs are 'enemy' of the Islamic "Emirates", and thus are to be targeted and prosecuted anywhere they are found/captured ... The only roads that are secure are the roads inside Jaghori and other districts where the entire population of the district is Hazara. But since people are totally dependent on procuring their daily needs, (including food and fuel) they need to travel to Ghazni city, to Kandahar and to other places outside their districts. The same applies to students who have to travel to Kabul and Ghazni for taking exams and attending universities. Number of students have been killed and beheaded on their way to

⁸ 'Afghanistan: Hazara Issues Paper', *Department of Immigration and Border Protection, Country of Origin Information Service*, March 2015, p.46-47.

⁹ 'Insurgent Risks Leave Ghazni Villagers Stranded In City', *Tolo News*, 21 April 2015, available at <http://www.tolonews.com/en/afghanistan/19171-insurgent-risks-leave-ghazni-villagers-stranded-in-city>

¹⁰ See 'DFAT Report 1450 – RRT Information Request: AFG41196', *Department of Foreign Affairs and Trade*, 5 November 2012; 'Country Information Report No. 11/56 – CIS Request No.AFG12298: Road security in Ghazni', *DIAC Country Information Service*, 21 September 2011; Ruttig, T, 'Comments provided by Thomas Ruttig on travel between Kabul and Ghazni for Hazaras', 25 May 2012; Maley, W, 'On the Position of the Hazara Minority in Afghanistan', 9 September 2012; 'Kabul-Kandahar highway is a symbol of what's gone wrong in Afghanistan', *The Telegraph*, 9 September 2012, available at <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/9530320/Kabul-Kandahar-highway-is-a-symbol-of-whats-gone-wrong-in-Afghanistan.html>; Zeerak, M, 'Email to RRT, Re: Request for advice on road security and ethnic targeting in Ghazni province', 25 March 2013.

Kabul. So even if inside Jaghori is secure it does not help the people, and does not make any difference on the safety of Hazaras.¹¹

33. DFAT have recently commented that whilst no ethnic group is immune from kidnapping that they assessed that Hazaras travelling by road between Kabul and the Hazarajat face a risk that is greater than other ethnic group. Whilst ethnicity is rarely the primary motivating factor, they assess that ethnicity can be a contributing factor particularly in the choice of victim. They assess that if a bus with a mixture of ethnic groups on board is stopped in these areas, ethnic Hazaras (and other non-Pashtuns) are more likely to be subject to kidnapping and violence than Pashtun passengers. They noted, however, that kidnappings of Hazaras are relatively rare in a country-wide context.¹²
34. Considering the totality of the country information, including the deteriorating security situation throughout Afghanistan and the poor security situation in Ghazni province, I consider the chance that the applicant will be subject to kidnapping or other types of serious harm (including a threat to his life and liberty and significant physical harassment and ill-treatment) on account of being a Hazara Shia cannot be described as remote. In my view, considering the country information as a whole, the applicant is at an elevated risk of being targeted in on the roads outside Jaghori because he is a Hazara Shia. Considering the country information as a whole and the applicant's individual circumstances, I find that he faces a real chance of serious harm amounting to persecution in the reasonably foreseeable future at the hands of the Taliban and other insurgent groups on the roads to and around his home area of Jaghori as a Hazara Shia.

State protection

35. DFAT have recently commented:

4.1 The ongoing insurgency and deteriorating security situation across the country mean that the government does not exercise uniformly effective control over all parts of the country. Government control tends to be better in major urban centres; insurgents operate more freely in rural and remote areas. As a result, the government lacks the ability to adequately address human rights issues, protect vulnerable groups and prosecute human rights violators in some (particularly rural) areas of the country. In rural areas, many Afghan groups—including Hazara groups—maintain their own local militias to protect themselves from criminals and insurgents, in the absence of effective state protection mechanisms.¹³

36. Given this authoritative information, I find that the applicant would not be able to access state protection in accordance with the principles in *MIMA v Respondents S152/2003*.

Relocation

37. A Hazara Issues Paper issued by the Department of Immigration in March 2015 stated:

Hazaras in Kabul have not been systematically targeted by insurgent attacks or other ethnic groups since 2001 because of their ethnicity or religion, apart from one deadly attack aimed on a Shia mosque in 2011 where many of the victims were Hazaras.¹⁴

...

¹¹ M. E. Zeerak, 'Email to RRT: Re: Request for advice on road security and ethnic targeting in Ghazni province', 25 March 2013, CIS28576.

¹² Department of Foreign Affairs and Trade, DFAT Country Information Report Afghanistan, 18 September 2015.

¹³ Department of Foreign Affairs and Trade, DFAT Thematic Report Afghanistan, Hazaras in Afghanistan, 8 February 2016.

¹⁴ Department of Immigration, Afghanistan: Hazaras Issues Paper, March 2015.

Although the reports note a high level of attacks in and around Kabul, most target government and international personnel and no reports suggest that Hazaras and Shias are being disproportionately targeted by these attacks.

In 2014, analysis of attacks in Kabul by insurgents¹⁵ found that insurgents targeted Afghan military personnel, police officers, political figures and foreigners, as well as government buildings, hotels and embassies.¹⁶

38. DFAT specifically reported in relation to Kabul in September 2015:

2.29 Insurgents regularly conduct high-profile attacks in Kabul. DFAT assesses that the primary targets for insurgent attacks are government institutions, political figures, Afghan National Defence and Security Forces (ANDSF), personnel from the Resolute Support mission (the NATO-led mission that replaced the International Security Assistance Force or ISAF on 1 January 2015), other security services, and international organisations. Such attacks often cause significant casualties amongst civilian bystanders in addition to those being targeted. Kabul has seen a marked increase in the number of incidents in 2015 compared to the corresponding period in 2014. According to a Resolute Support mission report for January-April 2015, insurgent attacks in Kabul have increased by around 60 per cent compared with the same period in 2014.

2.30 Representative examples include the series of bombings against employees (including prosecutors and judges) of the Ministry of Justice in May 2015, which killed at least 11 people and injured dozens more; an attack on the Park Palace guesthouse in May 2015 that killed five people, including foreigners; and a car bomb attack near the Ministry of Finance in Kabul which killed eight people and wounded 37 more. Kabul International Airport has been attacked on a number of occasions, with a rocket attack in 2014 landing on the runway apron. Attacks also occur in the vicinity of the airport, including in May 2015 when a European Union vehicle was hit by a vehicle-borne improvised explosive device, killing at least three people and injuring 18 others. On 22 June 2015, the National Parliament building in Kabul was attacked by the Taliban. A suicide vehicle detonated outside the building, followed by gunfire. Twelve people were reportedly killed, including six Taliban gunmen and the suicide bomber, with at least 21 more people injured in the attack. In August 2015, a series of attacks resulted in an estimated 355 civilian casualties (deaths and injuries), the largest number of civilian casualties in a single day since data collection started in 2009.

2.31 The ANDSF and international forces have put in place a range of counter-measures to prevent and respond to insurgent attacks in Kabul. There are numerous checkpoints along highways leading to Kabul, at major intersections and at government and international institutions within Kabul. These provide a deterrent to insurgent attacks by increasing the risk that insurgents will be detected prior to undertaking attacks in Kabul. ANDSF are quick to respond to insurgent attacks when they occur. Nonetheless, violent attacks within the city are common.¹⁷

39. I have taken into account the reports of regular insurgency attacks on Kabul that have taken place but these need to be seen in the context that Kabul has a population of four million and that the government maintains effective control of Kabul and has a range of counter-

¹⁵ see European Country of Origin Information Network 2015, General Security Situation in Afghanistan and Events in Kabul, 12 January <http://www.ecoi.net/news/188769:afghanistan/101.general-security-situation-in-afghanistan-and-events-in-kabul.htm>.

¹⁶ European Country of Origin Information Network 2015, General Security Situation in Afghanistan and Events in Kabul, 12 January.

¹⁷ Department of Foreign Affairs and Trade, DFAT Thematic Report, Conditions in Kabul, 18 September 2015.

measures in place to prevent and respond to insurgent attacks.¹⁸ I am of the view that the available country information considered as a whole indicates that the chance of the applicant being seriously harmed in such a circumstance would be best described as remote, and not a real chance. Based on the whole of the country information, I do not accept that all Hazara Shias in Kabul face a real chance of persecution now or in the reasonably foreseeable future from Sunni groups or anyone else. I accept that the applicant is a Shia and will attend mosque and religious events; however, given the country information viewed overall, I find that the chance he will be seriously harmed is remote.

40. The independent country information indicates that there is no official policy of discrimination pursued by the government on the basis of ethnicity.¹⁹ The country information further indicates that though there is societal discrimination on the basis of ethnicity it is most commonly manifested in forms of nepotism within ethnic and religious communities and that positive societal discrimination in favour of family, tribal or ethnic group members is common.²⁰ DFAT have also commented that ethnic based violence in Kabul is rare.²¹ I find that the chance that he will suffer discrimination or treatment amounting to serious harm is remote.

41. Having regard to the country information concerning the overall situation for Hazara Shias and the country information that indicates that the Government maintains effective control of Kabul and the applicant's individual circumstances, I do not accept that the applicant faces a real chance of persecution in the reasonably foreseeable future in Kabul on account of being a Hazara Shia at the hands of the Taliban and other insurgent groups or anybody else.

42. DFAT have commented:

2.14 Although there are no reliable statistics, unemployment is widespread in Kabul and underemployment is also common. The influx of IDPs and returnees to the city has put pressure on the local labour market. The decrease in the international presence and the tight budgetary situation of the Afghan government have further reduced the availability of quality employment opportunities.

...

2.20 The health care system in Afghanistan has improved greatly since 2001. Basic public health care is free, but medicines are not, which excludes the poor from treatment for common illnesses. Medical facilities in the public system, while still basic, tend to be better in Kabul than in other areas of Afghanistan, particularly remote rural areas. Better quality services are provided by private practices, but many residents cannot access these services because of their high cost.

...

2.22 Access to electricity is highly variable, even in formal areas of the city. Electricity 'load shedding' is common, causing blackouts (including scheduled blackouts) that can last up to 15 hours. For many residents of Kabul's informal areas, electricity is supplied by a community generator for which a fee is charged by the operator, a relatively expensive form of supply. According to the World Bank and the United Nations High Commissioner for Refugees (UNHCR), although most established

¹⁸ Department of Foreign Affairs and Trade, DFAT Thematic Report, Conditions in Kabul, 18 September 2015.

¹⁹ Department of Foreign Affairs and Trade, DFAT Thematic Report, Hazaras in Afghanistan, 8 February 2016.

²⁰ Department of Foreign Affairs and Trade, DFAT Country Information Report Afghanistan, 18 September 2015.

²¹ Department of Foreign Affairs and Trade, DFAT Thematic Report, Conditions in Kabul, 18 September 2015.

residents have access to some electricity, up to 84 per cent of IDPs lack access to any electricity.

2.23 Most informal and illegal areas do not have reliable access to municipal water supply, relying instead on wells and water deliveries. Sanitation in these areas is poor. Waste collection is better in informal areas than illegal areas. Many communities burn their waste which contributes to high levels of air pollution.

...

3.6 Large urban areas in Afghanistan are home to mixed ethnic and religious communities and offer greater opportunities for employment, access to services and a greater degree of state protection than many other areas. As Afghanistan's largest urban centre, Kabul provides the most viable option for many people for internal relocation and resettlement in Afghanistan.

...

3.8 Traditional extended family and tribal community structures are the main protection and coping mechanisms for people in Afghanistan, who rely on these networks for their safety and economic survival, including access to accommodation and an adequate level of subsistence. People tend to move and settle in large groups, often with several other families, for this reason. As a consequence, large groups of people can arrive in a particular area, resulting in rapid population growth and a strain on infrastructure and services.

...

3.10 Kabul's size and diversity means that there are large communities of almost all ethnic, linguistic and religious groups in the city. Given the growth of Kabul's population since 2001, many individuals may have members of their extended family in Kabul who can assist with their relocation. Ethnic-based violence in Kabul is rare.

3.11 DFAT assesses that, notwithstanding road safety concerns and the security situation in Kabul, there are generally options available for members of most ethnic and religious minorities to relocate from other parts of Afghanistan to relative safety in Kabul. This relocation is more likely to be successful where the individual travels as part of a larger group, or has established networks that can assist with the provision of basic necessities.

...

3.12 In practice, DFAT assesses that a lack of financial resources and lack of employment opportunities are the greatest constraints on successful internal relocation. This is compounded by Kabul's relatively high cost of living, particularly for housing.

3.13 Internal relocation to urban areas is generally more successful for single men of working age, provided they are able to make use of family or tribal networks. Unaccompanied women and children are least likely to be able to successfully relocate to urban areas, particularly if these networks are lacking.²²

43. I have had regard to the information in this recent DFAT report that suggests generally there are options available for members of most ethnic and religious minorities to be able to relocate from other parts of Afghanistan to relative safety in Kabul. I have taken into account that the applicant can speak Hazaragi and Urdu and he has work skills [in two specified

²² Department of Foreign Affairs and Trade, DFAT Thematic Report, Conditions in Kabul, 18 September 2015.

occupations]. However, there are a number of factors that in my opinion outweigh this evidence and make it unreasonable for the applicant to relocate to Kabul to avoid the real chance of persecution on the roads outside his home area. These are:

- DFAT have emphasised family and tribal networks as being important factors for successful relocation. They state that internal relocation to urban areas is generally more successful for single men of working age, provided they are able to make use of family or tribal networks. However, the applicant has not lived in Kabul and has no family located there. The applicant also has a family consisting of a wife and [young children] to support.
- There is a huge Hazara underclass in Kabul that does not have access to clean water or electricity and rents are very high. DFAT have also referred to unemployment being widespread in Kabul and underemployment common.
- Notwithstanding, Kabul is safer than other parts of the country there is evidence of a number of insurgent attacks that target government institutions, political figures and Afghan National Security Forces, other security services and international organisations. Though this is not sufficient in itself to establish a real chance that the applicant would face serious harm, the existence of these attacks and the danger that the applicant may be caught up in them contributes to the unreasonableness of relocation.

44. I therefore do not consider it reasonable for the applicant to relocate to Kabul and factors set out above (e.g. lack of family networks, widespread unemployment limiting the ability to meet his basic needs and the general lack of security) would also be applicable to other areas. I therefore consider his fear of persecution is well-founded.

Third Country Protection

45. The evidence does not establish that the applicant has the right to enter and reside in any safe third country for the purposes of s.36(3) of the Act and I find that this section does not apply in his case.

Conclusions

46. For the reasons given above, the Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

DECISION

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

David Corrigan
Member