

**DECISION RECORD**

**RRT CASE NUMBER:** 071929223

**DIAC REFERENCE(S):** CLF2007/128480 CLF2007/128639

**COUNTRY OF REFERENCE:** Pakistan

**TRIBUNAL MEMBER:** Ann Duffield

**DATE DECISION SIGNED:** 25 March 2008

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the other named applicants satisfy s.36(2)(b)(i) of the Migration Act, being the spouse and dependants of the first named applicant.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

The applicants, who claim to be citizens of Pakistan, arrived in Australia, and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas. The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter.

The delegate refused the visa application on the basis that the applicants are not persons to whom Australia has protection obligations under the Refugees Convention.

The applicants applied to the Tribunal for review of the delegate's decisions.

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

### **RELEVANT LAW**

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

### **Definition of 'refugee'**

Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country

of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

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

Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable,

or unwilling because of his or her fear, to return to his or her country of former habitual residence.

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

## **CLAIMS AND EVIDENCE**

The Tribunal has before it the Department's and the Tribunal's files relating to the applicants. 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.

The applicants appeared before the Tribunal to give evidence and present arguments.

The applicants were represented in relation to the review by their registered migration agent who also attended the hearing.

### *Information on the department's file*

The main applicant is a male national of Pakistan. Also included in his application are his wife, a female national of Pakistan and their two children – also nationals of Pakistan.

The applicant arrived in Australia in the mid 2000s. The secondary applicants arrived the following year. None of the secondary applicants have their own claims to be refugees but rely instead on the claims of the main applicant (herein called the applicant).

In a statement attached to his original Protection Visa Application the applicant claims that he and his family are Shiite Muslims and on a "hit list" because they are literate and his family supported the US following the events of 11 September 2001. He claims that his male relatives are concerned about their safety and remain confined to their village. The applicant claims that some of his male relatives are tribal leaders and senior members who played an important role in the arrest and handing over of the Taliban terrorists to other authorities.

The applicant claims that he has received threats in the form of telephone calls and written notes stating "you are an Agent of America. You are heretics. We will teach you a lesson" The Clergy Government in the NWFP would not take action against the Terrorists and promoted Talibanisation and the threats against him continued. He claims the Sunni knew him.

The applicant got a job in a safe area. The job provided him with family accommodation. He claims that a couple of years later he got another position, a government position, in City A. He claims that during his period in City A he criticised terrorism and extremism and this added to his difficulties. He claims that his family was already on the "hit list" and extremists spied on them. He claims that they threatened to kidnap his children so he had to quit his job in city A. He claims he restricted himself to the job in the safe area. He claims that even then he was not safe and felt restricted to the area. He claims that his wife also had to quit her jobs because it was too risky to travel outside the area. He claims that she is now on medication and has also developed a medical condition.

The applicant claims that in the mid 2000s he and a relative were fired upon when they were travelling back to the District 1 from city A. He claims it was because they were Shiites. He claims that there were several attempts to assassinate them including some years earlier when he

and a relative and their families were on the way to FATA from City A when their car was shot at. He claims that the car was then involved in an accident as a result.

He claims that he was beaten up by the Taliban whilst on the way to the work who called him “kafir”. He was assisted by some passers-by. He claims a further attack occurred when some Terrorists stopped his car. He claims they tore his clothes and beat him up warning him to embrace Talibanisation or face death and destruction. He claims that this incident was reported to the Police but no charges were laid as the Police are pro Taliban. He claims that the provincial pro Taliban government is not taking any action against extremists and promotes Talibanisation in the NWFP and FATA.

After he arrived in Australia he claims he went to see his local Member of Parliament who told him that he could apply for a Protection Visa at anytime. As he was hoping that the situation in Pakistan would improve, he did not apply for a Protection Visa immediately.

He claims that his wife and children lived with his parents after he came to Australia but attacks on the village meant that they were forced to go to her parent’s village. He claims that the Sunni’s control the region and target Shiites. He claims that there is no area where he can be safe in Pakistan.

#### *Application for review*

With his application for review, the applicant provided the Tribunal with a vast quantity of newspaper, internet and other articles on the security situation in north-west Pakistan; the area where the applicant and his family reside. The information does not indicate the applicant or members of his family in any way. The applicant also provided information on a number of terrorist groups that operate in the area.

#### *Evidence at the Tribunal hearing*

The applicant told the Tribunal that he and his family came from District 1 in FATA. Some male relatives are tribal leaders, in that area. He claims that the area became a haven for terrorists not only from Afghanistan but around the world after the USA invasion in 2001. He claims that sectarianism has been a historical reality in the area. The applicant claimed that his male relatives as Maliks, played an important role in helping the USA locate and arrest terrorists by mobilizing their tribesmen. He claims that the terrorists started to target members of his family because of the role his relatives had played. The applicant did not himself have a role in these incidents as he told the Tribunal that he and his family lived in City A from the early 2000s. The applicant told the Tribunal that a relative had recently been injured and killed and other family members had also been injured or killed over the years.

The applicant told the Tribunal that he himself had been the victim of extremists as a result of his work. He claimed that on several occasions, he was beaten up and his car was rammed. He told the Tribunal that he knew they were Islamist extremists by the things that they said to him. He claims he also received threatening telephone calls and notes. The Tribunal asked the applicant if he considered relocating to another part of Pakistan at that time and he claimed that things were not too difficult and as he was living in a safe area at the time. However he claims that they only felt safe in that area and restricted their activities to within the area as he claims it was too dangerous to go outside except when necessary.

The applicant claims he was fired upon whilst driving in his car on the way home. He claims he did not know who the gunmen were but claimed that the area was identified as one where Shiites were targeted by Sunni militants. He claims he reported the incidents to the police but as they are pro-Taliban they did not help him.

The applicant told the Tribunal that he began the process of applying for his visa when things were beginning to become intolerable. Asked why he undertook to engage in such a long and drawn out process rather than relocating somewhere else in Pakistan or approaching foreign embassies or the UNHCR the applicant claimed that approaching foreign embassies was very difficult because of security issues. He claims that he did not think of relocating because he would not have had any links with family and friends and more importantly, it would have been very difficult for him to get a job in other parts of Pakistan. Asked why he didn't apply for a different type of visa he claimed that it was very difficult for people in Pakistan to get visas to travel to any western country. The Tribunal put to the applicant that if he felt safe enough to remain in Pakistan for two years in the process of applying for his visa, the Tribunal may come to the view that his fear of persecution was not well founded. The applicant claimed that as he and his family were living in a safe area, it was relatively safe if they did not venture outside. However he claimed that the situation was getting worse by the day and he did not feel safe.

The applicant told the Tribunal that as soon as he received his visa he made arrangements to travel to Australia and sent his wife and children back to his home village in FATA. Asked why he did not apply for his wife and children to travel with him the applicant claimed that he did not have enough money to bring them all at that time. The Tribunal put to him that if he felt confident enough of the situation to send his family back to the village rather than feel any urgency in obtaining visas for them, or allowing them to remain in City A, the Tribunal may come to the view that his fear of persecution was not well founded. He claims that it was not possible to leave his family in City A because he quit his job and they were unable to remain in safety. He claims that the family compound in the village was well fortified and armed so his wife and children would be safer there than on their own in City A. He claims that he had already borrowed a large sum of money to secure his own visa and it was impossible for him to borrow any more. The applicant claimed that it was very difficult to obtain a visa and the conditions on the sponsoring of family were too onerous for him at that time. The applicant claimed that he had looked at other countries and his brother had applied to one of those countries.

The Tribunal put to the applicant that even if it was satisfied that his situation was as he described it, it also needed to be satisfied that he could not relocate to another part of Pakistan where he would be free from persecution. The applicant claims that he cannot relocate because of language problems, sectarian problems and ethnic problems. He claims that he would have to sit additional exams in order to be qualified to apply for jobs in other parts of Pakistan. The Tribunal put to the applicant country information which indicates that tens of thousands of people from the NWFP and FATA have relocated to other parts of Pakistan, including Karachi and Islamabad and there was no evidence that he and his wife would not be able to get jobs. The applicant claimed that they would not be safe anywhere because they were being spied upon as a result of his relatives' activities in supporting the USA.

The Tribunal asked the applicant why it took so long for him to apply for a protection visa once he was in Australia. He claimed that he had no idea how to apply and contacted the office of a Member of Parliament. He claims they printed out some information and sent it to him and also advised him that he could apply at any time. He claims that he wanted to wait until his family arrived so that they could make a joint application. The applicant claimed that he approached the department for advice as to whether he should apply for them to come as dependents on his visa.

and the department advised that as he had not been in Australia for 12 months, it would be better for him to sponsor them as visitors. He claims that he waited until he had sufficient money saved before he made the applications. He told the Tribunal that he lived in a simple room and saved as much money as he could. The applicant told the Tribunal that it was a difficult time for his wife and family as they had to continuously move between his families' homes.

The Tribunal took evidence from the applicant's wife and asked her about her relative's involvement in the arrest of Islamist terrorists, post 2001. She claimed that he was involved in the capture of terrorists and this affected their lifestyle because they were confined to the house. The Tribunal clarified with the applicant wife its understanding that she and the family were living in City A at the time and she claimed that they were, however she came to know about her relative's involvement. Asked how she came to know she claimed that there was an incident where the Maliks captured some terrorists at a named place and this incident became known to everyone.

The applicant wife told the Tribunal that life in City A was good and comfortable but they started to get threats from terrorists after her husband started his second employment. She claimed that they were told that if they did not refrain from those activities that they would be killed. She claimed that as a result of these continuous threats she was on medication and had to quit her job. Asked when she quit her job she claimed that it was in the mid 2000s. Asked when she left City A to return to the village she claimed that it was when her husband got his visa for Australia. Asked why she did not remain in City A she claimed that she was fearful of living there without her husband. She claimed that she was fearful even when her husband was living with them and even now, whilst living in Australia, she continued to fear for her life.

The Tribunal asked the applicant wife if anything happened to her or her family while they were living in the village and she claimed that they moved from place to place to avoid attacks. Asked if those attacks were specific to them or as a result of getting caught in the middle of sectarian violence the applicant claimed that their house had been specifically targeted because of her family's activity in capturing terrorists. The Tribunal asked the applicant wife if she and her husband had ever discussed moving to another part of Pakistan and she claimed that they had not. She claimed that they would never leave them alone, no matter where they lived.

The Tribunal told the applicant that he was entitled to ask for more time to address the issues and concerns of the Tribunal and it would consider such a request. The applicant's adviser sought additional time and when questioned by the Tribunal as to what additional evidence she needed time to provide, the adviser provided the Tribunal with a copy of a "first report" – a police report – of the incident where the applicant's relative was killed. The Tribunal asked the interpreter to provide a translation of the document and he set out the description of the incident whereby people in a vehicle armed with a rifle fired upon the applicant's relative and his friends when instructed to by a passenger in the vehicle who shouted "those are the people". The report sites sectarianism as the reasons for the attack. The Tribunal pointed out that the police took a report which indicated at least some willingness to take some action against the perpetrators. The applicant claimed that his relative was specifically targeted because of the family association.

The Tribunal also received a copy of a hospital record from the applicant's adviser. The Tribunal considered them and put to the applicant that the records only state that a person was hospitalized with particular injuries and again, did not in and of itself support his claim of persecution.

The Tribunal asked if the applicant had any further response to the issues or concerns raised by the Tribunal that it had not already discussed. The applicant's adviser claimed that the applicant

was being targeted because of his religion. The Tribunal put to the adviser that it would very carefully consider her submissions and the applicant's evidence and response to the Tribunal's concerns and issues. The Tribunal noted that the applicant had provided extensive comments to the delegate's reasons for denying his application and that the delegate's concerns were similar to its own and these had been discussed extensively during the hearing. The Tribunal also noted that the adviser had provided extensive submissions on those issues and concerns and provided. The Tribunal put to the adviser that unless she wanted more time to respond to or comment upon issues and concerns that had not been discussed at the hearing or dealt with in their written submissions, it was not minded to grant the request for additional time. The Tribunal noted that if the adviser or the applicant wanted to provide additional material or evidence that it wanted the Tribunal to consider, it would do so if it received that material prior to handing down. The adviser agreed.

The Tribunal received further submissions from the review applicant which it has considered carefully. This included information about eligibility for certain positions in the public service in Pakistan; news articles on general unrest in Pakistan; offer of admissions from Australian universities; bank statements; copies of advertisements for jobs in Pakistan; news articles on the death of the applicant's relative. Where relevant, the Tribunal has included its consideration of these materials in its Findings and Reasons below.

#### *Country information*

According to the South Asia Terrorism Portal:

The Tehreek-e-Nafaz-e-Shariat-e-Mohammadi (TNSM) is one of the five outfits that have been proscribed by President Pervez Musharraf on January 12, 2002.

#### **Ideology and Objectives**

It is a militant, Wahabi tribal outfit. The primary objective of the TNSM is the imposition of *shariat* in Pakistan. Ideologically, it is dedicated to transform Pakistan into a Taliban style state. In an August 1998-speech in Peshawar, Maulana Sufi Mohammed, its leader, reportedly declared that those opposing the imposition of *shari'a* in Pakistan were *wajib-ul-qatl* (worthy of death). The outfit while outrightly rejecting democracy has termed it as 'un-Islamic'. In an interview Sufi Mohammed said, "We want enforcement of the Islamic judicial system in totality: judicial, political, economic, jihad, fi sabilillah, education and health. In my opinion the life of the faithful will automatically be moulded according to the Islamic system when the judicial system is enforced." TNSM rejects all political and religio-political parties as, according to it, they follow the western style of democracy. Its Chief frequently uses the term *talaq* (divorce) for his opponents when he criticizes any of their acts of infidelity, such as voting in the election. TNSM openly condones the use of force in what they see as a *Jehad*.

Reports on freedom of movement in Pakistan note that the authorities have sought to limit access to certain areas, such as parts of Balochistan and the Federally Administered Tribal Areas (FATA), but access to major cities like Islamabad, Lahore or Karachi does not appear to be restricted. Freedom of movement within such cities has, in recent years, been subject to



certain restrictions with regard to certain political groupings and identities but it would not appear that any restrictions have been placed on the residency rights of citizens generally.<sup>1</sup>

**November 19, 2007 at 08:41:50**

## **Another Victory For Al-Qaeda In Pakistan**

by *Muhammad Khurshid* Page 1 of 1 page(s)

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Clashes between Sunni and Shia sects in Kurram Agency, a tribal area of Pakistan have claimed the lives of more than 100 people. A deliberate attempt is being made to convert Pakistan into another Iraq.

Who is responsible? No one knows, but at least it is the responsibility of the government of Pakistan to provide security. The Pakistani administration is failing in its duty. The country may be falling into the hands of al-Qaeda, but the Pakistani rulers have been fighting a war for power.

According to a newspaper comment: a Sunni-Shia clash has killed 30 and wounded 130 in Parachinar, the major city of the Kurram Agency on the border with Afghanistan. The Sunnis accused the Shia of having hurled a hand-grenade at their central mosque in Parachinar during Friday prayer. The Shia community accused Sunni militants from nearby towns of starting the violence by firing rockets at their homes and mosques. The sectarian trouble, brewing in nearby Aurakzai Tribal Agency too, has peaked in Parachinar. This follows the Shia community's sense of maltreatment at the hands of the Sunni Taliban forces which have let off the Sunni paramilitaries captured from the security agencies operating there after negotiations with the government but beheaded the Shia soldiers. In Waziristan, too, a Shia leader has recently "disappeared".

Sectarian killings in Pakistan have subsided after a likely secret compact between Al Qaeda and Iran following rumours that the United States might be preparing to attack Iran. The perception of America as the common enemy may have given rise to this understanding on sectarian violence in the Gulf where most of the Iranian trading companies are located to ward off the effects of possible sanctions. But the case of Parachinar is different. There is vendetta attached to the violence seen on Saturday. In 2001, the Parachinari community did not offer shelter to Al Qaeda and Taliban elements fleeing from Afghanistan. In fact, one tribe agreed to shelter the "Arab mujahideen" fleeing from Tora Bora while another betrayed them to the Pakistani authorities who brought them to a jail in Kohat where a gunfight killed 10 of them. A monument to Al Qaeda warriors in Kohat still stands, memorialising also the sectarian violence that unfolded in that city in the days that followed.

Pakistan has inherited the Kurram Valley vendetta. As the Afghan war loosened its control over the areas, and as Sunnis took part in the war as mujahideen, and the Shias abstained, the administrative competence of the Pakistani officers in the Agency was eroded. The periodic battles that have taken place are also a Pakistani legacy, the Lower Kurram Valley being controlled completely by the anti-Shia organisation earlier called

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<sup>1</sup> see: US Department of State 2006, *Country Reports on Human Rights Practices for 2006 – Pakistan*, Section d. 'Freedom of Movement Within the Country, Foreign Travel, Emigration, and Repatriation', 6 March; see also: Human Rights Commission of Pakistan 2005, 'Freedom of Movement' in *The State of Human Rights in 2005* [http://www.hrcp-web.org/images/publication/annual\\_report/pdf\\_2005/3-1.pdf](http://www.hrcp-web.org/images/publication/annual_report/pdf_2005/3-1.pdf) – Accessed 14 May 2007

Sipah Sahaba (SSP). Azam Tariq, the Punjabi chief of SSP, became a leader of these Pushtuns more than in Jhang in Punjab from where he had started, and the Kurram Valley factor was clearly the cause of his strength vis-à-vis the Pakistan government. Under General Zia, the trend to attack the Shia began in Parachinar in 1986, when the mujahideen felt hampered by the Turis while marching into Afghanistan to fight the Soviet forces.

It was in 1986 that General Zia allowed a “purge” of the Turi Shias in the divided city of Parachinar at the hands of the Sunni Afghan mujahideen in conjunction with the local Sunni population. The Shia organisation Tehrike-e-Nifaz-e-Fiqh-e-Jaafari (TNFJ) had come into being under the leadership of a Turi Shia of Parachinar, Allama Ariful Hussaini in 1983. When the Parachinar massacre occurred, the party was led by him. Allama Hussaini was murdered in Peshawar in August 1988, for which the Turis held General Zia responsible. That was also the year of General Zia’s death (within a fortnight of Hussaini’s murder) in an air-crash in Bahawalpur, and for a time there was rumour of Shia involvement in his assassination although no solid evidence supporting this speculation was ever uncovered. But the NWFP governor General Fazle Haq, whom the Turis accused of complicity in the murder of Allama Hussaini, was ambushed and killed in 1991. (Mehram Ali, the Shia terrorist who blew up the Sipah leader Maulana Zia-ur-Rehman Farooqi at the sessions court in Lahore, was trained in Parachinar).

Sectarian violence can come back any time. And it can come as close to the state of Pakistan as Islamabad where the shrine of Shia origin, Barri Imam, was bombed under the watch of General Musharraf. The most memorable outburst of terrorism of Lal Masjid in Islamabad was managed by two brothers whose father, the founder of the Red Mosque, was killed because of his sectarian preaching. The first Lal Masjid vigilante attack was on the house of a Shia woman. The cities that can again come under attack from the sectarianists in Al Qaeda are: Karachi, DI Khan, Gilgit, Kohat, Quetta, etc. And it is a foregone conclusion that in the territories “won” by Taliban for Al Qaeda, the Shia community will be purged. Out of the Tribal Areas, a number of cities like DI Khan and Kohat, with concentrations of the Shia, are already under attack from the suicide-bombers of South Waziristan. One should also bear in mind that after Iran, Pakistan has the largest population of Shias in the world. And if our Northern Areas are ever given the status of a province it will be the country’s first Shia-majority province, reminding us that sectarianism is the most self-destructive factor in the state of Pakistan.

## **FINDINGS AND REASONS**

The applicants claim to be nationals of Pakistan and of no other country and the primary applicant has made claims against no other country. The Tribunal has sighted the applicants’ passports and is satisfied that the applicants are outside their country of nationality and that their country of nationality is Pakistan for the purposes of article 1A(2) of the Convention.

The Applicant claims fear of persecution in Pakistan for what may reasonably be characterised as Convention-related reasons of “religion” “political opinion” or “membership of a particular social group”. The Applicant claims that he and his family are members of the Shia religion which are being persecuted by the Sunni religious group. He claims that his relatives were actively involved in the location and capture of Islamist terrorists and the whole family are therefore targets of those terrorists. He also claims that he has spoken out against religious extremism during his employment and has also been targeted as a result.

On the basis of country information provided to the Tribunal by the applicant, the Tribunal accepts that the activities of Islamist terrorists/extremists in the applicant’s region of residence in Pakistan may amount to persecutory conduct in certain circumstances. However the identified existence of incidences of serious harm against ordinary Pakistani citizens by these groups are

not sufficient conditions to find in favour of the applicant in regard to whether he is owed protection by Australia. A finding on this matter can only be made by examining the applicant's personal circumstances and claims in relation to the country information and other evidence before the Tribunal.

#### *Membership of a particular social group/political opinion*

The applicant claims that male members of his family are Maliks Tribes and assisted the authorities in the identification and capture of Taliban militants in their region after 11 September 2001. He claims that as a result, members of the family are being targeted by Taliban militants and their lives threatened. The applicant has submitted a number of newspaper articles which detail incidents where the applicant's tribe and the mainly Sunni Muslim tribe engaged in violence resulting in the deaths of dozens of people. He claims that some of his family members have already been harmed and killed. He also claims that he has been outspoken against religious extremism during his employment. The Tribunal accepts this evidence and the applicant's claims.

The Tribunal has considered whether the applicant has a well founded fear of being persecuted in his local district by pro-Taliban forces because of his relative's anti-Taliban activities. On this point the Tribunal notes the evidence of recent intense fighting between pro-Taliban and Pakistani forces; as well as well documented incidents of sectarian and inter-tribal (religious) violence. It is apparent, that pro-Taliban forces are enjoying a resurgence of influence in the region and whilst recent military activity has seen them retreat, the Tribunal cannot assume that that their retreat is permanent and regards the security situation in the area from which the applicant originates as unpredictable, with the possibility of a return of some combination of TNSM, pro-Taliban or pro-al Qaida forces in the reasonably foreseeable future. Furthermore, the sectarian violence between the sunni and shia appears to be a ever present reality. The applicant himself expressed his opposition to Islamic extremism in a public forum. For these reasons the Tribunal is satisfied that opponents of any kind of Islamist extremism, including the applicant, would generally be regarded by the various religious extremist groups in his district as political opponents. Given the level of violence employed by these groups, and given the unpredictability of the security situation in his area, the chance is not remote that the applicant might be harmed because of his political opinions if he returned to that area. The Tribunal is also of the view that the risk to both him and his wife is significantly greater than that to others because they are also members of families who have been actively anti-Taliban. There is a real chance under these circumstances that the applicant and his wife, as well as other members of the family might be seriously harmed by religious extremists if he returns to his local district. The Tribunal therefore finds that the applicant has a well-founded fear of politically motivated persecution in that district. The Tribunal also finds that both the applicant and his wife have a well founded fear of persecution on the basis of their membership of a particular social group.

#### *Relocation*

No reports could be located by the Tribunal that would indicate that the religious extremism of the type experienced in the FATA has spread to other areas of Pakistan outside the NWFP, or that these extremists have tracked down persons who have fled the area to Pakistan's cities. The applicant claims that his outspokenness during his employment has led the extremists to City A where he was targeted. The evidence before the Tribunal does not suggest that the applicant's fear would be well-founded if he were to relocate to some other part of the country. The Tribunal is not satisfied that it would be. The applicant's wife returned to the family village in FATA after the applicant left for Australia. The applicant claims that the family is not safe there and the

only measure of protection they have is if they remain in the family compound which is heavily fortified and guarded by armed men. The applicant has given evidence that he would have extreme difficulty finding work in other areas of Pakistan because of the quota system imposed on recruitment in the civil service. Further he has no other family members living outside the NWFP and FATA in particular who could assist his wife and because of his relatives' activities, he would be tracked down wherever he went.

It is widely accepted that even where the feared persecution is localised, as in the present case, a person will not be excluded from refugee status merely because he or she could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him or her to do so. The High Court has endorsed this proposition, explaining that what is reasonable, in the sense of practicable, must depend upon the particular circumstances of the applicant and the impact upon that person of relocating within their country (SZATV v MIAC [2007] HCA 40 at [24]). As Kirby J stated, the supposed possibility of relocation will not detract from a "well-founded fear of persecution" where any such relocation would, in all the circumstances be unreasonable (ibid, per Kirby J at [97]).

In the present case the Tribunal has had regard to the applicant's evidence, which it considers plausible, that he and his family felt relatively safe in City A because they lived in a safe area and whilst his wife and children have not been harmed since they returned to FATA after his departure, it is only because they move frequently between villages and live in heavily fortified and guarded family compounds. The reason his wife and family returned to the village was because they could not remain in the safe area as this was dependent upon the applicant's employment there. Nor could they remain elsewhere in City A unaccompanied by family members. The Tribunal is therefore satisfied that, if he were to return to Pakistan, he would have no relatives with whom he could settle outside the area in which he is at risk. The Tribunal is also satisfied that his overriding current concern is for his family's safety and the health of his wife.

While the Tribunal accepts that the applicant has been working outside the area for some years and has clearly been a self-reliant individual in that period, the Tribunal accepts that his relative safety was the result of living in a safe area. Furthermore, during that time his wife was also working and able to look after the children. However, the applicant's wife's health has suffered since that time and in the Tribunal's view this may limit her ability to provide any assistance to the applicant. The applicant claimed that he had attempted to relocate within Pakistan and applied for positions but was not successful. Not only is there a quota imposed on applicants from the FATA and NWFP of only 4%, there is a maximum age limit of 30 years and a residency requirement. Combined with the difficulties he would invariably face in locating employment sufficient to support the family the Tribunal is of the view that in all these circumstances, it would be unreasonable to expect him to relocate.

#### *Delay in apply for Protection Visas*

The applicant claims that he began the process of escaping Pakistan when he got his passport whereby he went through the long process of applying for one type of visa rather than applying directly for a visitor's visa. The applicant was in Australia for more than one year prior to lodging his protection visa application. He claims that he was advised that he could lodge one at any time and he also wanted to complete his studies. His wife and children did not join him in Australia until some months after his arrival. They did not apply for visas until more than five months after they were issued with their passports. Even once those visas were issued it was weeks before the family made their way to Australia. The Tribunal is mindful that these factors can indicate that the applicants may not have had a genuine fear of persecution in Pakistan.

However, in this case the applicant began his application for a visa in the belief that it was the one he was most likely to be successful in obtaining. He did not apply to bring his family at the same time because he did not have the funds required by regulations. He was still working and living in the safe area and he and his family felt relatively safe while they remained there. From such a position he felt that he had time to make longer term plans for the safety and security of his family. He gave evidence that obtaining a visitor's visa for Australia in Pakistan is very difficult and the Tribunal is also aware of this fact. His delay in applying for a protection visa for himself when he arrived in Australia may also give rise to concerns that his fear of persecution was not well founded, however he sought advice upon his arrival and decided that he would try and find a way to have his family join him before he made an application for a protection visa. The Tribunal is of the view that a well founded fear cannot be identified in terms of whether one is forced to flee across a border at a moment's notice, or whether one is able to do as the applicant has done and keep his family safe while longer term plans to seek asylum elsewhere are made. In the Tribunal's mind such a methodical and considered approach is not necessarily at odds with a well founded fear of persecution.

### *State Protection*

The applicant claims that the police and the state government in FATA are pro-Taliban and cannot protect him. The Tribunal put to the applicant country information which shows that the Pakistani government is taking the threat of Islamist extremists seriously as it has demonstrated by the deployment of large number of forces into the NWFP over recent months and that there had been some successes by the army. On the other hand, country information indicates that elections in FATA have been permanently delayed because of the sectarian violence in the area. Be that as it may, it is apparent from the above sources, that pro-Taliban forces are enjoying a resurgence of influence in the region. On that basis the Tribunal cannot assume that that their retreat is permanent and regards the security situation in the area from which the applicant originates as unpredictable, with the possibility of a return of some combination of TNSM, pro-Taliban or pro-al Qaida forces in the reasonably foreseeable future. The applicant himself expressed his opposition to Islamic extremism in public. Given the level of violence employed by these groups, and given the unpredictability of the security situation in his area, the chance is not remote that the applicant might be harmed because of his political opinions, if he returned to that area. In material provided to the Tribunal by the applicant, and in sources consulted by the Tribunal, there are conflicting reports regarding the role of the military in allowing Sunni militants to attack Shia communities before moving in and even that government law enforcement agencies themselves have been found attacking Shia civilians. The Tribunal cannot be satisfied that under such circumstances that the applicant and his family will receive the protection from the State to which they are entitled.

In these circumstances, the Tribunal is satisfied that the applicant does not have effective protection in Pakistan. The Tribunal is therefore satisfied that the applicant has a well-founded fear of persecution by reason of his political opinion, membership of a particular social group and religious beliefs and is unwilling to avail himself of the protection of Pakistan by reason of that fear. As the applicant does not have the right to enter a third country and reside there, the Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations.

## **CONCLUSIONS**

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

## DECISION

The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the other named applicants satisfy s.36(2)(b)(i) of the Migration Act, being the spouse and dependants of the first named applicant.

<p>I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the <i>Migration Act 1958</i>. Sealing Officer's I.D. PRDRSC</p>
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