FEDERAL COURT OF AUSTRALIA

WAHK v Minister for Immigration & Multicultural & Indigenous Affairs

[2004] FCAFC 12

MIGRATION – appeal from Federal Magistrate – RRT found that when appellant left Afghanistan he had a well founded fear of persecution – RRT found that he was not a refugee – RRT found that conditions had changed since departure from Afghanistan – whether wrong test applied – RRT had regard to Taliban's lack of government power and whether Pashtuns were in control – whether wrong question was asked – whether an error going to jurisdiction.

Migration Act 1958 (Cth)

NAAV v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 123 FCR 298 discussed

Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476 cited

VAAW v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 259 followed

Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 discussed

Minister for Immigration and Multicultural Afffairs v Eshetu (1999) 197 CLR 611 discussed

Re Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57 discussed

SFGB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 231 cited

WAHK v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

W 16 of 2003

LEE, TAMBERLIN AND RD NICHOLSON JJ

30 JANUARY 2004

PERTH

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W16 OF 2003

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT

BETWEEN:	WAHK APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	LEE, TAMBERLIN AND RD NICHOLSON JJ
DATE OF ORDER:	30 JANUARY 2004
WHERE MADE:	PERTH

THE COURT ORDERS THAT:

1. The appeal is allowed.
2. The orders made by the Magistrate are set aside.
3. The decision of the Refugee Review Tribunal is set aside.
4. The application is remitted to the Refugee Review Tribunal for determination in accordance with law.

5. The respondent pay the appellant's costs of the appeal and of the hearing before the Magistrate.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W16 OF 2003

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT

BETWEEN:	WAHK APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	LEE, TAMBERLIN AND RD NICHOLSON JJ
DATE:	30 JANUARY 2004
PLACE:	PERTH

REASONS FOR JUDGMENT

LEE AND tamberlin JJ:

1 This is an appeal from a decision of a Federal Magistrate, who dismissed an application for judicial review of a decision by the Refugee Review Tribunal ("the RRT") made on 29 May 2002, which upheld a refusal by

a Ministerial delegate to grant to the appellant a protection visa under the *Migration Act 1958* (Cth) ("the Act").

2 The appellant's case is that if he is returned to Afghanistan there is a real chance that he will be persecuted for a Convention reason because he is an ethnic Hazara and a Shi'Ite Muslim in a predominantly Sunni country. The persecution feared is from the Taliban and/or members of the Pashtun ethnic group.

3 The RRT's finding turned on whether there is a real chance of persecution. The RRT was not satisfied that, on the available evidence, ethnic Hazaras in Ghazni, which is the name of the province in which the appellant lived, are generally at risk of persecution in the foreseeable future from the Taliban, the Pashtuns, or any other group.

background

4 The RRT accepted that the appellant was a Shi'a Hazara, and a citizen of Afghanistan, and that he had lived there until he came to Australia. He arrived in Australia on 22 August 2001, and lodged an application for a protection visa as a refugee, which was refused on 30 November 2001. The appellant applied to the RRT for review. The RRT accepted that, at the time that he left Afghanistan, the appellant, as a Shi'a Hazara, was at risk of suffering persecution while the Taliban effectively governed Afghanistan. It found that, at that time, he not only had a subjective fear of persecution, but also a well-founded fear of persecution, because there was a real chance that if he was returned then, he would be at risk of persecution on a Convention ground. However, the RRT considered that since the appellant's departure, conditions had materially changed in Afghanistan, and that by the time of the RRT decision on 29 May 2002, which is the relevant date, the risk no longer existed.

5 The RRT found that although individuals who had previously exercised local authority under the Taliban retained similar positions of authority under the new regime, the Taliban had been effectively removed as a political and military force in Afghanistan. In its reasons, the RRT member said:

"…

I am satisfied that the circumstances which motivated the Applicant to flee Afghanistan no longer exist. The Applicant is no longer at risk of harm from the Taliban **as the government of Afghanistan**.

I note that the Applicant states that even if the Taliban have gone the situation is essentially unchanged and he is still at risk of harm from the Pashtoons [sic].

I am not satisfied that the situation is essentially unchanged or that the **Pashtuns control the interim government**. I note that Pashtuns have about eight of the

Ministerial positions while Hazaras hold five portfolios in the new Afghan government including Planning, Transport, Commerce and Education. There are also non-Hazara Shias [sic] in the interim government. The new government has been welcomed on behalf of Hazaras by the leader of the powerful (Hazara-Shia [sic]) Hezb-i-Wadhat party and militia ("New Afghanistan Cabinet members", FWN Financial via COMTEX in Reuters Business Briefing, 27 December 2001, CISNET CX60779), as well as by the transitional authorities in Ghazni.

I accept that there has been some historical marginalisation of Hazaras in Afghanistan. I accept that there is evidence that Hazaras have been accorded low status in Afghanistan.

I also note that despite the current media spotlight on Afghanistan there has been no report or suggestion of any persecution of Hazaras since the fall of the Taliban last year.

I am not aware of any reports of present mistreatment of Hazaras or Shi'as (as Hazaras or Shi'as) by the Northern Alliance or by Pashtuns or any other group.

I note that the Applicant claims that the Hazaras are unarmed and defenceless and presumably therefore at risk of being mistreated by other groups. I also note evidence of a formidable Hazara militia … and as early as the beginning of December 2001 the powerful militia of the (Hazara) Harekat-e-Islami party was reported as a significant force in Ghazni province, accepting Taliban surrenders there …

I am not satisfied, on the available evidence, that Hazaras in Ghazni are **generally** at risk of persecution in the foreseeable future.

I am not satisfied that the Applicant would face a real chance of persecution from the Taliban or others on return to Afghanistan. I am not satisfied that the Applicant would face a real chance of persecution from Pashtoons [sic] should he return to Afghanistan.

I am not satisfied that the Applicant's fear of persecution at the hands of the Pashtoons [sic], or remnant Taliban, or any other groups is well founded.

…" (Emphasis added)

THE APPELLANT'S CASE

6 The appellant submits that the RRT misunderstood the test to be applied, and focused wrongly on whether a real risk of persecution arose from the Taliban as the government of Afghanistan, or from the Pashtuns to the extent that they controlled the interim government.

7 The appellant submits that the RRT only considered part of the evidence and that, read as a whole, the evidence established that the Taliban remained a significant power in Afghanistan, especially in the appellant's

province of Ghazni. The appellant submits that the Governor of Ghazni was an ethnic Sunni with a long history of human rights abuse, and that the position in Afghanistan was so uncertain that it was not open to find that there was no real risk that an ethnic Hazara would be protected from persecution. The appellant submits that the RRT ought to have so found, and that, having accepted that the Hazara had been historically subject to persecution, it fell into error by failing to consider evidence relating to the above matters. The removal of the Taliban as a government did not mean that there was no risk of persecution, and the RRT had misunderstood the test to be applied, and ignored relevant material.

the magistrate's decision

8 The Magistrate decided the case on the basis of the reasoning contained in the decision of the Full Federal Court in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298 ("*NAAV*"). The relevant reasoning in *NAAV* has, subsequent to the Magistrate's decision, been found to have been wrong by the High Court in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 ("*Plaintiff S157/2002*"). There has thus been an error of law established.

9 The Magistrate, however, states in his reasons that, notwithstanding the decision in *NAAV,* he was not satisfied that the RRT had failed to apply the correct test. The Magistrate points out that the RRT examined recent country information, which is information from sources other than the appellant, regarding events in Afghanistan. The RRT referred to specific country reports that stated that, although some individuals who had previously exercised local authority had been able to retain their positions, the Taliban had been eliminated as a political and military force. The RRT observed that Pashtuns held eight of the Ministerial positions in the interim government, there were non Hazara Shi'as in the interim government, and that the Hazaras hold five portfolios in the new Afghan government. The RRT referred to information that indicated, despite the historical marginalisation of Hazaras in Afghanistan, and evidence that they had been given low status, that there had been no report of any persecution of Hazaras since the fall of the Taliban in 2001. Nor were there any reports of any present persecution by the Northern Alliance or Pashtuns. The RRT also referred to the evidence of a formidable Hazara militia, which, as early as December 2001, was a significant force in Ghazni province. Considering the fact that the RRT had reviewed up-to-date information, and assessed for itself that there was no risk, the Magistrate found that there was no reviewable error, and refused the application for judicial review.

reasoning on appeal

10 Having regard to the decision in *Plaintiff S157/2002,* it is clear the learned Magistrate erred in considering that he was bound to apply the majority view in *NAAV.* However, we do not think it is convenient or appropriate in the circumstances of the present case, nor in the interests of

justice, to set aside the decision of the Magistrate on this ground alone and remit the matter for further consideration. In our view, the most convenient course is to consider the substantive point raised as a basis for judicial review: see *VAAW v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 259 at [8].

11 The RRT reasoning focused on the elimination of the Taliban "as a political and military force in Afghanistan", with the emphasis being placed on the consideration that it no longer governs or administers the country. The conclusion reached on this basis was that the circumstances which gave rise to the appellant's departure from Afghanistan, and had constituted a risk of persecution at that time, no longer existed. There was therefore said to be no risk from the Taliban as the government of Afghanistan.

12 Where the RRT has accepted that an applicant had a well-founded risk of persecution at the time of their departure, a question arises concerning the approach that the RRT should take, in view of that finding, at the time it makes its decision concerning whether that applicant would have a well-founded risk of persecution, if they were returned. In *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 ("*Chan*"), Gaudron J, (at 415), accepted that the correct approach to a submission as to changed circumstances is as follows:

"If an applicant relied on his past experiences it is, in my view, incumbent on a decision-maker to evaluate whether those experiences produced a well-founded fear of being persecuted. If they did, then a continuing fear ought to be accepted as well-founded unless it is at least possible to say that the fear of a reasonable person in the position of the claimant would be allayed by knowledge of the subsequent changes in the country of nationality."

13 The above view was not shared by Gummow J, who, in *Minister for Immigration and Multicultural Afffairs v Eshetu* (1999) 197 CLR 611 at 659, said that the view of Gaudron J in *Chan* (quoted above) did not represent the view of the Court in *Chan*. Gaudron J accepted that this observation was correct in the case of *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [69]. Her Honour considered that her approach was, nevertheless, correct.

14 The relevant question is whether, as at 29 May 2002, the objective facts establish that the appellant had a well-founded fear of persecution. This is to be assessed on an objective basis, and not on the basis that the fear of a reasonable person in the position of the claimant would not be allayed by knowledge of subsequent changes in the country of nationality. The reference to a "well-founded fear" is a reference to the objective factual position at that time.

15 In the present case, the decision of the RRT referred to the position of the Pashtuns, in relation to governmental control, and emphasised the fact that the Hazaras held five portfolios in the government, including planning, transport, commerce and education, while the Pashtuns held eight positions.

The reasons point out that the new government was welcomed on behalf of Hazaras by Hazara political and military leaders, as well as by the transitional authorities in Ghazni. However, the welcoming of a new government with some Hazara participants alone would not provide a basis for finding that the **risk** of persecution from either the Taliban or Pashtuns no longer existed. The non-awareness of any reports concerning mistreatment of Hazaras by the Northern Alliance or Pashtuns in recent times is in itself a neutral consideration and cannot be considered to lead to a conclusion that any risk had been eliminated.

16 The RRT noted that the Hazaras have a formidable militia, and that it was a significant force in the Ghazni province, where the surrender of some of the Taliban had been accepted. Again, this consideration does not eliminate the risk.

17 The RRT decision concludes that, having regard to these matters, the Hazaras are not at risk from the Taliban or others including Pashtuns.

18 It is settled law that it is not necessary for the threat of persecution to come from the government or authorities in the relevant country. To require an appellant to show that the well-founded fear arose from government or official action alone would be to apply a test that is too restrictive. It is sufficient if there is no protection provided by the authorities, or the authorities are unable to provide protection to the person who faces a real risk of persecution for a Convention reason from other groups in the community. In the present case, the principal risk is from the Taliban.

19 Considered in context, the reasoning of the RRT in this matter is premised on the basis that the government has changed in Afghanistan as a consequence of a power shift, which eliminated the Taliban as a **governmental** force and led to the inclusion of Pashtuns and Hazaras in the government. Therefore, it was considered that any “risk” of the appellant being persecuted for Convention reason has been eliminated.

20 It is true that, in generally considering the definition of a “refugee”, and in outlining the applicable legal principles, the RRT had observed that the persecution must have an official quality, in the sense that it must have been officially tolerated or have been beyond the control of the authorities of the country of nationality. However, when the reasoning and finding stage of the decision is reached, the RRT places considerable emphasis on the risk of the appellant being harmed by the Taliban or the Pashtuns as a governmental authority. This emphasis was wrong.

21 A considerable body of material before the RRT indicated that as recently as late January 2002, 5,000 Taliban soldiers with 250 tanks regrouped among villages in the Ghazni province and became locked in a stand off with opposing forces. Country information before the RRT indicated that different parts of Ghazni were under the control of the Northern Alliance, the Taliban, and tribal groups. United Nations sources as recently as 2 April 2002 indicated that while Kabul was the safest city in Afghanistan for

returnees, nevertheless, given the high level of political instability and uncertainty within Afghanistan, it was not possible to make predictions about even Kabul's future stability or security. It was noted that Afghans from various ethnic groups might generally traverse areas where other groups are in the majority, and that many parts of Afghanistan are insecure, but the level of lawlessness applies generally, rather than to any ethnic minority.

22 A fair reading of the RRT's decision, in its entirety, must give particular regard to the RRT's reasons for rejecting the appellant's contentions that, even if he was no longer at risk of harm from policies executed by the Taliban as the government of Afghanistan, he was, as a Hazara, at risk of harm from the Pashtun, which situation was essentially unchanged. The RRT's reasoning that circumstances had changed appeared to turn on its view that the Pashtun do not control the interim government, thereby indicating that the RRT had asked itself the wrong question. The RRT asked itself whether there is a risk of persecution, by those in charge of the government, against which the appellant, if returned, would not be protected. The position as at 29 May 2002, on the country information, appears to be that circumstances in Afghanistan were generally unpredictable, unstable, and insecure, that historical ethnic enmities remained latent, and that any violent manifestation thereof would be beyond the control of the interim government. As a consequence, it could not be said categorically that a real risk of persecution for a Convention reason no longer existed. The RRT accepted that the appellant had a well-founded fear of persecution by the Taliban, many of whom were Pashtun, at the time he left Afghanistan. In stating that it accepted that there had been 'historical marginalisation of Hazaras', the RRT appeared to accept that the Hazara had been subjected regularly to acts of segregation, discrimination and victimisation by other ethnic groups, in particular, the Pashtun. Therefore, the real question that the RRT had to ask and answer was whether the interim government was willing and able to protect the appellant in Ghazni province from such acts, whether committed by remnants of the Taliban, the Pashtun, or other ethnic groups: see *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231 at [27]. In stating that it was not aware of any reports of mistreatment of Hazaras by the Northern Alliance or Pashtun in the few months since the overthrow of the Taliban government, the RRT could not be taken to have made a finding that there was no real risk of persecution being suffered by the appellant in the future.

23 In our view, the asking of the wrong questions and the application of the wrong test, namely, whether the Taliban or the Pashtun controlled the government, which is indicated in the RRT's reasons by the emphasis that is placed on the question of government control, show an error going to jurisdiction.

24 For the above reasons, we consider that the appeal should be allowed, the decision of the Magistrate and the orders made by him should be set aside, the decision of the RRT should be set aside, and the matter remitted to the RRT for decision in accordance with law. We note that the learned Magistrate made no order as to costs, however, having regard to the outcome

of the appeal, the Minister should pay the appellant's costs of this appeal, and the application before the learned Magistrate.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Lee and Tamberlin.

Associate:

Dated: 30 January 2004

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W16 OF 2003

BETWEEN:	WAHK APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGE:	LEE, TAMBERLIN and RD NICHOLSON JJ
DATE:	30 JANUARY 2004
PLACE:	PERTH

REASONS FOR JUDGMENT

rd nicholson j:

25 I am grateful to Lee and Tamberlin JJ for the opportunity to examine their reasons in draft. I rely on those reasons for the statement of circumstances which it provides.

26 The critical issue in the appeal is whether the Tribunal fell into error of law when it concluded that the appellant was no longer at risk of harm because the Taliban were no longer the government of Afghanistan and the Pashtuns did not control the Interim Government; that is, whether the Tribunal focussed only upon the source of the well-founded fear of persecution as being government control and thereby ignored other possible sources of such fear.

27 Examination of the 'findings and reasons' of the Tribunal show that it addressed three matters:

(1) it formed the view in relation to the appellant's claims in relation to the Taliban as a government force;

(2) it formed a view in relation to the Pashtuns as a source of fear as a government force; and

(3) additionally, it concluded that there was no evidence before it of the Pashtuns or any other group providing a source of a well-founded fear to the appellant as a Hazara.

28 This third element was addressed by the Tribunal in its findings and reasons in the following terms:

'I accept that there has been some historical marginalisation of Hazaras in Afghanistan. I accept that there is evidence that Hazaras have been accorded low status in Afghanistan.

I note that despite the current media spotlight on Afghanistan there has been no report or suggestion of any persecution of Hazaras since the fall of the Taliban last year.

I am not aware of any reports of present mistreatment of Hazaras or Shi'as (as Hazaras or Shia'as) by the Northern Alliance or by the Pashtuns or any other group.

…

I am not satisfied, on the available evidence, that Hazaras in Ghazni are generally at risk of persecution in the foreseeable future.'

Those passages appear to me to address the issue of persecution viewed independently from the issue of governmental control by the Taliban or the Pashtuns. It is necessary, therefore, to examine the course of evidence and reasoning to see if there was an evidentiary foundation upon which the Tribunal could have based this third limb of its reasoning.

29 It is the case that portions of the reasons of the Tribunal focuses on the issue of governmental control. That appears to have arisen from the nature of the appellant's original claim. In his statutory declaration made on 21 September 2001 he referred to the Taliban having issued an edict that Shi'ite Hazaras were to go to the front line unless they converted to be Sunni Muslims. That was an edict issued from a position of governmental control. It was this that he claimed led to his older brother being taken and possibly executed by the Taliban. Furthermore, he claimed the Taliban had come to his shop and arrested his father after claiming he had a gun. His claim therefore initially originated in an assertion that the Taliban were to be feared for their exercise of governmental control.

30 When the appellant's advisers prepared a written submission to the Tribunal they claimed that his fear of persecution was based on the following Convention grounds:

(a) Actual or imputed political opinion – anti-Taliban, anti parties that supported the Taliban and anti many parties in the Interim Authority;

(b) Race – Hazara ethnicity; and

(c) Religion – Shi'ia religion.

It will be noted that claim (a) in relation to the Taliban and other authorities is related to political opinion and hence involved the Taliban and the other parties when they were exercising political power. However, that is not the case in the way in which claims (b) and (c) were expressed. The country information which was annexed to the written submission of the advisers addressed the three bases of the claim. The information provided addressed attacks by the Taliban relevant to the three bases of claim, referring to exercises of power, and hence of governmental control, by the Taliban on each of those bases.

31 When the matter came before the Tribunal and the Tribunal turned to the requirements of the law, it clearly appreciated that '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'. It said that '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'. In reciting the appellant's claims the Tribunal referred to a source of his fear of persecution as arising from his belief that his brother had been killed and his family mistreated by the Taliban. The Tribunal also identified as a source of fear held by the appellant that if he returned to Afghanistan he would be killed by the Pashtuns because they were 'against the applicant's race and religion'. This was coupled with a statement that he said those who were in power when he left Afghanistan were still in power so that nothing had changed. However, it was noted by the Tribunal that it had been put to the appellant that there did not seem to be any evidence that Hazaras were being killed or otherwise harmed by the Pashtuns. Reference was made also to the submissions by the appellant's adviser and to his formulation that the appellant's well-founded fear arose by reason of being a

Hazara, a practicing Shi'ia Muslim and 'being perceived to be opposed to the Taliban or those aligned with, or previously aligned with, the Taliban and factions of the current Interim Authority and various warlords and governors in positions of power in Afghanistan simply because of ethnicity and religion'. That latter formulation stressed the aspect of power and hence seemingly of governmental control but the preceding formulations were not so confined.

32 In turning to country information, the Tribunal referred to the report of the US Department of State on International Religious Freedom documenting the Taliban's persecution of Hazaras but from a position of the occupancy of governmental power. It addressed the information concerning the Interim Authority and the new cabinet ministers. However, reference was made to a DFAT report that Hazaras would not face 'specific problems' in returning to areas of Afghanistan where they were in the ethnic majority. Reference was also made to a report that Hazaras had mistreated Pashtuns in Ghazni province since the demise of the Taliban.

33 In coming to its findings and reasons the Tribunal identified the claimed fear of harassment and mistreatment by the Taliban or the Pashtuns as arising by reason of the appellant's race and religion. Importantly it was additionally said that the appellant was fearful 'that he will be at risk of harm not only from the Taliban but also other groups that have targeted Hazaras previously'. It was said that the appellant had claimed that the Interim Government did not have the ability to provide him with protection from the harm he anticipates.

34 In relation to the country information the Tribunal found that it supported the appellant's claim that Shi'ia Muslims, Hazaras and all political opponents of the Taliban were at risk of suffering persecution while the Taliban effectively governed Afghanistan. The Tribunal was satisfied that at the time of the appellant's departure from Afghanistan he was at risk of persecution by the Taliban due to his race and religion. However, it rejected his claim that nothing had changed in Afghanistan and concluded that the Taliban had been effectively eliminated as a 'political and military force in Afghanistan and no longer governed or administered Afghanistan'. This led to its finding that the appellant was no longer at risk of harm from the Taliban 'as the government of Afghanistan'. Other findings were that the Tribunal was not satisfied that the situation in Afghanistan was essentially unchanged or that the Pashtuns controlled the Interim Government.

35 The Tribunal then progressed to the reasoning set out above. It accepted that there had been some historical marginalisation of Hazaras in Afghanistan and they had been accorded low status. However, it was said 'there has been no report or suggestion of any persecution of Hazaras since the fall of the Taliban last year'. The comment was added that the Tribunal was not aware of any reports of mistreatment of Hazaras or Shi'ias (as Hazaras or Shi'ias) by the Northern Alliance or by Pashtuns **or by any other group**.

36 It is true that as originally formulated by the appellant his claim appears to have been directed to issues of governmental control. As re-expressed in the written submission by his adviser, the claim was directed partly to governmental control but also to non-government factors. Much of the country information to which the adviser directed attention related to the issue of governmental control. However, the Tribunal did not confine itself to that information and examined wider sources of country information. The Tribunal put to the appellant during the course of the hearing, as its reasons recount, that there did not seem to be any evidence that Hazaras were being killed or otherwise harmed by Pashtuns, reference not tied to the issue of governmental control

37 I am satisfied that the Tribunal ultimately addressed not only the issues of governmental control but also the claimed sources of fear for the appellant outside government. It was the absence of evidence of any report or suggestion of persecution of Hazaras since the fall of the Taliban from any source that grounded the Tribunal's conclusion. The Tribunal was entitled to reach that view on the evidence (or absence of negative evidence) before it.

38 For these reasons I am unable to agree with the view expressed by Lee and Tamberlin JJ that a reading of the Tribunal's decision in its entirety indicates that the Tribunal asked itself the wrong question and confined its consideration to a risk of persecution by those in charge of the government. In my view it went further than that and examined other claimed or possible sources of fear of persecution in respect of the appellant as a Hazara.

39 For these reasons I consider that there is no apparent jurisdictional error and that the appeal should be dismissed.

I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice RD Nicholson.

Associate:

Dated: 30 January 2004

Counsel for the Appellant:	T J Carmady
Counsel for the Respondent:	J D Allanson
Solicitor for the Respondent:	Blake Dawson Waldron
Date of Hearing:	24 November 2003
Date of Judgment:	30 January 2004