FEDERAL COURT OF AUSTRALIA

BTP18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 265

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| Appeal from: |  *BTP18 v Minister for Home Affairs* [2019] FCCA 2608 |
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| File number(s): | ACD 69 of 2019 |
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| Judge(s): | **BROMWICH J** |
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| Date of judgment: | 3 March 2020 |
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| Catchwords: | **MIGRATION** – appeal from a decision of the Federal Circuit Court of Australia – jurisdictional error – whether the primary judge erred in finding that the Immigration Assessment Authority did not misapply the ‘real chance’ test – appeal dismissed.  |
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| Legislation: | *Migration Act 1958* (Cth) s 5H, s 5J, s 36(2)(a), s 65  |
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| Cases cited: | *CGA15 v Minister for Home Affairs* [2019] FCAFC 46*CGA15 v Minister for Immigration* [2018] FCCA 1450*Chan Yee Kin v Minister for Immigration* (1989) 169 CLR 379*CID15 v Minister for Immigration and Border Protection* [2017] FCA 780*CID15 v Minister for Immigration* [2016] FCCA 3076*Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 456; 43 FCR 280*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259*SZVJE v Minister for Immigration* [2016] FCCA 594  |
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| Date of hearing: | 17 February 2020 |
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| Registry: |  |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Solicitor for the Appellant: | Mr S Kikkert |
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| Counsel for the First Respondent: | Mr B Kaplan |
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| Solicitor for the First Respondent: | Clayton Utz |

ORDERS

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|  | ACD 69 of 2019 |
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| BETWEEN: | BTP18Appellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

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| JUDGE: | BROMWICH J |
| DATE OF ORDER: | 3 MARCH 2020 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs as assessed or agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Revised from transcript)

BROMWICH J:

1. This is an appeal from orders made by a judge of the Federal Circuit Court of Australia by which an amended application for judicial review was dismissed with costs. The second respondent, the Immigration Assessment **Authority**, had affirmed a decision of a delegate of the first respondent, the **Minister** for Immigration, Citizenship, Migrant Services and Multicultural Affairs (then the Minister for Home Affairs), to refuse the grant of a particular kind of protection visa known as a SHEV (Safe Haven Enterprise Visa).
2. The appellant is an Afghan citizen, being an ethnic Hazara of the Shia Muslim faith. He fears that if he is returned to Afghanistan he will be seriously harmed by the Taliban by reason of his ethnicity, religion, imputed anti-Taliban political opinion and membership of a particular social group (returnees from western countries). Part of this fear turns on work he did for the Afghan government. He did not experience harm when he was in Afghanistan, but believes that he would have been killed by the Taliban if he had not left. He said he could not relocate even to Kabul because of the Taliban’s network of spies and informants, because it is very dangerous for Shia Hazaras to travel on roads and because he would be personally targeted.
3. The appellant advanced five grounds of review in the Federal Circuit Court by which he asserted jurisdictional error on the part of the Authority in conducting limited merits review of the delegate’s decision. Only the first ground of judicial review before the primary judge is pressed on appeal as follows:

The [Authority] fell into jurisdictional error by applying a relative, rather than an objective, approach in assessing whether the applicant could safely relocate to his home region of Surkh-e Parsa [Surkh-o- Parsa or Surkhi Parsa] in Parwan.

1. This appeal therefore concerns the jurisdictional requirement imposed upon the Authority by s 5J of the *Migration Act 1958* (Cth), for the purposes of s 36(2)(a) of that Act, to assess whether a protection visa applicant has a “*well-founded fear of persecution*”. That concept, legislatively drawn from the terms of the 1951Convention Relating to the Status of Refugees, in turn requires an assessment of whether there is a “*real chance*” that the protection visa applicant will suffer persecution for a Convention reason. Unless that assessment is resolved in a protection visa applicant’s favour, any fear that is genuinely subjectively held will not be well-founded, and a necessary criterion for the grant of a protection visa will not be met. Section 65 of the *Migration Act* then compels refusal to grant the protection visa sought.
2. The authorities on this topic, as relevant to this appeal, establish the following:
3. A “*real chance*” is one that is substantial rather than remote or far-fetched, regardless of whether it is more than a 50 per cent chance or not – it may even be only a 10 per cent chance in a given case: ***Chan*** *v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at p 389 per Mason CJ, p 398 per Dawson J, p 407 per Toohey J and p 429 per McHugh J. This approach was applied to ss 36(2)(a) and thus to s 5J by the Full Court in ***CGA15*** *v Minister for Home Affairs* [2019] FCAFC 46 at [22].
4. The “*real chance*” test is objective. As Judge Driver pointed out in *SZVJE v Minister for Immigration* [2016] FCCA 594 at [20], “*[t]he test of whether there is a real chance or a real risk of harm is not a relative one. It is not determinative whether the risk in one place is ‘less severe’ than the risk in another place. What matters is the actual level of risk in any particular place*”. That expression of the test was endorsed by Moshinsky J in ***CID15*** *v Minister for Immigration and Border Protection* [2017] FCA 780 at [35], and in turn endorsed by the Full Court in *CGA15* at [23].
5. As the Full Court in *CGA15* further observed, also at [23], citing *CID15* at [35]:

The test of whether there is a real chance that an applicant for protection will suffer harm in a place is not a relative one, and it is not determinative whether the risk in one place is less severe than another place. It is plain that the mere fact that a person might be safer in place B than place A does not entail that the person does not face a real chance of persecution in place B. For example, if place A is very unsafe and place B is relatively safer it might still be the case that a person faces a real chance of serious harm in place B. What matters is the actual level of risk in any particular place … .

1. The appellant relied upon [44] of the Authority’s reasons, asserting that this paragraph infects the entire decision by reason of conducting a relative, rather than objective, assessment of the “*real chance*” test, contrary to *CID15* and *CGA15.* TheAuthority said (at [44]):

I have considered the information provided by the representatives as to conflict patterns in Afghanistan and the fluidity of the security situation. I have considered that Surkh-e Parsa neighbours with Pashtun districts like Ghorband and Jalrez and is in proximate distance to the Ghorband valley, areas which have seen a deterioration in their security. However I am satisfied that while there are credible security concerns in parts of Parwan and other areas, but, on the evidence, Surkh-e Parsa … remains relatively secure with very few security incidents in the past few years and there is no sign that the insurgent and criminal activities which have taken place in the other districts will spread to Surkh-e Parsa within the foreseeable future, or to the roads linking Surkh-e Parsa to [other districts] in this region is more than remote. … The applicant’s representative has also provided a number of reports referring to claims that the Taliban and Islamic State have established themselves, or are attempting to establish themselves, in various areas of Afghanistan. However, none of these reports refer to such matters affecting the applicant’s home district or any of the districts through which the applicant would travel after arriving in Bamyan. I am not satisfied the risk of the applicant being harmed through generalised violence is more than remote.

1. The primary judge, after referring to *CID15* and quoting from *CGA15* at [22]-[28] and [32], said (at [52]-[54]):

As the submissions of the First Respondent, set out earlier in these reasons, make plain, and as noted in the summary of the IAA’s decision also, the IAA made a series of specific findings “on the evidence” in the current matter. In my view, the conclusion reached by the Full Court in *CGA15* at [32] (set out above) applies equally here. Read in their entirety, which must be my approach, the IAA made “a series of findings” on the evidence, which, in my view, were plainly open to it. It is the series of findings which points clearly to the IAA making an objective assessment of the evidence, rather than (as alleged by the Applicant) the IAA having taken a “relative” approach.

In particular, as noted in the First Respondent’s submissions, the IAA’s relevant findings, which I accept, were as follows:

*a) Most returnees from Australia are returned to Kabul airport: CB 368 [39].*

*b) Surkh-e Parsa is accessible from Bamyan Province: CB 368 [41].*

*c) The applicant has not claimed and there is no evidence before the Authority indicating that the applicant would not be able to finance a single airfare to Bamyan Province: CB 368 [41].*

*d) From Bamyan Province, the applicant could travel, by road, to Surkh-e Parsa through various districts which are either predominantly or significantly populated by Hazaras: CB 368-369 [42].*

*e) In 2016 and 2017, there were no attacks on returnees in areas through which the applicant would need to travel to reach Surkh-e Parsa: CB 369 [43].*

*f) The possibility of the applicant being harmed in relation to his being Hazara, Shia and/or any type of returnee on his single trip to Surkh-e Parsa is remote: CB 369 [43].*

*g) Surkh-e Parsa neighbours areas that have deteriorated in terms of their security situation: CB 369 [44].*

*h) While there are credible security concerns in parts of Parwan Province and other areas, “on the evidence” “Surkh-e Parsa remains relatively secure with very few security incidents in the past few years”: CB 369 [44].*

*i) The Authority was not satisfied that the risk of the applicant’s being harmed in generalised violence is more than remote: CB 369 [44].*

*j) The “chance” of the applicant being harmed in a targeted attack or through generalised violence in Kabul before travelling to his home area is remote: CB 370 [45].*

Accordingly, Ground 1 in the Amended Application is not made out and must be rejected.

1. The substance of the appellant’s submissions on appeal seek to apply the principle stated in *CID15* as endorsed in *CGA15*, but to distinguish the result in *CGA15*. He submits that he has discharged his onus in demonstrating jurisdictional error on the part of the Authority, and thereby error on the part of the primary judge in failing to find such jurisdictional error. This, he submits, is by reason of having demonstrated that there was a misunderstanding or misapplication of the “*real chance*” test, even on a fair reading of the reasons, read as a whole and without “*an eye keenly attuned to the perception of error*” as precluded by *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.
2. The appellant submits that the primary judge erred by holding that the Authority had not applied a “*relative*” rather than an “*objective*” approach in assessing whether he could safely return to his home region of Surkh-e Parsa in Parwan. In particular, he relies upon the parts of [44] of the Authority’s reasons (reproduced at [6] above) in which it was accepted that “*Surkh-e Parsa neighbours with Pashtun districts like Ghorband and Jalrez and is in proximate distance to the Ghorband valley, areas which have seen a deterioration in their security*” and that there were “*credible security concerns in parts of Parwan and other areas*”, but then found that Surkh-e Parsa “*remains relatively secure with very few security incidents in the past few years and there is no sign that the insurgent and criminal activities which have taken place in the other districts will spread to Surkh-e Parsa within the foreseeable future, or to the roads linking Surkh-e Parsa to* [other districts] *in this region*”. He submits that the Authority’s finding is “*extremely clear*” and involved a misapplication of the “*real chance*” test, because that test is objective, not relative, and is not determined properly by considering whether the risk in one place is less severe than the risk in another place.
3. The appellant submits that the Authority’s finding at [44] is of “*such force as to persuade that, on the balance of probabilities, the* [Authority] *made the error alleged*”. He submits that it is clear that the Authority was comparing the security of Surkh-e Parsa with Ghorband, Jalrez and the Ghorband valley and in this context found that Surkh-e Parsa was “*relatively secure*” with “*very few security incidents*”. The appellant submits that this was done instead of assessing whether the chance or risk actually faced by him was not remote, insubstantial or far-fetched, noting that this chance or risk may be statistically as low as 10 per cent as noted by McHugh J in *Chan* at p 429. He submits that this risk is not a relative test to be measured against other parts of the country. The correct question for the Authority was not whether there were “*very few security incidents*”, but rather whether the presence of any security incidents in Surkh-e Parsa created a real chance or risk that the appellant would suffer serious or significant harm if he were to be returned. The appellant submits that reaching

a conclusion that there is only a remote chance of harm based on a comparison of different areas in Afghanistan and … failing to assess the risk despite accepting that there were “*security incidents*” even if they were few in number, is to apply a test that is not supported by … authority.

1. The assessment and determination of this appeal turns on the fair characterisation of the Authority’s reasons. There is little doubt that if the appellant’s characterisation of [44] of the Authority’s reasons was correct, the real chance test would not have been properly applied, there would have been a jurisdictional error, and the primary judge would have erred. The substance of the appellant’s case turns upon the asserted clarity of the error said to be present within the terms of [44] of the Authority’s reasons, such that no resort to other findings or parts of the Authority’s reasons can cure this defect.
2. The Minister submits that the answer to the question posed by the appellant turns on a careful consideration of both the language used in [44] of the Authority’s reasons, and, if needs be, upon the balance of those reasons with a particular focus on those parts providing both relevant prior findings and the context for [44]. The Minister submits that when this is done properly, the appellant’s arguments must fail, both on the language of [44] alone, and if more is required, by reference to prior findings and context.
3. As to the language used in [44] of the Authority’s reasons alone, the Minister submits that the single use of the word “*relatively*” in [44] does not, even standing alone in the sentence in which it appears, entail any comparison of relative safety between the appellant’s home district and adjoining districts, instead of the necessary objective assessment of risk or chance of harm. Rather, the Minister submits that “*relatively*” is being used as a term of objective assessment, not comparative assessment, in the sense of finding that the objective risk of harm in the appellant’s home district was low because there had been very few incidents there in recent times. The Minister goes further and suggests that “*relatively*” is used in the sense of “*moderately*”.
4. Additionally, and alternatively, the Minister submits, as he did before the primary judge, that [44] has to be read not just in the context of [39]-[43], but also in the context of earlier country information mentioned in those paragraphs and considered in some detail. The Minister especially pointed to [27]-[29], and to the basis upon which further country information was obtained and relied upon by the Authority, as set out at [7]-[8].
5. In my view, the correct way to read the use of the word “*relatively*” as it appears in [44] of the Authority’s reasons is as the Minister principally suggests. That is because, even without resort to a beneficial reading, that word is referring to the evidence concerning the appellant’s home district, including the very few incidents there, and the lack of any indication that insurgent and criminal activities in other districts would spread to that district. I do not divine any comparison of risk with other areas, let alone such a comparison of the kind that evades the necessary objective assessment. While I would not go so far as the Minister suggests in treating “*relatively*” as being used as a synonym for “*moderately*”, I accept that the proscribed process of relative risk assessment has not taken place.
6. Even if I was incorrect in my reading of [44] in isolation, the context puts the resolution of the issue beyond doubt. The Authority was concerned to ensure that it was acting upon recent and relevant country information about the class of persons to which the appellant belonged, and also that it went beyond the delegate’s consideration of the “*real chance*” of harm inKabul and extended to the appellant’s home district, including travel to get there. The Authority stated (at [7]-[8], omitting citations):

I have also obtained new information about classes of persons of which the applicant is a member, including information on the situation in Afghanistan for Shi’a Muslims, Hazaras and returnees including those who originate from Surkh-e Parsa in Parwan. Much of this information was published after the date of the delegate’s decision and given this, and given that it provides information about these matters with regard to the developing security situation in Afghanistan, I am satisfied that there are exceptional reasons to justify considering this information.

Some of the information I obtained was available at the time of the delegate’s decision. However, as the delegate did not consider the risk of harm to the applicant specifically within his home area, country information specific to the applicant’s district and province was not considered. Similarly, while findings were made on the risk of harm while travelling to his home area, the information relied upon by the delegate did not contain specific information on the route/s the applicant would travel to his home in Parwan. For these reasons … I therefore require additional information to assess the applicant’s protection claims and I am satisfied that there are exceptional circumstances to justify considering this information.

1. The Authority subsequently summarised the effect of certain of that country information, focussing upon both the region in which the appellant’s home district was located, and that home district itself. That information revealed a small number of incidents in that home district, and a substantial reduction in incidents in the region as a whole as follows (at [26]-[29], citations omitted):

According to EASO, there were 424 documented security incidents in Parwan between January 2015 and 31 May 2017. A high number of Parwan’s security incidents occurred in Bagram district, a strategic location containing Bagram airbase (once housing 40 000 military and civilian contractors) which is still the biggest US military airbase in Afghanistan and home to the government run Bagram detention centre. A large number have also occurred in Chaharikar, where the Parwan provincial capital is located and in the contested Ghorband valley which stretches over Ghorband and Shekhali districts (both of which neighbour with Surkh-e Parsa) and Shinwar district.

In the applicant’s district, EASO reported that from January to August 2015 there were 154 security incidents in Parwan though only zero to nine were recorded as occurring in Surkh-e Parsa. From September 2015 to May 2016 there were 140 security incidents recorded, three of which occurred in Surkh-e Parsa and from 1 September 2016 to 31 May 2017 130 security incidents were recorded throughout the province with just one occurring in Surkh-e Parsa. In summary, of the 424 security incidents which occurred in Parwan between January 2015 and May 2017, around 3 % of these occurred in the applicant’s district, which remains under Afghan government control. While this information indicates that Surkh-e Parsa is not devoid of security incidents, I am satisfied that there have been few security incidents in recent years and there is limited insurgent activity.

I accept insurgent groups such as the Taliban and Islamic State do have the capability to orchestrate attacks however while the Taliban is active in parts of Parwan including in neighbouring districts, it has specifically condemned the recent mass casualty attacks against Shi’as in Kabul, Herat and Balkh province and there is no evidence of them conducting racial or religious targeting against Hazaras and/or Shia’s in Parwan province. While Islamic State or their supporters have conducted recent attacks against Hazara Shi’as in Kabul, Herat and Balkh and I accept they have the willingness and capability to conduct further attacks in certain locations, there are no reports of an Islamic State presence in Surkh-e Parsa or of ethnic or religious targeting against Hazaras/ Shi’as in Parwan. Nor is there any recent evidence of such targeting by other insurgents/AGEs in the area.

Neither the United Nations Assistance Mission in Afghanistan (UNAMA) nor other credible sources highlight Surkh-e Parsa as being an area of particular concern in relation to conflict-related abductions or racial or religious targeting by insurgents, or anyone else. While Hazaras have been subject to roadside abductions in other parts of Afghanistan, relevantly, there have been no such abductions in any part of Parwan province in … at least the past three years. There is no recent evidence of the Taliban, Islamic State, other insurgents or any criminal groups conducting racial or religious targeting against Hazaras and/or Shia’s in Parwan province. On the evidence I am not satisfied that Islamic State’s attempts to stoke sectarian violence with its attacks against Shi’as have influenced a rise in sectarianism against Hazaras/Shi’as amongst other actors in the conflict. I am not satisfied that Islamic State’s influence in Afghanistan is such that a violent sectarianism is likely to take hold in Afghanistan in the reasonably foreseeable future. I consider the chance that this would occur in the reasonably foreseeable future upon return in the applicant’s home area to be remote.

1. The Authority then made a series of findings applying the “*real chance*” test to the appellant, stating (at [30]-[34], citations omitted):

As noted above, in Surkh-e Parsa Hazaras [make up] the dominant, or at least one of the dominant groups. There are some reports of inter-ethnic or inter-religious problems in parts of Afghanistan from time to time however I am not satisfied there has been any recent rise in sectarianism and I am not satisfied that clashes between groups or individuals occur with frequency or severity indicating a real chance of harm to Hazara Shi’as through community level [ethnic] or sectarian violence. Although I note the Sunni and Shi’a Hazara communities in the applicant’s district share ideological differences, country information does not support that in Surkh-e Parsa, or more broadly in Parwan in recent years, Hazaras or Shi’as are subject to targeting by Pashtuns, Tajiks, Turkmen or other ethnic or religious groups. I am not satisfied [the] applicant would face a real chance of being harmed in community level racial or sectarian violence in Surkh-e Parsa.

Country information does not support, and I do not accept that the applicant faces a real chance of harm from the Taliban, Islamic State, other insurgents, or members of the community in Surkh-e Parsa on the basis of his racial and/or religious profile.

Having regard to the threats the applicant received on account of working for the government by [providing services], I have not accepted the applicant was of anything more than low-level interest to the Taliban at the time he departed Afghanistan. Given this and that there has now been a five year passage of time since he departed and there is no indication that the Taliban have shown any interest in the applicant during this time, I am not satisfied that the applicant is still of any interest to the Taliban in relation to his previous work, nor for any other reason. On the basis of these factors and the information indicating insurgent activity in the applicant’s home area to be limited, I am not satisfied that the applicant faces a real chance of harm from the Taliban or anyone else in relation to his previous work as a [Occupation 1] and the associated threats.

Having regard to the applicant’s future employment, given that he has consistently worked in [Occupation 1] and [serving] roles since 1997, I find that he would likely continue to work in the industry upon return. While I am not satisfied he would specifically seek out arrangements for the servicing [of] government [assets], I accept that his work may from time to time and as a matter of course, involve some work [for] government employees and contractors. However as with his previous work, I find that any government association with which the applicant may be imputed on account of this work would be low-level only and given the low level of insurgent presence and activity in Surkh-e Parsa and that security incidents in recent years have been rare, I am not satisfied the applicant would face a real chance of harm from the Taliban, other insurgents or any other persons if he resumed [Occupation 1] work or a [Occupation 1] business in his home area upon return.

The applicant has lived in Australia and he claims he will be targeted on account of his being a returnee from the west capable of influencing others. I note also that Hazaras are widely perceived to be affiliated with both the government and international community and some individuals perceived as having adopted values and/or appearances associated with western countries have been targeted due to their imputed support for the Government and the international community. DFAT acknowledges that people who have been identified as having international associations face a high risk of being targeted by anti-government elements (AGEs) and that this may possibly include returnees from western countries. DFAT notes there are occasional reports of Hazara returnees from western countries (including two from Australia in 2014) allegedly being targeted for having spent time in a western country.

1. After considering claims concerning the appellant’s time in Australia, and the consequences of him returning to Afghanistan, the Authority made the following findings in relation to the appellant’s return to Afghanistan (at [38]-[44], omitting citations and repeating [44] for ease of reading in context):

I have considered the applicant’s claims overall and I am not satisfied the applicant faces a real chance of serious harm in his home region of Surkh-e Parsa in Parwan on account of the previous threats for his work [for the] government, nor if he [provided] such [services] upon return, his race, religion, because he has spent a significant time in overseas countries and would be returning having sought asylum in the west - nor for any cumulative profile.

Country information indicates that most returnees are returned to Kabul airport. In terms of the applicant’s ability to return safely to his home region, I have considered that country information indicates there is insecurity on roads passing through areas contested by insurgents, where the Taliban and other insurgents as well as criminal elements set up unofficial checkpoints, targeting those who appear wealthy or are associated with the government or the international community. I am satisfied that any interest the Taliban previously held in the applicant was low-level and that they do not currently and would not upon return have any adverse interest in the applicant such that they would be looking for him personally. While I note the applicant ran a successful business, as there is nothing in the applicant’s evidence, the submissions or referred materials to indicate so, I am not satisfied that the applicant is wealthy or that he would be perceived as such upon return.

There are no direct road routes between Kabul and Surkh-e Parsa, seemingly due to large snow-capped mountains making travel difficult in summer and impossible in winter. The most direct road route from Kabul is a highway which runs through areas including Charikar and the Ghorband district which as noted above, have seen higher levels of insecurity. I have considered the reports before me regarding incidents of kidnapping/abduction and other attacks against Hazara Shi’a and returnee road travellers, in particular, on the roads linking Kabul and the Hazarajat. However, all ethnic groups are reported to be vulnerable to attacks and it can be difficult to ascertain the motivation for attacks, and to separate criminal attacks from insurgent activity. Notably, none of these incidents were reported as to have occurred on the roads between Kabul city and the border with Parwan, nor in Parwan province. However, as a result of the insurgency and criminal elements, at times, Surkh-e Parsa and Sheikh Ali districts have been inaccessible by road from Kabul and I accept there may be some risks to road travellers on this route.

However, country information indicates that humanitarian assistance providers have been accessing Surkh-e Parsa and Sheikh Ali from Bamyan and this route is also available to the applicant. Country information indicates that the applicant can return to his home area, travelling by air to Bamyan and then onwards by road to his home area. There are regular flights from Kabul to Bamyan and estimated flight cost is approximately USD 100. The applicant has not claimed and there is no other evidence before me to indicate that the applicant would not be able to finance this single fare air travel and I note he is currently employed in Australia.

From Bamyan, the applicant can travel by road either through Hesa-e-Awal-e-Behsud district in Wardak province to Surkh-e Parsa or through Shibar district of Bamyan, through Sheikh Ali and then to Surkh-e Parsa. All of these districts are either predominantly or significantly populated by Hazaras. According to DFAT Shibar sees higher levels of violence by armed AGEs than other parts Bamyan, but it is nonetheless also case that Shibar sees few security incidents and very little insurgent activity and when insurgent actions have occurred in Shibar they have tend to be targeted at government officials. DFAT assesses that overall Hazaras are able to travel through Bamyan’s areas without facing undue security risks. There is no evidence of ordinary Hazara Shi’as or returnees being targeted on Bamyan roads. Regarding Wardak, there were two incidents of abduction targeting Hazara civilians in 2015 and 34 in 2016. However UNAMA attributes this increase to continuing land disputes in the area between Hazara residents and Kuchi tribal members and I am satisfied that these circumstances are distinct from those of the applicant, who would only be briefly travelling through the area. There is no evidence of returnees being targeted on Wardak roads. No such incidents have been reported as to have occurred on the roads in Sheikh Ali or Surkh-e Parsa in Parwan. Nor have there been any reported incidents of attacks on Hazaras, Shi’as and/or any type of returnee in the broader Parwan province for at least the last three years. There is no evidence of the roads through these areas being affected by checkpoints set-up by Taliban or other AGEs searching for persons associated with the Afghan government or the international community as has been the case in other restive Pashtun districts.

I give significant weight to the fact that while there were two attacks on returnees in 2014 and a spike of road incidents involving Hazaras in 2015, this has tapered off in 2016 and 2017 and apart from Wardak, which the applicant would only pass through briefly, there have been no such incidents in the areas the applicant would need to travel through to reach Surkh-e Parsa. Having considered the relevant issues, I consider the possibility of the applicant being harmed in relation to his being Hazara, Shi’a and/or any type of returnee on his single return trip to Surkh-e Parsa to be remote and therefore not real.

I have considered the information provided by the representatives as to conflict patterns in Afghanistan and the fluidity of the security situation. I have considered that Surkh-e Parsa neighbours with Pashtun districts like Ghorband and Jalrez and is in proximate distance to the Ghorband valley, areas which have seen a deterioration in their security. However I am satisfied that while there are credible security concerns in parts of Parwan and other areas, but, on the evidence, Surkh-e Parsa a remains relatively secure with very few security incidents in the past few years and there is no sign that the insurgent and criminal activities which have taken place in the other districts will spread to Surkh-e Parsa within the foreseeable future, or to the roads linking Surkh-e Parsa to in this region is more than remote. Bamyan’s airport. The applicant’s representative has also provided a number of reports referring to claims that the Taliban and Islamic State have established themselves, or are attempting to establish themselves, in various areas of Afghanistan. However, none of these reports refer to such matters affecting the applicant’s home district or any of the districts through which the applicant would travel after arriving in Bamyan. I am not satisfied the risk of the applicant being harmed through generalised violence is more than remote.

1. The above passages make it abundantly clear that that the Authority did not engage in any proscribed application or assessment of the “*real chance*” test. There was no mere relative assessment of risk compared to other districts in the region that the appellant came from, but rather a thorough assessment of the objective risk that the appellant faced in returning to his home district, and a finding based upon that assessment that he did not have a well-founded fear of persecution.

## Conclusion

1. The appeal must be dismissed with costs.

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| I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich. |

Associate:

Dated: 3 March 2020