

**071329032 [2007] RRTA 82 (23 April 2007)**

**DECISION RECORD**

**RRT CASE NUMBER: 071329032**

**DIAC REFERENCE(S): CLF1999/18672**

**COUNTRY OF REFERENCE: Afghanistan**

**TRIBUNAL MEMBER: Mr S Norman**

**DATE DECISION SIGNED: 23 April 2007**

**PLACE OF DECISION: Sydney**

**DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2) of the Migration Act, being 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 Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of Afghanistan, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The applicant was granted a Subclass 785 (Temporary Protection) visa on the basis that he was assessed to be a person to whom Australia has protection obligations under the Refugees Convention. The applicant applied for a further Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights. The applicant applied to the Refugee Review Tribunal for a review of that decision.

### **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 although some statutory qualifications enacted since then may also be relevant.

Section 36(2) of the Act relevantly provided that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under 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).

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 generally speaking, has protection obligations to 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.

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

Sections 91R and 91S of the Act 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 and apply to all protection 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.

## **Convention ‘cessation’ – Article 1C**

The definition of a refugee in Article 1A of the Convention needs to be read in the context of the succeeding sections of Article 1, including section C, which sets out the circumstances in which the Convention ceases to apply to a person who has previously been recognised as a refugee under Article 1A.

Paragraphs (5) and (6) of Article 1C provide for cessation of refugee status due to changed circumstances in the refugee’s country. Article 1C(5) applies to nationals who, because the circumstances in connection with which they were recognised as refugees have ceased to exist, can no longer continue to refuse to avail themselves of the protection of their country of nationality. Article 1C(6) applies to stateless refugees who, because the circumstances in connection with which they were recognised as refugees have ceased to exist, are able to return to the country of their former habitual residence.

Thus, Articles 1A(2) and 1C(5) and (6) turn upon the same basic notion: protection is afforded to persons in relevant need, that is, persons who have a well-founded fear of being persecuted, for Convention reasons, in the country or countries in respect of which they have a right or ability to access: *NBGM v MIMA* (2006) 231 ALR 380 at [44] citing *NBGM v MIMIA* (2004) 84 ALD 40 per Emmett J.

If a non-citizen, before entering Australia, suffered persecution or had a well-founded fear of it in their country, unless there have been real and ameliorative changes that are unlikely to be reversed in the reasonably foreseeable future, then the person will probably continue to be one to whom Australia has protection obligations: *MIMIA v QAAH of 2004* (2006) 231 ALR 340 at [39]; see also *Chan* at 391, 399 and 406.

## **CLAIMS AND EVIDENCE**

The Tribunal has before it the Department’s file relating to the applicant. The Tribunal also has had regard to other material available to it from a range of sources.

The Tribunal has before it the (now) Department of Immigration and Citizenship (DIAC) file and other material from a range of sources. The Applicant gave oral evidence to the Tribunal.

The Applicant, an Afghan male, arrived in Australia as an unauthorized boat arrival without a travel document. The Applicant's circumstances were set out initially in an interview with an Immigration officer, conducted using a Dari interpreter.

### *Interview with an Immigration officer*

The Applicant stated that he is from Ghazni and had left Afghanistan a few months earlier, travelling via Country A, City A and Country B.

Asked why he had left Afghanistan, the Applicant replied because there was a war. Every six months the Taliban would come and take some of the stock. They had come to his house several times when he was not there, most recently a few months before he left Afghanistan. They would take some of the sheep and more than half of the wheat and oil. There was no other reason. The Applicant stated that he did not wish to return because the Taliban are cruel and take away the youngsters. They do this because he is Hazara; they come and cut you and kill you and cut off your ears; they had not done this to him yet.

### *Applicant's application form and accompanying statement*

The Applicant's claims were elaborated in his original protection visa application form and an accompanying statement.

The Applicant stated that he was born in the Ghazni province and that "I am Hazara and a Shi'a". He had worked in a neighbour's business until he left Afghanistan. The Applicant said that his mother, sisters and two youngest brothers all left for Bamyan province after the Taliban came and took over their village because the Taliban would come into Shi'a houses and attack young women. He had not had any contact with his mother and siblings since the mid 1990's.

The Applicant stated that when they heard that the Taliban were coming to their village, he and the other young men (usually about ten to fifteen at a time) would hide in the mountains. They were afraid of the Taliban because they say that Hazaras are not Afghans and that they have to accept their religion or leave. The Taliban would come to their village about every few months or so and would stay there for about a month or sometimes longer.

The Applicant stated that on one occasion several years ago the Taliban beat his father in the mosque because as a Shia he prayed a different way to the Taliban, and his father was injured. The Taliban believed that it was allowed to kill Shi'a. The Taliban looted the houses and foodstuffs; they would take sheep and cattle, some of the flock.

The Applicant stated that he fears that if he returns to Afghanistan he will be arrested and killed by the Taliban because he is Hazara and Shi'a.

### *Interview with (now) DIAC delegate*

The Applicant was interviewed by the DIAC delegate. When the delegate put to the Applicant that his appearance did not appear consistent with him being an Hazara, the Applicant responded that he was "Sayed", which he described as a high level group of Hazaras, commanding respect in their community. He said that as a member of this elite group of Hazara he would be more likely to be targeted by the Taliban than other Hazara. He made no claim that Sayeds are persecuted by Hazaras.

The delegate accepted the Applicant's claims and, having regard to independent country information found that his fear of persecution for a Convention reason was well-founded. The Applicant received a temporary protection visa (TPV).

### *Further application for protection visa*

The Applicant lodged a further application for a protection visa (866) together with a copy of the earlier statement.

The Department wrote to the Applicant, noting that he is the holder of a 785 TPV who had held that visa and who has lodged an application for a further protection visa. He was invited to submit to the Department any additional information relevant to his application.

The Applicant submitted to the Department an "Afghanistan country profile" prepared by an Immigration Legal Service organization, together with a signed statement by the Applicant.

The Applicant stated that since he had departed, his entire family has left Afghanistan. His mother is in Country C but he does not know the whereabouts of the rest of his family. He therefore has no family in Afghanistan upon whom he can rely for support.

The Applicant stated that he understands that “the Taliban and Al-Qaeida” are still operating in his area: they operate at night-time, enter houses and take valuable items and food and other necessities, and if a person is uncooperative they will hit or stab him. If he returns to Ghazni, he will be subjected to this sort of pressure. The Taliban will know he fled to Australia to escape them before and will seek to extract money or valuables from him to finance their operations. The Applicant stated that his father had been involved in Shi’a religious activities which had made him of adverse interest to the Taliban, and if the Applicant returns the Taliban will sooner or later hear of his return and he will also be of adverse interest to them because of his father’s activities.

The Applicant stated that since the lessening of the activities of the Taliban, other political parties have made a comeback in his area, the principal one being Wahdat. Its two factions, Khalili and Akbari, are always fighting and will seek to enlist people such as himself to fight for them. Also, because he has been overseas they will expect him to have a lot of money and would seek large donations from him, demands he would be unable to meet. They would therefore target him and if he refuses what they ask will view him as a traitor and kill him. Before he left Afghanistan, his father used to pay the Wahdat money to avoid being forcibly enlisted but should he now return he would be forced to help Wahdat. He does not have any money to pay the Wahdat to prevent being enlisted and he will not fight on their behalf, and consequently they will view the Applicant as their opponent and will persecute him; he fears he may be injured or tortured or even killed.

The Applicant stated that even if he relocates to another area of Afghanistan, he will not have any family to assist him and will be at the mercy of the remnant Taliban / Al-Qaeida and/or the other political parties, none of which he wishes to get involved with.

The Applicant was subsequently invited by the delegate to a further interview. He was also provided with country information summarising recent changes in Afghanistan (apparently the DIAC document “Country Information Report, Events in the Islamic Transitional Government of Afghanistan”).

At the interview the Applicant provided additional information and/or claims. The Applicant stated that according to media reports the Taliban are still a force in his area and different Hazara and Pashtun groups are involved in fighting. Hazara groups are also fighting among themselves. The Applicant stated that he has an ID card or pass issued by the Wahdat party and believes he will be killed either by the Taliban because of his past links with the Wahdat or by Wahdat if he refuses to fight for them. The Applicant stated that the governor of Ghazni province, Qari Baba, was the same as during the Taliban and his attitude is still the same and Hazaras will continue to be mistreated under his rule.

The Applicant stated that he had no direct contact with Afghanistan and had last heard from his family when he had a brief telephone conversation with his mother about a year earlier, when she was in Country C with his siblings and had mentioned that his father had also left Afghanistan.

In his decision record, on the basis of country information the delegate did not accept that race and religion provided valid reasons or fear of harm by Hazara Shi’as. The delegate also noted that there was no evidence that the Applicant was ever affiliated with Wahdat and that this claim

had only been mentioned at interview. The delegate had been unable to find any reports about Taliban or Al-Qaeda operations in the Applicant's district since the fall of the Taliban regime. The delegate noted that Qari Baba is no longer governor of Ghazni. The delegate cited specific information about the situation in the Applicant's district. The delegate did not accept that the Applicant would face persecution from Hazara groups, including Wahdat, on return to Afghanistan.

### *Review application*

In brief comments accompanying his review application, the Applicant stated he will be at risk of harm in Afghanistan because he is Hazara and because of the political and cultural situation in Afghanistan.

### *Tribunal hearing*

The Tribunal explored with the Applicant at a hearing his experiences and concerns.

The Applicant confirmed that he come from the northern part of the Qarabagh district of Ghazni province.

Asked about his concerns, the Applicant stated that firstly, there are still all Pashtun-speaking Afghans and former Taliban people in his area. Secondly, his father had problems with their own Hazara people because the Applicant used to have a Wahdat ID card and because of this he had to pay money. Asked what he feared may actually happen to him now if he returns to Afghanistan, the Applicant replied that he would certainly be killed "by the same group that are looking for me". The Tribunal asked the Applicant who is looking for him now and why. The Applicant stated that these people were from Wahdat; his father had borrowed some money from them because of the Applicant's trip, so on return they would want that money repaid. The Applicant did not know the names of those from whom his father had borrowed the money but was sure they were persons with positions in the Wahdat party. The Tribunal asked the Applicant if people seeking repayment of this money was his main concern about return. The Applicant replied that there are other problems as well. In particular, because he is a Sayed and there is a problem for Sayeds because others accuse them of having committed treason in Afshar and so Sayeds were persecuted and that is why his father (a local religious leader) had left Afghanistan. Asked why he had not made this claim previously, the Applicant stated that it was because these problems had occurred since the Taliban, that Sayeds were harmed and persecuted in his area. The Tribunal noted that this claim had not been mentioned at all in his previous statement or interview, both of which were after the fall of the Taliban. The Applicant said he had discussed a number of matters with his agent but did not know why it had not been written.

The Tribunal then asked the Applicant what had happened and when regarding persecution of Sayeds in his area. The Applicant stated that the incident of Afshar had happened previous to the Taliban coming and during the Taliban rule the Hazara people did not have the opportunity of questioning the Sayeds about what happened then, when Sayeds were said to have sold the bunkers. Pressed again as to what specific persecution of Sayeds there had been in his district and when, the Applicant stated that they have persecuted the Sayeds at some places, they have totally ransacked their homes, confiscated everything and killed them. The Tribunal noted that it had seen no reports of this and again asked the Applicant exactly where and when this had occurred. The Applicant stated that apparently this had taken place in his area late last year but this news does not come out but is only known among Hazaras themselves. Published books claim that there are no real Sayeds in Afghanistan. Pressed further, the Applicant said he did not know

exactly when this had happened but it was after Afshar and a particular Sayed elder had left the Wahdat party and had been branded a traitor. The Applicant said that there are no Sayeds in the Wahdat at present and repeated that in recent times they have been subjected to a lot of persecution and harassment.

The Applicant clarified that he had not had any recent direct contact with his home area. His last news had been from his mother in Country C, when she told him that his father had left Afghanistan because he had borrowed money that he had not been able to repay to people, and also about the issues of Sayeds and people persistently hassling Sayeds. The Tribunal confirmed with the Applicant that his information about the treatment of Sayeds in his area was based on what his mother had told him.

Asked if there was anything else of significance in relation to his claims or concerns about return which he had not mentioned at today's hearing, the Applicant stated that in his area as well as these hassles, there are lots of Taliban people still; there, bombings go on day and night. The Tribunal observed that it was not aware of reports of Taliban bombing or attacks on a daily basis in Qarabagh. The Applicant replied that all the news and media talk about it every day, there is lots of fighting going on in Ghazni between the Taliban and the government and American forces as well as among Hazaras themselves.

The Tribunal explored with the Applicant the significance of the Wahdat 'ID' card to which he had previously referred. The Applicant stated that he did not himself have any direct association with the Wahdat in the past. The Applicant then confirmed that he had not been a Wahdat member; his father had just paid money for the ID card so that the Applicant could travel around the area controlled by the Wahdat without trouble. This was in the time before the Taliban came to his area. The Applicant stated that because he had left Afghanistan, his father was no longer paying the Wahdat money each year to renew his ID card, so the Wahdat would be angry with him.

Referring to the Applicant's original claims in relation to feared persecution by the Taliban authorities, the Tribunal put to the Applicant that the Taliban regime had fallen from power in late 2001 and that although Taliban remnants remain, independent country information indicated that the Taliban are no longer in control of Afghanistan (or of his province or district) and there was no evidence that these remnants are forcing Hazaras to fight for them or are targeting Hazaras and Shias in Ghazni. Non-government organisations were cited in the Danish Immigration Service's report of March 2003 as stating that Hazaras are not persecuted in Afghanistan now due to their ethnicity or religion.

The Tribunal also put to the Applicant material concerning the situation in relation to Hazaras and Pashtuns in Qarabagh district and the degree of conflict between groups, including Wahdat. The Applicant stated that those same anti Hazara and anti Shia people still hold power. The Applicant stated that even President Kharzai had previously been with the Taliban although he had left Afghanistan because of difficulties with them. The Applicant asserted that the Pashtun people are all Taliban and anti-Hazara. He had heard news reports that Hazaras had been beheaded in his area and that Taliban remnants are fighting American forces there. The Tribunal noted that reports (including one of those submitted by the Applicant) stated that the Taliban remnants are targeting aid workers, officials and government forces, not the Hazara people. The one specific attack on Hazaras had been in another province. The Applicant stated that traditionally there had been fighting between Wahdat and the Harakat prior to the Taliban, and this would continue.



The Tribunal also put to the Applicant material concerning Sayeds in Afghanistan, indicating that they have a respected and privileged position in Hazara communities. That individual Sayeds may have been regarded as traitors, or that opinions hostile to Sayeds had been expressed, did not of itself lead to any necessary conclusions about persecution. The Tribunal also referred to specific advice about Sayeds in Qarabagh provided by the UNHCR as recently as October 2003. The Applicant stated that it is true that in the past Sayeds held a position of respect but in recent years, and especially after the Afshar incident, a lot of people say that Sayeds are not true Sayeds, not true descendants of Mohammad. Back then they did burn some Sayed houses over there. However, the Applicant was unable to say exactly where this had occurred, but it had been at the time of the Afshar incident when some commanders had sold out, and some of them were Sayeds and some were executed. He thought this had been in the early 1990s.

The Tribunal noted that the Applicant had previously said that the governor of Ghazni was the same as during the Taliban, Qari Baba, and that he would continue to mistreat Hazaras. The Tribunal put to the Applicant that since early 2002 the governor of Ghazni has been Al Haj Assadullah Khalid, who had fought against the Taliban and is not regarded as anti Hazara but had brought a more professional approach to administration. Nor did the evidence suggest that Hazaras are now being persecuted in Ghazni province.

The Tribunal provided to the Applicant a number of summaries and extracts of country material for his information and, if he wished, he could prepare a submission and comment:

- UNHCR advice of 22 October 2003, *Request of information on Qarabagh political & military activities*
- UNHCR advice of 26 October 2003, *Request of information on Sayyeds in Qarabagh district*).
- DFAT cable of 6 August 2003, in *Country Information Report 108/03*, CISNET CX83438;
- Bernt Glatzner, "Is Afghanistan on the brink of ethnic and tribal disintegration" in Maley, William, editor, *Fundamentalism reborn?*, New York University Press, New York, 1998, pp.171 (extract);
- Adamec, Ludwig W. 1997, *Historical Dictionary of Afghanistan*, Second Edition, The Scarecrow Press Inc, London, p.278 (definition of Sayyid);
- advice provided to RRT, 29 May 2001 by Dr. Nour Ali (extract); advice provided to RRT, 8 May 2001, Dr William Maley (extract);
- Kopecky, Lucas-Michael, "The Imami Sayyed of the Hazarajat: The Maintenance of their Elite Position", in *Folk*, Vol. 24, 1982, at p. 91;
- Summaries prepared by the Tribunal (with citations) concerning:
  - *General situation in Afghanistan*
  - *Situation of Hazaras*
  - *Hezb-e-Wahdat*

The Applicant also submitted at hearing copies of some recent articles about Afghanistan.

### *Post-hearing*

The Applicant provided further submissions and comment in a statement, together with copies of some news items.

The Applicant stated that in Ghazni the Taliban still has power over the people and attack the Hazara people. He stated that there are many recent examples of the Taliban persecuting Hazaras in his area. He referred specifically to media reports that the Taliban in Ghazni slaughtered 13 people travelling on a bus simply because they were Hazara. A UNHCR field officer had been killed by the Taliban in Ghazni.

The Applicant stated that he fears that if he returns he will be discriminated because he is Hazara and Shia; the Taliban discriminate against Sayeds because they are Hazara and Shia. The Hazara and Wahdat also discriminate against Sayeds because in the 1990s Sayeds participated in a massacre in Afshar in west Kabul. Since then, Sayeds in Ghazni are no longer respected but are discriminated against by everyone. The Taliban come to their houses at night and destroy property and steal things. Wahdat commanders make the Sayed people in Ghazni pay bribes to leave them alone. He fears that if he returns, if he does not pay the Wahdat or fight for them he will be tortured or killed.

The Applicant stated that in his area there are a few Wahdat commanders. They knew his father who used to pay them money to ensure that he was not injured. If he returns they will torture or kill him if he refuses to fight for them.

The news items submitted included reports of attacks attributed to the Taliban, including on local officials, foreign aid workers and government and international forces. These included, but were not confined to:

- An internet report dated 8 January 2004, stating that twelve Hazaras had been killed in an ambush in Helmand province “by unknown armed men”, attributed to Taliban militants.
- An *Associated Press* report dated 19 February 2004 referring to Taliban activity in Zabul province in southern Afghanistan.
- *The Guardian* report of 7 January 2004 concerning a bomb explosion in Kandahar attributed to the Taliban and referring to insecurity in Pashtun areas.
- An internet report dated 17 November 2003 concerning the murder of a UNHCR field officer in Ghazni by two attackers who were arrested and identified as Taliban supporters. The article referred to other attacks on foreign aid workers and their Afghan employees.
- An internet report dated 18 September 2003 reporting a cart bomb attack directed against a senior police officer in Ghazni and the arrest of four suspected Taliban. The item also reported that Taliban remnants are targeting aid agencies as well as officials and government forces.

## Background

### General situation in Afghanistan

The recent history of Afghanistan has included over twenty years of civil, political and inter-ethnic violence; repressive rule by communist governments, regional warlords and the Islamic fundamentalist group the Taliban; a period of virtual lawlessness under the Mujahidin; widespread population displacement; and severe drought. These factors have undermined or destroyed many of the civil, legal and administrative institutions in the country, leaving it with little capacity for effective central government. In October 2001 the USA and its allies attacked Taliban forces in Afghanistan who were harbouring Osama bin Laden and members of his terrorist group al-Qaeda, said to be responsible for the 11 September attacks on New York. By December, the main Taliban forces had been substantially defeated.

The US State Department's *Country Reports on Human Rights Practices for 2002, Afghanistan*, provides the following summary:

Afghanistan has experienced civil war and political instability for 23 years. The arrival of Operation Enduring Freedom (OEF) forces and the collapse of the Taliban in 2001 helped to begin to bring an end the decades-long pattern of serious human rights abuses. There was no functioning central government from 1996 until December 22, 2001, when the Afghan Interim Administration (AIA) took office. On December 5, 2001, a U.N.-sponsored Afghan peace conference in Bonn, Germany, approved a broad agreement for the establishment of transitional mechanisms, including a 6-month AIA to govern the country. There was a peaceful transfer of power from the AIA to the Transitional Islamic State of Afghanistan (TISA). As mandated by the Bonn Agreement, the AIA/TISA formed the Judicial Commission, the Human Rights Commission, and a Drafting Committee of the Constitutional Commission to begin the process of reform in these areas. A Civil Service Commission has yet to be named. In June the Emergency Loya Jirga, a gathering of Afghan representatives from throughout the country, elected Hamid Karzai as President of the Transitional Islamic State of Afghanistan. Karzai subsequently formed a cabinet including two female members and broad ethnic representation. The Loya Jirga was unable to reach a decision on formation of a legislative body and deferred its creation until elections scheduled for June 2004. Major provincial centers were under the control of regional commanders. With one significant exception in the southeast, these commanders acknowledged the Karzai administration as the legitimate central authority. Karzai appointed governors to all 32 provinces. The 1964 Constitution served as the interim Constitution. The legal framework of the country and judicial system of the country were also set forth in the Bonn Agreement. Existing laws, not inconsistent with the Bonn Agreement, the country's international obligations, or applicable provisions of the Constitution, remained in effect. Judicial power rested with the Supreme Court. Under the Karzai Government, the rule of law applied throughout the country; however, in practice recognition of the rule of law, particularly outside of Kabul, was limited. Years of Soviet occupation and civil war resulted in the country's laws becoming a mix of codes. During these years, much of the formal judicial structure deteriorated. The judiciary continued to operate on an ad hoc basis.

During most of 2001, the Taliban, an ultra-conservative Islamic movement, controlled approximately 90 percent of the country. On October 7, 2001, OEF, a U.S.-led coalition, began military action aimed at toppling the Taliban regime and eliminating the al-Qa'ida network in the country. U.S. forces worked in concert with anti-Taliban forces of the Northern Alliance as well as others in the southern part of the country. By mid-November 2001, the Taliban had been removed from power. U.S. military operations continued during the year, especially in southern and eastern regions, to capture and detain remaining Taliban and al-Qa'ida fighters.

The International Security Assistance Force (ISAF), established on December 20, 2001, was responsible for the security of Kabul under the command of the United Kingdom and later Turkey. Outside the capital, regional commanders and warlords maintained local militias. ...

Although Taliban remnants in Afghanistan continue to be active, the Taliban no longer exists as a unified political movement or as a controlling authority. For example, according to the Danish Immigration Service's report of a fact finding mission to Afghanistan in September-October 2002 (Danish Immigration Service, *The Political, Security and Human Rights Situation in Afghanistan*, Copenhagen, March 2003, p. 14):

The coordinator of UNAMA's Civil Affairs Branch explained that the Taliban still exists in the rural areas as priests but not as a political movement. The strength of the Taliban movement is based on the Uleema - conservative Muslims - and Taliban groups can still be found in Uruzgan and the tribal areas of Pakistan. In this context the source pointed out that Al-Qaida has no political interest in Afghanistan today - they are only interested in the country as a "safe haven" for their network.

The UNHCR-Kabul also emphasized that at present the Taliban does not exist as a powerful movement, but that there are groups who have been closely associated with the movement and who now constitute a security problem and engage in activities, especially in the provinces of Zabul, Paktia and Khost, in the southern and south-eastern regions of Afghanistan. There are some elements, who have been closely affiliated with the Taliban throughout the country, and there continue to be attacks by radical, fundamentalist forces.

According to the Norwegian ambassador, the Taliban remains a latent concept in Afghanistan. It is no longer a movement as such, but it may become an alternative to some form of future political Pashtun movement, if the disenchantment with the current government grows. The ambassador stressed that the Pashtun groups would not be rising; it would be the individual Pashtun commandants.

According to ICG, it would not be possible for the Taliban movement to become a significant political organization again. The movement has no formal influence in Afghanistan today, and according to the source, it never really was a proper organization but rather a movement incorporating several different elements. According to ICG, the activities of the Taliban movement were mainly organized from outside.

## Situation of Hazaras

The Hazaras are one of the largest of some fifty different ethnic groups in Afghanistan. According to various figures they comprise between 10-20% of the Afghan population of over twenty million. They are distinguished by having a more central Asian or Mongol appearance than the bulk of the Afghan population; and by the fact that most of them follow the Shia branch of Islam, while the majority of Afghans are Sunni Muslims. Historically, the Hazara population has been concentrated in the area known as the Hazarajat, which covers the central province of Bamiyan as well as parts of the neighbouring provinces of Ghor, Orozgan, Ghazni, Wardak, Parwan, Baghlan, Samangan and Sare Pol (although there are also Hazara minorities scattered throughout much of the country, including Kabul).

Hazaras have been widely regarded as second class citizens in Afghanistan and during times of conflict have been particularly vulnerable. Some extremist movements of Sunni Islam such as the Taliban have regarded Hazaras as heretical because of their Shia beliefs, and their physical distinctiveness has made them easy targets for such groups.

There are at least four Hazaras in the Transitional Administration, including one of the Vice Presidents.

The Danish Immigration Service's report (Danish Immigration Service, *The Political, Security and Human Rights Situation in Afghanistan*, Copenhagen, March 2003, p. 44), indicated that continuing discrimination against Hazaras fell short of persecution, and stated:

UNHCR-Kabul believed that the Hazaras have a marginal role in Afghanistan today and that discrimination against the group occurs. According to UNHCR this is a group that is currently managing, but generally speaking the Hazaras are more cautious than other groups, e.g. they do not go

out after nightfall in Kabul. UNHCR found that the group is less protected than other groups and is more exposed to discrimination - although, according to the source, it has not been possible to accurately establish the form and extent of such discrimination. The UNHCR also stressed that the Hazaras are not considered to be *prima-facie* refugees, but that the organization is closely monitoring Hazaras who have been repatriated from Iran and Australia.

The EU's special representative found that there is ongoing discrimination of Hazaras in Afghanistan today. According to the source, the discrimination is in the form of being refused access to high positions and discrimination in terms of access to education. In this context the source pointed out that the Hazaras are not a group who have networks in the neighbouring countries to look after them, but that their networks are limited to Afghanistan, particularly to the province of Bamian.

CCA\* said that the Hazaras no longer have problems in Afghanistan based on ethnicity, and that in general, the group considered itself to be free.

ACBAR\* also was of the opinion that the Hazaras do not have problems due to their ethnicity.

[“CCA” refers to the Cooperation Centre for Afghanistan and “ACBAR” refers to the Agency Coordinating Body for Afghan Relief”.]

However, according to the Afghan academic Dr Sayed Askar Mousavi (advice to RRT, *The Hazaras in Jaghori and Kabul in 2003*, 16 June 2003), the situation of the Hazaras worsened significantly since the outbreak of civil war and ethnic conflict in Afghanistan. Hazaras, as Shi'a Muslims and Dari-speakers, still suffered from ethnic, religious and linguistic discrimination. Dr Mousavi said that in 2003 the Hazaras remained politically underrepresented, economically and socially excluded and lacked basic security.

#### Hezb-e-Wahdat

The Hezb-e-Wahdat was formed in 1989 with the combination of the six main Hazara and Shia groups at that time. The two dominant forces were the Sazman-e-Nasr led by Abdul Ali Mazari and the Sepah-e-Pasdaran led by Mohammad Akbari. The relationship between the two remained tense and in 1994 the Hezb-e-Wahdat split between Mazari's followers and Akbari's followers. Following Mazari's death in 1995 Khalili was elected leader of what was in effect the former Sazman-e-Nasr, and is now known as the Hezb-e-Wahdat (Khalili). It is the most powerful political organisation among the Hazaras while the Hezb-e-Wahdat (Akbari) is the other group with a presence in the Hazarajat (Dr Sayed Askar Mousavi, *The Hazaras in Jaghori and Kabul in 2003*, 16 June 2003).

Further country information considered by the present Tribunal included:

Afghanistan's human rights record remained poor due to weak central institutions, a deadly insurgency, and the country's ongoing recovery from two decades of war. While the government struggled to expand its authority over provincial centers, a few areas remained under the control of regional commanders. There continued to be instances in which security and factional forces committed extrajudicial killings and torture. Extensive reporting of human rights abuses led to increased action against abusers...There were credible reports that police continued to detain prisoners in Kabul and Ghazni after they were found innocent...The Taliban beheaded several individuals throughout the year in Helmand and Ghazni provinces for allegedly spying for a foreign country. In November the Taliban kidnapped and killed a road worker in Nimroz Province in an apparent attempt to pressure aid groups to leave. After initially accepting responsibility, the Taliban later denied involvement. (Country Reports on Human Rights Practices, 2005, Afghanistan, Released by the Bureau of Democracy, Human Rights, and Labor, March 8, 2006)

The government and its international partners remained incapable of providing security to the people of Afghanistan. Factional commanders secured positions of public authority, acted

independently of government control and remained a major source of insecurity. Absence of rule of law, and a barely functional criminal justice system left many victims of human rights violations, especially women, without redress. Over 1,000 civilians were killed in attacks by US and Coalition forces and by armed groups. US forces continued to carry out arbitrary arrests and indefinite detentions. Refugees were pressured into returning to Afghanistan, despite continuing threats to their safety. (Amnesty International Report 2006, Afghanistan)

## **FINDINGS AND REASONS**

The Tribunal is satisfied the applicant is a citizen of Afghanistan as claimed.

The applicant has previously been recognised by Australia as a refugee, thus the question for the Tribunal includes whether it is satisfied the applicant has a presently existing well-founded fear of being persecuted for Convention reasons in Afghanistan; and is thereby entitled to continuing protection.

### *Persecution:*

Based on his evidence (ie he claimed to fear being killed or otherwise seriously harmed in Ghazni), I am satisfied the harm the applicant is claiming to fear, and based on the country information to which he may be subject, would at least constitute significant physical harassment of the person or significant physical ill-treatment of the person (see s91R(2)(b) & (c) Migration Act). Accordingly, I am satisfied the harm the applicant fears is sufficiently serious to constitute persecution for the purposes of the Refugees Convention.

### *Convention ground:*

The claimed fear of persecution must be for reasons of one of the grounds set out in the Refugees Convention. The mere fact that an organisation (or persons purporting to represent it) with a political objective (ie the Wahdat Party), intend to harm and or persecute a person does not, without more, indicate the relevant person is being targeted for reasons of eg, an actual or imputed political opinion, or for any other Convention reason.

That said, based on the country information considered, I am satisfied there is evidence that (recent) returnees to Afghanistan may have a greater chance of being targeted for harm given eg, the likelihood they may be perceived as comparatively wealthy due to their residence and work in Australia for the past few years. Notwithstanding this, based on the evidence considered, I am satisfied the primary reason such persons may be harmed (including in Ghazni or Bamiyan) should they return would be for reasons of the mere criminality that is reported to be endemic there.

However, one would ordinarily also need to consider *inter alia*, the context in which such criminal activity is perpetrated. Thus even if the primary reason a person may be targeted is for reason of their perceived wealth, this does not mean that a Convention reason could not also constitute a significant and essential reason that person may be targeted.

The country information considered indicated *inter alia* the current security situation in Ghazni Province is 'deteriorating at a rather rapid pace' (UNHCR Advice to RRT 'UNHCR office in Ghazni', UNHCR in Afghanistan (sent via UNHCR Canberra), 31 August 2004). Based on the country information considered, while I am satisfied much of the violence, currently and historically instigated in Afghanistan, may have been undertaken primarily or substantially in order to eg, acquire by force if necessary, scarce resources; the evidence considered also

indicates that such violence is commonly instigated on eg, ethnic/political/religious lines. I have not located a direct quote to reflect this finding, however I am satisfied it is accurate based on country evidence in the sources considered (including US Department of State, Country Reports on Human Rights Practices, Afghanistan, 2003; Human Rights Watch, World Report 2003, Afghanistan; UK Home Office, Afghanistan Country Report, October 2003). Importantly, the more recent country information considered has satisfied the present Tribunal the situation has continued to deteriorate.

Therefore, given this (continuing) ‘deteriorating’ security situation in and around the Ghazni Province, and based on the country information considered, I am satisfied the violence that continues to manifest itself within Ghazni Province, and that will continue to manifest itself in the reasonably foreseeable future, is manifested on eg ethnic, political and or religious lines; and thus comes well within the grounds provided for by the Refugees Convention.

Accordingly, I am satisfied the persecution the applicant fears arises for at least one of the reasons provided in the Refugees Convention (including race / religion / political opinion / and or membership of a particular social group).

*Well founded fear:*

I need now consider whether the applicant has a real chance of being subject to the persecution feared. A real chance is not a remote chance; there needs be real substantial basis that an applicant would be subject to the persecution feared. Based on the country information set out above and elsewhere, including that there has been a ‘deterioration’ in the security situation in Ghazni Province, and in surrounding Provinces, I am satisfied there is a real substantial basis for finding there is a prospective real chance the applicant will be subject to the persecution feared. Consequently, I am satisfied the applicant's fear of persecution is well founded for the purposes of the Refugees Convention.

*Relocation:*

After having considered all the country information in the sources cited in this decision and elsewhere, I am satisfied that relocation is neither a safe nor reasonable option for the present applicant (ie see CX91720, Compilation of Country of Origin Information on Afghanistan Relevant in the Context of Refugee Status Determination in Australia, UNHCR Canberra, 22 March 2004 – which the Tribunal understands is not contradicted by more recent evidence).

Accordingly, I am satisfied the applicant has a well founded fear of persecution for a Convention reason in Afghanistan.

## **CONCLUSIONS**

The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. 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 satisfies s.36(2) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

I certify that this decision contains no information which might identify the applicant or any relative or dependent of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.  
Sealing Officer's I.D. PRRRNM