FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZQDZ v MINISTER FOR IMMIGRATION & ANOR *[2011] FMCA 652*

MIGRATION – Persecution – review of recommendation made by independent merits reviewer ("Reviewer") that the applicant not be recognised as a person to whom Australia has protection obligations – allegation that the Reviewer misunderstood the relevant tests, failed to take relevant considerations into account, took an irrelevant consideration into account, made a finding for which there was no evidence and failed to put certain facts to the applicant.

Migration Act 1958, ss.5, 13, 14, 36, 46A, 91R, 195A, 477

Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia (2010) 85 ALJR 133
Minister for Immigration & Multicultural Affairs v Respondents S152/2003 (2004) 222 CLR 1
Horvath v Secretary of State for Home Department [2001] 1 AC 489
Siaw v Minister for Immigration & Multicultural Affairs [2001] FCA 953

Applicant:	SZQDZ
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	CHRISTOPHER PACKER IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER
File Number:	SYG 758 of 2011
Judgment of:	Cameron FM
Hearing date:	15 August 2011
Date of Last Submission:	15 August 2011
Delivered at:	Sydney
Delivered on:	25 August 2011

REPRESENTATION

Counsel for the Applicant: Mr P. Bodisco

Solicitors for the Respondents: Australian Government Solicitor

ORDERS

(1) The application be dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 758 of 2011

SZQDZ
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

CHRISTOPHER PACKER IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant, who claims to be a citizen of Afghanistan, arrived by boat at Christmas Island on 6 April 2010. On 20 June 2010 he lodged an application for a Refugee Status Assessment ("RSA") alleging that he was a refugee and, as such, was a person to whom Australia had protection obligations under the *United Nations Convention relating to the Status of Refugees 1951* as amended by the *Protocol relating to the Status of Refugees 1967* ("Convention"). He is currently in immigration detention and, it may be presumed, has been so since he landed at Christmas Island. On 19 August 2010 he was assessed by a delegate of the first respondent ("Minister") as not meeting the definition of a "refugee" under the Convention. He sought a review of that decision and on 16 February 2011 the second respondent ("Reviewer) recommended that the applicant not be recognised as a person to whom Australia has protection obligations under the Convention. The

applicant was notified of the Reviewer's recommendation on 24 February 2011.

2. The applicant has made an application to this Court for judicial review of the Reviewer's recommendation. He has sought a declaration that it is affected by legal error and an injunction restraining the Minister from relying on the recommendation.

3. In his entry interview on 25 April 2010 the applicant said that he had never applied for a visa to Australia. Section 5(1) of the *Migration Act 1958* ("Act") provides that Christmas Island is an "excised offshore place". As he lacked a visa and arrived in Australia at Christmas Island, and because of ss.13 and 14 of the Act, the applicant is an "offshore entry person" as defined by s.5(1) of the Act who, in the circumstances and as provided by s.46A(1) of the Act, cannot make a valid application for a protection visa. However, ss.46A and 195A of the Act also provide that the Minister may, in his discretion, lift the bar on the applicant making such an application and may grant him a visa. Relevantly, those sections provide:

> ***46A Visa applications by offshore entry persons***
>
> *(1) An application for a visa is not a valid application if it is made by an offshore entry person who:*
>
> *(a) is in Australia; and*
>
> *(b) is an unlawful non-citizen.*
>
> *(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.*
>
> *(3) The power under subsection (2) may only be exercised by the Minister personally.*
>
> *...*
>
> *(7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any offshore entry person whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances.*

195A Minister may grant detainee visa (whether or not on application)

Persons to whom section applies

(1) This section applies to a person who is in detention under section 189.

Minister may grant visa

(2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).

(3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.

Minister not under duty to consider whether to exercise power

(4) The Minister does not have a duty to consider whether to exercise the power under subsection (2), whether he or she is requested to do so by any person, or in any other circumstances.

Minister to exercise power personally

(5) The power under subsection (2) may only be exercised by the Minister personally. …

4. It was an unstated assumption in these proceedings that the Minister would consider exercising his ss.46A and 195A discretions in favour of the applicant if he received advice to that effect, advice which would be based on the recommendation of the Reviewer: see *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 85 ALJR 133 at 143 [49]. In *Plaintiff M61* it was held that an offshore entry person such as the applicant who seeks to engage Australia's protection obligations under the Convention, and is detained by the Commonwealth pending the outcome of that process, must be afforded natural justice by the independent merits reviewer reviewing his case. That right requires the reviewer to conduct a review which is procedurally fair and which correctly addresses the relevant legal question or questions.

5. For the reasons which follow, the application will be dismissed.

Background facts

6. The recommendation made by the Reviewer to the Minister was supported by written reasons. The facts alleged in support of the applicant's claim for protection were set out on pages 2-10 of those reasons. Relevant factual allegations are summarised below.

Entry interview

7. The applicant made the following claims during his entry interview on 25 April 2010:

    a) he was born in Afghanistan but had lived in Pakistan since 1985 or 1986;

    b) he is of Hazara Sayed ethnicity and is a Shia Muslim. The place where he had lived in Pakistan was not safe for Hazaras;

    c) his father had taken the family from Afghanistan to Pakistan because they had not wanted to kill or to be killed. He fears returning to Afghanistan because of the poor security there and because Shia Muslims are killed there because of their religion; and

    d) he organised his travel to Australia for US$13,200 and left Pakistan on a false passport. His taskera remained in Pakistan.

RSA application

8. In a statement dated 20 June 2010 and attached to his RSA application, the applicant also made the following claims:

    a) he fears returning to Afghanistan because of his ethnicity, religion and imputed political opinion as a returnee from a Western country;

    b) he left Afghanistan when he was nine years old. At that time there had been different military groups in the area fighting each other

and there was pressure to join these military groups. His father had not wanted to join these military groups so he took his family to Pakistan;

c) his father had shared land with his brothers in Afghanistan. Three of his uncles were dead and his other uncle was in Pakistan, having leased the family land to someone such that his father no longer had any rights to it;

d) since 1998 Hazara and Shia people in Pakistan have been targeted by many different groups. It was easy to identify them because they lived in certain areas;

e) in 2000 a friend of his had been shot and killed, along with five other people, whilst travelling in a vehicle owned by a Hazara company;

f) before leaving Pakistan he was worried about his safety and he had had to be careful to avoid being killed. This was because there had been incidents where people were stopped and their motorbikes taken; others had their money stolen and some people had been killed;

g) he feared for his life and fled Pakistan, travelling to Malaysia then Indonesia and then on a boat to Australia which was intercepted by the Royal Australian Navy;

h) if he returned to Afghanistan he would face a real risk of serious harm from the Taliban. He fears that people would find out that he had returned from Australia and that he would be considered an infidel, putting his life further in danger. He has no home or family living in his home village in Afghanistan and nothing to return to there; and

i) the Afghan government does not have the facilities or power to protect him should he return.

9. A submission on behalf of the applicant was sent to the RSA on 17 July 2010. It was a generic submission in relation to all the Afghan clients of the applicant's migration agent. It stated that the "applicants" feared persecution from the Taliban on account of their Hazara ethnicity and

Shia religion, their actual or imputed political opinion of being opposed to Taliban rule and supporting government forces, their membership of the particular social group of actual or perceived sympathisers or supporters of the coalition forces or foreign workers/NGOs and failed asylum seekers returning from a Western country.

10. The applicant was interviewed by an officer of the Minister's department in relation to his RSA. He stated, amongst other things, that his uncle's daughters were still in his home area in Afghanistan but that he had lost contact with them.

Application for independent merits review

11. The applicant was interviewed by the Reviewer on 7 December 2010. He said that after the RSA decision his father had told him over the telephone that his uncle's daughters and their families had moved to Iran so there was no one left in Afghanistan. He also said that if someone helped the government in his home area, they became a target for the Taliban.

12. The applicant's migration agent provided post-interview submissions on 8 February 2011, responding to a "natural justice letter" from the Reviewer. The submission addressed various items of country information.

Reviewer's findings and reasons

13. After discussing the claims made by the applicant and the evidence before him, the Reviewer found that the applicant did not meet the criteria for the grant of a protection visa as set out in s.36(2) of the Act. The Reviewer consequently recommended that the applicant not be recognised as a person to whom Australia has protection obligations under the Convention.

14. The Reviewer accepted that the applicant was a Hazara, an ethnic minority group in Afghanistan, and a Shia Muslim, a religious minority group in Afghanistan. However, he did not accept that the applicant's ethnicity and religion by themselves meant that he would face a real chance of serious harm from non-state agents, namely Pashtuns, Sunni

Muslims or the Taliban, or by government authorities amounting to persecution in Afghanistan in the reasonably foreseeable future. In this regard:

a) the Reviewer referred to country information which indicated that in the past few years individual Hazaras had at times suffered serious harm as a result of the insurgency's attacks on persons associated with or perceived as supporting the government, in attacks on communications, facilities and road transport and during some disputes over land and access to natural resources. However, he found that the reports did not show that Hazaras and Shia Muslims were targeted and persecuted for the sole reason of their minority status;

b) the Reviewer was not satisfied that the general insecurity and insurgency in Afghanistan, together with the threats to safe and secure travel within Afghanistan, would give rise to a well-founded fear of persecution for a Convention reason;

c) the Reviewer found that information from various sources did not corroborate the claim that Hazara Shias were targeted by the government, the Taliban, the majority Sunni Muslims, or any other non-state party on a general basis and that instead there had been positive reports that the general situation of the Hazara Shias had improved. He noted and accepted two Department of Foreign Affairs and Trade ("DFAT") reports which indicated that although there had been a resurgence of the Taliban, Hazaras were not targeted by the Taliban as they had been in the past and that conditions for Hazaras had improved significantly since the fall of the Taliban; and

d) the Reviewer did not accept that the social discrimination against Hazaras referred to by some sources, including the United Nations High Commission for Refugees ("UNHCR"), the DFAT and the US Department of State, was so severe that it amounted to persecution.

15. The Reviewer accepted that the applicant was originally from the Jaghori district of the Ghazni province in Afghanistan but found that there was no real chance that he would face serious harm in the

reasonably foreseeable future, either in his home area or in travelling to that area upon his return, amounting to persecution for a Convention reason. In this regard:

a) the Reviewer noted that authoritative sources (comments from an Afghan MP set out in a DFAT advice, a Cooperation for Peace and Unity ("CPAU") report, the Afghanistan Independent Human Rights Commission ("AIHRC") and the UNHCR) indicated that Hazara districts were secure. In particular, a 2009 CPAU report considered that the risk of ethnic conflict between the Taliban and Hazara was lower in Jaghori than elsewhere in the Hazarajat. It also considered that the Jaghori and Malistan districts remained out of the Taliban's reach due to the military and political power of the Hizb-i Wahdat Khalili/Nasr faction which seemed to be robust across the Hazarajat. The Reviewer noted that even though the report was written in 2009, its conclusions had not been contradicted by later events;

b) the Reviewer noted and accepted DFAT advice which indicated that there were secure routes between Kabul and Ghazni, and between Ghazni and Jaghori. These secure routes, and the protection afforded by the Hazara faction which was strong in the Jaghori area, led the Reviewer to conclude that there was no real chance that the applicant would face harm travelling to his home area upon his return to Afghanistan;

c) the Reviewer found that the applicant's home area was a Hazara dominated region where he could reasonably seek access to traditional family and/or community structures. He referred to country information indicating that the applicant's home area was a secure area where markets, health care and schools continued to function. He concluded that there was not a situation of generalised violence in Hazara dominated areas which would prevent the applicant from residing there. He accepted that the applicant's father had taken his family out of Afghanistan in 1985 or 1986 but found that this was in the distant past and would not lead to the applicant facing serious harm in his home area; and

d) the Reviewer acknowledged that the economic conditions throughout Afghanistan were poor but did not accept that the

applicant's personal financial circumstances upon his return would mean that he faced a real chance of serious harm for a Convention reason.

16. The Reviewer did not accept that the applicant had a well-founded fear of persecution due to his membership of any of the following particular social groups: actual or perceived sympathisers or supporters of the coalition forces or foreign workers/NGOs; returnees from Western countries; failed asylum seekers returning from a Western country or as a returnee for any reason. In this regard:

a) the Reviewer referred to country information indicating that there had been incidents of harm to deportees where they were known or suspected of returning with large amounts of money but that these incidents appeared very isolated, relating to their particular circumstances and the general insurgency. He noted that other sources referred to the economic and social difficulties facing returnees but not to them being adversely targeted by non-state agents or government authorities for that reason alone;

b) the Reviewer found that even if some of the applicant's family members had left his home area, he and his family would still have community and tribal links there;

c) the Reviewer noted and accepted a DFAT report indicating that Hazaras would not be targeted because they had sought asylum in the West and concluded that there was no credible evidence before him that persons returning to Afghanistan from western countries as failed asylum seekers were targeted and persecuted for that reason. The Reviewer found that the applicant had not provided any compelling evidence that he had modified his religious views or had been westernised to any degree such that he would receive adverse treatment for becoming westernised, an atheist or un-Islamic in his practices; and

d) the Reviewer noted that the applicant did not claim to have any political affiliations or connections to the Afghan government or armed forces, or links to organisations that were anti-Taliban.

Proceedings in this Court

17. The applicant seeks an extension of time to bring these proceedings. In his application he stated:

> *1. The applicant was notified of the decision of Independent Merits Reviewer on 24 February 2041* [sic].
>
> *2. The applicant tried to contact his previous migration agent who applied for his protection visa while he was on Christmas Island but without success.*
>
> *3. The applicant then heard that a group called Balmain for Refugees was trying to assist those refused protection by the Independent Merits Review.*
>
> *4. On 9 March 2011 the applicant contacted Frances Milne from Balmain for Refugees and asked her to assist him apply to the Federal Magistrates Court (FMC) for review of the decision of the Independent Merits Reviewer.*
>
> *5. On 17 March 2011 Frances Milne asked barrister Paul Bodisco to assess whether there were grounds to apply to the FMC. In early April Mr Bodisco provided such grounds as are now the grounds in this application.*
>
> *6. On behalf of the applicant Balmain for Refugees sought to file and serve an application to the FMC on 19 April 2011.*
>
> *7. The applicant seeks an extension of time to file and serve this application.*

18. The claim for final relief was pleaded in the amended application as follows:

> *1. The second respondent's recommendation was not made in accordance with law because the second respondent fundamentally misunderstood the correct test to be applied under the Refugees Convention and the Migration Act 1958 (Cth) ("the Act").*
>
> *2. The second respondent's recommendation was not made in accordance with law because the second respondent failed to take a relevant consideration into account.*

3. *The second respondent's recommendation was not made in accordance with law because the second respondent took an irrelevant consideration into account.*

4. *The second respondent's recommendation was not in accordance with law because there was no evidence to support the second respondent's critical finding that the applicant would be afforded adequate protection in the Jaghori region.*

5. *The second respondent's recommendation was not made in accordance with law because the second respondent fundamentally misunderstood the correct test to be applied under the Refugees Convention and the Act.*

6. *The second respondent's recommendation was not made in accordance with law because the second respondent denied the applicant procedural fairness.*

Time for the bringing of proceedings

19. The first issue to address is the question whether the proceedings have been brought out of time. Section 477(1) provides that proceedings must be brought within 35 days of the date of the migration decision sought to be reviewed. Section 477(3) defines the "date of the migration decision" to mean, relevantly for this case, the date of the written notice of the decision. It was accepted by the parties that the relevant decision in this case is the Reviewer's decision to make a recommendation that the applicant does not meet the criteria for the grant of a protection visa. The Reviewer's recommendation was dated 16 February 2011 and the proceedings were commenced on 19 April 2011. To be in time, the application should have been filed by 23 March 2011. Consequently, the proceedings have been brought out of time.

Extension of time

20. Section 477(2) provides that the Court may extend the 35 day limitation period under the Act if:

a) an application for that order has been made in writing to the Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and

b) the Court is satisfied that it is necessary in the interests of the administration of justice to make such an order.

Formal criteria

21. In this case, the applicant made an application in writing for an extension of time by including such a request in his application commencing these proceedings. In that application he also specified why he said it was in the interests of the administration of justice for time to be extended. Those grounds have been set out above at [17]. Consequently, the first criterion for the grant of an extension of time has been satisfied.

Interests of the administration of justice

22. The second question to be considered is whether it is in the interests of the administration of justice to extend time for the filing of the application commencing these proceedings. Although the Court is not limited in the matters which it may consider when determining this question, the matters which I consider relevant in the context of these proceedings are whether the applicant has demonstrated a reasonable explanation for the delay in question and whether the allegations made in the application have reasonable prospects of success.

Reasonable explanation for delay

23. Although the allegations made in the application in support of the application for an extension of time were not supported by evidence, I am willing to accept that the applicant's circumstances made it difficult for him to obtain legal advice and to bring these proceedings in the short time period allowed by the Act. I am willing to accept the factual accuracy of the allegations made in the application concerning the reasons for the delay commencing these proceedings and find the explanation to be a reasonable one. I also note that the Minister has acknowledged that he has suffered no prejudice by reason of the delay.

Reasonable prospects of success

24. To determine whether the applicant has reasonable prospects of success it is necessary to embark on a consideration of the allegations made in his amended application.

Reviewer misunderstood the tests under the Convention and Act

25. The first ground of the amended application was particularised as follows:

> *The second respondent found the applicant did not have a well founded fear of persecution, because the applicant could avail himself of the protection of a non-state actor, the Hizb-I Wahdat Khalili/Nasr faction controlling the Jaghori district of Afghanistan.*

26. The applicant submitted that the Reviewer misconstrued and misapplied the test found in Article 1A(2) of the Convention and s.36(2) of the Act. Article 1A(2) of the Convention relevantly defines a refugee to be a 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 …*

Section 36(2) relevantly provides that a criterion for the grant of 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 Convention. The application of the Convention test is also governed by s.91R of the Act although that provision is not of particular significance in this case.

27. The applicant submitted that the Reviewer erred by asking himself whether the applicant could avail himself of the protection of non-state actors rather than the Afghan state. He said:

> *The general purpose of the Refugees Convention is for the international community to provide protection in circumstances where a person's nation state is unable to do so. Whether a nation state offers "real protection" has been described as the "focus" of the Convention definition of refugee. The second respondent*

failed to recognise this, and therefore applied the wrong test when assessing the applicant's claim for a protection visa. This resulted in a recommendation that was not made in accordance with law. (reference omitted)

28. The applicant referred to *Minister for Immigration & Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1. In that case Gleeson CJ, Hayne and Heydon JJ discussed the Convention and, in particular, the immediate context of its operation being that of a putative refugee who is outside the country of his nationality and who is unable or, owing to fear of persecution, unwilling to avail himself of the diplomatic or consular protection extended abroad by a country to its nationals. Their Honours also discussed the wider context of the Convention's operation being its general purpose to enable a person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn to the international community for protection. Their Honours cited with approval the view taken by the majority of the House of Lords in *Horvath v Secretary of State for Home Department* [2001] 1 AC 489 that, in a case of alleged persecution by non-state agents, the willingness and ability of the state to discharge its obligation to protect its citizens may be relevant:

a) to whether the fear is well-founded;

b) to whether the conduct giving rise to the fear is persecution; and

c) to whether a person is unable or, owing to fear of persecution, is unwilling to avail himself of the protection of his home state.

That is to say:

a) if state protection is sufficient, the applicant's fear of persecution by others will not be well-founded;

b) if state protection is insufficient, it may turn the acts of others into persecution for a Convention reason, in particular it may supply the discriminatory element in the persecution meted out by others; and

c) if state protection is insufficient, it may be the reason why the applicant is unable, or if its amounts to persecution unwilling, to

> avail himself of the protection of his home state. (*Respondents S152/2003* at 9 [21])

29. The applicant's argument was that the availability of effective state protection was a matter to be considered by the Reviewer whether or not he, the applicant, required protection from the Afghan state and the Reviewer erred because he did not consider this but instead concluded that protection was available from the Hizb-I Wahdat Khalili/Nasr faction.

30. As to the latter point, the Reviewer did not conclude that the applicant could avail himself of the faction's protection. Rather, he found that the military and political power of that faction seemed to be robust across the Hazarajat to the exclusion of the Taliban. The Reviewer's conclusion was simply that circumstances in the Hazarajat were such that any fear of persecution by the Taliban in that area which the applicant might have was not factually well-founded. The Reviewer said nothing about whether the applicant could avail himself of the faction's protection, confining his observations to the practical effect which the faction's operation in the Hazarajat had on Taliban activities in that area.

31. As to the other point raised by the applicant, the Reviewer's conclusion that the applicant did not have a well-founded fear of persecution in the Jaghori district meant that there was no need for him to consider whether effective Afghan state protection was available to the applicant were he to return there. The political composition of those who keep the peace and make an area secure is not relevant to the assessment of whether an applicant has a well-founded fear: *Siaw v Minister for Immigration & Multicultural Affairs* [2001] FCA 953 at [7] per Sundberg J. Contrary to the applicant's submissions, *Respondents S152/2003* does not require another conclusion. Nothing said by the majority in that case suggests that in this case there was a need to consider the question of state protection in the absence of actions by third parties which could amount to persecution, whether in their own right or because of the acts or omissions of the Afghan state.

32. For these reasons, the first ground of the amended application does not disclose error on the Reviewer's part.

Reviewer failed to take relevant considerations into account

33. The second ground of the amended application was particularised as follows:

> *In finding the applicant did not have a well founded fear of persecution because the applicant could avail himself of the protection of the Hizb-I Wahdat Khalili/Nasr faction controlling the Jaghori district of Afghanistan, the second respondent failed to take into account the insufficient protection offered by the Afghan state.*

34. The applicant submitted that the Reviewer failed to make any finding in relation to his evidence that the state of Afghanistan did not provide adequate protection against persecution in the Jaghori district or any findings as to state toleration of persecution of members of the particular groups of which the applicant claimed to be a member. He submitted that a fundamental part of the test of whether a person's fear of persecution is well-founded is whether the relevant state provides adequate protection. He said that the Reviewer failed to consider this.

35. For the reasons given in relation to the first ground of the amended application, the Reviewer was not required to turn his mind to whether, in circumstances where the applicant did not have a well-founded fear of persecution by the Taliban were he to return to the Jaghori district, the Afghan state was able to provide him with adequate protection. As a consequence, the Reviewer did not fail to take into account a relevant consideration as the applicant alleges.

Reviewer took an irrelevant consideration into account

36. The third ground of the amended application was particularised as follows:

> *In finding the applicant did not have a well founded fear of persecution, the second respondent took the irrelevant consideration into account that the applicant could avail himself of the protection of the Hizb-I Wahdat Khalili/Nasr faction controlling the Jaghori district of Afghanistan.*

37. The applicant submitted that the Convention test is directed towards questions of protection by the state and that although states are not obliged to eliminate all risks of harm or guarantee the safety of their

nationals in all circumstances, their nationals are entitled to expect a level of protection which meets international standards. He said that the availability of protection by non-state actors, particularly in circumstances where there was no evidence concerning their relationship with the state and the nature of any conditions imposed as a condition of protection, was an irrelevant consideration.

38. This ground of the amended application proceeds on a false premise, namely, that the Reviewer concluded that the Hizb-I Wahdat Khalili/Nasr faction provided the applicant with some form of surrogate state protection. The Reviewer did not do this; instead he found that the presence and operation of that faction in the Hazarajat had the practical effect of excluding the Taliban from operating there. To conclude that a political organisation's military force effectively excludes the influence of another is a very different thing to saying that the former provides surrogate state protection to individuals living within its area of control.

39. Consequently, this ground does not disclose error on the Reviewer's part.

No evidence to support Reviewer's finding of protection in Jaghori region

40. The applicant particularised the fourth ground of the amended application by reference to the particulars of the second allegation.

41. The applicant submitted that, as there was no evidence concerning the protection offered by the state of Afghanistan, the Reviewer had no evidence upon which to conclude that the applicant's fear of persecution was not well-founded.

42. The basis of the Reviewer's conclusion that the applicant did not have a well-founded fear of persecution was the strength of the Hizb-I Wahdat Khalili/Nasr faction in the Hazarajat and the related fact that the Taliban were effectively excluded from that area by reason of the faction's strength. For the reasons already given, it is not always necessary for the availability of state protection to be a factor in reasoning leading to a conclusion that an individual does not have a well-founded fear of persecution for a Convention reason. It may be, as in this case, that the fear which the applicant alleges would not be

factually well-founded were he to reside in a particular part of his home country. This ground does not disclose error on the Reviewer's part.

Reviewer misunderstood correct test to be applied under Convention and Act

43. The fifth ground of the amended application was particularised as follows:

> *In assessing the reasonableness of requiring the applicant to live in the Jaghori region of Afghanistan, the second respondent failed to consider:*
>
> *a. whether the applicant's freedom of movement would be significantly curtailed;*
>
> *b. whether the internal safety of the applicant would be illusory or unpredictable;*
>
> *c. the quality of protection offered by the Hizb-I Wahdat Khalili/Nasr faction; and*
>
> *d. what conditions attached to any protection offered by the Hizb-I Wahdat Khalili/Nasr faction.*

44. It may be observed that this allegation is essentially identical to the first allegation, although particularised differently.

45. The applicant submitted that the Reviewer was required to consider whether his unwillingness to return to the Jaghori district in Afghanistan was objectively reasonable. He submitted that there were several possible impediments to his return which were relevant to whether it was reasonable of him to be unwilling to return there, namely:

a) his freedom of movement would be significantly curtailed;

b) his safety was illusory or unpredictable;

c) the quality of protection offered by the Hizb-I Wahdat Khalili/Nasr faction was questionable; and

d) there may have been conditions attached to any protection offered by the faction.

46. However, the issue was not whether it was reasonable and practicable for the applicant to relocate from his home district in Afghanistan but whether, were he to return to it, he would have a well-founded fear of persecution for a Convention reason. Considerations relevant to relocation within a person's country of nationality are not relevant to the question of whether a person can return to their home district or area and live there without a well-founded fear of persecution for a Convention reason. Consequently, the fifth ground of the amended application does not disclose error on the Tribunal's part.

Reviewer denied applicant procedural fairness

47. The sixth ground of the amended application was particularised as follows:

> *The second respondent relied on particular assumptions to conclude that the applicant did not have a well founded fear of persecution:*
>
> *a. That Jaghori and Malistan districts both remain out of Taliban control due to the military and political power of Hizb-I Wahdat Khalili/Nasr faction; and*
>
> *b. That protection afforded by the Hizb-I Wahdat Khalili/Nasr faction is strong across the Hazarajat including the Jaghori district.*
>
> *The specific assumptions as to the military and political ability of the Hizb-I Wahdat Khalili/Nasr faction to protect Hazaras in the Jaghori district were never put to the applicant, denying him the opportunity to call evidence or make submissions on the point.*

48. The applicant submitted that the Reviewer's recommendation was based on an assumption that protection would be afforded by the Hizb-I Wahdat Khalili/Nasr faction and that this satisfied the requirement that he would be adequately protected in the Jaghori district. The applicant submitted that the Reviewer's failure to alert him to the determinative weight which would be given to the protection offered by the faction denied him an opportunity to call evidence concerning that question which amounted to a denial of procedural fairness. The applicant also submitted that the Reviewer had not raised in the natural justice letter the question of the applicant's safe conduct to the Jaghori

district were he to return to Afghanistan or matters concerning the safety of Kabul.

49. As to the latter issue, the Reviewer's recommendation was not based upon the situation in Kabul but upon his conclusion that the applicant would not face serious harm in the reasonably foreseeable future in his home area. Consequently, there was no reason to put to the applicant matters associated with Kabul although, in fact, he did. Nor was the Reviewer required to include in the natural justice letter, or to raise at the interview, matters associated with protection which the applicant might be able to obtain from the faction were he to return to his local area because the Reviewer's recommendation was not based on any findings that such protection might have been available. His conclusion that the applicant did not have a well-founded fear of persecution in the Jaghori district was based on the faction's exclusion of Taliban influence, not on any form of surrogate state protection which the faction might have afforded him.

50. As to travel to his home area, the applicant was unable to identify any claim which he had made to the RSA or to the Reviewer which was to the effect that he had a well-founded Convention-based fear connected with travel to his home area. He pointed to travel advice given by the British Government, presumably to its own nationals, that:

> *There is a heightened threat of roadside and ambush outside Kabul City. You should maintain a heightened level of vigilance at all time* [sic], *observing the strictest of security measures and avoid any unnecessary travel.*

This quotation appears in the written submission which the applicant's advisers made in support of his RSA application and before any questions of the applicant's return to the Jaghori district of the Ghazni province were raised with him. It was quoted under the heading "Afghanistan now – Taliban resurgence" and cannot reasonably be seen to be more than a comment on the situation in Afghanistan generally. It was not a claim to have a fear of travel to Jaghori. As the applicant never claimed to have such a fear, the safety of his travel to his home district was not something which needed to be addressed in the natural justice letter.

Conclusion

51. Although the applicant has supplied a satisfactory explanation for his delay in commencing the proceedings, I am not satisfied that the allegations contained in the amended application have reasonable prospects of success. I find that none of them discloses error on the part of the Reviewer.

52. In those circumstances, I conclude that it is not in the interests of the administration of justice that time be extended for the commencement of these proceedings. Consequently, the application will be dismissed.

I certify that the preceding fifty-two (52) paragraphs are a true copy of the reasons for judgment of Cameron FM

Date: 25 August 2011