

1405982 (Refugee) [2016] AATA 3243 (4 February 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1405982
COUNTRY OF REFERENCE:	Pakistan
MEMBER:	Stuart Webb
DATE:	4 February 2016
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Statement made on 04 February 2016 at 2:59pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Pakistan, applied for the visa [in] December 2012 and the delegate refused to grant the visa [in] March 2014.
3. The applicant appeared before the Tribunal on 9 July 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Pashto and English languages.
4. The applicant was represented in relation to the review by his registered migration agent. The applicant provided a copy of the delegate's decision to the Tribunal.

RELEVANT LAW

5. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.

Refugee criterion

6. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 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).
7. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
8. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the Regulations to a particular person.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). Examples of 'serious harm' are set out in s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual

or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

11. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
12. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
13. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
14. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
15. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Complementary protection criterion

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Section 499 Ministerial Direction

19. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

20. The applicant provided the following statement with his application.

I am a [age] year old male citizen of Pakistan born in [home village], Parachinar, Kurram Agency, Khyber Pakhtunkhwa Province. Annexed hereto and marked:

"A" is a certified copy of my passport;

"B" is a certified copy of my national identification card;

"C" is a copy of my birth certificate;

"D" is a copy of my domicile certificate;

"E" is a copy of my membership card for the Islamabad Chamber of Commerce and Industry;

"F" is a copy of my degree certificate;

"G" is a copy of my marriage certificate for my marriage to [the applicant's second wife];

"H" is a copy of my marriage certificate for my marriage to [the applicant's first wife];

"I" is a copy of a police clearance certificate from the Kurram Agency police force dated [in] May 2012; and,

"J" is a copy of my national tax number certificate;

COUNTRY TO WHICH I DO NOT WANT TO RETURN

I am afraid to return to Pakistan.

WHY I LEFT THAT COUNTRY, INCLUDING DETAILS OF PRIOR HARM

I was born a Shia Muslim. My family are all Shia Muslim. We are members of the BANGASH tribe, sub-section [sub-tribe name]. My father is one of [the] elders of the BANGASH tribe in our village. Our [village] has a population of more than [number] people and my father is very influential. He would often represent our village in

government matters. As an influential man, my father is targeted by the Taliban and other Sunni para-military organisations, such as Sipah-e-Sahaba ("SeS"). He is constantly harassed and threatened by these organisations. They want to kill him because he is a Shia and he co-operates with the Pakistani government. These troubles and threats are extended to our whole family.

In or about 1999, I was studying a degree in Parachinar and my brother, [Mr A], was financing these studies. His business was [product] transport. He would transport [products] from Kamalia to Parachinar. While in Kamalia, my brother was attacked by SeS a Sunni para-military organisation. He had previously been threatened by the SeS in Kamalia because they knew he was Shia. The owners of the [products] with whom [Mr A] was doing business would often tell him the SeS were looking for him. While [Mr A] was at one of these [businesses], members of the SeS came to the [business] and emptied all their bullets into the car. [Mr A] suffered multiple gunshot wounds to the legs and his spinal cord was severed. He became a paraplegic. [Mr A] was forced to stop work; he was the primary income earner in our family. [Mr A] suffered all his life from these injuries and finally succumbed in April 2012.

In or about 2002, my brother [Mr B], was travelling from Parachinar to our home after he finished work. He was a [business owner] selling [products]. He closed [his business] and was walking home alone. Our house is about [distance] by foot from Parachinar. When he was halfway to our house he was attacked by the SeS. He was shot and killed. I do not know exactly what happened as we found out about this incident about one or two hours after he was killed. Mr B] was threatened many times by the SeS in Parachinar. The SeS would call him at work, demand that he close his [business] or he would be killed. He had been threatened since he opened his business about two or three years before. He could not close his [business] because it was the only source of income for our family.

In or about February 2006, I established a [business] in Islamabad. I had many investors from the Parachinar region. They knew me from my work with my [former employer]. My investors from the Parachinar region also trusted me because I was the son of a local elder. When I had enough investors I started my own business. The investors would [details deleted]. I had contracts with many Non-Government Organisations ("NGO"), such as [three NGOs]. I also had a large contract with [a company].

In or about April 2007, the Kurram Agency War began. The Taliban attacked our home one night during this war. The Taliban fired their AK-47's into our home. I was not at home at this time; I was in Islamabad working to support the family. My [first wife] was injured badly. [Details of injury deleted]. My [nephew] (the son of my [brother]) was shot in the leg. The attack lasted for about ten or fifteen minutes. The Taliban were driven away by the other villagers. My wife and nephew were taken to the hospital in Parachinar about two hours after the attack.

The next day, my wife and nephew were evacuated by government convoy to a larger hospital in Peshawar. They were accompanied by my brother [Mr C] and [a relative]. I travelled from Islamabad to Peshawar to meet them. It was very distressing seeing my wife and nephew injured in this attack.

After the Kurram Agency war, the Taliban started threatening my investors in the Parachinar area.

In or about 2008, [Mr D], an investor from [Town 1] (a town between Peshawar and Parachinar), was threatened by the Taliban. [Mr D] is also a good friend of mine. I met him while I was working with [my former employer]. The Taliban told him to stop doing business with me because I was Shia and I worked with NGOs. The Taliban told [Mr D] that they were going to kill me and that if he did not stop doing business with me they would also kill him. Initially [Mr D] kept his business with me; however,

as the threats from the Taliban became more constant, he withdrew his business in 2009.

In or about 2009 or 2010, I decided to travel to Parachinar to visit my family. I would travel from Islamabad to Parachinar two or three times a year. The route I took during these trips was dependant on the safety of the roads. The trip became a lot more dangerous after the Kurram Agency war. If it was safe, I would usually travel to Parachinar through [Town 2] then [Town 1] then [Town 3]. However, on this journey I was forced to travel through Afghanistan. The Taliban had made it impossible for any Shia to travel to Parachinar. I drove from Islamabad to Peshawar, through [a route] to Parachinar. The drive from Islamabad to Parachinar would usually take about seven hours. This journey, through Afghanistan, took eighteen hours. I stayed in Parachinar for about fifteen days. The roads were still not safe when I wanted to return to Islamabad so I had to travel in a government convoy out of Parachinar.

In or about 2010, [Mr E], an investor from Banno (a town near [Town 2]) was threatened by the Taliban. [Mr E] is a friend of mine. I met him during my time at [my former employer]. The Taliban threatened him, telling him to stop doing business with me because I was a Shia and helped the NGOs. The Taliban told [Mr E] they were going to kill me. The Taliban threatened to kill [Mr E]. Despite these numerous threats and even though his life was in danger, [Mr E] chose to keep his business with me.

In or about late 2010, I was told by a good friend of mine [that] I was well known to the Taliban in Parachinar. [My friend] is [an occupation] who worked for [two companies] in Pakistan. He was from Parachinar and I had known him for many years. [My friend] told me that my life would be in danger if when if I returned Parachinar.

During 2011 and 2012 my office would receive a lot of threatening calls. The calls would be anonymous but I am sure it was the Taliban. The calls would often be taken by my [office assistant]. The caller would seek information about me; such as, when I would be going to Parachinar, what roads I would be taking. I believe the callers were trying to target and kill me.

In or about February 2012, I started making plans to leave Pakistan. I made the decision to leave because I was being directly threatened by the Taliban. My family was also being constantly threatened. My father cannot leave home through fear for his life.

In or about April 2012, just after the death of my brother [Mr A], my father received another threatening call from the Taliban. He would receive these calls approximately one a month. The Taliban told him to stop his involvement with the Pakistani government. The Taliban said that they would kill my father and all our family.

I left because of the threats to me and my family. The threats to [Mr D] and [Mr E] are just two examples of threats to my investors. The Taliban threatened nearly all of my investors. My business was still alive when I left but it was greatly diminished because of the threats from the Taliban. I could not do business in Pakistan because of my family's profile. I was the primary source of income for my family. I had to care for my parents, my wives, my children, my widowed [relatives] and their children.

We could not move elsewhere in Pakistan because we have a very large family and we have a deep connection with the Parachinar area. The Taliban is causing my family serious harm because they are constantly threatening my family and our livelihood.

[In] April 2012 I obtained a tourist visa for [another country]. I applied for the visa on the basis of my business documents.

[In] May 2012 I flew to [that country]. I travelled to [a city] to meet a people smuggler. I was [there] for about one and a half months before boarding a boat for Australia.

It is still very dangerous for my family and Shia people in Parachinar.

[In] September 2012, there was a large bombing in front of my brother, [Mr C's] [business] near [a location] in Parachinar, His [business] is [a distance] from the [location]. [A number of] people died and [a number of] people were injured. [Mr C] and my other [brother] were injured in this blast. The roof of the [business] had collapsed on top of them. They suffered injuries to their head and back. They spent [several] nights in the hospital in Parachinar. They are having issues restarting their business in Parachinar.

WHAT I FEAR MAY HAPPEN IF I RETURN TO THAT COUNTRY

I will be killed by the Taliban.

WHO I THINK WILL HARM / MISTREAT ME IF I WAS FORCED TO RETURN TO THAT COUNTRY

The Taliban.

WHY I THINK I WILL BE HARMED / MISTREATED IF I RETURN TO THAT COUNTRY

I will be persecuted because of my religion — I am a Shia Muslim.

I will be persecuted because I have been imputed with a political opinion — the Taliban know I assisted NGOs through my business.

I will be persecuted because I have been imputed with a political opinion — the Taliban know my father assists the Pakistani government and through this work, he prevents the Taliban gaining more power in the Parachinar region.

I will be persecuted because I am a member of a particular social group — I am a Shia member of the Bangash tribe — the Taliban are constantly attacking the Shia Bangash in the Parachinar region.

WHY I THINK THE COUNTRY'S AUTHORITIES WILL NOT PROTECT ME IF I AM FORCED TO GO BACK TO THERE

The Pakistani authorities have no power to prevent the Taliban from persecuting me.

21. Evidence of injuries and death to family members was provided. The applicant also provided evidence of his business activities.
22. The delegate accepted the applicant's identity and background. the delegate considered country information on violence against Shias in Pakistan, Bangash Tribe members and Malikis. The delegate considered country information about violence against Shias in Islamabad. The delegate accepted that the applicant's association with his father, a Malik in Kurram Agency, would lead to a real chance of serious harm. State Protection in Kurram was not available. The delegate considered relocation for the applicant, and noted that the applicant had resided in Islamabad for 10 years, where he operated a sizeable business, which earned about \$[amount]/month, and rented accommodation, where his wives and children would visit and stay with him. The delegate considered it was the personal choice of the applicant to maintain a home in Parachinar for his wives and children. He was active in the Shia community in Islamabad. The delegate considered the general violence in Pakistan, and the applicant personal claims. The delegate did not accept that the applicant's business

was being specifically targeted by the Taliban, or that as a son of an elder he would be targeted outside of Kurram Agency. The delegate did not accept that all Shia were at risk of harm in Pakistan. The delegate considered that the applicant could again establish himself in Islamabad.

23. The applicant's agent provided a submission to the Tribunal. It was submitted that the applicant could not return to his home location in Kurram Agency, that he would be targeted because of his religion and Bangash tribal allegiance, an imputed political opinion arising out of his father's role as a Shia elder and involvement with the Pakistani government, an anti-Taliban political opinion involvement with west and NGOs, and PSGs comprising of Shias from Parachinar and educated Shia Muslims. It was submitted that there was an increase in violence against Shia, that the Taliban was active, that they had assaulted schools, that the government could not provide protection, and he could not relocate. The submission included examples of violence in cities of Pakistan, noting that Islamabad had not experienced sectarian violence to the same level of other cities, but was not immune from such attacks. It was submitted that Shias from Parachinar were being targeted. It was submitted that the applicant does not have any social supports outside of Parachinar, and the applicant would be compelled to go home to visit his family. It was also submitted that the Tribunal substitute a decision to grant the applicant a protection visa, given the issue of Regulation 2.08F, which had the effect of making the application to be a temporary protection visa application.
24. It was also submitted that in early 2015 the applicant's father and first wife travelled to Islamabad for medical treatment. It was stated that they were followed by a car with several men inside with guns. They found a patrolling police car, which, it was submitted, compelled the stalkers to depart.

FINDINGS AND REASONS

Country of nationality

25. The applicant claims to be a citizen of Pakistan, and has consistently claimed this. He has provided documentary evidence that show he is of Pakistani background, including a passport and other documentary evidence. The Tribunal finds that the applicant is a citizen of Pakistan, that Pakistan is the applicant's country of nationality for the purposes of the Refugees Convention, and that Pakistan is his receiving country for the purposes of complementary protection.

Third country protection

26. There is no evidence before me to suggest that the claimant has the right to enter and reside in any safe third country for the purposes of s.36(3) of the Act.
27. The Tribunal found the applicant to be a generally truthful witness. The Tribunal considers that the applicant exaggerated elements of his claims to an extent, but that this is explainable in the context of his past experience, given the violence that has beset the applicant's home region for some time.

Claims

28. The applicant has considered the claims of the applicant. The Tribunal notes that it has considered a number of applications arising from similar backgrounds, including a number of applicants who have used the same agent and relied on very similar country information pertaining to the situation for Pashtun Shias, Turi or Bangash tribe members whose home region is the Parachinar/Kurram region of Pakistan. The Tribunal has considered and discussed country information with the applicant that demonstrates, that aside from an anomalous incident in December 2015, the region that the applicant calls home has had significant improvements in the overall security situation, and specifically for those who identify as Pashtun Shia from Turi/Bangash tribes from the region. The [Town 3] road has opened, there is very limited violence in the region and this situation has lasted for some time. The military operation in the region has led to a distinct drop in violence as recorded by reputable agencies such as the South Asia Terrorism Portal (SATP), the bombing of December 2015 notwithstanding,
29. The Tribunal notes the claims of the applicant in particular with respect to his relationship with his father, a Malik of his community. The Tribunal considers that this is the essential and significant reason why the applicant fears serious harm on return to Pakistan. The delegate in their decision provided some considered information regarding Maliks and the Jirga system¹. The delegate references in part a recent advice to the RRT with respect to the Malik system. *Country Advice PAK39807* of 16 February 2012 discusses the role and treatment of tribal elders (*maliks*), including as follows:

Malik is an official title bestowed on certain Pashtun tribal leaders in the Federally Administered Tribal Areas (FATA) of Pakistan. A 2005 World Bank report states that there are three types of *malik*: those granted *Maliki* status during British colonial era; those appointed in the 1960s under the rule of dictator Ayub Khan; and those conferred the position by the Political Agent (PA). According to the report, “[a]ll three types have varying perks and privileges in respective descending order”.² No recent statistics were located on the current number of *maliks* in the FATA. However, prior to the granting of the franchise to adults in the FATA by the government of Benazir Bhutto in 1996, FATA representatives in the national assembly were appointed by an “electoral college of some 35,500 maliks”.³

Officially, *maliks* represent and advocate on behalf of their tribe.⁴ However, *maliks* also play an integral role in the administrative system of the FATA. There is no representative government in any of the seven FATA agencies. Rather, each agency is administered by a federally appointed PA, a powerful bureaucrat with extensive judicial, executive and revenue powers.⁵ Each political agent reports to Pakistan’s president through the governor of Khyber-Pakhtunkhwa (KPK) province, formerly known as North West Frontier Province (NWFP).^{6,7} *Maliks* are tasked by the PA with maintaining law and order within their tribes, as well as ensuring tribal loyalty to the state of Pakistan. For this role, a *malik* receives an allowance, paid by the federal ministry of States and Frontier Regions (SAFRON). Furthermore, a *malik*’s tribe is said to receive “financial privileges from the administration if their tribe cooperates in

¹ Pp12-13 of [date] March 2014 decision, AAT folios 7-8.

² World Bank 2005, *Traditional Structures in Local Governance for Local Development: A Case Study of Pakhtun Residing in NWFP & FATA, Pakistan*, p.14
<http://info.worldbank.org/etools/docs/library/153053/Pakistan.pdf>

³ International Crisis Group 2009, *Pakistan: Countering Militancy in FATA*, Asia Report N°178,21 October, p 3

⁴ Vira & Cordesman 2011, *Pakistan: Violence & Stability*, Centre for Strategic & International Studies. 5 May.pp.43, 76

⁵ International Crisis Group 2009, *Pakistan: Countering Militancy in FATA*, Asia Report N°178,21 October, p2

⁶ US Department of State 2010, *Country Reports on Human Rights Practices for 2009 – Pakistan*, March, Section 1(d)

⁷ White, J.T. 2008, *Pakistan’s Islamist Frontier: Islamic Politics and U.S. Policy in Pakistan’s North-West Frontier*, Center on Faith & International Affairs, Religion & Security Monograph Series, no. 1, p.15

suppressing crime, maintaining social peace and generally supporting the government”.⁸ The International Crisis Group (ICG) describes this political arrangement as “a colonial-era political, administrative and judicial system that denies basic constitutional rights and political representation”.⁹

The administrative role, and subsequently the title of *malik*, is hereditary, passed to the eldest son.¹⁰ However, the ICG states that the PA “can arbitrarily withdraw, suspend or cancel malik status if he deems the individual is not serving the interests of the state”.¹¹ *Maliks* have been arrested and detained on the orders of political agents and assistant political agents.¹²

...Sources indicate that that several hundred *maliks* across almost all FATA agencies were killed or kidnapped by militants in the past decade. By 2009, it was reported that at least 600 *maliks*/elders had been killed by Sunni militants and some 146 cases of kidnapping of government functionaries/pro-government *maliks* were recorded.¹³ ¹⁴ According to the ICG, the mass killing of “several hundred maliks” allowed militants to consolidate their power throughout many parts of the FATA, forcing tribes to “adjust their loyalties”, and “accept the authority of local militant leaders”.¹⁵

Maliks and tribal elders who raise *lashkars* (tribal militias) for use in offensives against militants in their tribal areas are especially targeted. During a single jirga (tribal conference) in October 2008, called by the Ali Khel tribe to discuss the formation of a *lashkar*, the TTP “rammed an explosive-laden car” into the venue, “killing at least 82 elders”.¹⁶ In March 2011, at least 36 people were killed and a further 40 injured when a suicide bomber attacked the funeral of the wife of a pro-government ethnic Pashtun tribal elder in Adezai village, 15 kilometres from Peshawar. *BBC News* reported that the funeral was being attended by “many anti-Taliban militiamen in the region”.¹⁷

Much of the killing of *maliks* in the past decade was conducted in the context of tribal warlords’ war on the Pakistani state and therefore, by extension, the FATA authorities. However, the ongoing conflict in Kurram differs from conflicts elsewhere in the FATA in that it is primarily a sectarian conflict, in which the target of harm is not the state, but rather the large Shi’a population. The ICG argues that while sectarian tensions had long existed in Kurram, the US-led invasion of Afghanistan caused an influx of jihadists into the agency, introducing “a hard-core brand of Taliban-style

⁸ International Crisis Group 2009, *Pakistan: Countering Militancy in FATA*, Crisis Group Asia Report N°178, 21 October, p.3

⁹ International Crisis Group 2009, *Pakistan: Countering Militancy in FATA*, Asia Report N°178, 21 October, p.1

¹⁰ World Bank 2005, *Traditional Structures in Local Governance for Local Development: A Case Study of Pakhtun Residing in NWFP & FATA, Pakistan*, p.14

<http://info.worldbank.org/etools/docs/library/153053/Pakistan.pdf>

¹¹ International Crisis Group 2009, *Pakistan: Countering Militancy in FATA*, Asia Report N°178, 21 October, p.3

¹² Asian Indigenous & Tribal Peoples Network 2006, ‘FATA: The dark region of Pakistan’, AITPN website <http://www.aitpn.org/IRQ/vol-II/Issue-02/issue06.htm>

¹³ Planning & Development Department, FATA Secretariat 2009, ‘Cost of Conflict in FATA’, FATA Secretariat website, April, p. 15 <http://fata.gov.pk/files/costconflict.pdf>

¹⁴ Siddique, Q. 2010, *Tehrik-E-Taliban Pakistan: An Attempt To Deconstruct The Umbrella Organization and The Reasons For Its Growth In Pakistan’s North-West*, Danish Institute For International Studies, DIIS Report 2010:12, p.61

¹⁵ International Crisis Group 2009, *Pakistan: Countering Militancy in FATA*, Crisis Group Asia Report N°178, 21 October, p.4

¹⁶ Siddique, Q. 2010, *Tehrik-E-Taliban Pakistan: An Attempt To Deconstruct The Umbrella Organization and The Reasons For Its Growth In Pakistan’s North-West*, Danish Institute For International Studies, DIIS Report 2010:12, p.58

¹⁷ ‘Deadly attack at Pakistan funeral procession’ 2011, *BBC News*, 9 March <http://www.bbc.co.uk/news/world-south-asia-12684954>

Sunni ideology”, fuelling sectarian conflict.¹⁸ In the 2010 report, *The Battle for Pakistan: Militancy and Conflict in Kurram*, the author states the TTP also took advantage of the sectarian conflict to launch its own attack on the Turi, ostensibly due to the Turi elders’ refusal to allow the Afghani Taliban the use of Upper Kurram as a refuge and “launching pad for attacks into Afghanistan”.¹⁹

30. The Tribunal notes the applicant’s agent’s submissions on this issue, as found at paras 87 – 88 of the 8 June 2015 submission, which includes further country information on Jirga’s.
31. The Tribunal discussed the applicant’s relationship with his father as a Malik, and his own circumstances as a son of a Malik. At the hearing the applicant stated that his family had faced some significant issues, including the death of a brother, and threatening calls made to his father. The applicant stated that his father received calls that he should cease his involvement with the Pakistani authorities, and that if he did not do so the applicant’s father and family would be killed.
32. The applicant provided evidence regarding the threats to his father and family. The applicant provided evidence with respect to a more recent threat to his father and wife, in early 2015, when the applicant’s father was in Islamabad to receive medical treatment. The Tribunal asked detailed questions with respect to this incident, and accepts that it occurred. The Tribunal accepts the contention of the applicant that the reason his father was targeted in Islamabad was because he was identified as a Malik, and that he was chased because of the position he held. The Tribunal accepts this as plausible, the Tribunal does not accept that the applicant’s father would be targeted simply because he is a Shia from the Parachinar region. As the country information provides, Maliks have been targeted in locations in the West of Pakistan due to their prominent role in their community. The Tribunal considers it is plausible that the applicant’s father was identified by chance and targeted for harm, as described by the applicant.
33. The applicant also claimed that it was likely that he would be made the Malik on his father’s death. The Tribunal questioned this, given its understanding as per the country information that the title of Malik passed on to the eldest son, and that the applicant had two older brothers. The applicant stated that ordinarily this was so, but that his family’s circumstances were different. The Tribunal noted that two of his brothers had been killed. The applicant was the most influential person in the family, having established his own business and had provided significant financial support to the family over an extended period of time. The applicant stated that his older two brothers were not fit to be the Malik, and that his father was certainly considering the applicant as his heir to the title of Malik. The applicant stated that his eldest brother was [an occupation] and had no education, while his next elder brother was [an occupation], was very introverted and not part of the broader community. Given his activities in business and on behalf of the family, the prospect the applicant would be made the Malik on his father’s death was quite high.
34. Having considered all the evidence and country information, the Tribunal concludes, as did the delegate, that the chance of the applicant being targeted for harm arising from his father’s position as a Malik cannot be considered remote, even given the overall improvement in the security in the applicant’s home area, and general decline in violence. The Tribunal considers that the chance of the applicant being seriously harmed in his home region of Kurram for this reason, which encompasses Convention grounds of a political

¹⁸ International Crisis Group 2009, *Pakistan: The Militant Jihadi Challenge*, Asia Report N°164, 13 March, p.15

¹⁹ Mahsud, M.K. 2010, *The Battle for Pakistan: Militancy and Conflict in Kurram*, Human Security Report Project website, April, pp.1,4
http://www.humansecuritygateway.com/documents/NAF_TheBattleforPakistan_MilitancyandConflictinKurram.pdf

opinion that opposes the Taliban and membership of a particular social group being a family member of a Malik, cannot be considered remote. The Tribunal finds that there is real chance of serious harm for these Convention reasons in the applicant's home region, now and in the reasonably foreseeable future. The Tribunal finds that the applicant has a well-founded fear of persecution for these reasons.

35. The Tribunal has considered the prospect of state protection. The Tribunal accepts that the country information demonstrates that the authorities have taken significant steps in improving the safety and security in the Kurram region of Pakistan. The Tribunal consider that generally the authorities do provide effective protection for Pashtun Shia from Turi/Bangash tribes, have opened and secured the [road] reduced the level of violence to very low levels.
36. However, the Tribunal accepts that in certain circumstances this protection may not be effective. As detailed, the Taliban have sought to target Maliks whom they believe have acted against them in persuading the Shia community of Parachinar and surrounds to oppose the Taliban and their interest in free movement through Kurram into Afghanistan. The Tribunal considers that in the circumstances of the applicant the level of protection which is afforded to Maliks and their families in this region of Pakistan and are entitled to expect is not effective at present. The Tribunal concludes that the applicant's unwillingness to seek protection from those authorities is therefore justified for the purposes of Article 1A(2).

Relocation

37. Having determined that the applicant does have genuine fears return to his home region, the Tribunal is required to consider whether the applicant could reasonably relocate to a separate part of Pakistan. There remains the question of whether the applicant will face less than a real chance of serious harm or real risk of significant harm by relocating to a different part of Pakistan. It is well settled that the focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: *Randhawa v MILGEA* (1994) 52 FCR 437 per Black CJ at 440-1. Depending upon the circumstances of the particular case, it may be reasonable for a person to relocate in the country of nationality or former habitual residence to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution, and where it is reasonable, under all the circumstances, in the sense that it is practicable, to expect him to seek refuge in another part of the country.
38. 'Reasonable' will depend upon the particular circumstances of the applicant and the impact of relocation upon that person within the person's country. However, whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense.²⁰ Depending upon the circumstances of the particular case, it may be reasonable for a person to relocate in the country of nationality or former habitual residence to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. Thus, a person will be excluded from refugee status if under all the circumstances it would be reasonable, in the sense of 'practicable', to expect him or her to seek refuge in another part of the same country. What is 'reasonable' in this sense must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country. However, whether relocation is reasonable is not to be

²⁰ *SZATV v MIAC* [2007] HCA 40 and *SZFDV v MIAC* [2007] HCA 41, per Gummow, Hayne and Brennan JJ, Callinan, J, agreeing.

judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights.

39. The issue of whether it would be reasonable to expect an applicant to relocate within Pakistan only arises if the circumstances indicate that there is a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution, that is, where the feared persecution is localised rather than nation-wide.
40. The Tribunal notes that the applicant has had an extensive history living in Islamabad, including establishing a business and earning a reasonable living in that city. The delegate concluded that the applicant could relocate to Islamabad, a reasonable determination at the time the decision was made. However the Tribunal considers that the more recent incident of the applicant's father being identified and chased in Islamabad provides the reason as to why the applicant has a real chance of serious harm in Islamabad. As accepted by the Tribunal, the applicant's father was identified and targeted in Islamabad because of his Malik status. The Tribunal has determined that the applicant faces a real chance of serious harm arising out of his relationship to his father and the Malik status of his family. It follows that Islamabad is not a location where the applicant can relocate to where he does not face a real chance of serious harm or a real risk of significant harm.
41. The Tribunal has considered relocation to other locations in Pakistan. The Tribunal accepts that there is a level of violence in Pakistan. The applicant's representatives have provided country information regarding this. The applicant claimed he would not be safe from the Taliban anywhere in Pakistan as they had a network throughout the country and would seek to harm him and would search for him throughout Pakistan. The Tribunal noted that country information indicates that the security situation varies greatly within different parts of Pakistan and there are a number of areas within the country which remain relatively free from the threat of militant, sectarian and politically motivated violence, particularly outside of KPK and Balochistan.²¹ The Tribunal notes that the DFAT report indicates that the Taliban is a loose network of Sunni militant groups, and whilst they had attacked targets throughout Pakistan, these were against security forces and institutions, political rivals and civilian infrastructure.²²
42. The Tribunal notes that there is a significant population of Shia Pashtuns in Lahore, that state protection is more available and Taliban or other militant Sunni activities are less prevalent in Lahore.²³ The Tribunal notes that this information suggested that the Taliban were a loose network of militant organisations which did not have the level of cohesion and integration to target locally known activists like the applicant outside of their home regions, or that there was a Taliban wide 'hit list'. The Tribunal notes that the country information indicated that the Taliban were most active in KPK and certain regions in the Tribal areas, that urban areas in other parts of Pakistan saw relatively few attacks, and that the attacks that did occur were targeted against military or other authorities.

²¹ DFAT Pakistan Country Report: April 2015, 2.25. A newer DFAT Pakistan report was released in January 2016, the assessment regarding Punjab remains the same (at 2.30)

²² DFAT Pakistan Country Report: April 2015, 2.27 – 2.28. A newer DFAT Pakistan report was released in January 2016, the assessment regarding the TTP remains the same (at 2.32-2.33)

²³ DFAT Pakistan Country Report: April 2015, 2.25, 2.27; South Asian Terrorism Portal Pakistan reports – Sectarian violence in Punjab since 2009
<http://www.satp.org/satporgtp/countries/pakistan/punjab/datasheet/sectarianviolencepunjab2009.htm> ; terrorism related incidents in Lahore 2015 -
http://www.satp.org/satporgtp/countries/pakistan/punjab/datasheet/lahore_incident.htm ; Terrorism-related Incidents in Islamabad – 2013 -
http://www.satp.org/satporgtp/countries/pakistan/punjab/datasheet/Islamabad_incident2013.htm .

43. The Tribunal has considered the applicant's circumstances. While it has accepted that the applicant has a real chance of serious harm in the applicant's home region, the Tribunal does not accept that the real chance exists across Pakistan generally. The Tribunal does not accept that the applicant's family's status as a Malik is known generally across Pakistan, there is nothing from the applicant's name or identity documents that demonstrates this in the broader context of Pakistan..
44. The applicant has claimed that he would be targeted across Pakistan because of his actual and imputed political opinion against the Taliban. As discussed with the applicant at the hearing, the Tribunal considers that the majority of Pakistan's population does not support the Taliban or their beliefs or activities, so he is not alone in his opinion. A review of articles and political statements demonstrate that the political position of most parties in Pakistan is against the Taliban and their violent activities, though opinions differ as to whether to fight or negotiate with the Taliban. The applicant's family has presented this opinion in meetings. According, the Tribunal considers that the actual and imputed political opinion is the predominate opinion in the broader population.
45. The Tribunal accepts that the applicant would be seen by the Taliban to be against them, his father's activities demonstrate this. However the Tribunal does not accept that the Taliban would seek to harm the applicant because of his actual and imputed anti-Taliban political opinion across Pakistan. The Tribunal does not accept that the Taliban would target him because of his father's activities as a Malik in all of Pakistan. The Tribunal does not accept that the Taliban would seek to harm the applicant because of the actual or imputed anti-Taliban political opinion that he holds, the Tribunal considers that the Taliban would not seek to harm the applicant for holding such an opinion.
46. The Tribunal does not accept that the applicant has a real chance of serious harm or a real risk of significant harm because of his and his family's actual and imputed anti- Taliban political opinion, his father's responsibility as a Malik, or his relationship to his father the Malik, either individually or cumulatively, in all of Pakistan.
47. At the hearing the Tribunal discussed country information in relation to relocation with the applicant. The Tribunal has also notes the written submissions made by the applicant and his agent with respect to the reasonableness of relocation. After discussing it with him and considering the country information, the Tribunal is satisfied that the applicant, as a citizen of Pakistan, has the right to relocate within Pakistan and that there is freedom of movement of Pakistani citizens throughout the country.²⁴ The DFAT report identifies that options are available for most ethnic and religious groups to relocate to large, urban centres that are home to mixed populations.²⁵
48. The Tribunal has considered whether it is reasonable, in the sense of practical, for the applicant to relocate within Pakistan. The Tribunal notes that the applicant does not have the connections to other locations in Pakistan, such as Lahore or other Punjabi cities that he has in Western regions. The applicant's business connections and previous experience has located itself in Islamabad and locations to the West of that city. The applicant has submitted and the Tribunal accepts that the applicant has no familial or social supports outside of Parachinar or Islamabad. The Tribunal further notes that the applicant has a significant family that is dependent upon him, whom it would be reasonable to expect would seek to reside with him given his inability to return to his home location. The applicant would be required to establish a home and gain employment that would support such a family. The

²⁴ DFAT Pakistan Country Report: April 2015, 5.14, same information in new report 5.15

²⁵ DFAT Pakistan Country Report: April 2015, 5.16 – 5.19, very similar and consistent information in new report 5.18 - 5.21.

Tribunal is concerned that this will be very difficult for the applicant in his personal circumstances.

49. The applicant is an intelligent and capable young man, who has faced a significant series of difficulties in the past. His family has been targeted for harm in the past, and despite this he has managed to be successful. However the violence led to his being required to leave, he has lost his business due to events outside his control. The applicant does not have financial supports available to him to establish an ongoing presence in areas outside of his home region, given the relative costs of locations such as Lahore. The applicant himself had been the significant financial benefactor of his family prior to his departure. Given all the circumstances, the Tribunal considers that the applicant's ability to establish himself and his family in such circumstances is not present
50. The Tribunal have considered the totality of the applicant's circumstances as a Shia from Parachinar who has been targeted for harm for his and his family's actual and imputed political opinion, and his family's responsibilities as Maliks. Taking into account the individual and cumulative effect of these circumstances, the Tribunal is satisfied, having had regard to the applicant's particular circumstances, the circumstances he would reasonably be expected to face in the place of relocation, and the impact on the applicant of being sent to the place of relocation, that it is not reasonable for the applicant to relocate to another location area outside Parachinar.²⁶
51. Having regard to the above, the Tribunal finds that the applicant faces a real chance of serious harm arising from his political opinion and membership of a particular social group in the reasonably foreseeable future. The Tribunal finds that the applicant has a well-founded fear of persecution for these reasons.
52. For the reasons given above, the Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

DECISION

53. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Stuart Webb
Member

²⁶ *SZSRQ v Minister for Immigration & Anor* [2014] FCCA 2205