

**060627969 [2006] RRTA 183 (30 October 2006)**

**DECISION RECORD**

**RRT CASE NUMBER:** 060627969

**DIMA REFERENCE(S):** CLF2001/37792 CLF2005/064068

**COUNTRY OF REFERENCE:** Afghanistan

**TRIBUNAL MEMBER:** Kerry-Anne Hartman

**DATE DECISION SIGNED:** 30 October 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.

He lodged an application for a temporary protection visa with the Department under the Migration Act 1958 (the Act).

The applicant was assessed to be a person to whom Australia had protection obligations under the Refugees Convention and was granted a subclass 785 (Temporary Protection) visa.

The applicant lodged an application for a further protection (class XA) visa with the Department.

The applicant was invited to an interview by the Department to discuss his claims and for the applicant to provide any new information relating to his application. The applicant attended the interview.

A delegate of the Minister for Immigration and Multicultural and Indigenous Affairs refused to grant a protection visa and the applicant applied for review of that decision.

The Tribunal previously constituted affirmed the delegate's decision.

The applicant sought review of the Tribunal's decision by the Federal Court.

The Court set aside the decision and remitted the matter to the Tribunal to be determined according to law.

The matter is now before the Tribunal pursuant to the order of the Federal Court.

### **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. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged, in this case 31 July 2001, although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act 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.

## Definition of ‘refugee’

Australia is a party to the Refugees Convention and the Refugees Protocol and, generally speaking, has protection obligations to people who are refugees as defined in them. 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) 205 ALR 487 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. These provisions were inserted on 1 October 2001 but apply to all visa applications not finalised before that date.

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) of the Act.

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. However, the circumstances in which a person fled his country is a relevant consideration, and if at that time the applicant satisfied the relevant test, the absence of any material, or substantial, change in circumstances will point to a continuation of his original status: see *Chan* at 391, 399, 406.

#### *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. In relation to a person who has a nationality, 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 Convention 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 Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 145 FCR 363 (*QAAH*) 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. 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) of the Act 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) of the Act is qualified by subsections (3)-(5). Subsections 36(3) and (4) provide 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.

There is conflicting authority as to whether s.36(3) can operate in relation to an applicant for a protection visa who has previously been recognised by Australia as a Convention refugee, and more generally, as to the proper approach to be taken on an application of this kind: see *NBGM v MIMIA* (2006) 150 FCR 522. These issues are currently before the High Court. However, a majority of the Full Federal Court has held that, whatever approach is taken, in relation to an application where the relevant circumstances are said to have changed since the grant of an earlier visa, s.36 of the Act mandates that the decision-maker must be satisfied that, at the time the decision is made, the applicant then has a well-founded fear of persecution for a Convention reason, and that the circumstance that a previous decision-maker was satisfied that the applicant had such a fear at an earlier time is not sufficient to establish what s.36 requires: *NBGM* at [25].

## **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.

The applicant appeared before the Tribunal to give evidence and present arguments.

The applicant was represented in relation to the review by a registered migration agent. The representative attended the Tribunal hearing.

### **‘Unauthorized arrival’ interview**

When the Applicant was interviewed by the Department and asked why he left Afghanistan, he said he left because of “the atrocities”. He claimed that the Taliban few times took him in and detained him. [Information about the applicant’s arrest deleted in accordance with s.431 as it may identify the applicant]. He claimed that they picked on him because he is a Hazara and a Shia Muslim. They also took his relative on suspicion that he had firearms. When asked if he could return to Afghanistan he responded by saying that he cannot return to the country because of the atrocities. He said he feared that because he is a Hazara, when he returns the Taliban will take him in again.

### **Submission**

In his submission to the Department the applicant made the following claims:

- His religion is Shia Muslim.
- His ethnic group is Hazara.
- His relatives are living in Afghanistan and that one of his relative is deceased.
- Many Hazaras have been arrested and put in detention.
- He obtained a lease for a shop. The Taliban would come to the shop to check if he had money. If he did they would take some.
- The Taliban arrested his relative and was questioned as to why he was Hazara and not a real Muslim. They asked him why he was speaking the Dari language and not Pashtun.
- His relative was detained for a short while, but after they paid some money to the Taliban his relative was released.
- He was arrested by the Taliban twice.
- He was arrested and detained the first time because he was speaking Dari. He was released when he paid money to the Taliban.
- He was arrested the second time because his beard was too short.
- He fears if he returns to Afghanistan he will be killed because he is a Hazara and a Shia.

### **1<sup>st</sup> Statement**

In this statement the applicant repeated the claims made in his submission to the Department. He also claimed:

- Very recently the Taliban have been deposed from power in Kabul and other places. The northern alliance is now governing in the place of the Taliban. The northern alliance consists of Tajiks in the majority and Pashtuns, led by Mr Rabani.

- As a Hazara and Muslim Shia I am a member of the minority group in Afghanistan. The Hazara and Muslim Shias have always been oppressed by the larger ethnic groups, namely Tajiks and Pashtuns, each of whom are of the Sunni religion. We have suffered in the extreme. We have been denied our rights and have not been recognised as Afghan citizens.
- I do not believe the change in government will provide Hazaras and Muslim Shias with any better treatment by the Pashtuns and Tajiks. ...The northern alliance comprises Tajiks in the majority, and a representation of Pashtuns.
- Should I be returned to Afghanistan I have a well founded fear of being persecuted at the hands of Tajiks and Pashtuns.

## **2<sup>nd</sup> Statement**

In this statement the applicant claimed that he has not mentioned some of the things in his earlier statement because they did not seem relevant or important at the time he presented his initial refugee claim. He said he was only prompted to talk about problems arising from the Taliban period. He then claimed:

- He fears persecution in Afghanistan because of his ethnicity as a Hazara and his relative's government employment
- His relatives have all fled Afghanistan for another country;
- They fled Afghanistan because of the increasing pressure and harassment they experienced at the hands of the local Pashtuns and Tajiks.
- The harassment was due to the fact that his relative was an employee of the government. His relative was branded by the locals as a Communist sympathiser.
- Before his relative left Afghanistan the local Tajiks came to his shop on several occasions, asking of his whereabouts.
- The same people had tried to take his relative away from their house earlier.
- His relative spent most of his time at his other relative's house and so he was able to escape from these people.
- He has started a new life in Australia. He had worked for various jobs.
- He has been practicing Islam privately at home without going to the mosque. He considers himself a moderate Muslim but in the eyes of the Sunni Pashtuns he is an apostate and deserves to be killed.
- He fears persecution because of his relative's employment with the government and the fact that he does not feel safe from the hostile Pashtuns and Tajiks who are aware of his relative's employment with the government.
- If he was forced to return to Afghanistan he will be identified, arrested, detained, beaten up and questioned by members of his local community who know his relative.

- The Taliban may have been officially removed from power in Afghanistan, but they are still operating in different areas of Afghanistan.

### **Statutory Declaration**

The applicant made the following claims:

- He has been in constant contact with his family in another country.
- His relative still fears returning to Afghanistan because of his previous employment in the government.
- His relative advised him that he was employed in [Information about the applicant's relative's employment details s.431]
- His relative worked in the Department [information about the applicant's relative's employment deleted s.431].
- His relative told him that he started working for the Communist government after he completed his national service in Afghanistan.
- His relative maintained the family business, a shop that he had inherited from his relative.
- His relative did not talk to him much about his work with the government. He claimed his relative said the less he knew about his job the better it was for him.
- Sometime ago he received a terrible injury at work.

### **Oral evidence**

The Tribunal has listened to the tape of the hearing and the "Claims and Evidence" in the Tribunal previous decision accurately summarises the evidence given by the applicant during the hearing. The Tribunal summarised the evidence as follows.

At the hearing the applicant claimed that he attended school for a few years in a high school. He said it was not a religious school. After he finished school he started working in a shop which he operated. He said the shop was owned by his family which had inherited it from his relative. He worked in the shop for several years. His relative had a business partner who worked there also. He claimed his relative started working there as a young man with his other relative. He said he the applicant, has siblings.

The applicant also claimed his relative and his family members are now all living in another country. The Tribunal asked him who is looking after the family shop. He said the shop was sold. The applicant claimed that he is not married and that his parents are alive and well in another country, where they have lived for sometimes. He said he speaks to his parents often, once every few months, and has in fact spoken to them only several weeks ago.

The Tribunal asked the applicant why he left Afghanistan. He said he left Afghanistan because of the persecutory acts of the Taliban. He repeated his allegation that he was arrested previously. The Tribunal drew the applicant's attention to the fact that the Taliban have been removed from office. He responded by saying that his relative worked for the government, and so he fears



returning to Afghanistan because people who knew of his relative's employment could hunt him down. He was asked if he knew when his relative worked for the government. He said he did not know. He also said his relative worked until the government left office. He was asked if he knew exactly what his relative did. He said that all he knew was that his relative worked for the government. He explained that because of that he fears that his relative's enemies might hunt him down.

The applicant also claimed that quite apart from his links with his relative he has other reasons that he doesn't want to return to Afghanistan. He said he fears returning to Afghanistan because the Taliban have not gone away. He also said that his relative was subject to persecution at the hands of government men. The Tribunal asked him to explain what he meant by 'government men'. He said people who work for the government. The Tribunal asked him what the people who "worked for the government" did to his relative. He said, fortunately, whenever the people came looking for his relative his relative was never there. They never found him. But in view of the fact that people were always looking for him, his relative then left the country with the rest of the family to another country. The Tribunal asked the applicant if he knew why people had been looking for his relative. He said they were looking for him because of his relative's previous employment. The Tribunal asked him why he had not mentioned anything about his relative when he first arrived in the country. He said he did not mention it because he did not know about his relative's work. He said he did not know the full extent of his relative's involvement and that it was only after his arrival in Australia that he made phone calls to his relative, who then told him what his position was. He said he found out about his relative only about several weeks ago. The Tribunal asked him if he was sure that he had only learned about his relative's involvement in the government only several weeks ago. The applicant said yes.

The Tribunal put it to the applicant that in his statement made earlier he had not mentioned anything about his relative, but had only stated that he feared returning to Afghanistan because of the Tajiks and the Pashtuns. He said that he had not mentioned anything about his relative because at the time he did not know what his relative's involvement in the work for the government was. The Tribunal also drew the applicant's attention to the fact that his statement that his relative worked with the government is not consistent with his earlier admission that his relative worked in a shop and that he had worked there for a long time as a young man with his relative. The applicant responded by saying that his relative in fact kept few jobs, and that his relative had a partner who did most of the work, so his relative was, most of the time, not in the shop as such.

The applicant insisted that he only knew about his relative's job only about several weeks ago. He said he was a child when his relative was working with the government, so he could not have known what the relative's work was. The applicant said that, in his culture, it would have been very unusual for a young boy like him to ask his relative what he did outside the house. He said he was very young and did not know what his relative did. The applicant was asked why he had not included the fact that government men had come looking for his relative. He said that he had included it by saying that Tajiks and Pashtuns were looking for his relative, and what he meant by government men was that they were Tajiks and Pashtuns. The Tribunal put it to the applicant that if it was possible for his relative to live in Afghanistan during the time of the Taliban without being attacked, then it seems implausible that he now fears possible persecution when the Taliban have left. He responded by saying that it was only after the Taliban left office that some neighbours reported his relative to the administration. He claimed that during the Taliban period the neighbours had escaped and left town, and that after the Taliban period the neighbours had

returned, so now these neighbours have reported his relative to the authorities in the area and he is facing difficulties as a result of that

The Applicant claimed that he wanted to clarify to the Tribunal that his relative only worked with the government to avoid national service in the military. The Tribunal asked him that if he did not know that his relative was working for the government, why does he think that his relative's neighbours would have known. He said that his relative's neighbours would have known because they have known his relative for much, much longer than he had, before he was born. Finally the applicant was asked why he thought he couldn't relocate to other parts of Afghanistan. He said it is simply not possible because sooner or later people would find him out and they will know he has arrived in the country, and as a relative of his relative, they will find him and kill him. The Tribunal asked him again to clarify what position exactly his relative occupied in the government. He said one could say that his relative was a [details of the applicant's relative's employment deleted s.431] . He said he had limited knowledge about his relative's work, and that it was only after the Department rejected his application that he had rung his relative to ask more questions. He said it was the fact that his relative had left for another country that prompted him to ask so many questions.

### **Submissions by the applicant's advisor**

The applicant's advisor also made submissions. Firstly, his adviser claimed that the applicant's relative's employment with the government only became relevant after his relative fled Afghanistan to go to another country. He said the applicant made enquiries as to why the relative had relocated to another country. The relative then began explaining that he had experienced harassment in Afghanistan at the hands of the Tajiks. The adviser claimed that with the fall of the Taliban his relative's neighbours saw an opportunity to report him and did so accordingly. The adviser said he appreciated that there were inconsistencies in the applicant's statement which justified the concern of the Tribunal, however, the Tribunal should understand that the applicant is not a very intelligent man and that his condition may have been affected by an accident he suffered at work. Next the applicant's adviser argued that the cessation clause cannot apply in this case. He relied on the case of Chan from the Commonwealth and said that, for the cessation clause to apply the conditions must be stable, durable and substantial. He argued that the changes in Afghanistan are neither stable, durable nor substantial because the country is now in the middle of huge insecurity and turbulence. He relied on country evidence that suggested that there is a considerable degree of insecurity in the country.

### **Oral evidence**

The applicant stated he wanted to rely on the claims he had previously made to the Department and to the Tribunal previously constituted.

The applicant claimed that he feared returning to Afghanistan because of his relative's past work with the communists. The applicant claimed that the situation in Afghanistan was different to the situation in Australia. He claimed that people seek revenge on family members. He claimed that because of his relative's position in the past his Pashtun and Tajik neighbours would seek revenge. He claimed they tried to attack his relative several times. He claimed his relative had to flee from Afghanistan because he was attacked. The Tribunal asked the applicant if he could tell the Tribunal anything more about his relative's role in the past. The applicant claimed he didn't know much and the information his relative had told him he had provided to the Tribunal previously constituted.

The applicant claimed he couldn't return to Afghanistan because he was a Hazara. The applicant claimed that he feared returning to Afghanistan because of the current situation. He claimed his advisor had information on the current situation in Afghanistan. He claimed that the Taliban were still in Afghanistan even though they were not in power.

The applicant claimed that he could not return to Afghanistan because having lived in a western country for several years he would be perceived as wealthy.

### **Submission by the applicant's advisor**

The applicant's advisor made the following submissions:

The main characteristics of the applicant's claims are a fear of persecution for being a Hazara. A differently constituted Tribunal found my client to be a refugee. In relation to these two characteristics the Tribunal relied on the following country information:

An *IRIN* article dated 10 July 2006 reports that more than 1,110 people in Afghanistan have lost their lives in insurgency-related violence in 2006 alone.

### **Kabul City**

Security incidents in Kabul City in August 2006 are as follows:

- 2 August 2006: A car exploded killing the driver and wounding two others in the Bini Hesar area of Kabul City. NATO Spokesman Major Luke Knittig said that initial police reports suggest that a suicide bomber "was intercepted by police and prematurely exploded his bomb" ('Afghanistan Briefing 31 July – 2 August 2006' 2006, *BBC Monitoring*, source: *Afghan Islamic Press News Agency*, *Agence France Presse & Associated Press*, 2 August).

Security incidents in Kabul City in July 2006 are as follows:

- 31 July 2006: An explosion injured one person ('Afghanistan Briefing 31 July – 2 August 2006' 2006, *BBC Monitoring*, source: *Tolo TV*, 2 August);
- 20 July 2006: One pedestrian was killed and three more injured when a bomb went off in the fifth police district of Kabul City (Moahid, Ahmad Khalid 2006, 'One killed, three injured in Kabul blast', *Pajhwok Afghan News*, 20 July);
- 14 July 2006: Police arrested an Afghan man trying to plant a bomb outside the Ministry of Information and Culture (Khan, Noor & Coghlan, Tomas 2006, 'Taleban takes fight to coalition as force lays siege to police station', *The Scotsman*, 14 July);
- 4-5 July 2006: Five roadside bombs killed at least one and injured up to 50 people. The first bomb hit a Ministry of Interior bus, the second bomb in a vending cart blew up outside the Ministry of Justice, the third bomb struck a bus carrying Afghan army officers to work, the fourth bomb in a vending cart hit a bus carrying Ministry of Commerce workers and the fifth bomb targeted an Afghan army convoy. The Taliban claimed responsibility for three of the blasts with spokesman for the Taliban, Mohammad Hanif, saying "the attacks had shown the Taliban could strike anywhere. He vowed more." NATO Spokesman Major Knittig said "I think it's fair to say that you're going to see more of this kind of insurgent activity – not just in the capital, but in other places as well" ('Afghan capital rocked by blasts' 2006, *BBC News*, 5 July);

I submit that the independent country information indicates that the Taliban insurgency continues to grow and even Kabul is not free of Taliban activities. The Taliban is targeting the government in an attempt to bring about its collapse and create an opportunity to regain

power. Even if the Taliban are not successful in their objective to regain power in Afghanistan, they still form a very powerful non-government group that has persecuted Hazaras in the past and continue to do so regardless of whether they are in power or not.

## **Hazaras**

The Tribunal relied on a number of sources, including Professor Maley, who on 30 September 2005 provided the Tribunal with the following information:

the Hazaras, the ethnic minority that is scattered through different parts of Afghanistan particularly concentrated in the Hazarajat, which – and there it is difficult to generalise beyond making the obvious point that the Hazaras have experienced relatively high level discrimination in Afghanistan since the late 19th century and there is no particular reason to think that that is going to break up. One still witnesses this almost on a daily basis.

If the Hazaras have jobs they are in the most squalid and discredited areas of the economy. The rhetoric of Pushtuns, not so much in public venues but in private, is still very hostile to Hazaras. The top Pushtun leaders know that the international community is not going to welcome racist rhetoric from their mouths so they tend not to engage in it in that kind of venue but you can – you don't have to scratch too far beneath the surface to discover virulent anti Hazaras attitudes.

... And the prospect that there will be a significant improvement in the security situation for Hazaras there is poor.

I respectfully submit that the applicant has already been recognised by Australia as a refugee under Article 1A(2) and there has been no changes in Afghanistan that could be called “fundamental, stable and durable” that would cease his refugee status under Article 1C of the Refugee Convention.

## **Country Information**

An *IRIN* article dated 10 July 2006 reports that more than 1,110 people in Afghanistan have lost their lives in insurgency-related violence in 2006 alone. According to the Afghanistan Independent Human Rights Commission, more than 600 Afghan civilians have been killed or wounded in insurgency-related violence in 2006 with about 70% of the casualties caused by Taliban-linked attacks such as suicide and roadside bombings (‘Afghanistan: UN concerned at deteriorating security’ 2006, *IRIN*, 10 July <http://www.irinnews.org/report.asp?ReportID=54516&SelectRegion=Asia&SelectCountry=AFGHANISTAN> – Accessed 11 August 2006; and ‘600 Afghan civilians killed, hurt in violence this year: watchdog’ 2006, *Agence France Presse*, 22 July, ReliefWeb website <http://www.reliefweb.int/rw/RWB.NSF/db900SID/KHII-6RZ7SH?OpenDocument> – Accessed 11 August 2006).

A report dated 7 March 2006 by the UN Security Council provides the following information on the general security situation in Afghanistan.

39. The security situation over the past six months was characterized by a clear consolidation of previously reported trends in extremist activity. The operational tempo and tactical sophistication of insurgent and other anti-Government elements have continued to develop. These activities pose an increasing threat to the local

population, national security forces, international military forces and the international assistance effort. Violence and threats against local officials, religious leaders, teachers and staff and facilities of the education system have continued and intensified, in particular in the south and south-east of the country. Corruption, the menace of a criminalized economy, dominated by drug and other organized criminal networks, and the presence of illegally armed groups have continued to undermine the authority of the legitimately elected government.

40. Over the course of the reporting period, insurgents and other anti-Government elements increasingly employed more sophisticated and lethal tactics, such as the use of complex improvised explosive devices, well-planned ambushes and technically advanced multiple rocket attacks. Perhaps of greatest concern is the steep rise in the number of suicide bombings. Prior to 2005, there had been only five cases in the three preceding years. In 2005, there were 17. By 23 February 2006, the annual total for 2006 already stood at 11. This represents 65 per cent of the 2005 total in a two-month period. The lethality of these attacks has also grown. In 2006, the average number of victims per attack was 11, up from 5.4 in 2005.

41. Up to November 2005, a significant proportion of security related incidents involved clashes between anti-Government elements and security forces, primarily international military forces. Since most of those incidents resulted in the defeat of anti-Government elements, attacks against foreign military forces have been decreasing in favour of attacks against Afghan security forces and against soft targets (Government and social institutions), by entities that are difficult to detect or identify. This changing tactic is evident in four principal threat areas; namely: improvised explosive devices, suicide bombings, kidnapping and attacks against the education system.

42. Insurgents departed from the seasonal trend of past years by maintaining a high level of operational activity throughout the winter period. The first months of 2006 witnessed a rising level of insurgent attacks, in particular in the south and east of the country. Indeed, the number of anti-Government elements-related incidents has grown, unabated, since 2003. Of particular note is that the frequency of such attacks during the latter half of 2005 and the start of 2006 (200 per month) was higher than during any of the previous reporting periods, including the presidential elections of 2004. Over the past six months, the incidence of successful improvised explosive device attacks compared with the previous half year has increased by over 50 per cent. Anti-Government elements also appear to have expanded their theatre of operations into traditionally calmer areas of the west, north and north-east of the country. Activities include the use of improvised explosive devices (previously rare in these areas), as well as four suicide attacks or attempts in Mazari Sharif and Balkh between October and January. In December, Hirat suffered its first recorded suicide attack.

43. Kidnapping is not a new trend in Afghanistan and numerous incidents of abductions of nationals for revenge or criminal reasons continue. ...Numerous reports received in January and February 2006 indicate criminal and anti-Government elements intent to kidnap foreigners for political leverage and/or ransom, primarily in Kabul and the eastern region of the country.

44. The reporting period was marred by methodical attempts to undermine the education system. Incidents included the burning or bombing of schools; the assassination of principals, teachers and officials and threats to students (UN Security Council 2006, *The situation in Afghanistan and its implications for international peace and security*, 7 March, pp.10-11 <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDCOI&id=4416bfe84> – Accessed 11 August 2006).

The above report was updated on September 2006. It states:

2. Since my previous report (A/60/712-S/2006/145), the most significant development in Afghanistan has been the upsurge in violence, particularly in the south, south-east and east of the country. Security has, once again, become the paramount concern of a majority of Afghans. It is estimated that over 2,000 people, at least one third of them civilians, have lost their lives in the fighting since the start of 2006. This represents a three- to four-fold increase in the rate of casualties compared to 2005. The number of security incidents involving anti-Government elements has increased from fewer than 300 per month at the end of March 2006 to close to 500 per month subsequently.

3. The growing number of casualties in the south can be attributed both to a rise in anti-Government attacks and to a corresponding increase in offensive military operations being conducted by the Afghan National Army and its international partners (see “Afghan security forces” and “International Security Assistance Forces” below). In the south-east, where major military operations are only just getting under way, insurgent activity has been conducted largely unchecked. Suicide attacks continue to be a highly emotive issue and are widely reported in the international media. The phenomenon is now well established in Afghanistan. The number of suicide attacks already stood in mid-August at 65, against 17 such incidents during all of 2005.

4. 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 recognition of the gravity of the situation, President Hamid Karzai convened Afghan security forces, their international counterparts, some representatives from Member States with a significant troop presence in the south and UNAMA to produce a shared assessment of the sources of instability. A high degree of consensus emerged from these consultations regarding the nature of the conflict. In addition to a quantitative spike in their activities, a qualitative shift was detected in the operations and coordination of the insurgent forces’ intent on overthrowing the Government through violent means.

5. The insurgency is being conducted mostly by Afghans operating inside Afghanistan’s borders. However, its leadership appears to rely on support and sanctuary from outside the country. The insurgency’s current centre of gravity falls in and around the provinces of Kandahar, Helmand, Uruzgan and increasingly, Farah. Anti-Government operations nevertheless continue in many parts of the east and south-east and have become an acute concern in Wardak and Logar provinces, close to the capital. The insurgency now covers a broad arc of mostly Pashtun dominated territory, extending from Kunar province in the east to Farah province in the west; it also increasingly affects the southern fringe of the central highlands, in Ghor and Day Kundi provinces.

6. Five distinct leadership centres of the insurgency can be identified. They appear to act in loose coordination with each other and a number benefit from financial and operational links with drug trafficking networks. They include: the wing of the Hezb-i-Islami party led by Gulbuddin Hekmatyar, in Kunar province and neighbouring areas; the Taliban northern command, for Nangarhar and Laghman provinces; networks led by Jalaluddin Haqqani, a former minister in the Taliban regime, mainly for Khost and Paktya provinces; the Wana Shura, for Paktika; and the Taliban southern command, for the provinces of Zabul, Kandahar, Hilmand, and Uruzgan. The Taliban southern command has recently begun to establish parallel civil administrations and courts in its area of operations, although they remain marginal in most districts. Leadership and support structures for the insurgency straddle the southern border of Afghanistan.

7. The leadership centres form the hard core of the insurgency and are widely considered not to be open to reconciliation. The “strengthening peace” programme, a national initiative to reintegrate Taliban and other insurgent combatants, has had successes with mid-level Taliban commanders but has not focused on attracting senior commanders.

8. The leadership relies heavily on cross-border fighters, many of whom are Afghans drawn from nearby refugee camps and radical seminaries in Pakistan. The fighters are typically indoctrinated, unemployed young men whose sense of identity has been blurred by years in exile. They are trained and paid to serve as medium level commanders, leading operations inside Afghanistan, and they are able to retreat back to safe havens outside the country.

9. The foot soldiers of the insurgency are Afghans recruited within Afghanistan; they are driven by poverty, poor education and general disenchantment with their place in society. These internal fighters are not ideologically driven, but their ranks have expanded to support the growing upper echelons of the insurgency. They are thought to be ready to disengage from the insurgency if the appropriate incentives, particularly economic, are provided.

10. Dialogue with elders, clerics and other community leaders in areas affected by the insurgency has revealed a consistent set of grievances that, if properly addressed, these leaders believe could significantly weaken support for the insurgency. Government corruption at the provincial and district levels, particularly within the police and the judiciary, has alienated local populations as have unfulfilled expectations of development following the fall of the Taliban regime. Imbalances in the distribution of power between different Pashtun tribes at the provincial level have also contributed to a sense of marginalization felt by entire tribes. Finally, conservative elements of the population — a clear majority in rural areas — often view the Government’s social policies as insufficiently protective of, or even harmful to, traditional religious, tribal and cultural norms.

11. The trend towards instability has not been restricted to areas affected by the insurgency. **A sense of volatility has also gripped Kabul over the past three months**, triggered by the violent riots that broke out in the capital on 29 May following a tragic traffic incident involving the United States-led coalition forces in the northern districts of the city. At least 25 people died on that day, and several properties were looted or burned, including four United Nations guesthouses and several compounds belonging to aid organizations.

### **Kabul**

Security incidents in Kabul City in August 2006 are as follows:

□ 2 August 2006: A car exploded killing the driver and wounding two others in the Bini Hesar area of Kabul City. NATO Spokesman Major Luke Knittig said that initial police reports suggest that a suicide bomber “was intercepted by police and prematurely exploded his bomb” (‘Afghanistan Briefing 31 July – 2 August 2006’ 2006, *BBC Monitoring* , source: *Afghan Islamic Press News Agency* , *Agence France Presse & Associated Press* , 2 August).

Security incidents in Kabul City in July 2006 are as follows:

□ 31 July 2006: An explosion injured one person (‘Afghanistan Briefing 31 July – 2 August 2006’ 2006, *BBC Monitoring* , source: *Tolo TV* , 2 August);

□ 20 July 2006: One pedestrian was killed and three more injured when a bomb went off in the fifth police district of Kabul City (Moahid, Ahmad Khalid 2006, ‘One killed, three injured in Kabul blast’, *Pajhwok Afghan News* , 20 July <http://www.pajhwok.com/viewstory.asp?lng=eng&id=21552> – Accessed 10 August 2006);

□ 14 July 2006: Police arrested an Afghan man trying to plant a bomb outside the Ministry of Information and Culture (Khan, Noor & Coghlan, Tomas 2006, ‘Taleban takes fight to coalition as force lays siege to police station’, *The Scotsman* , 14 July <http://news.scotsman.com/topics.cfm?tid=444&id=1023362006> – Accessed 10 August 2006);

□ 4-5 July 2006: Five roadside bombs killed at least one and injured up to 50 people. The first bomb hit a Ministry of Interior bus, the second bomb in a vending cart blew up outside the Ministry of Justice, the third bomb struck a bus carrying Afghan army officers to work, the fourth bomb in a vending cart hit a bus carrying Ministry of Commerce workers and the fifth bomb targeted an Afghan army convoy. The Taliban claimed responsibility for three of the blasts with spokesman for the Taliban, Mohammad Hanif, saying “the attacks had shown the Taliban could strike anywhere. He vowed more.” NATO Spokesman Major Knittig said “I think it’s fair to say that you’re going to see more of this kind of insurgent activity – not just in the capital, but in other places as well” (‘Afghan capital rocked by blasts’ 2006, *BBC News* , 5 July [http://news.bbc.co.uk/2/hi/south\\_asia/5148982.stm](http://news.bbc.co.uk/2/hi/south_asia/5148982.stm) – Accessed 10 August 2006 – Attachment 7 ; ‘Afghanistan Briefing 3 July – 5 July 2006’ 2006, *BBC Monitoring* , source: *Afghan Islamic Press News Agency* , 5 July; Azimy, Yousuf 2006, ‘Blasts hit Afghan buses, one dead, 45 hurt’, *Reuters* , 5 July, ReliefWeb website <http://www.reliefweb.int/rw/RWB.NSF/db900SID/LTIO-6REKY8?OpenDocument> – Accessed 10 August 2006 – Attachment 9 ; and Dummett, Mark 2006, ‘Afghan capital edgy after blasts’, *BBC News* , 5 July [http://news.bbc.co.uk/2/hi/south\\_asia/5151998.stm](http://news.bbc.co.uk/2/hi/south_asia/5151998.stm) – Accessed 10 August 2006).

Security incidents in Kabul City in May 2006 are as follows:

□ 29 May 2006: A brake failure led a large US military truck to crash into about a dozen cars at a busy intersection in the Khair Khana district of Kabul City. The accident developed into a major riot with up to 2,000 people chanting “Death to America” and “Death to Karzai” as they headed for the presidential palace and parliament. The situation escalated when US soldiers and Afghan security forces fired over the heads of the crowd or into the crowd, that is still not clear. The crowd threw rocks and stones at the US military, set fire to police cars and checkpoints, ransacked and set fire to NGO offices, shops, restaurants and other businesses. The death toll is said to be at least 20 with a further 160 people injured, most with gunshot wounds (British Agencies Afghanistan Group 2006, *Afghanistan: Monthly Review* , May [http://www.baag.org.uk/downloads/monthly\\_review\\_06/72\\_May\\_06.pdf](http://www.baag.org.uk/downloads/monthly_review_06/72_May_06.pdf) – Accessed 10 August 2006; and ‘US crash sparks Afghanistan riot’



2006, *BBC News* , 29 May [http://news.bbc.co.uk/2/hi/south\\_asia/5026350.stm](http://news.bbc.co.uk/2/hi/south_asia/5026350.stm) – Accessed 10 August 2006);

- 21 May 2006: A car bomb exploded prematurely killing three people on a road linking several bases belonging to the US and NATO ('Car Bomb Kills Three in Kabul' 2006, *Radio Free Europe* , source: *Associated Press & Reuters* , 21 May <http://www.rferl.org/featuresarticle/2006/5/8503EFE0-B4CF-47DB-B605-F0DC5B24F959.html> – Accessed 10 August 2006).

Security incidents in Kabul City in April 2006 are as follows:

- 25 April 2006: Three people were injured when two bombs exploded along the road to Kabul airport (British Agencies Afghanistan Group 2006, *Afghanistan: Monthly Review* , April [http://www.baag.org.uk/downloads/monthly\\_review\\_06/71-April\\_06.pdf](http://www.baag.org.uk/downloads/monthly_review_06/71-April_06.pdf) – Accessed 10 August 2006);
- 10 April 2006: A policeman was injured when a rocket hit the state TV building, adjacent to the US Embassy (British Agencies Afghanistan Group 2006, *Afghanistan: Monthly Review* , April – [http://www.baag.org.uk/downloads/monthly\\_review\\_06/71-April\\_06.pdf](http://www.baag.org.uk/downloads/monthly_review_06/71-April_06.pdf) – Accessed 10 August 2006).

Security incidents in Kabul City in March 2006 are as follows:

- 21 March 2006: Police defused two “powerful bombs near a major Shia Muslim shrine ahead of a major festival.” Police blamed the attempted attack on the Taliban ('Bomb defused' near Kabul shrine' 2006, *BBC News* , 21 March [http://news.bbc.co.uk/2/hi/south\\_asia/4827992.stm](http://news.bbc.co.uk/2/hi/south_asia/4827992.stm) – Accessed 10 August 2006 );
- 14 March 2006: Around 100 Afghan policemen were posted outside the Pakistan Embassy in Kabul after Pakistani authorities received information that some people want to attack the embassy” ('Pakistan's Kabul embassy secured' 2006, *BBC News* , 14 March [http://news.bbc.co.uk/2/hi/south\\_asia/4804936.stm](http://news.bbc.co.uk/2/hi/south_asia/4804936.stm) – Accessed 10 August 2006);
- 12 March 2006: Two civilians and two suicide bombers were killed in an attack on Afghan Senator Sibghatullah Mujaddedi who leads a government commission seeking reconciliation with the Taliban. Mujaddedi blamed the Pakistani Directorate for Inter-Services Intelligence but Pakistan denied the claim ('Kabul bombers target Senate chief' 2006, *BBC News* , 12 March [http://news.bbc.co.uk/2/hi/south\\_asia/4798248.stm](http://news.bbc.co.uk/2/hi/south_asia/4798248.stm) – Accessed 10 August 2006).

Security incidents in Kabul City in February 2006 are as follows:

- 28 February 2006: One of two Nepalese men kidnapped in Kabul on 11 February 2006 by a criminal gang has been freed while the other was reported to have died due to a stomach problem ('Nepal hostage dies in Afghanistan' 2006, *BBC News* , 28 February [http://news.bbc.co.uk/2/hi/south\\_asia/4758194.stm](http://news.bbc.co.uk/2/hi/south_asia/4758194.stm) – Accessed 10 August 2006 );
- 18 February 2006: A rocket was fired at the Intercontinental Hotel but missed its target (British Agencies Afghanistan Group 2006, *Afghanistan: Monthly Review* , February <http://www.baag.org.uk/downloads/monthly%20review%2006/69-February06.pdf> – Accessed 10 August 2006).

On 3 June 2006, Kabul Police Chief Jamil Jumbish was replaced by Amanullah Gozar. Gozar is “a former commander known for his extortion and drug-trafficking activities” and Jumbish “has been implicated in murder, torture, intimidation, bribery and interfering with investigations into misconduct by officers directly under his control. He is currently under investigation by the Afghan government for involvement in the torture and death of two men in his custody. Jumbish has allegedly used his position of power to sell police posts and is accused of possession of illegal weapons, which has refused to turn over to the appropriate authorities” ('Afghan police in major shake-up' 2006, *BBC News* , 3 June [http://news.bbc.co.uk/2/hi/south\\_asia/5043802.stm](http://news.bbc.co.uk/2/hi/south_asia/5043802.stm) – Accessed 10 August 2006; Human Rights Watch 2006, 'Afghanistan: Reject Known Abusers as Police Chiefs', 4 May

<http://hrw.org/english/docs/2006/05/04/afghan13308.htm> – Accessed 10 August 2006 – Attachment 21 ; and Niada, Marco 2006, ‘Afghanistan: last chance’, Open Democracy website, 13 July [http://www.opendemocracy.net/democracy-institutions\\_government/afghanistan\\_chance\\_3734.jsp](http://www.opendemocracy.net/democracy-institutions_government/afghanistan_chance_3734.jsp) – Accessed 10 August 2006 ).

## Hazaras

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).

In October 2005, Afghan journalist Ali Mohaqeq Nasab, editor of *Hooq-e-Zan ( Women’s Rights )*, was sentenced to two years in prison for blasphemy after questioning the harsh punishment under Shari’a law for women found guilty of adultery. On appeal the sentence was reduced to six months. Nasab believes he was targeted because of his Hazara ethnicity. Another Hazara, popular presenter Shakeb Isaar “was threatened and forced to flee” Afghanistan (Committee to Protect Journalists 2006, *Attacks on the Press in 2005 – Afghanistan* [http://www.cpj.org/attacks05/asia05/afghan\\_05.html](http://www.cpj.org/attacks05/asia05/afghan_05.html) – Accessed 11 August 2006; and Esfandiari, Golnaz 2005, ‘Imprisoned journalist says freedom of expression under attack’, *RFE/RL Media Matters* , Vol. 5, No. 21, 29 December).

On 27 September 2005, Saeed Mohammad Ashraf Ramazan, prominent businessman, ethnic Hazara associated with Mohaqeq’s *Hizb-e Wahdat-e Islami-ye Mardum-e Afghanistan* party and successful parliamentary candidate for Balkh was murdered in Mazar-i-Sharif. A little known group purporting to be associated with the Taliban claimed responsibility, however few people believed this. Mohaqeq and his supporters alleged that political rival Governor Atta of the *Jamiat-e-Islami* party was behind the assassination. According to Mohaqeq “Ramazan came to see him in Kabul immediately before he was killed, complaining about the governor and expressing fears that he might try to have him eliminated.” Governor Atta denied the allegations alleging that Mohaqeq was behind the assassination. Up to 4,000 people marched in Kabul and up to 1,000 demonstrated in Mazar-i-Sharif demanding the resignation of Governor Atta. Following the demonstrations, three men were arrested, one of which has close ties to Governor Atta. They were released in early November 2005, “but the unrest continued” (Ibrahimi, Sayed Yaqub 2005, ‘Killing Sparks Fears of unrest in North, *Institute for War & Peace Reporting Afghan Recovery Report No 196* , 30 November [http://www.iwpr.net/?p=arr&s=f&o=258367&apc\\_state=heniarr2005](http://www.iwpr.net/?p=arr&s=f&o=258367&apc_state=heniarr2005) – Accessed 11 August 2006; and ‘Afghans Continue to Protest Candidate’s Slaying’ 2005, *Radio Free Europe/Radio Liberty* , 3 October). On 10 November 2005, the three were detained again and sent to Kabul for interrogation:

Observers say Kabul may have felt a need to intervene because of fears that Ramazan’s murder could ignite ethnic and political tensions that have been brewing for years.

There has been friction between the Tajik and Hazara communities in Mazar-e-Sharif in the past, most recently in 2004, when land and government posts were being distributed. According to many Hazaras, Atta used his position to further his own interests at their expense.

“The governor gave most of the land to his supporters, and declared any land distributed to the Hazaras to be illegal. He also used various pretexts to get rid of any Hazaras working in the government,” said Mohaqeq’s deputy Saidi.

... Ghulam Farooq Khpelwak, a political analyst who lectures at Balkh University, said that the fact that the government intervened showed just how explosive the situation in the north has become (Ibrahimi, Sayed Yaqub 2005, ‘Killing Sparks Fears of unrest in North, *Institute for War & Peace Reporting Afghan Recovery Report No 196*, 30 November

[http://www.iwpr.net/?p=arr&s=f&o=258367&apc\\_state=heniarr2005](http://www.iwpr.net/?p=arr&s=f&o=258367&apc_state=heniarr2005) – Accessed 11 August 2006).

According to the Afghanistan Research and Evaluation Unit Hazaras won 30 seats (12%) in the 18 September 2005 *Wolesi Jirga* election while non-Hazara Shias won 11 seats (4.4%) (Wilder, Andrew 2005, *A House Divided? Analysing the 2005 Afghan Elections*, December, Afghanistan Research and Evaluation Unit website, p.8).

On 30 September 2005 Professor Maley provided the Tribunal with the following information on the situation of Hazaras in Afghanistan:

Clearly one population which is of significant concern to DIMIA and to the Tribunal is that of the Hazaras, the ethnic minority that is scattered through different parts of Afghanistan particularly concentrated in the Hazarajat, which – and there it is difficult to generalise beyond making the obvious point that the **Hazaras have experienced relatively high level discrimination in Afghanistan since the late 19th century and there is no particular reason to think that that is going to break up. One still witnesses this almost on a daily basis.**

If the Hazaras have jobs they are in the most squalid and discredited areas of the economy. The rhetoric of Pushtuns, not so much in public venues but in private, is still very hostile to Hazaras. The top Pushtun leaders know that the international community is not going to welcome racist rhetoric from their mouths so they tend not to engage in it in that kind of venue but you can – you don’t have to scratch too far beneath the surface to discover virulent anti Hazaras attitudes.

... **And the prospect that there will be a significant improvement in the security situation for Hazaras there is poor.** Now this is not to say that Hazaras are under attack on a regular or a routine basis. It is rather to say that there are not in place the institutional protections that guarantee that a situation will not flare up into something very nasty very quickly. In Australia we don’t necessarily have a policeman on every corner to cope with every problem that emerges but ordinary people understand that if something nasty happens the police will come, there will be a proper investigation meaning the perpetrators are highly likely to be caught and rendered to the justice system and this is then a deterrent for misbehaviour whereas in Afghanistan they have none of those institutional guarantees.

Strong people are likely to get away with it no matter how nasty may be the activity in which they have engaged and in many areas of the country there is a climate of total impunity.

...FEMALE SPEAKER: What is the current situation of Hazaras in Kabul?

PROF MALEY: It is not a happy situation and with the likely election of Sayyaf as a member of the Wolesi Jirga from Kabul it is going to become a lot unhappier I think because – you see Hazaras in different parts of the city but the main Hazara enclave is Afshar which is down in the south below what is called the silo, anyway on the road out to Qargha and then Paghman and it is unfortunate from their point of view that Sayyaf's main centre is Paghman.

...Frankly the militia could run out of Paghman into Afshar and harass the Shiite there, as there is some evidence of their having done, and get back to Paghman without people in the central state even being aware of what is going on. And there is a lot of predation of that sort that is happening. It is a sort of protection, racket and stuff. It is not necessarily massacres but it is extraction of resources from vulnerable people, you know, you pay us and we will see that you are okay. Which is hypocritical given that the people making those offers are the main threat. **I wouldn't want to be a Hazara in Kabul.**

...FEMALE SPEAKER: Can I ask you one last question.....Hazaras? Is there anything to indicate that the historical persecution of that group will change?

PROF MALEY: No. No. The marginalisation of the Hazaras is a product of a range of deep-rooted cultural prejudice coming together. Both the prejudice amongst some Sunni Muslims against Shiite Muslims, the Hazaras are overwhelmingly Shiite, together with the fact that Hazaras are – tend to be quite distinctive in their appearance because they have a Central Asian phenotype rather than a Mediterranean appearance and that has then set them up for classic economic social closure in the sense of the term that other activists could maximise their economic gains by excluding one particular type of competitor and marginalising them into the least desirable occupation areas.

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. I actually had a conversation with a very prominent Afghan Australian in Kabul last week, and his comment was that his parents, whom I know very well, don't make overt comments about Hazaras but he can tell that they just can't stand them.

And his parents are highly educated, cosmopolitan, sophisticated people who have lived in a number of different countries. They have constrained the way in which they voice their views – they don't publicly express prejudice against Hazaras – but even there it is around. 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. And that kind of sometimes strong signals from the State that can be used to turn around hostilities to particular groups within a community – like in the way people in the United States will no longer talk about African Americans in the way that they used to in the South in the 1950s. But that was a sustained pattern of concentrated

signalling from the state, from the government, from courts and from media that turned that around.

Now in Afghanistan all those institutions are relatively weak. They are not in a position to reverse that burden of attitudes. **So Hazaras in that sense are really behind the eight ball in Afghanistan** (Maley, Professor William 2005, *Transcript of Seminar on Afghanistan* , 30 September).

On 13 April 2005 Dr Jonathan Goodhand provided the Tribunal with the following information on the situation of Hazaras in Afghanistan:

First of all, I think it is important to situate Hazaras, socially and politically within the Afghan society.

They 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), which probably many of you will know about.

**Although the Hazaras have probably advanced their position politically they are still seen in many ways a marginal group, as for example they are under represented 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.**

...So just to finish off on the very specific question at the end, 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).

On 10 November 2004, Ahmed Rashid provided the Tribunal with the following information on the situation of Hazaras in Afghanistan:

**The other big factor is that reconstruction has not taken place in the Hazara areas.** You had very limited involvement by the international community, and this is really – excuse the French – but this is really pissing off the Hazaras enormously. They are really fed up – 3 years down the road you’ve got major projects going on all over the country, and you haven’t had anything done in Hazarajat. There has been some progress – I mean the Americans have now promised to build the road to Bamyan from Kabul, the Indians are promising a power station in Bamyan, etc., and there are promises by the world banks for mini dams to create water, irrigation and power, in parts of the Hazarajat. But the fact is that so far you have not really had any kind of investment there. So that’s another factor which has ignored Hazaras enormously.

A couple of other points, there has been a huge return of Hazaras, but unfortunately they are returning mostly to the cities which is creating an enormous urban problem, and they are taking very menial jobs – many of them are not going home simply because there is nothing for them back home because of the lack of investment. **The second factor is that it’s not just the Pashtuns they’re scared of, they’re equally scared of Uzbek, Tajik power in their areas**, although that I think will diminish given the ... withdrawal and the demobilisation, especially of the Tajik militias – the Pancheris. Ultimately, I mean why I think they voted for Mahakik Mohaqaq – it was a vote of protest – that nothing has been done for us, and we support Karzai – he’s a reasonable guy, but he has not focused sufficiently on us, the Hazaras, and that’s why we are registering our vote of protest and going for Mahakik Mohaqaq.

SYDNEY/MELBOURNE: I wonder if you could give us an update on Hazaras in Kabul.

MR RASHID: There are huge numbers of Hazaras in Kabul. I mean much of it of course is the traditional population, but there’s a huge influx of refugees from Iran and people coming back from Quetta, Pakistan also. Unfortunately in Kabul – they are the ones with the least money, the ones who are having to take the menial jobs – in a sense there is a fear that they will go back to this kind of second class status that they had in Afghanistan before 1979, where they were treated as cheap labour, taking the menial jobs, becoming servants for people in houses, etc., rather than having the ability where they can open shops, do trading, get other kinds of jobs, etc., etc. So it’s not a good situation because when you’re coming back as a refugee from Iran or wherever, you have this little package from UNHCR which brings you wherever you’re going, but doesn’t give you anything to start a new life there. I mean what is needed very drastically is some kind of micro credit scheme which of course is being looked at by the World Bank and by others, but I think it’s particularly needed for the Hazaras. And don’t forget that the Hazaras coming back now are extremely well educated – they’re much better educated than other elements who are coming back from – other ethnic groups the Pashtuns, some amongst the Tajiks – Hazaras who have been living in Iran for 20 years are used to a different kind of lifestyle – their women and their boys are all very well educated – and then you’re asking them to take on labouring jobs, become taxi drivers, etc., etc., and this is breeding resentment.

... SYDNEY/MELBOURNE: You talked about the large numbers of Hazaras who've returned to Kabul. What's the security situation like there for them at the present time?

MR RASHID: Well even in Kabul there's an enormous amount of harassment from Sayaf's people. Abdul Sayaf you know once a member of the Northern Alliance, very close to the hardline Sunni, Wahabbi Islam, a person who has been responsible for carrying out massacres and programs against the Hazaras during the civil war.

**There's a lot of harassment in West Kabul, where a lot of the Hazaras are concentrated, by Sayaf's people.** Secondly, there's a lot of criminality which has been fuelled by police commanders and militia commanders, a lot of the Panjsheris who've stayed behind, who are still armed, who have not been disarmed in Kabul, and **a lot of that criminality is aimed at the Hazaras . I mean it's easy to rob or steal or rape or whatever it is – you know Hazaras are easier than others because Hazaras are less effective in getting revenge, retribution, or getting the authorities to deal with these cases.** So I think these two issues are still quite important for the Hazaras. ...So even in Kabul – you know the fact that this hostage taking took place in Kabul in broad daylight in a very sophisticated way, and these hostages were then spirited out of Kabul and kept – quite close to Kabul – but the fact that all this could happen under the eyes of a city which has got NATO troops and a very tough security presence and intelligence, etc. – I mean this points to the fact that **Kabul is not necessarily the most secure place, and as a result the Hazaras will be feeling very vulnerable there** (Rashid, Ahmed 2004, *Transcript of Video Conference on Afghanistan between RRT Melbourne, RRT Sydney and Ahmed Rashid*, 10 November).

## FINDINGS AND REASONS

The applicant was recognised by Australia as a refugee previously 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, the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

As the applicant 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 the applicant falls within Article 1A(2).

The delegate in her decision found that the applicant was a national of Afghanistan. The delegate accepted he was a Hazara and Shia. The delegate was satisfied that the applicant feared persecution for the Convention reason of race and religion. The delegate was satisfied given the country information that the fear of persecution identified by the applicant was well founded. The circumstances in connection with which the applicant was recognised as a refugee was that he had a well founded fear of persecution for reasons of his Hazara ethnicity and Shia religion.

The Tribunal must therefore determine whether the circumstances in connection with which the applicant was recognised have ceased to exist to the extent that the applicant can no longer refuse to avail himself of the protection of his country.

The country information before the Tribunal indicates that there has been an upsurge in violence in Afghanistan. The number of security incidents involving anti-Government elements has increased from fewer than 300 per month at the end of March 2006 to close to 500 per month subsequently. The number of suicide attacks stood in mid August at 65, against 17 such incidents during all of 2005. At no time since the fall of the Taliban in late 2001 has the threat to Afghanistan's transition been so severe. A significant shift has been detected in the operations and coordination of the insurgent forces' intent on overthrowing the Government through violent means. The insurgency is being conducted mostly by Afghans operating inside Afghanistan's borders. The insurgency's current centre of gravity falls in and around the provinces of Kandahar, Helmand, Uruzgan and increasingly, Farah. The trend towards instability has not been restricted to areas affected by the insurgency. A sense of volatility has gripped Kabul over the past three months, triggered by the violent riots that broke out in the capital on 29 May following a tragic traffic incident involving the United States-led coalition forces in the northern districts of the city. At least 25 people died on that day, and several properties were looted or burned, including four United Nations guesthouses and several compounds belonging to aid organizations. In August 2006 a car exploded killing the driver and wounding two others in the Bini Hesar area of Kabul City. NATO Spokesman Major Luke Knittig said that initial police reports suggest that a suicide bomber "was intercepted by police and prematurely exploded his bomb". Security incidents in Kabul City in July 2006 are as follows:

□ 31 July 2006: An explosion injured one person

□ 20 July 2006: One pedestrian was killed and three more injured when a bomb went off in the fifth police district of Kabul City

□ 14 July 2006: Police arrested an Afghan man trying to plant a bomb outside the Ministry of Information and Culture

□ 4-5 July 2006: Five roadside bombs killed at least one and injured up to 50 people. The first bomb hit a Ministry of Interior bus, the second bomb in a vending cart blew up outside the Ministry of Justice, the third bomb struck a bus carrying Afghan army officers to work, the fourth bomb in a vending cart hit a bus carrying Ministry of Commerce workers and the fifth bomb targeted an Afghan army convoy. The Taliban claimed responsibility for three of the blasts with spokesman for the Taliban, Mohammad Hanif, saying "the attacks had shown the Taliban could strike anywhere. He vowed more." NATO Spokesman Major Knittig said "I think it's fair to say that you're going to see more of this kind of insurgent activity – not just in the capital, but in other places as well".

On the basis of the above country information the Tribunal finds that there has been a significant deterioration in the security situation in Afghanistan. The country information indicates that the insurgent forces continue to undermine the authority of the legitimately elected government. The trend towards instability is not restricted to areas affected by the insurgency. The country information indicates that Kabul is not free of Taliban activities. Over the last six months Kabul City has experienced suicide and roadside bombings, rocket attacks and a major riot.

The country information before the Tribunal indicates that discrimination and harassment of Hazaras continues in Afghanistan. There has been no improvement in the security situation for Hazaras who are under-represented in the armed forces and the police. Ahmend Rashid



and Professor Maley have advised the Tribunal that Kabul is not necessarily the most secure place, and as a result the Hazaras would be very vulnerable.

On the basis of the country information the Tribunal finds that although the Taliban are no longer in power, the deterioration in the security situation in Afghanistan as a result of the recent upsurge in violence means that there has not been a substantial and durable change in relation to the way Hazaras are treated. On the basis of the country information the Tribunal finds that there remains an absence of effective protection for Hazaras in Afghanistan. Therefore the Tribunal is satisfied that the applicant continues to have a well founded fear of persecution for reason of his ethnicity.

The Tribunal is not satisfied that the circumstances in connection with which the applicant was recognised as a refugee have ceased to exist. Therefore, Article 1C(5) does not apply to him. For the same reasons, the Tribunal is satisfied that the applicant continues to have a well-founded fear of being persecuted in Afghanistan for the purposes of s.36(4) of the Act. Therefore s.36(3) does not apply to him in relation to that country. Further, there is no information before the Tribunal to suggest that the applicant has a right to enter and reside in a “safe third country”. Accordingly, the Tribunal is satisfied that the Applicant is not excluded from Australia’s protection by subsection 36(3) of the Act, in respect of either Afghanistan or any other country.

Having reached this conclusion, it is unnecessary to consider the additional reasons for which the applicant now claims to fear persecution in Afghanistan.

## **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 the applicant 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.

<p>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 <i>Migration Act 1958</i>. Sealing Officer’s I.D. PRAKSA</p>
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