

1211227 [2012] RRTA 759 (12 September 2012)

DECISION RECORD

RRT CASE NUMBER:	1211227
DIAC REFERENCE(S):	CLF2012/121677
COUNTRY OF REFERENCE:	Afghanistan
TRIBUNAL MEMBER:	R Mathlin
DATE:	12 September 2012
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

STATEMENT 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 (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Afghanistan, applied to the Department of Immigration (the Department) for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] June 2012.
3. The delegate refused to grant the visa [in] July 2012, and the applicant applied to the Tribunal for review of that decision.

RELEVANT LAW

4. 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

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 Refugees 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. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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.
11. 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.
12. 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.
13. 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 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.
14. 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. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Complementary protection criterion

15. 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'). 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1), as are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country: s.36(2B) of the Act.

CLAIMS AND EVIDENCE

16. The Tribunal has before it the Department's file CLF2012/121677 relating to the applicant, and the Tribunal file, and has had regard to all information on those files in determining this application, including the country information referred to in the delegate's decision, and other information from a range of sources which is referred to below. The Tribunal was able to make a favourable decision on the review on the basis of this information, and it was therefore not necessary to invite the applicant to appear before the Tribunal at a hearing.
17. The applicant arrived on Christmas Island by boat [in] February 2012. He was interviewed on arrival [in] February 2012. He was interviewed again [in] March 2012. He completed his protection visa application [in] June 2012. He was interviewed about his application by the delegate [in] June 2012. He remains in [immigration detention].
18. The applicant has presented his claims consistently since his arrival in Australia. As noted below, most were accepted by the delegate.
19. The applicant claims to be a national of Afghanistan, born in the village of [Village 1], Jaghatu District, Ghazni Province. He claims to have always resided in that village except for a period of four years from 2007 until 2011, when he unsuccessfully sought asylum in the UK but was given special leave to remain there while he was a minor. He was removed from the UK to Afghanistan in July 2011. He departed again, [one week later], using a false Afghan passport which he claims was taken by the smuggler who brought him to Australia. The applicant has no identity documents. The applicant claims that he is a Shia Hazara. He claims that his father was an informer for the Taliban who was beaten to death by other villagers in 2006. His mother was attacked and injured at the same time, but she has remained in the village since, living with the applicant's uncle, his father's brother. After his father's death the applicant's uncle immediately arranged for him to leave the country. The applicant has one sister who lives in Iran.
20. The applicant returned to the village when he arrived back in Afghanistan and his uncle told him that his life was at risk because the Taliban do not like people who have been educated overseas. His uncle told him about a young man who had been removed from the UK and had been murdered by the Taliban. The applicant also fears that the people in his village will take revenge on him for his father's activities and because the applicant used to carry letters for his father, which probably contained information for the Taliban.

Country information

21. On 7 December 2011 an academic expert on Afghanistan, Professor William Maley, reported “On the Position of the Hazara Minority in Afghanistan”¹. After writing about the “profoundly threatening” and “extremely dangerous” security situation throughout Afghanistan, particularly in the south and east, he quoted official US travel advice for Afghanistan, valid for 1 December 2011, stating that “No part of Afghanistan should be considered immune from violence ... Afghan authorities have a limited ability to maintain order and ensure the security of Afghan citizens and foreign visitors ... The security environment remains *volatile and unpredictable*” (*Travel Warning: Afghanistan* (Washington DC: Bureau of Consular Affairs, United States Department of State, 2011) [emphasis added]. As to the situation of Hazaras, he wrote:

6. Hazaras have been subject to discrimination and persecution at least since the ‘Hazara Wars’ of 1891-1893, and there is no reason to believe that the underlying factors (both ethnic and sectarian) fuelling hostility towards Hazaras have dissipated. Under the Taliban, however, discrimination against Hazaras took a murderous form. When the Taliban occupied Mazar-e Sharif on 8 August 1998, they embarked on a three-day massacre ...

...

7. The overthrow of the Taliban regime and its replacement by the Interim Administration under Hamid Karzai put an end to official discrimination against Hazaras, but did nothing to secure them against Taliban attack in the vast tracts of Afghanistan where the Kabul Government is ineffectual. For example, on 6 January 2004, there was a grisly massacre of Hazara travellers near the border between Uruzgan and Helmand, leading a provincial official, Mohammed Wali Alizai, to suggest that the object of the assailants was ‘to stir up ethnic tensions’ (*Associated Press*, 7 January 2004.) A much more recent example came in late June 2010. As reported by Reuters newsagency (‘Police find 11 beheaded bodies in Afghan south’, 25 June 2010):

Afghanistan, June 25 (Reuters) - The bodies of 11 men, their heads cut off and placed next to them, have been found in a violent southern province of Afghanistan, a senior police official said on Friday. A police patrol discovered the bodies on Thursday in the Khas Uruzgan district of Uruzgan province, north of the Taliban stronghold of Kandahar, said police official Mohammad Gulab Wardak. “This was the work of the Taliban. *They beheaded these men because they were ethnic Hazaras and Shi’ite Muslims,*” he said. [emphasis added].

...

... Unfortunately, the limited capacity of the Afghan state means that ‘constitutional and legal reform to protect minorities’ rights’ is meaningless for most Afghans, the Taliban remain active, and the optimistic reference to ‘durable security’ is contradicted by the most recent Australian travel advice noted earlier, as well as by the June 2010 massacre.

....

10. Many asylum seekers in Australia have come from the province of Ghazni. The Taliban are now extremely active in large parts of Ghazni. As early as 20 May 2003,

¹ William Maley “On the position of the Hazara Minority in Afghanistan”, 7 December 2011.

it was described by Todd Pitman in an Associated Press despatch as ‘a hotbed of suspected Taliban activity southwest of Kabul’. The former governor was assassinated in 2006, and an analysis in April 2006 concluded that ‘A fierce Taleban-led insurgency in recent months has placed Ghazni, which lies just 135 km south of Kabul, among the most volatile provinces in southern Afghanistan’: Borhan Younus, *Taleban Call the Shots in Ghazni* (Kabul: Afghan Recovery Report no.213, Institute for War and Peace Reporting, 25 April 2006). The situation since then has become even worse (see Christoph Reuter and Borhan Younus, ‘The Return of the Taliban in Andar District: Ghazni’, in Antonio Giustozzi (ed.), *Decoding the New Taliban: Insights from the Afghan Field* (London: Hurst & Co., 2009) pp.101-118). In June 2011, the International Crisis Group reported that the province of Ghazni ‘has slipped from being one of the most stable to the third most volatile after Kandahar and Helmand’ (*The Insurgency in Afghanistan’s Heartland* (Kabul and Brussels; asia Report no.207, International Crisis Group, 27 June 2011, p.17). No part of Ghazni can realistically be considered safe for Hazaras, even in districts where they might seem numerically predominant. Most disturbingly, a June 2010 study by the highly-regarded Afghanistan Analysts Network warns of a risk to these areas: ‘The Taleban successfully have infiltrated Northern and Northeastern Afghanistan and destabilised certain areas, mainly in Kunduz province. Now, there are signs that they might attempt to push forward into mainly Hazara-settled areas [in] the central region. The main road into Jaghori, an important Hazara area, has been blocked raising fears of a new economic blockade or even an attack’ (Thomas Ruttig, *A New Taliban Front?* (Kabul: Afghanistan Analysts Network, 18 June 2010)). The Taliban now enjoy what the International Crisis Group (*op.cit.*, p.18) calls ‘near total control’ of Moqer, Qarabagh and Gelan, the three districts that immediately adjoin Jaghori to the east. And on 18 June 2011, there was an explosive outbreak of violence against Hazara villages in the Nawor district of Ghazni, with witnesses testifying to Taliban involvement (see Fabrizio Foschini, *Who cares about the Kuchi-Hazara conflict, nowadays* (Kabul: Afghanistan Analysts Network, 23 June 2011)). Finally, travel for Hazaras remains extremely dangerous, and claims that roads are ‘open’ need to be treated with great caution. On 3 December 2011, I received the following observation from a very highly respected Kabul-based observer: ‘Dozens of Hazaras have been killed or abducted and never heard of while travelling between Ghazni and Jaghuri and also through Wardak province to Behsud and Bamyan. Ghulam Hussain Naseri, a Hazara member of parliament from Behsud, reported on November 10 that 10 Hazaras were forced off vans and buses going to the Hazarajat in Wardak and killed in dreadful manners in front of other travelers during the preceding 10 days’.

11. It is also a mistake to conclude that Kabul is safe for Hazaras. This was tragically demonstrated on 6 December 2011, when a suicide bomber attacked Shiite Afghans, most of them Hazaras, at a place of commemoration in downtown Kabul during the *Ashura* festival that marks the anniversary of the Battle of Karbala in 680 AD. Almost simultaneously, a bomb in Mazar-e Sharif also killed Afghan Shia. The Kabul bomb killed at least 55 people, and the Mazar bomb four more (see Hashmat Baktash and Alex Rodrigues, ‘Two Afghanistan bombings aimed at Shiites kill at least 59 people’, *Los Angeles Times*, 7 December 2011). A claim of responsibility was made by the Pakistani Sunni extremist group *Lashkar-e Jhangvi*, which has a long history of sectarian violence against Shia (see Muhammad Qasim Zaman, ‘Sectarianism in Pakistan: The Radicalization of Shi’i and Sunni Identities’, *Modern Asian Studies*, vol.32, no.3, 1998, pp.689-716). The key point to note, however, is that no one with *any* knowledge of Afghanistan could seriously doubt that Hazara Shia were specifically targeted. *All ‘country information’ that suggests a ‘golden age’ for Hazaras after 2011, or that suggests that Hazara Shia have not suffered persecution for reasons recognised by the 1951 Convention, should be regarded as definitively outdated*

...

19. To assume that Hazaras can expect protection from the agencies of the Afghan state is unrealistic. The generally poor quality of the Afghan National Police, often combined with ingrained antagonism towards Hazaras, means that there is little prospect that the police will be willing or able to protect vulnerable Hazaras even in Kabul. This provides a further reason for extreme caution in drawing the conclusion that Hazaras do not have genuine protection needs.

22. Professor Maley is Professor and Director of the Asia-Pacific College of Diplomacy at the Australian National University. He has published extensively on Afghan politics for over two decades. He was asked to provide an expert opinion on the position of members of the Hazara minority in Afghanistan.

23. In contrast, DFAT advised in March 2012² that while discrimination against Hazaras continued, their challenges were mostly economic (and this was the reason for most migration) and they currently did not face an existential threat or systemic violence. Nonetheless:

Security in Ghazni (a mixed Hazara/Pashtun province) had deteriorated in the past six months. Currently the situation was stable - winter was traditionally a quieter period with less fighting - but violence would likely pick up in the spring. However, this applied across the province. Violence was not noticeably worse in the predominantly Hazara districts (Jaghathu, Nawr, Jaghori, Malistan).

...

11. Travel into and out of most districts, and all three [Hazara dominated] provinces, could still be dangerous in the context of broader security in Afghanistan. But the situation was equally risky for all travellers - there was no clear evidence any ethnic group was a particular target. In all three provinces, individuals associated with or working for the Government and international community were at greater risk of targeting from the insurgency.

24. The International Crisis Group has reported that the Taliban had “made substantial headway in Ghazni between 2008 and early 2011”, with the province slipping from being one of the most stable to the third most volatile (after Kandahar and Helmand). The Taliban is reported to be “the strongest insurgent group in the province with a near total control of Andar, Moquer, Qarabagh, Giro, Gelan and Nawah districts.” As in other provinces, the Taliban reportedly “combines assassination and intimidation to consolidate its hold...particularly targeting local Afghan security forces.”³ Information from UNHCR in December 2010 indicated that the security situation in Jaghathu district in Ghazni province was comparatively stable, although security had been worsening in areas of Ghazni where the Hazara did not constitute a majority or a substantial minority.⁴

² Department of Foreign Affairs and Trade 2012, Afghanistan – Hazara Community Update, 12 March (CISNET [CX283654](#))

³ International Crisis Group 2011, *The Insurgency in Afghanistan's Heartland*, Asia Report N° 207, 27 June, pp. 7, 17-18 & Appendix B (CISLIB Afghanistan [20921](#))

⁴ UNHCR 2010, ‘UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan’, UNHCR Refworld website, 17 December, p. 31
<http://www.unhcr.org/refworld/country,,,AFG,,4d0b55c92,0.html> – Accessed 28 June 2011

25. In July 2010 DFAT provided the following advice from an Afghan Member of Parliament about the situation in Ghazni ⁵:

“...of the 18 districts in Ghazni, the 12 Pashtun districts were not under Government control. Four were safe (the Hazara districts) and the security situation in two others (mixed Pashtun-Hazara districts), including Qarabagh, fluctuated. MPs from unsafe districts had found it difficult to visit their home areas in recent years...

The MP said there had been a recent Taliban attack in Qarabagh District (a mixed area), in which schools and government sites were targeted. The Taliban had burnt down a checkpost, a school and murdered the school principal (a Hazara) as he was travelling from Jaghori to his work in a neighbouring district.

The MP said that in Jaghori, there were two main problems. First, insecurity on the routes to and from Jaghori. This applied to the routes via Qarabagh and Ghilan into Jaghori. The MP indicated a third alternative route existed which was safer than the two main routes but which took several more hours. The MP said that within Jaghori itself the situation was safe but surrounding districts were insecure. .

The MP said there were three main sources of insecurity on the routes in and out of Jaghori: the Taliban; petty thieves; and organised criminals. The latter two categories affected Pashtuns and Hazaras equally. Hazaras faced particular difficulties, however, as compared to Pashtuns, if kidnapped by the Taliban on the road. Pashtuns who were kidnapped could draw on tribal and family networks to help secure their release. Such recourse to Pashtun networks was generally not an option for Hazaras which made securing their release difficult. Hazaras found it difficult to negotiate in such circumstances because they did not have direct communication channels with key figures in the Pashtun community that could influence the insurgents.

The MP said the Taliban in the area also remained anti-Shia. The MP thought that instructions from Mullah Omar and the Taliban leadership not to conduct attacks along sectarian lines were empty political rhetoric. Historical animosities against Hazaras were still in place. The MP said recent evidence of this was a threatening Taliban "letter" which was addressed to the (Hazara) people of Jaghori warning them not to travel on the road from Jaghori via Qarabagh and demanding the local population not to prevent the Taliban's entry into their area (a copy of the letter - in two parts - referred to, as published in 8subh Daily Newspaper, is attached along with our unofficial translation).

The MP said people had lost trust with ISAF and Afghan National Security Forces (ANSF) in the area. The Afghan National Police (ANP) for instance had appeared to have failed in reacting effectively to Taliban activity. The MP said that many Afghans believed that there must be some degree of collusion between the district government and the Taliban in Taliban-dominated areas in order to allow the government to stay in power. The MP personally did not have evidence of this but said that many believed it nonetheless. The MP claimed Hazaras in Ghazni, in contrast to the Pashtun areas of the province, did not possess armed defence forces due to disarmament programs, such as the Disbandment of Illegal Armed Groups (DIAG) initiative, which had been implemented in their communities. The MP estimated the Taliban could capture the Hazara areas of Ghazni relatively quickly, "in one or two hours", if they chose to go on the offensive. The Taliban could then also

⁵ CX246263: AFGHANISTAN: Situation in Ghazni Province - views of Member of Parliament, Australia: Department of Foreign Affairs and Trade (DFAT), 15 July, 2010.

begin to spread its influence more throughout Hazarajat. According to the MP, the ANP in Jaghori were very weak, consisting of only around 70 personnel.

...

The MP said there was also a growing sense of unease among Hazaras about non-Taliban Pashtun elements who were seen as trying to provoke instability in Hazara areas. ..

26. In 2010 the BBC Monitoring Service published a report from an Afghan news source stating that Taliban attacks in Ghazni province had increased, and that the deteriorating security situation in Ghazni had helped the Taliban take control over most districts in that province; the Afghan government was not perceived to have taken any serious measures to improve the security situation in the province in the previous two years.⁶ In 2010 an Afghan television station reported that Ghazni Provincial Council members had indicated that some local government officials were collaborating with the Taliban, that there were no police at security checkpoints, and that central government forces sent to Ghazni could not ensure security in villages.⁷ A report from April 2010, which refers to Jaghatu district and Bahrami Shahid district as separate districts in Ghazni province, indicates that in relation to the security situation in Ghazni, Jaghatu district was at significant risk and Bahrami Shahid district was at high risk.⁸ In February 2010, it was reported that a Taliban sub-commander and another insurgent who had been “responsible for conducting IED attacks and ambushes against Afghan and international troops” had been captured by an Afghan-international security force at Saleh Kheyl village in Jaghatu district in Ghazni province.⁹
27. UNHCR has recently noted that¹⁰:

Marginalized during the Taliban rule, the Hazara community continues to face some degree of discrimination, despite significant efforts by the Government to address historical ethnic tensions. Notwithstanding the comparatively stable security situations in provinces and districts where the Hazara constitute a majority or a substantial minority, such as Jaghatu, Jaghori and Malistan districts in Ghazni province, the security situation in the remainder of the province, including on access routes to and from these districts, has been worsening. Although not able to launch widespread operations in Jaghori, there are some reports of Taliban attacks in the district. Jaghori district is increasingly isolated given that some access routes to and from the district, including large stretches of the strategic Kabul-Kandahar road, are reportedly under Taliban control. There are regular reports of ambushes, robberies, kidnappings and killings by the Taliban and criminal groups along these roads. The Taliban have also intimidated, threatened and killed individuals, including Hazaras,

⁶ CX247496: ‘Afghan paper slams government for ignoring insecurity in southern province’ 2010, BBC Monitoring Service, 10 August, source: Hasht-e Sobh.

⁷ ‘Police in Afghan east province pay off Taliban, do nothing for people’ 2010, BBC Monitoring Service, 5 May, source: Shamshad TV.

⁸ ‘Ghazni’ 2010, Program for Culture & Conflict Studies, US Naval Postgraduate School website, 20 April http://www.nps.edu/programs/ccs/Docs/Executive%20Summaries/Ghazni_Exec_Summary.pdf – Accessed 2 August 2010

⁹ ‘Afghan-International Security Force Searches Compounds in Ghazni Province’ 2010, Afghanistan International Security Assistance Force website, 4 February <http://www.isaf.nato.int/article/isaf-releases/feb.-4-afghan-international-security-force-searches-compounds-in-ghazni-province.html> - Accessed 29 June 2011

¹⁰ The United Nations High Commissioner for Refugees, ‘*Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*’ 17 December 2010, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4d0b55c92&page=search>,

suspected of working for, or being supportive of, the Government and the international military forces. It has also been reported that in the Kajran District of Daykundi province, armed anti-Government groups engage in propaganda against Hazaras and Shia Muslims allegedly on the ground of religious differences.

28. In September 2011 DFAT provided advice on road security in Ghazni Province¹¹

Post provides an overview of travel routes to and within Ghazni, based on discussions with contacts from the province and members of the international community (IC) with a presence there. Detailed information on road routes in Afghanistan is extremely difficult to come by.

According to an Afghan contact with extensive and recent experience in Ghanzi [Ghazni], there are two well-established routes from Kabul to Ghazni. One is short and insecure, via Maidan Wardak. Another via Parwan Road and Bamyan is secure, but long and arduous.

Interlocutors' assessments of routes from Ghanzi [Ghazni] to Jaghori and Malistan varied. Contacts within the international community and Afghans working with international organisations tended to describe the situation in more positive terms than Afghans with political ties to Ghazni. Some international interlocutors based in Ghazni described travel between Ghazni City and Jaghori as 'quite safe', although long, slow and rough. Others (predominately Hazaras) described travel as 'unsafe'. Some vehicles were stopped and harassed, and occupants occasionally abducted or killed. Interlocutors agreed that road travel within Hazara districts of Ghazni - and the broader Hazara 'belt' in the Central Highlands region - was very safe.

Levels of risk on roads in Ghazni depend on the individuals involved. Contacts agreed that people with links to the Afghan Government or IC were targeted, regardless of ethnicity. Carrying documentation which pointed to a connection with the Government was dangerous. According to Hazara contacts, Hazaras tended to receive more scrutiny and were at greater risk of harassment and violence on the roads outside Hazara districts. Other Afghan and IC contacts noted that locals - who had ties to the province and knowledge of the area - were generally able to travel between Ghazni and Hazara districts without incident. They were not aware of targeting of any particular ethnic group on the roads.

International interlocutors noted that attacks from armed opposition groups mostly targeted Afghan officials. They were usually limited to road-side Improvised Explosive Devices (IEDs) with various detonation mechanisms. They were too small to damage most coalition forces' vehicles but could do mortal damage to the vehicles that Afghan officials and citizens travel in. The same contacts described the road security situation in Qarabagh and Nawur as 'reasonable'. They hoped to see improvements and an increased volume of traffic following the completion of construction projects currently underway. They believed the majority of violence around these districts was related more to criminality than the insurgency, focusing on bribes and protection.

A contact in the international community provided the following information regarding routes within Ghazni:

* A short unpaved route to the Nawur and Jaghuri districts passes through the Peeraki area. This is not safe, but the Afghan National Police (ANP) recently established a

¹¹ CX272986 AFGHANISTAN:Road security in Ghazni, Australia: Department of Foreign Affairs and Trade (DFAT), 21 September, 2011.

checkpoint in Muhmand Kotal to secure the road. This did not necessarily guarantee the route's security, but the ANP had reported improvements in security in 2011.

* A long paved route to Jaghuri and Malistan passes the Zardaloo area of Qarabagh district. ANP has established checkpoints on this route, but movement of anti-government elements (AGE) does occur in this area. AGE have blocked the road several times for extended periods, warning locals not to work with GIROA. AGE have the ability to conduct direct attacks or plant IEDs on this route.

Both roads are used frequently by locals, but during winter passage is severely hindered by snowfalls.

State protection

29. Numerous sources cited in the UK Home Office Border Agency Country of Origin report (UK COI Report) on Afghanistan, 11 October 2011 address the availability of state protection¹². At 10.17 the UK COI Report quoted the International Crisis Group's report *Afghanistan: Exit vs Engagement*, Asia Briefing N°115, 28 November 2010, stating:

Created, financed and overseen by the U.S. and its NATO allies, the ANP is corrupt, brutal and predatory. Although police reform is receiving more attention and resources than ever before, such increased resources are still to be matched by significant improvements in police effectiveness and public confidence. The poorly and hastily trained rank and file are largely illiterate, many are drug addicts, while officers, many appointed and promoted on political rather than professional grounds, are known more for their abuse of power, particularly at the local level.

Despite pay increases, attrition rates remain high as the poorly armed and poorly trained police is used more as an auxiliary security force than an enforcer of law. Resorting to bribery, illegal tax collection, drug dealing and even murder, the ANP is feared and mistrusted by Afghan citizens, not only undermining the legitimacy of the state but also that of the international community, particularly the U.S., responsible for bankrolling and training it.

30. At 10.05 it cited Jane's Security Country Risk Assessment report, 21 April 2011, stating that:

The police in Afghanistan have never had an effective national enforcement capacity and have only been able to fully represent the authority of central government within the main cities. Their effectiveness in rural areas (over 90 per cent of the country) has depended entirely on co-operation from local leaders, including religious figures...

The ANP does not function as a united, professional and disciplined law enforcement entity and is unable to preserve law and order across the majority of the country. Outside Kabul the police depend on considerable assistance from foreign organisations and nations, supported by military force. Former UF fighters without any police training who remain loyal to their former military commanders and/or tribal entities constitute the majority of personnel. Illiteracy and an ignorance of the law prevents some of them from performing even basic duties. Like several other tiers of civil service, many police personnel are not paid regularly and their stations lack even basic equipment such as radios/telephones, pens and paper.

¹² <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/coi/afghanistan/report-1110.pdf?view=Binary>

31. The United States Department of State *Country Report on Human Rights Practices on Afghanistan* for 2010 noted:

The law provides for an independent judiciary, but in practice the judiciary often was underfunded, understaffed, and subject to political influence and pervasive corruption. Bribery, corruption, and pressure from public officials, tribal leaders, families of accused persons, and individuals associated with the insurgency threatened judicial impartiality.

32. Freedom House¹³ similarly reports that the judicial system operates haphazardly, and justice in many places is administered on the basis of a mixture of legal codes by inadequately trained judges. Corruption in the judiciary is extensive, and judges and lawyers are often subject to threats from local leaders or armed groups.

Relocation

33. UNHCR advised as follows on the prospects for relocation within Afghanistan¹⁴:

...The traditional extended family and community structures of Afghan society continue to constitute the main protection and coping mechanism. Afghans rely on these structures and links for their safety and economic survival, including access to accommodation and an adequate level of subsistence. Furthermore, the protection provided by families and tribes is limited to areas where family or community links exist. As documented in studies on urban vulnerability, the household and the extended family remain the basic social network in Afghanistan and there are indications that existing traditional systems of sharing and redistribution are less effective in the extended urban family. It is, therefore, unlikely that Afghans will be able to lead a relatively normal life without undue hardship upon relocation to an area to which he or she is not fully protected by his/her family, community or tribe, including in urban areas of the country... In addition, relocation may also be unavailable for ethnic groups to areas where they would constitute a minority.

FINDINGS AND REASONS

34. The applicant claims to be a national of Afghanistan, born in [Village 1], Jaghatu District, Ghazni Province. He claims to have always resided in that village except for a period of four years from 2007 until 2011, when he sought asylum in the UK and was given special leave to remain there while he was a minor. He was removed from the UK to Afghanistan in July 2011. He departed again, this time for Australia, one week later. The applicant has no identity documents. The delegate accepted that the applicant is a national of Afghanistan and there is no information before me indicating that that finding should be disturbed. Similarly, I accept, as did the delegate, that the applicant is a Shia Hazara from [Village 1], Jaghatu district in Ghazni Province.
35. The applicant claimed that he faced harm from the population of his village as his father was an informant for the Taliban who was beaten to death by other villagers in 2006. He also claimed to fear harm from the Taliban as a Hazara Shia, and as a returnee from the UK. The delegate found that these claims were plausible.

¹³ *Freedom in the World 2011*, Afghanistan, 16 May 2011

¹⁴ The United Nations High Commissioner for Refugees, 'Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan' 17 December 2010, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4d0b55c92&page=search>,

36. The delegate did not accept that the applicant had a well-founded fear of persecution in relation to his father's activities, because his uncle and mother had remained in the village after his father's death and had not experienced any further harm. The delegate considered that there was no real chance that the villagers would seek further retribution against the applicant.
37. The delegate found, on the basis of country information, that due to a strong Taliban presence on roads in Ghazni, their history of persecuting Hazaras, the vulnerability of Hazaras in the region, and the applicant's increased vulnerability as a returnee, there was an objective basis to his fear of persecution in Jaghatu. The delegate also found, on the basis of country information, that Ghazni Province is insecure, and that the applicant would be unlikely to receive adequate state protection against harm from the Taliban.
38. The delegate found, however, that the applicant could avoid the harm he fears in Jaghatu by relocating to Kabul where there is a cohesive Hazara community, with some information suggesting that new arrivals could integrate easily. The delegate found that while there had been some security incidents in Kabul apparently targeting Shias, there was no systematic persecution of Shias in Kabul. The delegate considered that given the applicant's level of education and his demonstrated ability to live successfully in the UK for four years, relocation to Kabul was reasonable and practicable for the applicant.
39. Based on my assessment of the country information, including that taken into account by the delegate, I am satisfied that the applicant has a well-founded fear of persecution, as a Shia Hazara, in Ghazni Province. I find that Hazaras, as a distinct ethnic group, constitute a particular social group for the purposes of the Refugees Convention. I find that Hazaras may also face persecution for reason of their religion, Shia. I have considered the information set out above stating that there is currently no existential threat to Hazaras, that they are not specifically targeted by the Taliban or other groups, including on the roads, which are dangerous for everyone. However, I consider that the weight of the independent evidence indicates that Hazaras are at an increased and differential risk of harm because of their ethnicity and religion. Professor Maley states that there is no reason to believe that the ethnic and sectarian factors underlying past hostility towards Hazaras have dissipated, and cites numerous recent instances of apparently targeted killings of Hazaras, including suicide bombings in Kabul and Mazar-e-Sharif in December 2011 targeting Shia religious events. Professor Maley's report is consistent with numerous other reports before the Tribunal. The MP interviewed by DFAT in July 2010¹⁵ observed that Taliban in Ghazni remained anti-Shia and considered that instructions from the Taliban leadership to stop sectarian attacks were empty rhetoric. Reports of threatening night letters addressed specifically to the Hazara community further support the view that they are targeted in this area,¹⁶ as do reports of Hazaras being pulled out of vehicles travelling in Qarabagh, and other areas¹⁷, and the UNHCR Guidelines, 2010, which note a worsening security situation in parts of Ghazni, notably those parts not dominated by Hazaras, and increasing attacks by Taliban including against Hazaras.¹⁸ Given this information, I accept that Hazaras continue to face an increased risk of harm directed at them for Convention reasons. While there are reports which suggest

¹⁵ CX246263: AFGHANISTAN: Situation in Ghazni Province - views of Member of Parliament, Australia: Department of Foreign Affairs and Trade (DFAT), 15 July, 2010.

¹⁶ CX246263: AFGHANISTAN: Situation in Ghazni Province - views of Member of Parliament, Australia: Department of Foreign Affairs and Trade (DFAT), 15 July, 2010; Ruttig, supra.

¹⁷ CX246263: AFGHANISTAN: Situation in Ghazni Province - views of Member of Parliament, Australia: Department of Foreign Affairs and Trade (DFAT), 15 July, 2010

¹⁸ UNHCR Guidelines

that the applicant's home district of Jaghatu, one of several Hazara dominated districts, is one of the safest districts of Ghazni Province, there are reports from 2010 indicating that the Taliban has a presence there, and that there were significant security risks. There is more recent information indicating that the security situation in Ghazni is deteriorating, that numerous neighbouring districts are under Taliban control and that there are serious security concerns about the safety of road access into the province and for movement generally. I accept, based on the evidence referred to above, that Hazaras are at particular risk of harm while travelling as they may be readily identified and appear to be at increased risk of being targeted for abuses, including being killed, at Taliban roadblocks. Based on the information referred to above I am satisfied that in and around Ghazni Province, Taliban continue to target Hazaras for reason of their ethnicity and/or religion. Based on the weight of independent evidence I find that there is a real chance that a Hazara returning to Ghazni would be targeted by the Taliban for the Convention reasons of his or her ethnicity (membership of a particular social group) and/or religion, and that there is a real chance that they would be subjected to serious harm, including serious physical harm, that would amount to persecution.

40. I find that the applicant would not be able to access effective state protection against harm from the Taliban or anyone else. Professor Maley's view of the ineffectiveness of the Afghan state authorities is supported by numerous sources cited above, including the UK Home Office UK COI Report, Human Rights Watch¹⁹, and the United States Department of State. On the basis of this information I find that the applicant could not avail himself of state protection in relation to harm he might face in Ghazni or anywhere in Afghanistan.
41. I have considered whether the applicant could reasonably relocate to another area of Afghanistan, although I consider that Kabul is the only realistic option. The delegate relied on information indicating that there is a large Hazara community in Kabul, where the security situation is relatively stable, to find that the applicant could do so. The UNHCR Guidelines²⁰ referred to above state that traditional extended family and community structures of Afghan society constitute the main protection and coping mechanism; that Afghans rely on these structures; and that it is unlikely that Afghans would be able to lead a relatively normal life without undue hardship upon relocation to an area where he or she is not fully protected by his/her family, community or tribe, including in urban areas of the country. UNHCR has also advised that for some people, notably single males, subsistence without family and community support might be possible. However, based on the available information, I find that relocation would not be a reasonable option for the applicant, given his particular circumstances. I accept that the applicant has no family ties or support in Kabul, as his only relatives in Afghanistan reside in his village. As I accept that the applicant's father was killed as a Taliban informer in 2006 I accept that there is a real chance that this would be known to members of the Hazara community in Kabul, and in particular to anyone from the applicant's village or social network, who otherwise might have been in a position to provide support and assistance to him. In these circumstances, I am satisfied that the applicant would in all likelihood not be able to obtain assistance from any network of Hazaras in Kabul, and that he might even be at risk from such persons if they were aware of his family history. In these circumstances, despite his education and language skills which might otherwise enable him to

¹⁹ Human Rights Watch "Just Don't Call It a Militia" Impunity, Militias, and the "Afghan Local Police" 12 September 2011, <http://www.hrw.org/node/101507>.

²⁰ The United Nations High Commissioner for Refugees, 'Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan' 17 December 2010, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4d0b55c92&page=search>,

resettle in Kabul, I find that the applicant's personal circumstances mean that relocation to Kabul is not a reasonable or practicable option for him. I note that a report by Amnesty International describes conditions for displaced persons, including returning refugees, in Kabul as unrelentingly miserable²¹.

42. In the light of the above information, I find that as a person with no family in Kabul, and a family history that might place him at risk of harm from other Hazaras or at least deprive him of social support that might otherwise be available, the applicant could not reasonably be expected to relocate to an area of Afghanistan where he has never lived and has no connections. As I am satisfied that the applicant has a well-founded fear of persecution for Convention reasons in Jaghatu district of Ghazni province where he previously resided, I am satisfied that he meets the requirements of the Refugees Convention.

CONCLUSION

43. 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

44. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s36(2)(a) of the Migration Act.

²¹ Fleeing war, finding misery, The plight of the internally displaced in Afghanistan, Amnesty International, February 2012, http://www.amnesty.org.uk/uploads/documents/doc_22361.pdf