

**1213171 [2013] RRTA 157 (15 February 2013)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1213171

**DIAC REFERENCE(S):** CLF2012/142810

**COUNTRY OF REFERENCE:** Afghanistan

**TRIBUNAL MEMBER:** Alison Christou

**DATE:** 15 February 2013

**PLACE OF DECISION:** Brisbane

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant satisfied s36(2)(a) of the Migration Act.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

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

### RELEVANT LAW

4. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

#### Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:  
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant*

*S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

8. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression 'serious harm' includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
11. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
12. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
13. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
14. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb

of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

15. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

### **Complementary protection criterion**

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

### **CLAIMS AND EVIDENCE**

19. The Tribunal has before it the Department's file relating to the applicant. [Insert or modify as relevant: 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.]

### **Protection visa application**

20. The applicant applied for a protection visa [in] July 2012.
21. In the application, the applicant indicates that he was born in Afghanistan and is a citizen of that country. He claims that he is of Hazara ethnicity and a member of the Shia religion. The applicant notes that he has travelled outside of Afghanistan in the past, including to Iran and Pakistan.
22. The applicant attached to his protection visa application a statement outlining his claims. This statement was typed in English. The statement reads as follows:

My name is [name] and I am a [age] male born in Oruzgan, Afghanistan. My ethnicity is Hazara and my religion is Shia Muslim.

My mother, father and siblings currently reside in Pakistan. One of my sisters died many years ago. She was approximately [number] years younger than me.

Why I left my country:

I first left Afghanistan in approximately [year]. I was a child and very immature at the time.

My father would force me to attend religious studies which I did not want to do. There was no school or proper teacher in our area of [location] during the Taliban's era. I did not like the way that the Mullah treated me. He would poke me in the ear with his pen and this would really anger me. During that time, students would travel from our area to Pakistan to study. As such, some of my friends, who were adults were going to Pakistan. I told them that my father had asked them to take me to Pakistan for studies. I had some money with me at the time. They agreed to this and took me with them. I did not tell my parents that I had left the country. It was once month after I arrived in Iran that I wrote a letter home and sent it with people who were travelling back to Afghanistan. In • the letter I informed my parents that I had arrived in Iran. After being deported once and then returning to Iran, I again returned to Afghanistan in or about 2010 because I feared being deported from Iran. I stayed in Afghanistan for approximately one month during this time and was then forced to leave as my life was in danger.

It is very obvious that Hazaras and Shias are put in a difficult situation in Afghanistan. This is a common known and ongoing problem. Everyone knows about it. If I go back to Afghanistan, I might be caught by the Taliban or the Pashtun who might kill me. I have heard of incidents where Hazaras and Shias have been targeted and killed by the Taliban. The Taliban think that the Hazara and Shia are infidels and that if they kill a Hazara and Shia they will go to heaven.

When I first arrived from Iran and was on my way home, I was intercepted by the Taliban on my way home. They looked at my Taskera and tried to search me. They thought that I was an educated man studying in a Kabul university and also thought that I might have been a spy. They did not find anything and then let me go after slapping me on the face twice. I then went home to my village.

When I was living in my village for that one month, my father would cut trees and send these to other cities. I had nothing to do and was very bored. There was a place, which was half an hour from where we lived. [Relative A] was working there and I would also go there because I was bored and would help out here and there. The people that [Relative A] was working for had a daughter. I became friends with

this girl with the intention of getting married to her in the future. The girl told me that she was single but she was in fact engaged. Her family found out about our relationship and then beat [Relative A] one night when I was not there and had gone home. The next morning I was travelling to the place where they were doing their job. Before I arrived, I noticed that there were crowds of people in the village. I asked the locals what the fuss was all about. They told me that four people had gotten beaten (including [Relative A]) for a relationship between a boy they knew (me) and the girl from the house. The locals did not know that I was the boy and therefore I was able to leave after I realized. [Relative A] and his friends had to be taken to get medical assistance for their injuries and returned to our village.

[Relative A]'s family then went to the girl's family to get revenge and ask why they were beaten. They all started fighting and even firing at each other. The girl's family was living in an area that was controlled by the Taliban and the Taliban was involved in the fighting as well. No one was killed during this incident. I then went to [location], Malestan District in Ghazni to make a complaint to the police. The police asked me what I did, I told them that we were friends and that I did not do anything wrong. The police said that they could not help me and gave me a referral letter to the central province in Oruzgan to assess the situation. I refused to accept this letter. I was not able to go there because of the fear of the girl's family and the Taliban. The road that led to central province in Oruzgan was blocked for one month because of the conflict that had taken place. This had become very serious because the Taliban had become involved.

I fled straight from Malestan and made my way to Pakistan. I could not return home to my village as the Taliban and the girl's family would have found me.

Furthermore, the girl's family and also the Taliban would come to my village to look for me. One time, they also kicked my mother. My father could not remain in the village either because of my problem. He had to leave and my family had to relocate to Pakistan.

While I was in Pakistan, I called a local from our area in Afghanistan. He had a satellite phone. I would call him and he would tell me that what I did was very wrong. He would take the phone to my parents and they would cry over the phone. In Pakistan, I had some savings from my time in Iran and bought a house for my family and me in Quetta. I wanted to start a life there and wanted my family to come and join me. I prepared everything and tried to build a life for my parents in order to pay them back. I accept that what I did was very wrong and wanted to make it up to him for all the inconvenience. Furthermore, they had been forced to leave all their land and property behind.

The relationship between me and the girl was against Islamic beliefs and was haram as we were not married or even engaged. For what I have done, I will definitely be sentenced to death. Many people have been stoned because of similar incidents. The Taliban have been looking for me and if I return, they are bound to get me.

Although I had a house and job in Pakistan, groups such as the Lashkar-e-Jhangawi and ISI were said to be targeting Hazara and Shia people. Because my job involved me working in the main area, and there were ongoing target killings of the Hazara people in these areas, I had to leave. I was limited in the work I could do as I couldn't always bring goods for my shop to sell.

Furthermore, on one instance, there was a van contained more than 10 Hazara people. I did not witness this incident but arrived 10-15 minutes after the incident took place. Had I been there earlier, I too would have been killed. The situation for Hazaras and Shias in Pakistan is not improving. There are ongoing attacks and I fear that I will be the next killed.

As such, I cannot return to either Pakistan or Afghanistan.

**What I fear might happen if I go back to my country:**

I fear returning to Afghanistan and Pakistan as I will be killed,

**Who I think will harm or mistreat me if I go back:**

In Afghanistan I will be harmed or mistreated by the girl's family and the Taliban. In Pakistan, I will be harmed or mistreated by groups such as the ISI and the Lashkar-e-Jhangawi.

**Why I believe they will harm or mistreat me if go back:**

In Afghanistan I will be harmed and mistreated because of my relationship with the girl as well as the fact that I am a Hazara and Shia. Furthermore, once I return, it will be believed that I work with the government and that I am a Spy.

In Pakistan, I will be harmed and mistreated because I am a Hazara and a Shia.

**Why I believe that the authorities in my country will not protect me if I go back:**

The Afghanistan authorities cannot protect me as they are very weak in comparison to the Taliban. In Afghanistan, if we don't accept the Taliban's beliefs or rules, we cannot survive one day.

Furthermore, the Pakistani authorities cannot protect me either. A few days ago, some Hazaras were killed.

My parents told me that one of them was someone that was known to me and lived in my area. The authorities didn't even report this incident. They cannot protect me.

**Why I think I will suffer significant harm:**

I cannot return to Afghanistan as I will suffer significant harm. If I was to return, I would definitely be caught by the Taliban or the girl's family and thus tortured or killed. What I did is a very serious crime and I will be punished for it. Furthermore, the situation for Hazara and Shia people is too dangerous. I will also suffer significant harm if I am returned to Pakistan. I will be tortured and killed on account of my Hazara ethnicity and Muslim Shia faith.

**Departmental interview**

23. The applicant was interviewed by a Departmental officer [in] July 2012 and the Tribunal has had the opportunity to access materials associated with that interview.

**The review application**

24. The delegate refused the visa application [in] August 2012, notifying the applicant on that date. The applicant lodged an application for review of the decision to the Tribunal [in] August 2012.

**Applicant's evidence at Tribunal hearing**

25. The applicant attended a hearing via video link between Sydney and Brisbane [in] October 2012. He was accompanied by a representative and an interpreter in the Hazaragi and English languages was present.
26. [The applicant] was asked if he had any difficulties in understanding the Hazaragi interpreter. He responded that some words were different, probably due to his extensive time spent in Quetta, Pakistan. He noted that the effect was not extensive however, and agreed to proceed with the hearing. The applicant also stated that he agreed with the contents of the written application.
27. The applicant stated that the village where he is from, [location deleted: s.431(2)], was originally in the corner of Oruzgan. He believes that it is now officially part of Malesdan in Ghazni, due to provincial boundary changes. 'Malesdan, Ghazni' is written on his *taskera*.
28. The applicant stated that on his return to Afghanistan from Iran in 2010, he was stopped by Taliban. They checked his hands to gauge whether or not he was educated or perhaps working for the government. The Tribunal asked if it was at that point that the Taliban demanded to see his *taskera*, to which the applicant responded that they did not look at his *taskera*. The Tribunal queried as to why this account differed from his earlier representation made in the written application. He replied that he was indeed stopped in the '*wasteland between Iran and Afghanistan*', and then clarified that both his hands and his documents were in fact checked. The applicant then continued, explaining that he was slapped twice by these individuals and his friends were also slapped twice. The Tribunal asked if he was abused in any other way, to which the



applicant responded in the negative. The Tribunal expressed surprise that nothing else of note occurred to the applicant at this time, as an unprotected travelling Hazara. The applicant responded that things were quite bad in the beginning, but that *'things were not too tense with the Taliban then'*.

29. [The applicant] then stated that he eventually got back to his village on this occasion, returning to his family's home area in Malestan. He explained to the Tribunal that a problem then developed in relation a young woman who lived a small distance away. As background, [Relative A] of the applicant had been working away from the village in this neighbouring area. On his return from Iran, and whilst living in the village, the applicant would go and help [Relative A] in agricultural work. [The applicant] travelled there on his motorcycle, but stated that it was not far to go. The applicant indicated that he began talking to the employer's daughter named [Ms B], getting to know her in the following days. Yet he did not find out until it was too late that she was in fact engaged to somebody else named [name deleted: s.431(2)]. This became known in the employer's area and [Relative A] was later beaten by a group of villagers. The applicant was on the edge of this crowd and asked *'what is going on?'* He was told about the alleged infidelity and resulting dispute. He was not recognised and was later able to leave. The Tribunal noted that it appeared unusual that he was able to maintain anonymity, considering the events in question. The applicant noted that he was standing on the edge of the crowd, and the people there were watching the beating as they explained to him what was going on regarding the scandal around [Ms B].
30. This family altercation then led to general fighting and threats in the area, in which the Taliban became involved. The Tribunal expressed doubt about this likelihood, considering that the problems were between two Shia Hazara families and the Taliban are quite notoriously hostile both to Hazaras and to those of the Shia faith. The applicant responded that the Taliban became involved because locals connected with [Ms B]'s family enlisted their support. The Tribunal noted again that this seemed highly unusual and asked the applicant to explain further. The applicant responded that [Ms B]'s extended family was physically closer to the Pashtun area than the [applicant's family], and that this might be why they were able to do so. The Tribunal asked for the applicant's opinion as to why the Taliban would get involved in an internal Hazara dispute. He replied *'when Taliban are involved, there is no chance.'* The Tribunal noted that this did not answer the question. The applicant stated that the Taliban probably got involved for *'the religious issue'*, due to the fact that what he and [Ms B] did was not acceptable according to Islam. It was forbidden. *'There are consequences for this behaviour.'*
31. The Tribunal asked the applicant to describe what happened next. He stated that he went to [location deleted: s.431(2)] and told the police what was happening, including the abuse of his relative. The police were no help and merely gave him a referral letter to be taken to authorities in Oruzgan. He thinks that they were unhelpful because he had gone against Islamic rules. The Tribunal asked why the applicant did not seek help elsewhere. He stated that he could not get help in Oruzgan as the situation was getting worse there, whilst in Ghazni it would be *'difficult for him to get help as a Hazara. There is fighting there every day'*.
32. The Tribunal asked if it was at this point that the applicant decided to go to Pakistan. He replied in the affirmative. He went to Quetta and bought a house there. After

approximately two months he asked his family to join him there. He had problems in Quetta too, as a result of all the unrest.

33. The Tribunal asked [the applicant] to provide his thoughts on the potential for relocation within Afghanistan, in the event that Ghazni proved problematic. It was put to him that he might reasonably relocate to Kabul, for example. He responded that he supposed that he might be able to go to Kabul, but *'does not think that his father would let him'*. He stated that iff he had to go back to Ghazni or anywhere else *'it could be very hard for him.'*
34. The agent put to the Tribunal that the question of relocation must be looked at objectively; the claimant has only been to Kabul for 12 days previously in his life and has no knowledge of the area. He is quite naïve as to the harsh realities of existence there for outsiders. In reality, people are currently fleeing Kabul for safety reasons. The applicant in fact met people in Jakarta who had escaped Kabul on grounds of security. All of Afghanistan - including Kabul - might have lulls in violence, but sectarian problems can be reignited at any time. It is extremely volatile, and will become more so after troops are withdrawn from Afghanistan. It is also extremely difficult to move a whole family to Kabul, where the labour force is saturated. He has responsibility for the entire family. No family members will receive assistance and they will be *'thrown in the deep end.'* It is unreasonable to expect the applicant to relocate for reasons of safety and impracticality.

### **Independent Information**

35. In the following materials, emphasis is variously supplied throughout as relevant to the claims made herein.

Contravention of Islamic moral codes: religious *ulema* structures

36. Country information confirms that due to Islam's central place in Afghan law and culture, persons perceived to be contravening Islamic law can face severe punishment from authorities and discrimination from society.<sup>1</sup> Under Islamic law as practiced in Afghanistan, blasphemy and apostasy by Muslims are considered crimes punishable by death.<sup>2</sup> The Taliban are known to adhere to an orthodox interpretation of Islam and Sharia law and to target for violence persons perceived to contravene that interpretation.<sup>3</sup>

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<sup>1</sup> UNHCR 2010, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 17 December, pp. 18-19 <http://www.unhcr.org/refworld/pdfid/4d0b55c92.pdf> – Accessed 28 September 2011; Commission on International Religious Freedom (USCIRF) 2010, *USCIRF Annual Report 2010 – The Commission's Watch List: Afghanistan*, 29 April, <http://www.unhcr.org/refworld/docid/4be284070.html> – Accessed 28 September 2011; US Department of State 2011, *2010 International Religious Freedom Report (July-December)*, 13 September, Sec. II [www.state.gov/g/drl/rls/irf/2010\\_5/168240.htm](http://www.state.gov/g/drl/rls/irf/2010_5/168240.htm) – Accessed 30 September 2011.

<sup>2</sup> Freedom House 2011, *Freedom in the World 2011 – Afghanistan*, 16 May <http://www.unhcr.org/refworld/docid/4dd21a4dc.html> – Accessed 30 September 2011; US Department of State 2011, *2010 International Religious Freedom Report (July-December)*, 13 September, Sec. II [www.state.gov/g/drl/rls/irf/2010\\_5/168240.htm](http://www.state.gov/g/drl/rls/irf/2010_5/168240.htm) – Accessed 30 September 2011.

<sup>3</sup> 'Who are the Taliban?' 2010, *BBC News*, 21 October <http://www.bbc.co.uk/news/world-south-asia-11451718> – Accessed 30 September 2011; Bruno, Greg & Kaplan, Eben 2009, 'Backgrounder – The Taliban in Afghanistan', Council of Foreign Relations, 3 August <http://www.cfr.org/afghanistan/taliban-afghanistan/p10551> – Accessed 30 September 2011; US Department of State 2011, *2010 Country Reports on*

37. Growing Afghan conservatism among religious leaders and associated *ulemas* - including enhanced enforcement of Islamic decrees - is also demonstrated in the following 2010 Washington Post report. Emphasis is supplied regarding the treatment of allegedly forbidden or *haram* relationships:

*Afghan President Hamid Karzai's administration is struggling to shore up support from an influential Islamic council, which appears to be shifting to more conservative, anti-government views at a time when it is being asked to play a key role in persuading Taliban insurgents to surrender their arms.*

*The Ulema Council, composed of 3,000 mullahs from across the country, has long been counted on to spread a pro-government message to remote villages and keep the Karzai administration informed about popular opinion. The administration pays each mullah a monthly stipend of about \$100 and in return expects support for its agenda.*

*But council leader Fazl Hadi Shinwari, a former Afghan Supreme Court chief justice who is in his late 80s, has been in a coma at a hospital in India for months since suffering a stroke. And the government is having trouble finding a suitable replacement, said Mohammad Umer Daudzai, Karzai's chief of staff.*

*In the meantime, 350 Ulema Council members made headlines at a meeting a few weeks ago when they voted to demand that Karzai implement sharia law, a strict Islamic code that includes severe punishments, such as death by stoning for adultery. That was the method the Taliban chose last month for **the executions of a young couple who had eloped.***

*Without strong government support from the council, Daudzai said, clerics sympathetic to the Taliban could win influence over the populace.<sup>4</sup>*

38. The US Department of State's 2009 Human Rights Report for Afghanistan provides further information on the official *ulema shura*, the body of multi-denominational conservative Islamic leaders in Afghanistan who are paid to advise the government on religious issues:

*The Ulema Council, headed by former Supreme Court Chief Justice Fazl Hadi Shinwari, is a group of influential Sunni, Shi'a, and Sufi scholars, imams, and Muslim jurists from across the country reflecting the network of provincial ulema councils. Its senior members meet regularly with the president and advise him on Islamic moral, ethical, and legal issues. The council is nominally independent of the government, but its members receive financial support from the state. Through contacts with the presidential palace, the parliament, and ministries, the council or its members advise on the formulation of new legislation or the implementation of existing law. Although it is well represented in provincial capitals, the council has much less outreach in villages and rural*

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Human Rights Practices, 8 April, Sec. 1a. [www.state.gov/g/drl/rls/hrrpt/2010/sca/154477.htm](http://www.state.gov/g/drl/rls/hrrpt/2010/sca/154477.htm) – Accessed 30 September 2011.

<sup>4</sup> Title: Nakamura, D. & Partlow, J. 2010, 'Afghan government struggling to keep support of Islamic council', *The Washington Post*, 12 September <http://www.washingtonpost.com/wpdyn/content/article/2010/09/10/AR2010091003451.html> - Accessed 16 August 2011.

areas.<sup>5</sup>

News articles from as recently as September 2011 which refer to the Council, indicate the body is still in existence.<sup>6</sup>

39. Importantly, according to a February 2010 article from *The Long War Journal*, there is also a similar body called the Ulema Council within the Taliban's 'shadow government' organisational structure.<sup>7</sup> Further evidence can be found of this Taliban-based *ulema*, is noted by the American Foreign Policy Council in 2011:

*Most of the original Taliban leadership came from the same three southern provinces—Kandahar, Uruzgan and Helmand—and nearly all of them fought under one of the two main clerical resistance parties during the war against the Soviets: Hezb-i-Islami (Khalis) and Mohammad Nabi Mohammadi's Harakat-I Ineqelab-ye Islami. Most of the Taliban ulema (religious scholars and clerics) had completed their studies at Deobandi maddrassas in Pakistan's Northwestern Frontier Province.*

Site: <http://almanac.afpc.org/taliban>

The Taliban 'shadow government'

40. On the existence of a Taliban 'shadow government' in Afghanistan, a 2009 Washington Post report notes:

*As the United States prepares to send 30,000 additional troops to Afghanistan to bolster Karzai's beleaguered government, Taliban leaders are quietly pushing ahead with preparations for a moment they believe is inevitable: their return to power. **The Taliban has done so by establishing an elaborate shadow government of governors, police chiefs, district administrators and judges that in many cases already has more bearing on the lives of Afghans than the real government.***

*"These people in the shadow government are running the country now," said Khalid Pashtoon, a legislator from the southern province of Kandahar who has close ties to Karzai. "They're an important part of the chaos."*

*U.S. military officials say that dislodging the Taliban's shadow government and establishing the authority of the Karzai administration over the next 18 months will be critical to the success of President Obama's surge strategy. But the task has been complicated by the fact that in many areas, **Afghans have decided they prefer the severe but decisive authority of the Taliban to the corruption and inefficiency of Karzai's appointees.***

Site: <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/07/AR2009120704127.html>

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<sup>5</sup> United States Department of State 2010, '2009 Country Reports on Human Rights Practices', US State Department website, 11 March [www.state.gov/g/drl/rls/hrrpt/2009/sca/136084.htm](http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136084.htm) – Accessed 29 September 2011.

<sup>6</sup> 'Russian and Afghan clerics build anti-narcotics shield' 2011, *RT*, 28 September <http://rt.com/politics/russian-afghan-clerics-shield-541/> – Accessed 30 September 2011; MacKenzie, Jean 2011, 'With friends like these, who needs the Taliban?', *The Global Post*, 3 June <http://www.globalpost.com/dispatches/globalpost-blogs/dispatches-afpak/friends-these-who-needs-the-taliban> – Accessed 29 September 2011.

<sup>7</sup> Roggio, Bill 2010, 'The Afghan Taliban's top leaders', *The Long War Journal*, 23 February [http://www.longwarjournal.org/archives/2010/02/the\\_talibans\\_top\\_lea.php](http://www.longwarjournal.org/archives/2010/02/the_talibans_top_lea.php) – Accessed 29 September 2011.

41. In its choice of Taliban targets, the US Treasury in late 2012 noted the existence of Taliban ‘shadow governors’ of Afghan provinces, such as the following in Helmund:

*Treasury is designating Barich for the significant role he plays in international narcotics trafficking, particularly in Helmand province, Afghanistan. In January 2012, the Government of the Islamic Republic of Afghanistan (GIROA) Deputy Governor for Helmand province announced plans for government-led eradication of poppy, which is used to make heroin and opium. In early March 2012, Barich, the Taliban “Shadow Governor” of Helmand province, issued a written decree to subordinate Taliban commanders, detailing procedures to be adopted by Taliban in Helmand province to combat planned government-led eradication operations. Site: <http://www.treasury.gov/press-center/press-releases/Pages/tg1768.aspx>*

42. The following 2011 summary from Freedom House is also pertinent: Site: <http://www.unhcr.org/refworld/docid/4dd21a4dc.html>, accessed on 18 May, 2011 (in part). It provides some support for the applicant’s contention that Taliban bureaucrats are likely to become involved in local issues, with formal government structures unable to effectively intervene:

*Despite tens of thousands of additional U.S. and allied troops, and the ongoing development of the Afghan army, Afghanistan largely remained under the sway of local military commanders, tribal leaders, warlords, drug traffickers, and petty bandits...*

***[C]entral and provincial governments... struggled to control areas under their jurisdiction, deliver basic services, and engage in vital reconstruction efforts... Violence, insecurity, and repression continue to restrict political activity nationwide, particularly outside urban areas ...In a prevailing climate of impunity, government ministers as well as warlords in some provinces sanction widespread abuses by the police, military, local defense militias, and intelligence forces under their command, including arbitrary arrest and detention, torture, extortion, and extrajudicial killings. The Afghan Independent Human Rights Commission (AIHRC) receives hundreds of complaints of rights violations each year. In addition to the abuses by security forces, reported violations have involved land theft, displacement, kidnapping, child trafficking, domestic violence, and forced marriage...***

43. On the work of the shadow Taliban government in Ghazni particularly, the New York Times reported the following in 2011. It is interesting to note the level of civilian support for such structures:

*Hidden Power: The analysis outlines two distinct elements of Taliban structure: — a quasi government and the military arm that empowers it. On one level, the **Taliban has firmly re-established its hold over civilian life in rural Ghazni.** Even with an American battalion patrolling Andar and the neighboring Deh Yak District each day, the Taliban **runs 28 known schools**; circulates public statements by leaflets at night; **adjudicates** land, water-rights and property disputes through religious courts; **levies taxes** on residents; and punishes Afghans labeled as collaborators. “There are tangible indicators that **a shadow government does exist** and has been strong for the past two or three years,” said First Lt. Michael D. Marietta, the task force’s assistant intelligence officer. American officers said the Taliban’s influence grew in a vacuum: there had been an almost complete absence of government-provided services here since the Taliban were unseated in the American-led invasion of 2001. “The most common complaint we hear from Afghans,” said Lt. Col. David G. Fivecoat, the*



battalion's commander, "is that we haven't seen the government in 'X' number of years." ...[shadow Taliban governors] also **have a support network, the officers said, of at least 4,000 civilians** The supporters provide food, shelter and part-time help, like passing false information to the Americans and signaling the movements of the battalion's patrols with mirrors or thick plumes of smoke.

Site: <http://www.nytimes.com/2011/02/07/world/asia/07taliban.html?hp=&pagewanted=all>

44. A similar exposition of Taliban shadow government within the vast majority of Afghan provinces is also evidenced in the following National Defence University Press report:

*The first signs of Taliban provincial governors date back to 2003, when the Taliban started controlling significant chunks of Afghan territory. From about 2006, district governors and "chiefs of security" also started being reported. By 2010, 33 provincial governors and about 180 district governors were said to be in existence. The only province without a governor was Panjshir, which was placed under the responsibility of the governor of Parwan.* Site: <http://www.ndu.edu/press/talibans-shadow-government.html>

45. A September 2010 DFAT report notes links between the Taliban and some Hazara 'strongmen' networks in Ghazni Province. These latter groups are characterised by "...commanders' strength and the flexibility of their relationships with other factional and insurgency networks – including the Taliban."<sup>8</sup>

46. A 2012 public submission to the Australian Expert Panel on Asylum Seekers by University of New England researcher Denise Phillips also confirms the existence of active non-government governance structures, particularly in remote Afghan regions:

*Afghanistan's 2004 Constitution includes exemplary protection for human rights and Hazaras have gained prominent government positions. However, with critical failures to implement the rule of law beyond Kabul – or even maintain it in Kabul – reform has not translated to improved safety for Hazaras in remote villages. Insurgents do not recognise government law. Moreover, Afghani culture is bound up with **traditions of governing and maintaining security through tribal and religious consensus, gained at district and community levels** rather than through a centralised authority.*

<http://expertpanelonasyumseekers.dPMC.gov.au/sites/default/files/public-submissions/PhillipsD.pdf>

Taliban communication systems

47. There is also evidence to indicate that the shadow Taliban government has robust communication networks, replete with the use of modern technology. In a 2011 report, AFP indicated as follows:

*KABUL: In the 10 years since being toppled from power by invading US troops, the Taliban have transformed **from media-shy mullahs into a technology-savvy guerilla force** who could still end up back in government.*

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<sup>8</sup> DIAC Country Information Service 2010, *Country Information Report No. 10/60 – CIS Request No. AFG10736: The Hazara*, (sourced from DFAT advice of 27 and 28 September 2010), 28 September

*Ousted just weeks after a foreign assault started on October 7, 2001, the Taliban retreated, at least partly to Pakistan, and were written off by Western militaries as a spent force. But they rebuilt and re-emerged to lead an increasingly brutal insurgency with a new generation of fighters motivated by the presence of 140,000 foreign troops — and some shifts in emphasis, if not belief. Until earlier this year, Mullah Noor-Ul Aziz was the Taliban's shadow governor in Kunduz, north Afghanistan and before that was a commander in charge of 300 fighters in the southern province of Helmand.*

*“About 10 per cent were old fighters and 90 per cent were new recruits,” he told AFP, of his former men... They share the militant religious zeal of their elders but typically take a less hardline view of the media. The Taliban banned television when they were in power between 1996 and 2001, but the new generation have been encouraged to join by Taliban propaganda such as Internet videos of attacks on Western troops and beheadings. “These young guys are equally radical in their Islamic beliefs (as the older generation) but they are **radicals of the computer era and the Internet era**,” said Afghan analyst and former diplomat Ahmad Sayedi. For example, **the Taliban use Twitter and text messages to communicate with media, plus their slick “Voice of Jihad” website in languages including English...**The government had anyway made scant progress on reaching out to the predominantly Pashtun Taliban, who say they will not engage until all foreign troops leave the country. Experts still predict, though, that the Taliban will end up in power one way or the other after foreign combat forces leave Afghanistan, slated for the end of 2014. “If the Americans leave the country, they will definitely take back power,” said Haroon Mir of the Afghanistan Centre for Research and Policy Studies. Site: <http://dawn.com/2011/10/04/all-change-all-the-same-afghan-taliban-10-years-on/>*

48. The following Foreign Relations Council report from 2011 also relevantly states:

The insurgents are also **increasingly adopting technology for propaganda; they use Twitter and text messages...** to communicate with media, operate a clandestine radio station, "Voice of Shariat," and publish videos.

Site: <http://www.cfr.org/afghanistan/taliban-afghanistan/p10551>

#### Relocation

49. Regarding the question of possible relocation within Afghanistan, the Asian Development Bank notes that Afghanistan continues to display limited economic opportunities, widespread insecurity, weak governance and institutionalised corruption as well as a lack of infrastructure, housing and social services.<sup>9</sup> A number of sources

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<sup>9</sup> Asian Development Bank 2012, 'Afghanistan: Overview' <<http://www.adb.org/countries/afghanistan/main>> Accessed 4 October 2012 <Attachment>; Cordesman, AH and Mausner, A 2010, *Afghanistan: Food and Conflict in 2010*, CSIS Center for Strategic and International Studies, April <<http://csis.org/publication/agriculture-food-and-poverty-afghanistan>> Accessed 28 September 2012 <Attachment>; 'Rural poverty in the Islamic Republic of Afghanistan' 2010, International Fund for Agricultural Development (IFAD), IFAD Rural Poverty Portal <<http://www.ruralpovertyportal.org/web/rural-poverty-portal/country/home/tags/afghanistan>> Accessed 4 October 2012 <Attachment>; UN Office of the High Commissioner for Human Rights 2010, *Human Rights Dimension of Poverty in Afghanistan*, March, p.iii

confirm that Afghans returning to Afghanistan from another country or relocating within Afghanistan will face difficulties with housing and employment, and some individuals may be targeted for various reasons, depending on their individual profile and the availability of support from their family or ethnic group.<sup>10</sup> Refugees International indicate that refugees returning to Afghanistan would be left vulnerable on account of the economic and security situation in that country:

*Afghanistan's extreme poverty, coupled with recurrent conflict and natural disasters, have left the majority of its citizens extremely vulnerable and unable to cope. ... Refugees returning from Iran and Pakistan are also vulnerable and continue to face an uncertain future*<sup>11</sup>

50. Internal relocation to centres such as Kabul holds not inconsiderable challenges, particularly for families with young children, as recently reported in the New York Times:

*Last winter, more than 100 children died of the cold in refugee camps around Kabul, with 26 dying in the Charahi Qambar camp alone*<sup>12</sup>

51. The following 2011 summary from UNHCR is also pertinent to the question of relocation: Site: <http://www.unhcr.org/refworld/docid/4dd21a4dc.html>, accessed on 18 May, 2011 (in part).

*Humanitarian agencies and Afghan authorities are ill-equipped to deal with the displaced. Factors like the poor security situation and widespread land-grabbing have prevented refugees from returning to their homes, and many congregate instead around major urban centres. In the absence of a properly functioning legal system, the state remains unable to protect property rights.*

## FINDINGS AND REASONS

52. On the issue of identity, the Tribunal has assessed available documentary evidence, in combination with [the applicant]s physical appearance, understanding of Hazaragi and consistency of statements in relation to his identity. As a result of the congruence of evidence provided on these issues, the Tribunal accepts that the applicant is a Shia Hazara male of stated age, and is a citizen of Afghanistan. It is also accepted that he has spent considerable time illegally in Iran and Pakistan, but the Tribunal does not find that he has a current legally enforceable right to enter and reside in a safe third country such that he is excluded from Australia's protection obligations. His claims are assessed in relation to Afghanistan.

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[http://unama.unmissions.org/Portals/UNAMA/human%20rights/Poverty%20Report%2030%20March%202010\\_English.pdf](http://unama.unmissions.org/Portals/UNAMA/human%20rights/Poverty%20Report%2030%20March%202010_English.pdf)> Accessed 4 October 2012 <Attachment>

<sup>10</sup> Majidi, N. 2011, 'Urban Returnees and Internally Displaced Persons in Afghanistan', *Middle East Institute & Foundation pour la Recherche Strategique*, 25 January, p.1, Refugee Cooperation website <[http://www.refugeecooperation.org/publications/afghanistan/pdf/01\\_majidi.pdf](http://www.refugeecooperation.org/publications/afghanistan/pdf/01_majidi.pdf)> Accessed 17 November 2011 <Attachment>

<sup>11</sup> Refugees International 2012, *Afghanistan* <<http://www.refintl.org/where-we-work/asia/afghanistan#in-depth-report>> Accessed 28 September 2012 <Attachment>. Refugees International are an independent, non-government advocacy organisation for displaced people.

<sup>12</sup> New York Times, 31 December 2012 at [http://www.nytimes.com/2012/12/31/world/asia/cold-afghan-camps-receive-some-aid-but-shortages-loom.html?\\_r=0](http://www.nytimes.com/2012/12/31/world/asia/cold-afghan-camps-receive-some-aid-but-shortages-loom.html?_r=0)



53. The Tribunal has closely examined the claims presented by [the applicant] and his agent, in particular those that relate to a need for protection. The Tribunal notes that Article 1A(2) of the Refugees Convention requires that a refugee have a well-founded fear of ‘being persecuted’ For the purposes of determining that issue, s.91R(1) of the Act provides that Article 1A(2) does not apply to persecution unless: one or more of the Convention reasons is the essential and significant reason or reasons for the persecution (s.91R(1)(a)); the persecution involves serious harm (s.91R(1)(b)); and the persecution involves systematic and discriminatory conduct (s.91R(1)(c)). Examples of ‘serious harm’ are set out in s.91R(2) of the Act. These include: a threat to life or liberty; significant physical harassment or ill-treatment and significant economic hardship or denial of access to basic services or a capacity to earn a livelihood, where such hardship or denial threatens the person’s capacity to subsist.
54. Regarding [the applicant]’s subjective fears regarding any return to Afghanistan, the Tribunal noted that the applicant has expressed quite discernible and firm beliefs regarding his inevitable harm at the hands of local Taliban in Ghazni. A key reason for this feared conduct involves his unacceptable relationship with a local woman which, it is claimed, marks him out as a member of the particular social group of ‘Afghans who contravene social mores.’ The applicant also states that he fears harm connected to his defining personal characteristics. These include his Shia religion, his Hazara ethnicity, his implied anti-Sunni/anti-Taliban political opinion and his membership of the particular social groups of both ethnically-identifiable Hazaras and returnees to Afghanistan. [The applicant] and his representative also expressed certainty regarding his inability to survive anywhere in Afghanistan; he would be regarded as an outsider and a spy wherever he went in the country, receiving no basic support from any source. It is claimed that survival in such circumstances would be impossible.
55. Assessing [the applicant]’s demeanour and affect, and the credible accounts provided regarding his experiences and fears of future harm, the Tribunal was left in no doubt as to [the applicant]’s true state of mind, being one of fear of serious harm on any return to Afghanistan, as a result of his enduring personal characteristics – namely his Hazara ethnicity, his Shia religion, his implied anti-Sunni/anti-Taliban political opinion and his membership of the particular social groupings noted above. The Tribunal accepts that [the applicant] holds subjective fears in relation to persecutory conduct at the hands of the local Taliban on these bases.
56. However, a further objective element is crucial to the establishment of a positive finding of eligibility for protection. Article 1A(2) of the Refugees Convention requires that a person’s fears of persecution be a ‘well-founded fear’. The High Court in *Chan Yee Kin v MIEA* (1989) 169 CLR 379 held that the concept of well-founded fear involves both a subjective *and* an objective element. That is, there must be a state of mind, a fear, and an objective basis for that fear. There will be a basis for that fear if there is a ‘real chance’ of being persecuted. 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 that case, McHugh J notes:
- [A] fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur... and applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be... persecuted. Obviously, a far-fetched possibility of persecution must be excluded (at 429)

57. In assessing whether the claimant possesses a fear that is objectively well-founded, it is necessary for the Tribunal to examine the credibility of the claimant's specific situation, against the backdrop of reliable and relevant country information regarding Afghanistan.
58. The Tribunal questioned [the applicant] in depth regarding a number of factual issues, and also sought input and clarification from his representative. The Tribunal notes that the applicant's account at hearing was generally coherent, comprehensive and devoid of discernible artifice. Key facts such as dates, events and places were largely consistent with earlier claims described at the Departmental level as well as within submitted documentation. The Tribunal had initial concerns that certain elements of evidence provided at hearing appeared somewhat vague and/or confused. Such elements included discussions regarding the applicant's interaction with Taliban personnel at the Afghan-Irani border and also the exact nature of parties involved in the local inter-family dispute. The Tribunal acknowledges, however, that interpretational issues were identified by the applicant at the commencement of the hearing and whilst not considered particularly onerous by the applicant at that early stage, the Tribunal accepts that minor descriptive difficulties have contributed to the above-noted potential discrepancies, which are accordingly afforded no evidentiary weight. Further, the potential discrepancies in question are not considered to be fatal to the veracity of total evidence provided. In assessing the generally consistent nature of prior evidence provided in written and oral forms and bearing in mind the practical realities of a bilingual hearing environment, the Tribunal finds that overall, the applicant presents as a witness of truth on key issues.
59. The Tribunal notes that the applicant was largely preoccupied throughout hearing with potential fall-out from his unsanctioned relationship with the woman named [Ms B]. Across time and in various fora, the applicant has consistently and cogently set out the genesis and nature of this relationship. Further, the likelihood of the applicant actually engaging in such risky behaviour is corroborated by a number of related and coextensive factors. Primarily, at all relevant times the applicant has presented as a somewhat impulsive young man, likely – as claimed - to become bored and to seek a social outlet from [Relative A]'s agricultural work. Such misdirected energy is also accepted to flow from his recent return to his home country after a previously quite varied life in Iran, as set out in accompanying documentation. This impulsivity is also reflected in the events of the applicant's earlier adulthood, wherein for example he rejected Shia Islamic school and suddenly left his family and country to seek out experiences across the border in Iran. His rather thoughtless consideration of subsistence in Kabul – he 'supposes he might' be able to live there (see 33-34 *supra*) - is further reflection of his rather reckless nature, which the Tribunal finds to be genuine. The Tribunal accepts on the basis of consistent evidence, observable applicant demeanour and the timing of the claimed relationship in the context of [the applicant]'s return to Afghanistan, that the careless development of a clandestine or *haram* relationship with a local engaged woman named [Ms B] did in fact occur.
60. The consequences of these actions relevant to the Convention are now examined. On the question of his related membership of the particular social group of 'Afghans who contravene social mores', the Tribunal accepts on the basis of compelling independent evidence that social life in Afghanistan is dominated by a strict and conservative observance of Islam (36-37). It is accepted that Afghan citizens who fail to observe a

strict interpretation of Islamic rules would fall within the noted social grouping, which the Tribunal accepts exists. The Tribunal further accepts on the basis of available evidence that both official and Taliban-controlled *ulemas* or religious councils enforce the compliance of Afghan citizens with this rigid form of religious observance (37-39). In the applicant's particular case, it is accepted on the basis of corroborative independent information that the local Ghazni religious *ulema* forms part of a Taliban-controlled 'shadow government' (40-46), which has the ability and tendency to adjudicate upon local disputes - both religious and secular (40,43). It is of note that *ulemas* are multi-denominational (38) and thus more likely to become involved in Islamic disputes generally, including those between Hazara Shias. Whilst *prima facie* the involvement of the Sunni Taliban in Shia affairs appears unlikely, considering the level of involvement of Taliban shadow governments in provincial affairs, it is accepted as genuine that this has occurred in the applicant's home area, as claimed. The Tribunal finds that within his home area the applicant has become known to both civilians and Taliban 'shadow' authorities as a result of his *haram* indiscretions, and that the claimed searches for [the applicant] and ongoing harassment of his family ensued.

61. Further, the Tribunal finds that on any return to his home area in Ghazni, the applicant will be quickly targeted by Taliban forces emanating from the local shadow government and subjected to systematic and discriminatory conduct amounting to serious harm as a direct result of his membership of the particular social group of 'Afghans who contravene social mores' Moreover, the Tribunal further finds that the harm that the applicant fears constitutes serious harm including but not restricted to torture and extra-judicial killing. Such violence at the hands of the Taliban well-documented in independent information, for example at paragraph 42 *supra*.
62. Due to the ongoing difficulties associated with security in Afghanistan, the Tribunal accepts that there is no effective State protection available to [the applicant] within Ghazni for the foreseeable future. As noted judicially in the matter of *S152*, if Convention-related motivating factors are found to exist, it will usually be necessary to consider whether the nation's authorities provide a reasonable level of protection against the harm feared.<sup>13</sup> Hypothetically, an Afghan citizen could reasonably expect that if persecuted by the Taliban in the manner applicable to [the applicant], the State could protect him or her from such abuse. This is not the case for the applicant, predominantly due to the above-evidenced structural and security issues in Afghanistan broadly (42, 49-51). Further, even if the applicant attempted to evade local Taliban authorities by existing secretly in Ghazni on return, the Tribunal finds that due to expanding communication capabilities within and across the Taliban (47-48), he would inevitably be located and subjected to serious harm in the reasonably foreseeable future by these assailants. The Tribunal finds that [the applicant] would have no recourse to effective State protection within Ghazni and that this is the case for the foreseeable future.
63. Further, the Tribunal finds that that relocation elsewhere within Afghanistan is not reasonable in the sense of practicable for the applicant. As noted in paragraphs 49-51 above, the prospects for internally displaced Afghan Hazaras attempting to relocate elsewhere in the country - such as Kabul - are dire in the extreme. A lack of economic and social support, as well as overarching hostility and neglect towards 'outsiders' will accompany any such move by [the applicant], who the Tribunal accepts has no feasible

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*MIMA v Respondents S152/2003* (2004) 222 CLR 1

supports outside of his home area. This inadequacy is such that the Tribunal finds that relocation within Afghanistan is not reasonable in the sense of practicable in the claimant's circumstances.

64. In summary, the Tribunal finds that the claimant faces a real chance of persecution on the basis of his membership of the particular social group of 'Afghans who contravene social mores', if he returns to Afghanistan now or in the reasonably foreseeable future. The Tribunal is satisfied that the applicant will be subjected to serious harm amounting to persecution for a Convention reason by private citizens, namely Taliban forces. The Tribunal finds that the Convention basis of membership of a particular social group is the essential and significant reason for the persecution; that the persecution involves serious harm to the person; and the persecution involves systematic and discriminatory conduct, and that no effective State protection is available. Relocation is not considered to be reasonable in the circumstances.
65. For reasons given above, the Tribunal is satisfied that the claimant has a well-founded fear of persecution, if he returns to Afghanistan now or in the reasonably foreseeable future.

## **CONCLUSIONS**

66. The Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

## **DECISION**

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