

071852303 [2008] RRTA 17 (25 January 2008)

DECISION RECORD

RRT CASE NUMBER: 071852303

COUNTRY OF REFERENCE: Afghanistan

TRIBUNAL MEMBER: Sydelle Muling

DATE DECISION SIGNED: 25 January 2008

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, 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 delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter.

The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The applicant applied to the Tribunal for review of the delegate's decision.

The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. 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)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 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.

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.

CLAIMS AND EVIDENCE

The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

According to the protection visa application, the applicant is an ethnic Hazara Shi'a male born in Town A, Afghanistan. From the mid-1900s for several years the applicant was living in Town A, Province B, Afghanistan and from the mid-1990s for many years he was living in Village C, in Ghazni. From the late 1990s the applicant was living in various other countries [information about applicants travel history deleted in accordance with s431 as it may identify the applicant]. The applicant received no education and can speak Dari and Farsi. He described his occupation as labourer and worked from the late 1900s for many years in that capacity for various Pashtuns in his village. In the late 1900s he worked as a labourer for a Pashtun named Person D in his village. Once he departed Afghanistan he worked as a labourer in Country E and Country F and in a factory in Country G. The applicant was married in Town H, Afghanistan. His wife, several children, mother and siblings were residing in Country F and he also had other siblings living in Afghanistan.

The applicant stated the he was seeking protection so he did not have to return to Afghanistan because he had a well-founded fear of persecution because he was a Hazara, because of his imputed political opinion and his membership of a social group.

In a statement attached to his protection visa application, the applicant claimed many years ago his father was approached by Party 2 for financial support. The Party 2 was very powerful and were based in Town A. His father was unable to pay and the Party 2 saw this as a refusal and as a result there was animosity from the Party 2 because they thought his father was supporting another party. His father was threatened many times and the applicant claimed he was also threatened. He told them they did not have any money and they said they would have to see what they would do but before anything could happen the Taliban took control and quashed the party. However ex-members of the party still lived there.

The applicant claimed when the Taliban was seizing control of Afghanistan, several years ago, he was working as a labourer for a Pashtun land owner named Person D in his village. Person D had a number of children and a lot of land and power. The applicant stated he was a Hazara worker for Person D. He was known in the area as a good worker and had worked for a long time as a labourer so Person D approached him and offered him work. At the time the Taliban were in Town I and had not yet reached his village. The applicant stated he could not afford to leave Afghanistan straight away like other Hazaras.

The applicant claimed one day he had a fight with Person D's child, (Person J), after Person J had accused him of not working hard and his wife staying home whilst everyone else was working. They had an argument and then Person J assaulted him. Another Pashtun whom he worked for came and separated them. Person D then came and threatened him and blamed

him for the fight but the other Pashtun came to his defence and said that it was Person J who started it.

The applicant claimed a few months later Person J went missing and Person D came to his house and accused him of having something to do with it. Person D threatened if his child was not back by a specific deadline he would kill him. His neighbour witnessed this and pulled Person D away. Later that day, Person D came back and asked him where Person J was and threatened he would kill him unless he found Person J. The applicant claimed his neighbour came to his house and told him to leave or else Person D would kill him. Person D had told everyone in the village that he was going to kill him that night because he had killed Person J. The applicant claimed Person D was also with the Taliban and the Taliban had taken over the village a few weeks before. Most other Hazaras had already left Afghanistan because it was not safe as the Taliban were killing many Hazara. He lived in an area dominated by Pashtuns and the only reason he had been safe until that point was because he was working for Person D.

The applicant claimed that night he and his family fled to Country E, including his siblings. His neighbour helped them by telling them to walk to a certain area and then he/she would organise a vehicle. They walked for a few hours to Town K and then went by vehicle to Uruzgan. They then walked to Town M and then for many more days until they got to Town N, where they stayed a few days until they found a smuggler to take them to Country E. The smuggler drove them close to the border, where they then had to walk across in order to avoid the checkpoint, and then he picked them up in Country E and drove them across.

The applicant claimed they stayed in a hotel in Town O. Another Hazara helped them to rent a house and he started working as a labourer. Other Hazaras who came to Town O bought letters from Hazaras who knew him in Town A and they told him Person D was looking for him as he was convinced he had killed Person J and wanted to kill him in revenge. He took these letters to people whom he trusted in Town O who could read them for him as he was illiterate.

A few years ago, the Country E authorities started deporting Afghans. The applicant claimed when he was on his way to work he was arrested and taken by the Country E authorities to Town P awaiting deportation. He was there for a few weeks, separated from his family, and after a few weeks he was taken by truck to the border of Afghanistan. As it was not safe for him to go back to Afghanistan, the applicant claimed he walked to Country F's border and went to Town Q.

In Town Q he found cheap accommodation and contacted his family in Town O by calling their neighbour and told them he was in Town Q. The Country E government had announced that Afghans had to leave the country. His family could not afford to pay to leave the country so they approached the authorities and told them they were willing to go. His family ended up in Town R and then they joined him in Town Q.

The applicant stated things were very difficult in Country F because they were unlawful. He could occasionally get a couple of days work as a labourer and he and his family were living in a house with another family. One day a Pashtun came to his house and made inquiries of him with his mother. When he came home from work and learnt what had happened, he was very scared that Person D had sent someone to find him. The applicant stated he believed ex-members of the Party 2 would have helped Person D to find him in Country F as some Party 2 officials were in Country F and were aware of the Afghans in Town Q. The applicant

claimed it was not safe for him to be in Country F any longer so he told the other family they were living with that he was going back to Country E but instead he paid a smuggler, who organised for him to go to Country G.

The applicant claimed in Country G he lived with some Hazaras in Town S. As he was illegal he had no hope of getting a job and therefore he could not stay in Country G. His Hazara friends told him the best thing was for him to go to a country which accepted refugees and they gave him the money so he could leave. The smuggler who helped him to get to Country G, organised for him to get Country T's visa in his false passport.

He flew from Country G to Town U, where he was in transit for a short time, before flying to Town V. When he arrived in Town V he contacted an associate of the smuggler, who organised his accommodation in Town V and his eventual travel to Australia.

The applicant claimed he could not go back to Afghanistan because he was an Hazara and it was not safe for him there as they were persecuted. In addition, he could not go back because of Person D, who was a powerful man, aligned with the Taliban. Person D would not rest until he found him. He had found him in Country F so he could find him anywhere in Afghanistan, especially because he was a supporter of the Taliban. The applicant claimed the area he was from was predominantly Pashtun, was in the Uruzgan area and was dominated by the Pashtuns and Taliban. There were also ex-members of the Party 2 in his area and in Afghanistan and because his father had not provided them with support, they were also his enemy and could do anything to him. He was not safe anywhere in Afghanistan. The Taliban were still very strong, they were everywhere and the government had no control. He could not go back to Country E or Country F as he had no legal right to be there.

The Tribunal received a submission from the applicant's adviser which outlined the general legal and evidentiary principles relevant to the applicant's case, the particular reasons for the applicant's fear of persecution in Afghanistan and effective protection and the applicability of the 7 day rule.

The adviser submitted the applicant feared persecution for a number of reasons, including:

[information amended in accordance with s431 of the Act as it may identify the applicant]

- on account of his Hazara ethnicity and Shi'a religion at the hands of Pashtuns and Taliban. The applicant claimed he and his family were persecuted by Pashtuns prior to them fleeing because they were Hazara Shi'a;
- he feared persecution on the basis of his and his father's support of the Party 3;
- his father's and his own refusal to support Party 2 which resulted in the applicant and his father being harassed and targeted by Party 2 and
- his membership of a particular social group being Afghan returnees from a Western country. It was submitted the applicant may be the target of the Taliban and other elements who were opposed to the Coalition Alliance;

The adviser contended that these were the 'essential and significant' reasons for the applicant's fear of persecution. The applicant had no remaining support structure in

Afghanistan as all his family had fled to Country F and this significantly increased his vulnerability to attack. It was also submitted it was not reasonable for the applicant to relocate elsewhere in Afghanistan as he had lived all his life in Village W in Ghazni. He had never lived elsewhere and had no family or other contacts in another place.

Attached to the submission from the applicant's adviser, was a statutory declaration made by the applicant in which he claimed he feared returning to Afghanistan because of his Hazara ethnicity and his imputed political opinion. His whole area was controlled by the Taliban and Pashtuns. He would be targeted because of the problems he had with his employer Person D. As a Hazara he would be targeted and also because he did not support Party 2. Instead he supported Party 3, which was a group of Shia' Hazaras who were fighting against the communists and then the Mujahideen. The applicant claimed his father and then he were helping Party 3 for a long time with some money, food and other supplies, until the area was taken over by the Taliban. The leader of Party 3 was Leader 4. Later on they made another group, when they joined with other groups, called Party 5. The applicant claimed often Party 2 threatened them and came to their house telling them not to help Party 3 because they were against them. He told Party 2 as his father had helped Party 3 so they would continue to help them. The applicant claimed at the time they were lucky nothing happened to them because Party 2 were worried about what Party 3 would do if they harmed him but now these people could do anything to him. The applicant explained he did not mention Party 3 in his first statement because he explained why he had to leave Afghanistan. He discussed his issues with Party 2 but did not realise it was important to mention his support of Party 3 because he did not have any problems with them. The applicant claimed the problems he faced from Party 2 were exacerbated because of the accusations made by Person D that he had killed his child. This meant the Pashtuns and Taliban would stop at nothing to get him as a Hazara man. He also feared because he had been away from Afghanistan and was now in the West, they would think he was contaminated and a bad element.

The applicant claimed most of Afghanistan was dominated by the Taliban again and it was not safe. He had no one and nothing anywhere in Afghanistan and would not be able to live safely. He could not live in Kabul because the Party 2 were part of the government and he did not support them. Now they were in power they would consider him as their enemy. The police could not protect him as they were in line with the Taliban and could not do anything.

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Dari and English languages.

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

The applicant stated he was born in Town A, Afghanistan. He lived in Town A before he moved to the Village C, in Uruzgan, when he was a youth. His family did not have land in Town A so they went to Village C to work. He did not receive any education in Afghanistan and worked as a labourer. The applicant stated he could not remember when he left Afghanistan but it was after the Taliban came to his village. He and his family fled at night to Country E. His wife, mother and siblings were living in Town O while he was secretly working in Town X. He was living in Country E for several years until Country E first deported him and then his family, his mother and siblings. He went to Country F and his family followed him there several months later. He lived a few years with his family in Country F but it was dangerous in Town Q so he went to Country G for several months. In Country G he worked a few days a month, secretly, because he did not have a visa. He left

Country G because he did not have a visa and could not work and therefore it was difficult for him to maintain the expenses of his family. From Country G he went to Town V, where he stayed for several months, before travelling to Country Y, where he stayed for many days. The applicant stated he could not remember when he was married but it was a date before the Taliban. He had several children. His family were residing in Town Q illegally. He was in contact with them a few times a month. He had no family living in Afghanistan. He had a relative but he/she was killed there. His siblings were with his family and his other siblings were married and he did not know where they were as he had lost contact with them since departing Country E.

The Tribunal asked the applicant when his family was first approached to provide support for Party 2. The applicant stated in Village C, Party 2 approached him before the Taliban came there because his father had passed away. The Tribunal asked the applicant if Party 2 had ever come before that time to ask for support from his family. He stated before Taliban they would come and now some of them were in power and the rest were in Town Q, in Country F. The Tribunal asked the applicant if they ever approached his father when he was alive and ask him for assistance He stated they would request but at that time his father was with another organisation, Party 3 The applicant stated his father had been a member of Party 3 since the revolution and formation of the organisation. After his father passed away he became a member. He had no choice; he had to help them. The Tribunal asked the applicant how often Party 2 would ask him or his father for support. He stated Party 2 were there everyday saying they had to help them They would say give them money or be with them. The Tribunal asked the applicant what happened when he or his father refused to comply with their demands. The applicant stated he could not be one of them and he could not afford to give them money. After his father passed away he fought with Party 2. He told them he could not help them because he was with Party 3 and they fought over this. The applicant stated they fought verbally. They said he should do something or leave this world. He confirmed they threatened him. They had threatened him before but it was minor threats and not much. The applicant stated he had this fight with Party 2 a few months before Taliban. The Tribunal asked the applicant if Party 2 did anything or said anything else after this fight with them because of his refusal to support him. He stated they told him they would kill him if they had enough force or otherwise ask someone else to kill him. The applicant stated he was still supporting Party 3 at this stage and continued to support them. He did not receive any further threats at that time, after this argument, but later they saw him in Country F and threatened him then.

The Tribunal asked the applicant when he started working for Person D. The applicant stated it was a few years before Taliban. He did labouring work for Person D The Tribunal asked the applicant about the fight he had with Person D's child. He stated one day Person D's child came and asked him why he did not work well. He told him/her that he could not work more than what he was doing and that he had been working for some years and had worked the same way in all that time. The Tribunal asked the applicant if Person D's child physically attacked him. He stated they fought and Person D's child used a weapon and injured him. Some people then came and took him away and Person D's child to his/her house. The Tribunal asked the applicant if he could remember when this fight took place. He stated he could not remember the date exactly but it was the time the Taliban had some parts of Afghanistan. This incident took place around the same time he fought with Party 2 The applicant stated he continued to work for Person D after the fight with Person J.

The applicant stated many days after the fight Person D's child went missing and his/her whereabouts were unknown. He did not know what had happened to him/her but thought he/she might have gone to Town R but his/her father, Person D, threatened him and stated he had killed Person J. The applicant stated after Person D's child (Person J) had disappeared, Person D came to his home and accused him of killing Person J. Person D stated he should hand Person J over to him within a specific deadline, dead or alive. The Tribunal asked the applicant why Person D believed he was responsible for Person J's disappearance. The applicant stated Person D was just making excuses as there were not many Hazaras in the area and he just wanted to kill him. The Tribunal asked the applicant if he had had any contact with Person D's child (Person J) after their fight. He stated no. The applicant stated Person D came to him and said this to him and also later and he was very angry. A neighbour intervened and prevented Person D from beating him up. The Tribunal asked the applicant why Person D came back later. He stated later Person D said by a deadline he should hand over Person J and he told Person D he did not know where Person J was. Later his neighbour came and told him he should remove himself from there because Person D would kill him. His neighbour knew this because he was from the area and they had worked together before and he had found out that by making the excuse that he had killed Person J, Person D could kill him. The Tribunal asked the applicant if Person D wanted to kill him, why had he not done so either during his first or second visit to him instead of come and warn him on these two occasions. The applicant stated he did not know but Person D made this threat because he was an Hazara. The Tribunal asked the applicant if what he was saying was that Person D did not really believe he was responsible for Person J's disappearance. The applicant stated Person D was saying he had killed Person J but he had not. He did not know where Person J was and this was his excuse. The Tribunal asked the applicant if Person D did not like Hazaras why had he employed him. He stated it was because he was a worker and he worked cheap.

After his neighbour advised him to leave, his neighbour went and found a vehicle for them and he left with his family that evening. The applicant stated they walked for hours from their village to the border, where they then met the vehicle. He could not remember how long it took them to get to Country E but thought it might have been a few weeks. The applicant confirmed his family lived in Town O and he lived in Town X. He would stay in Town X, where he worked in secret, for a few years and then he would return to his wife. The Tribunal asked the applicant if he received any news about what was happening in Afghanistan whilst he was in Country E. He stated Hazara neighbours would send letters. When the Tribunal queried how his Hazara neighbours knew to send letters in Country E given that he claimed he left his village in the evening, walking, so they would not know where he was going, the applicant stated after a few years they found out he was in Town O through people who would come and go from Country E. His neighbours would tell him the important news, which was that Hazaras were being killed in Afghanistan. In the letters he was also told not to come back because Person D was looking for him and wanted to kill him.

The applicant stated he could not remember the date he was deported from Country E but it was several years. On his way to work the authorities stopped him and he was kept in custody for a few weeks. He was then taken to the Afghanistan border and left there but he could not go to Afghanistan so he went by foot to Town Q, in Country F. The Tribunal asked the applicant where he was left on the border. He stated it was at the border, close to Town N, but it was at night so he could not remember the name. From there he went to Country F territory. The Tribunal asked the applicant how he went to Country F from the place he was dropped off. The applicant stated he walked all night and the next day and then he reached Country F.

He stated it took many hours to get to Country F. They dropped him off in the evening and then he walked until he reached the border of Country F. He stayed there and then he went to Town Q. The Tribunal asked the applicant the route he took to get from the Afghanistan/Country E border to the Afghanistan/Country F border. The applicant stated he paid some smugglers to assist him to get to Country F. He walked for a long time and after he went by vehicle. His family joined him in Country F several months later. They were deported from Country E to the border near Town N and they then travelled to Town I.

The applicant stated there were not many jobs in Country F but he did some labouring work. He and his family did not have a house to live in and had to rent. They had to move house regularly because the rent would go up. After it became dangerous in Town Q he fled. The Tribunal asked the applicant why it was dangerous in Town Q. He stated the people from Party 2 told the Taliban he was there. The Tribunal asked the applicant how he knew Party 2 told the Taliban he was there. He stated Party 2 had a house in Town Q and they had animosity towards him so that was why a Pashtun came to his house. He had been working during the day and when he came home his mother told him a Pashtun man had come and asked for him. The man had said he was a Pashtun but did not say his name. The Tribunal asked the applicant if this Pashtun man told his mother why he was looking for him. The applicant stated he thought it was because of Person D. He stated the man had only asked his mother if this was his house. He said nothing else. The applicant stated he thought the Pashtun was one of Person D's people. After this visit he and his family changed houses and went to another area. He stated Person D learnt he was in Country F from Party 2. The Tribunal put to the applicant it had been nearly a decade since he had left Afghanistan at that particular point of time, so why would Person D still have been pursuing him after such a long period. The applicant stated Pashtuns always wanted no Hazaras to live in Afghanistan. The Tribunal noted he had worked for Person D and had been out of the country for nearly a decade but Person D was still after him. The Tribunal expressed its understanding of the relationship between Pashtuns and Hazaras but put to the applicant this seemed a bit more than someone who hated Hazaras and wanted to kill them given that after such a long period of time Person D was seeking him out. The applicant stated Pashtuns had a habit of killing their enemies.

The applicant stated after moving his family to another area he fled to Town Z, where he stayed for several months. He left Town Z because he had no place to go. The Tribunal asked the applicant what made him go to Country G. He stated he did not know the language in Town Z so a smuggler told him he would send him to Country G. In Town Z he had no money or a house to stay in. In Country G he worked in a shop sometimes, in secret. He decided to leave Country G because he had no visa and could not work. He managed to pay the smuggler to make arrangements for him to leave Country G through the help of Afghani people working and living there a long time, who gave him money.

The Tribunal asked the applicant why he feared returning to Afghanistan now. The applicant stated Afghanistan did not accept Hazaras from the start and not even now. He stated Town I was full of Taliban so he could not go back there. He could not go back to Uruzgan or Village C because he had an enemy there. If he went to Kabul, Party 2 was his enemy. The Tribunal asked the applicant why Person D would be interested in him now. He stated because his excuse was that Hazaras should not be in their area.

The Tribunal asked the applicant if he or his family had experienced any harm in the past in Afghanistan either because of their Hazara ethnicity or Shi'a religion. The applicant stated he was always belittled because he was Shi'a. If he wanted to go from his village to the city his

wife and children would start crying because they believed he would not return but would be killed instead. He stated all Hazaras were in the same situation. The Tribunal noted in the recent submission it received it was claimed he and his family had been persecuted by Pashtuns prior to fleeing the country because they were Hazara Shi'as and asked the applicant what had happened. He stated Pashtuns in his area always made them suffer and would bother them. If he was wearing good clothes they would question him. His siblings who were young at the time would be beaten up and have their clothes and shoes taken from them

The Tribunal put to the applicant according to an article from the Economist.com dated 15 February 2007, the situation for Hazaras had improved under the present regime. Afghanistan's new constitution accepted Shi'a Islam as a State religion and gave all Afghans equal legal status, including the right to hold public office and work where they wanted. In the 2005 election Hazara won a disproportionate number of parliamentary seats – 43 out of 249, which was 18%, despite Hazaras only being 9-13% of the population. The applicant stated before Hazaras worked in government offices but the same killing happened. In the elections a year or 2 ago there was a Hazara in Mazar-i-Sharif who wanted to say things and prove to the world what was happening but he was killed at the time of the election. Also last month a Hazara, who wanted to show what was happening to Hazaras, was killed along with several other people.

The Tribunal asked the applicant what he feared may happen if he returned to Afghanistan because of his and his father's past support of Party 3. The applicant stated he was afraid a group of Party 2 in Kabul would again start harming him and hurting him. The Tribunal put to the applicant from the evidence he had provided in the hearing, the Tribunal understood he had not been harmed by Party 2 but had only been threatened by them because he had refused to support them. The applicant stated that was correct. They had not harmed him but only warned him. The Tribunal put to the applicant in his statutory declaration he had claimed his father was asked to support Party 2 many years ago and he took on his father's position in Party 3 and continued to refuse to support Party 2 after his father's death and during that long period of time nothing happened to either him or his father so why did he believe if he went back to Afghanistan after such a long duration of time Party 2 would want to harm him because of his and his father's support of Party 3, instead of them. The applicant stated the animosity would not go away. They were always the enemy and would not become peaceful so if they saw him they would kill him. He stated there were no human rights in Afghanistan. On the way between Town I and Ghazni there was an area, which was called paradise of Hazara. If a Hazara passed through there he would be killed and his head thrown in a well. He stated by name they say Hazaras were in Parliament but there was a Hazara channel two years ago, which broadcasted for 1 or 2 hours a day but it was stopped. The applicant stated Hazaras had no right to community in Afghanistan because Pashtuns did not like that

The Tribunal asked the applicant about his failure to mention either his or his father's involvement in Party 3 in the statutory declaration attached to his protection visa application. It noted in his recent statutory declaration he explained he did not mention Party 3 because he explained why he left Afghanistan and also he did not realise it was important to mention his support of Party 3. But the fact was that in his initial statutory declaration he claimed the reason his father did not provide support to Party 2 was because he did not have the money to give them and therefore he was unable to pay, which was quite different to what he was claiming now which was that his father did not want to pay because he supported another party. The applicant stated his father never had the money. There was a party that said they should be amongst them. He stated the absence of any reference to Party 3 in his original

statement may have been a mistake made by the interpreter who assisted him to prepare the statutory declaration.

The applicant confirmed he continued to be a practising Muslim and that he never lived in City 1.

The Tribunal asked the applicant what he feared would happen to him if he went back to Afghanistan, as a returnee from a Western country. The applicant stated if he went back to Afghanistan other Hazaras may accuse him of having had alcohol and doing other bad things and not allow him to go to the mosque. He could never go back to Afghanistan because there was a danger for him. He feared the Taliban and Pashtuns. In regard to the article about Afghanistan the Tribunal mentioned earlier, the applicant stated this was not true. Afghanistan was a place where the rich Hazaras could pay bribes to get by but it was not a place for a person like him who did not have money.

The applicant's adviser submitted in regard to the applicant's failure to mention Party 3, this information was not a contradiction and although it was omitted, the fact he had mentioned Party 2 and his father had not paid them any money was not inconsistent with the information he later added which was that his father was simultaneously supporting Party 3. It was also contended that this issue did not go to the substance of the claims which was the failure to support Party 2 and the threats which he received as a result. The adviser stated at the Department stage the issue was whether the applicant's claims were Convention related but at the Tribunal stage it was clear the issue was whether the applicant's claims were well-founded. It was submitted, there was a huge range of country information which described the situation in Afghanistan as deteriorating, particularly in the south/south-east of the country where the applicant was from. In terms of relocation, there were no reasonable alternatives for the applicant as he had no family, was illiterate and had no education and even in Kabul it was unclear whether state protection would be available to him. The adviser submitted the applicant's claims needed to be looked at cumulatively so even if the Tribunal found the incident with Person D was not Convention related, looking at the applicant's ethnicity, his lack of support of Party 2 and the re-emergence of the Taliban, particularly in his area, there was a real chance he would be persecuted. The adviser referred to a recent decision of the Tribunal in relation to an applicant with a similar profile where it was found there was a real chance of persecution.

In late 2007 the Tribunal received an excerpt from a Masters Thesis which focussed specifically on Hazaras in Afghanistan and, which the applicant's adviser submitted, detailed a vast range of country information which indicated the situation in Afghanistan, particularly for Hazaras, was unsafe and unstable.

COUNTRY INFORMATION

Hazaras

Hazaras are one of the largest of some fifty different ethnic groups in Afghanistan. According to the World Fact Book 2002, Hazaras constitute 10% of the population of Afghanistan. Hazaras are distinguished from other ethnic groups by their Asian appearance and by the fact that most of them are Shi'a Muslims. Historically, the Hazara population has been concentrated in an area known as Hazarajat, which covers the central province of Bamiyan as well as the neighbouring provinces of Ghor, Orozgan, Ghazni, Wardak, Parwan, Baghlan, Samangam and Sare Po. However Hazaras are also found throughout much of Afghanistan.

Due to their Shi'a beliefs, they have been regarded by some extremist movements of Sunni Islam, including the Taliban, as heretical. Hazaras are in a particularly vulnerable position in society due to their distinctive physical traits, which make them easy targets for such extremists. Hazaras have been widely regarded as second class citizens in Afghanistan and during times of conflict have been particularly vulnerable to attack. Since the fall of the Taliban the group has not been so overtly targeted, but they remain marginalised and vulnerable, particularly in areas where they form minorities. Although in Kabul some Hazaras are now employed in administration, overall the group still appears to suffer discrimination in employment.

In January 2004, Amnesty International noted that the Hazaras were the most economically disadvantaged people in Afghanistan. It also noted that Hazaras were at risk, especially in areas where the population was dominantly Pashtun. It confirmed discrimination in relation to education and employment continued.

On 9 January 2004, Professor William Maley provided the following information on the position of Hazaras and the ability of the Afghan administration to provide Hazaras with protection:

Furthermore, the claim that persecution of Hazaras in Afghanistan has halted is suspect. 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 fuelling hostility towards Hazaras have dissipated. On 6 January 2004, gunmen massacred 12 Hazaras travelling near the border between Helmand and Uruzgan, leading Helmand provincial official Mohammed Wali Alizai to suggest that the object of the assailants was 'to stir up ethnic tensions' (*Le bilan de l'attentat de Kandahar s'alourdit; 12 hommes abattus dans la province de Helmand*, Associated Press, 7 January 2004.) Attacks of this kind can be politically effective for the attackers in at least three ways: (a) they can lead to the withdrawal of international agencies whose presence adds to the credibility of the central state; (b) they can undermine the legitimacy claims of the state, by illustrating its inability to offer basic protections to ordinary citizens; (c) they can trigger a cycle of slayings at the local level, again compromising the credibility of the state.

In 2005 Dr Jonathan Goodhand provided the Tribunal with the following information regarding the treatment of Hazaras:

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

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

Now there are concerns that the gains made during the war years are going to be undermined as Pashtuns re-assert their traditional dominance. Also another thing that needs to be remembered is the history of enmity that was produced as a result of massacres and counter massacres during the war years. In particular, two incidents

stand out. In Kabul in 1993, when the Hazaras – there was a massacre in Kabul at the hands of Jamiat-e Islami and Ittehad-e Islami and then subsequently by the Taliban in Hazarajat (in 2001) in retaliation for the Taliban defeat in Mazar-e Sharif (in 1998)

....

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

... it is difficult to talk in generalised terms about whether Hazaras returning will be victimised because they are Hazaras or because of their allegedly communist or westernised background. These issues have to be seen in an individual context. These things can become major problems or they can be used as pretexts, for instance, to prevent returnees from coming back and claiming their land (Goodhand, Dr Jonathan 2005, *Transcript of Video Conference on Afghanistan between RRT Melbourne, RRT Sydney and Dr Jonathan Goodhand*, 13 April).

The US Department of State, Country Report on Human Rights Practices in Afghanistan, dated 6 March 2007, reports that during 2006 claims of social discrimination against Hazaras continued:

National/Racial/Ethnic Minorities

During the year claims of social discrimination against Hazaras and other Shi'as continued. The Hazaras accused President Karzai, a Pashtun, of providing preferential treatment to Pashtuns and of ignoring minorities, especially Hazaras. There were no further developments in the 2004 accusation by Pashtuns in Herat Province that then governor, ethnic Tajik Ismail Khan, discriminated against and abused their ethnic group. The nomadic Kuchis expressed concern that the voter registration process underrepresented their population; however, the government and the Joint Electoral Management Body worked to address their concerns.

A recent UNHCR paper reported that while attempts were made to address the problems faced by ethnic minorities and there were improvements in some areas, there was still a well-founded fear of persecution. Confiscation and illegal occupation of land by commanders caused displacement in isolated situations. Discrimination, at times amounting to persecution, by local commanders and local power-holders continued in some areas, in the form of extortion of money through illegal taxation, forced recruitment and force labor, physical abuses and detention. Other forms of discrimination concerned access to education, political representation and civil service employment(US Department of State 2007, Country Reports on Human Rights Practices for 2006 – Afghanistan, March, Introduction, Sections 5)

Resurgence of the Taliban

Initially the reports from government and non-government bodies describing the human rights situation indicated an improving social and political situation since the US led invasion. However, the situation started to significantly deteriorate around mid 2003, especially outside of Kabul. It appeared that the improvements implemented in Kabul could not be sustained or replicated outside of Kabul: UK Home Office *Afghanistan Country Assessment*, Country Information and Policy Unit, October 2003.

In a Fast Update provided by Swiss Peace for June to July 2007 the security situation and country stability in Afghanistan was described as deteriorating. It was reported Afghan security forces and international forces continued positional warfare and direct combat with the Taliban in various parts of the country including Uruzgan, where the applicant was from, and in these clashes, numerous Taliban insurgents, and a higher number of civilians, were reportedly killed. In terms of what the outlook for the future was at that point of time, it was

stated that the security situation in the country would remain unstable since the Taliban were increasing their area of operation and stepping up the use of terror tactics. In the Fast Update for August to September 2007 it was reported that the poor security situation had not changed and that the situation was not expected to improve significantly in the coming months. In the Update for October to November 2007 it was reported that Afghanistan remained instable in the face of mounting insecurity, weak governance, political polarisation and a booming drug economy. The Taliban were maintaining warfare in the south and east while also moving activity into new areas close to Kabul. Due to the expanding Taliban insurgency, the military-related death toll had risen to unprecedented levels since 2001 (2007, Swiss Peace, *Fast Update Nos. 3, 4 and 5*)

According to a recent report prepared by the Senlis Council, one of the few research groups with a base in Afghanistan, the security situation in the country was described as having reached “crisis proportions” and the Taliban’s resurgence across the state had been “proven beyond doubt”. It was reported the Taliban was back in control of “vast swaths” of Afghanistan and its influence was growing fast. Research undertaken by the group indicated that 54 per cent of Afghanistan’s landmass hosted a permanent Taliban presence, primarily in southern Afghanistan, and was subject to frequent hostile activity by the insurgency. The Taliban were the de fact governing authority in significant portions of territory in the south and east, and were starting to control parts of the local economy and key infrastructures such as roads and energy supply. The report also stated that the insurgency was exercising a significant amount of psychological control, gaining more and more political legitimacy in the minds of the Afghan people who had a long history of shifting alliances and regime change (2007, Senlis Afghanistan, *Stumbling Into Chaos: Afghanistan on the Brink*, November)

State Protection

The UK Home Office operational guidance note on Afghanistan dated 20 April 2007 includes the following information regarding Afghanistan’s security forces and the extent to which the public can rely on the protection of the police:

Afghanistan’s security forces comprise the army and air force, police forces including national, border, highway and counter-narcotics, and the intelligence service. These forces are moving towards a more professional approach with the assistance of the international community, and the power of warlords and commanders has been reduced accordingly. However, in many, possibly most areas, these figures continue to exert influence, often because commanders have been appointed to official positions in the police force in the very areas where they have their power bases. The Government is seeking to address this but in many cases allegiances are to ethnic and local leaders rather than to the policies of the Government and the security services are unable to control the warlords, local commanders, drug cultivation and trafficking, common criminality and human rights abuses. Therefore, the extent to which the public can rely on the protection of the police depends to a large extent on the loyalties of the particular police officers they approach for help. There are police who are loyal to the Government and who will uphold the law to the extent that they are able, but they are often constrained by a lack of resources.

In relation to the situation in Kabul, the operational guidance note indicates that:

A judicial and legal system with limited function exists in Afghanistan. In Kabul, the police authorities are generally willing to enforce the law, although their ability to do so is limited by inadequate resources and dependent to some extent on the loyalties of

individual officers. The International Security Assistance Force (ISAF) works alongside the Afghan Security Forces to maintain security in and around Kabul and as result the general security environment there is much better than in other areas (UK Home Office 2007, *Operational Guidance Note – Afghanistan*, 20 April, pp. 3 & 22).

The US Department of State human rights report on Afghanistan for 2006 indicates that “[t]he ANP [Afghan National Police], under the MOI [Ministry of Interior] had primary responsibility for internal order; however, some local and regional commanders maintained considerable power since the government did not control security nationwide. During the year, the government attempted to expand its reach through the use of auxiliary police in some areas.” The performance of the ANP “engendered mistrust among the local population, and reports of corruption and mistreatment of citizens in custody were widespread. In response, this year the MOI assigned General Atmar as the new head of its Human Rights Unit in an effort to re-energize efforts to ensure the ANP was compliant with human rights standards.” It is also stated in the report that:

The government continued to develop and professionalize its army and police force. Increased monitoring of police by internal and external monitors helped to prevent abuses. Human rights training became a normal aspect of training and education for most police. Extensive reporting of human rights abuses led to increased arrests and prosecutions of abusers. The government continued to make strides towards upholding human rights standards and took action to remove corrupt officials. In some areas of concern, even where there was commitment from the government, resources restricted the ability to uphold those standards.

The report also notes that “[t]he shortage of effective and trained police, poor infrastructure and communications, instability, and insecurity hampered investigations of unlawful killings, bombings, and civilian deaths” (US Department of State 2007, *Country Reports on Human Rights Practices for 2006 – Afghanistan*, March, Introduction, Sections 1(a) & (d)).

Returnees

The September 2007 UK Home Office report discusses the situation of returnees to Afghanistan in general and provides the following information:

The report of the UN-appointed independent expert of the Commission on Human Rights in Afghanistan dated 21 September 2004 stated:

“As a result of three decades of conflict, large portions of the Afghan population were forced to become refugees or IDPs. With the fall of the Taliban, large numbers of refugees have returned to Afghanistan... As these individuals return to the country, whether to their original homes or to new settlement areas, they face an array of problems and, as highly vulnerable populations, they are often the victims of serious human rights violations. Returning refugees and resettled IDPs are commonly subjected to acts of violence, including killing; arbitrary arrest and detention; illegal occupation and confiscation of their land by warlords, commanders and others; forced labour, extortion, illegal taxation and other abusive economic practices; discrimination and persecution based on ethnic identity; and sexual violence and gender-related discrimination. There are thousands of reported cases of returnees being subjected to these violations in many communities” **[39k] (para 70-72)**

A March-April 2004 fact-finding mission by the Danish Immigration Service also looked at the situation of returning refugees in general and provided the following information:

...The UNHCR found that the lack of disarmament of militia groups is hindering repatriation. It is still difficult for refugees to go back to the southern regions. Nevertheless, the source expected that

repatriation to Kabul would remain at the same level this year as in 2003. The source found that the conditions for repatriation to Bamian are better this year than in 2002 or 2003, which among other things is due to the work of the PRT unit in Bamian.

The source was of the opinion that refugees who are considering repatriation are more concerned with the difficulties in finding employment than with the uncertain security situation. The source mentioned that access to land has become more and more difficult for repatriated refugees. Some of the refugees can rent land by paying a large part of their income to the landowners, but at the same time this implies that they remain in great poverty and are heavily indebted.

The IOM explained that the lack of accommodation and work is one of the main reasons why Afghan citizens do not wish to return to Afghanistan. The organization pointed out that the lack of accommodation is one of the main problems in Kabul and other large towns in the country. The organization explained that Kabul was originally constructed for 500,000 (five hundred thousand) people but today 3 million (three) live there.

The AIHRC had become aware of a case in which a Dutch citizen of Afghan origin was seriously mistreated because he did not want to pay a bribe, which was large enough. The source mentioned that it can be difficult for Afghans to return to Afghanistan. They are often regarded as western orientated, and it has caused hostile feelings within the community that Afghans from abroad have occupied several important positions in the government and administration. In the point of view of this source it can be difficult for the Afghans who have lived abroad to return to the provinces unless they are protected by the local warlord in the region. Afghans who return to their country are not even welcome in Kabul (Danish Immigration Service 2004, *The political conditions, the security and human rights situation in Afghanistan – Report on fact-finding mission to Kabul, Afghanistan 20 March – 2 April 2004*, November, pp.59-60, para.6.10.

On 13 April 2005 Dr Jonathan Goodhand provided the following information on the treatment of Westernised or secular returnees:

...THE CHAIRMAN: Dr Goodhand, would you be able to comment on – some of our applicants claim that they state to the Tribunal they would be considered infidels and persecuted because they have now married a westerner. Would they be targeted by the local mullahs?

DR GOODHAND: I have spoken to colleagues about this very question and it is perhaps not a very useful response but it is actually a realistic one and that is, it all depends on the area and the local mullahs. Certainly, that scenario that you have painted is plausible and possible and I come across areas of Afghanistan, where those kind of situations have developed, and I alluded to earlier the kind of the radicalisation of Islam, which has been one of the characteristics of the conflict and how, Islam has become a banner issue that has been used and mobilised by a whole range of different groups and the Taliban were perhaps the most extreme manifestation of that.

But it is also, it has happened not only at the higher political levels but at the grass roots as well in terms of the changing role of mullahs and so, that situation is very plausible but it is also – would be inaccurate to kind of paint the picture that all mullahs would take that position. One of the people I spoke to on this has said, well actually an alternative way of looking at it would be, they would think, they would be respectful of someone coming from outside who had been successful and got some of the trappings of the west but I think it is tied up with a whole range of other things.

There is a lot of resentment around people coming back, particularly in terms of the pressure on land and resources, and so pretexts are created to point the finger at these people, and one of those pretexts may be Islam, it may be their kind of past political connections and so on, but the

underlying issue could quite easily be either one around resources or a personalised kind of long running history of enmity.

...FEMALE SPEAKER: So would the situation then be the same for returnees who are perhaps more secular, who aren't as religious as they were when they left Afghanistan? Would that be an issue coming back, not visiting the mosque, perhaps drinking alcohol, having more secular views rather than religious?

DR GOODHAND: It depends, there is strong pressure to conform in Afghan society, you know, in lots of ways. So not conforming is frowned upon and could be dangerous for the person not to do so but clearly it is different for a person going back to Kabul than it is to going to rural Ghazni. In rural Ghazni it would certainly be frowned upon for somebody to kind of say that they were an atheist and to be un-Islamic in their practices.

So I think, you know, that that would be dangerous for people to go back into that kind of a context and be openly, if you like, "un-Islamic". In Kabul it would be easier for that, for somebody to kind of perhaps have a more liberal lifestyle, but certainly in rural areas it would be extremely difficult.

THE CHAIRMAN: Melbourne, any further questions? Sydney, do you have any further questions? Okay. I have got just one follow-up question, Dr Goodhand, if you can shed some light on. A lot of our applicants have been in Australia for quite a long time, so consequently we were wondering would someone who had lived in a western country and returned to Afghanistan, in particular to Ghazni, encounter discrimination or persecution because of their perceived western taint?

DR GOODHAND: There is certainly a growing animosity and resentment towards expatriate Afghans coming back and walking into kind of relatively high paying positions and taking resources. I mean, anywhere there has been a war and there are people who have stayed and there are people who have left, when people return there is always, (almost always) tensions and resentment towards those who come back.

One sees this, in particular, in Kabul, with the return of a lot of technocrats but certainly in Kabul, I think it is a big issue because of the perception that the better qualified, the English speaking, the computer trained Afghans coming back and are taking relatively high paid positions.

In Ghazni, I think that certainly there would be a much more profound question around adjustments and because the difference between the lifestyle the person would have experienced in Australia and they would come back to in rural Ghazni would be much more profound and certainly that person is likely to stand out more. I think a lot of this though, comes back to whether this person is bringing in resources or competing for resources, and then if it is around trying to reclaim land, for instance, this being used then, that would become much more of a tension inducing issue (Dr Goodhand, Dr Jonathan 2005, *Transcription of Video Conference between RRT Melbourne, RRT Sydney and Dr Jonathan Goodhand on 13 April 2005*, 13 April)

According to Phillippe Leclerc of the UNHCR, Hazaras who are perceived as wealthy will be targeted.

Q: The majority of our cases are young Hazara and they claim that if they are returned, they will be targeted, robbed and even killed and they won't find any support whatsoever.

A: They will be targeted if they are perceived as being wealthy. If you come back from any industrialised country you are easily seen to be wealthy; in reality a lot of these people may

come back with a package but most of them have sold their houses or they are indebted, so this money does not go far as they pay off debts or try to acquire a house.

There has been a risk of robbery or extortion, especially if you do not have protection of strong groups or individuals. Killing would be exceptional. They are now appointing new district governors in those areas where such trends exist, especially in Jaghori, and it seems this has been done with a lot of consultation between Hezbi Wahdat, Nasr and the governor. It seems that this will solve part of the difficulties that people are experiencing (Leclerc, Philippe 2003, *DIMIA Onshore Protection and CIS researchers question and answer verbatim transcript*, July)

Professor William Maley, in a seminar on Afghanistan for the Tribunal held on 30 September 2005, made the following observations concerning the subconscious effect of exposure to western lifestyle:

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

It is quite a complex story. But even Afghans who came to Australia as adults who are going back after 10 or 20 years are finding that they are instantly recognised as people who lived outside the country even though they speak fluent Persian, they are not unfamiliar with the layout of cities and that kind of thing, but there is just something about them that the locals pick up (Maley, Professor William 2005, *Transcript of Seminar on Afghanistan*, 30 September, p. 28).

FINDINGS AND REASONS

The applicant claims he is a national of Afghanistan. No suggestion has been made that the applicant is not from Afghanistan, and the delegate accepted that the applicant is from Afghanistan. Based on the evidence provided by the applicant in the hearing, the Tribunal accepts that the applicant is from Afghanistan and that he is outside his country of nationality. Therefore, for the purposes of the Convention, the Tribunal has assessed his claims against Afghanistan as his country of nationality.

The applicant has claimed he fears persecution for a number of reasons if he returns to Afghanistan. He has claimed he can not go back to Afghanistan because he is a Hazara and Shi'a Muslim and he would be persecuted by the Taliban and Pashtuns. Secondly, he fears Person D, a Pashtun aligned with the Taliban, will kill him because he believes the applicant is responsible for the disappearance of Person J and also because of the applicant's Hazara ethnicity. Thirdly, the applicant fears being harassed and targeted by members of Party 2 because of his and his father's refusal to support them and support of the Party 3 political party instead. Finally, the applicant also fears he will be harmed because he has been away from Afghanistan and living in the West so he will be considered contaminated and a bad element.

The Tribunal accepts that the applicant is a Hazara Shi'a from the village Village C, which is located in Uruzgan district, in Ghazni. It accepts the applicant hails from an area which is predominantly Pashtun and currently boasts a substantial Taliban presence, according to the Senlis Afghanistan report, cited above. The Tribunal has taken into consideration the

information provided by Amnesty International in January 2004, cited above, which noted that Hazaras were at risk particularly in areas where the population was dominantly Pashtun. The Tribunal has also taken into consideration the information regarding the control the Taliban exerts in relation to key infrastructures such as roads and the incidents of assaults, kidnappings and killings on individuals travelling in areas such as Ghazni (*Taliban rule the road in Ghazni*, BBC News). When this is considered in conjunction with the worsening security situation in the country as a result of the intensification in violence by the Taliban, particularly in the area which the applicant is from, and the Taliban's attitude towards Hazaras and Shi'as, the Tribunal finds that the chance of the applicant coming to the Taliban's attention is more than remote.

The Tribunal has also considered the applicant's position as a returnee to Afghanistan after a protracted absence from the country. Although the Tribunal accepts the applicant would be returning to Afghanistan from a Western country, the Tribunal notes the applicant has spent the majority of the years he has been away from the country outside the West and therefore it does not accept he would necessarily be readily identifiable as a returnee from the West or Westernised. However, the Tribunal accepts that as someone who had been absent from Afghanistan for an extended period of time, the applicant may encounter the numerous difficulties returnees to the country have experienced, as detailed in the country information cited above, including serious human rights abuses and acts of violence, including killing. The Tribunal notes the applicant would be in a particularly vulnerable position returning to a predominantly Pashtun area, so many years after he departed the country, where he has no land or no familial connections. In light of the country information regarding the situation for returnees to Afghanistan, the Tribunal is satisfied that the applicant would face more than a remote chance of serious harm, amounting to persecution if he returned to Afghanistan, now or in the reasonably future.

The Tribunal has taken into consideration the country information regarding the ability of the Afghan State to provide protection to its citizens. The Tribunal notes that although Afghanistan's security forces were reportedly moving towards a more professional approach with the assistance of the international community, the power warlords and commanders continued to exert over the security forces had resulted in the security services being unable to control the warlords, local commanders, drug cultivation and trafficking, common criminality and human rights abusers. In addition, the effectiveness of the police in Afghanistan was often constrained by a lack of resources. Based on the considerable amount of independent information available regarding the deteriorating conditions in Afghanistan and the need for an increase in the number of international forces to assist in curtailing the gains being made by the Taliban throughout the country, the Tribunal is not satisfied that state protection in accordance with international standards would be available to the applicant as a Hazara Shi'a male returnee.

Consequently, considering the applicant's cumulatively, the Tribunal finds that the applicant has a well-founded fear of persecution for reasons of his Hazara race, Shi'a religion and his membership of a particular social group of returnees to Afghanistan. Given this finding, it is not necessary for the Tribunal to consider the applicant's claims regarding his fear of persecution from Party 2 because of his failure to support them and because of his membership of the Party 3 party or his fears relating to Person D.

The Tribunal does not accept that in all the circumstances it could be reasonable for the applicant to relocate to some other part of Afghanistan where he would be safe from the persecution which he fears. The Tribunal had taken into consideration the information

provided by UNHCR (cited in the UK Home Office Afghanistan Country Assessment, Country Information and Policy Unit, September 2007 at Section 28) which suggests relocation is unreasonable where the person has no effective links in the area to which they are relocating. The Tribunal notes that although the applicant has siblings living in Afghanistan, he has not had any contact with them for a significant number of years and has no knowledge of their whereabouts. Therefore there is no evidence before the Tribunal that the applicant has any connections outside Ghazni. The Tribunal is therefore satisfied that in the applicant's circumstances, relocation to another part of Afghanistan would not be reasonable.

There is no evidence before the Tribunal to suggest the applicant has a right to enter and reside in a safe third country. Although the applicant has lived in Country E, Country F and Country G for considerable periods, the Tribunal is satisfied on the applicant's evidence he was living in these countries illegally and does not have the right to re-enter and reside in these countries. Similarly, the Tribunal accepts the applicant was in Country T and Country Y illegally and has no right to enter and reside in these countries. Accordingly, the Tribunal is satisfied that the applicant is not excluded from Australia's protection by subsection 36 (3) of the Act, in respect of either Afghanistan or any other country.

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)(a) 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 dependant 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. rmorri