

1416155 (Refugee) [2016] AATA 4278 (5 August 2016)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1416155

COUNTRY OF REFERENCE: Pakistan

MEMBER: Nicole Burns

DATE: 5 August 2016

PLACE OF DECISION: Melbourne

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

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act; and
- (ii) that the other applicants satisfy s.36(2)(b)(i) of the Migration Act, on the basis of membership of the same family unit as the first named applicant.

Statement made on 05 August 2016 at 12:35pm

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 applicants Protection visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants who claim to be citizens of Pakistan, applied for the visas [in] October 2013 and the delegate refused to grant the visas [in] September 2014.
3. The applicants appeared before the Tribunal on 2 June 2016 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 applicants were represented in relation to the review by their registered migration agent. The representative attended the Tribunal hearing.

CRITERIA FOR A PROTECTION VISA

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.
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. 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').
9. 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

Background, nationality and family composition

10. According to information on the Departmental file the first named applicant (the applicant) is [an age] year old male from [Village 1], [Subdivision 1], Swat District, Khyber Pakhtunkhwa (KPK), Pakistan. He lived his entire life in Swat except for when he lived in [Country 1] from [specified year] to 2007. He is a Pashtun and Sunni Muslim. He arrived in Australia on a [temporary] visa [in] December 2011 on a Pakistani passport issued in his own name. He left Australia [in] March 2012 and returned [in] July 2013 along with his wife and son (the second and third named applicants), before lodging a protection visa application [in] October 2013. On the basis of the applicant's Pakistani passport and the fact the delegate had no issues with the applicant's claimed identity and country of nationality, the Tribunal accepts the applicant is a Pakistani national and has assessed his protection claims accordingly.
11. The Tribunal accepts the applicant's evidence with respect to his employment history and family composition. That is it accepts that he worked as [an Occupation 1] from [year] to [year]; that he worked for [Employer 1] in [Country 1] from [year] to 2007; and that his family owned a [business 1] in [Village 1] and used to farm a small amount of land which they owned. The applicant and his wife (the second named applicant) have [number] sons (the youngest being the third named applicant) and a daughter who is married and lives in [another country]. His [other children] also reside in Australia, having come here to study in the past. His eldest [child], [Child 1], came to Australia to study in 2011, has since applied for a protection visa which was refused and he is now the subject of review.¹ The applicant told the Tribunal that [Child 1] applied for a protection visa because he was involved with their local peace committee and helped the army (as was the applicant, discussed further below) and is therefore fearful of the Taliban on return. [Child 1] returned to visit Pakistan twice since coming to Australia. The applicant's other son, [Child 2], came to study in Australia in [year] and has visited Pakistan twice since then to see his wife. He has finished studying and is looking for a job, having been granted a [temporary] visa² (his wife has joined him in Australia). The applicant's other son, [Child 3], studied in Peshawar from 2007 and came to study in Australia in 2013 and is still studying. He is also married with a child and they all live with the applicant and his wife in Melbourne. [Child 3] has not visited Pakistan since he came to Australia.

Refugee assessment

12. The applicant claims to fear serious harm at the hands of the Taliban on return to Swat district on the basis of his imputed political opinion due to his involvement in a peace committee and actual and perceived support to the Pakistan army as a village elder.
13. The applicant set out his initial protection claims in a statutory declaration dated [in] October 2013 that accompanied his visa application. In it he outlined past experiences he and his family experienced in Swat which led to his decision to leave. He stated, among other things, that he believes he will be harmed on return by the Taliban because he was an active member of his local peace committee since 2009 (as were other members of his family); he has received personal threats from the Taliban; and because he has lived in the West and has sided against them in Pakistan, he will be seen as a traitor.

¹ AAT [case number deleted]

² [Deleted.]

14. In support of the visa application the applicant provided to the Department various material including,
 - A copy of a photograph of the applicant's eldest son ([Child 1]) and his brother-in-law in front of a building whose walls have been riddled with bullets from an attack by the Taliban, in close proximity to his home.
 - A letter from [Employer 2] dated [in] May 2013 with respect to the applicant's [relative 1] who worked as [occupation 2] in Swat and with a non-government organisation.
 - A copy of a security pass issued by the army to the third named applicant ([name]).
 - A copy of the applicant's membership card of the '[Committee 1]' ([Village 1] Swat), showing the applicant's photograph.
 - An untranslated letter from a member of the peace committee the applicant and others allegedly received advising them to remain cautious after attacks against some of its members.
 - An untranslated copy of a letter allegedly from the Taliban to the applicant.
 - A copy of an UNHCR ration cards for Swat Internally Displaced Persons (IDPs).
15. The applicant's then representative provided a written submission to the delegate dated [in] May 2014 in which he referenced country information from a variety of sources to support his contention that the applicant has a well-founded fear of persecution in Swat, despite some improvements in the security situation, and that relocation to another part of Pakistan is neither reasonable nor relevant in the applicant's case.
16. [In] September 2014 the delegate refused to grant the applicant a protection visa. The delegate accepted the applicant was a member of the peace committee in the past in Pakistan, but considered his involvement was minimal and did not accept he had a profile that would place him at risk on return.
17. On review the applicant provided to the Tribunal a detailed statutory declaration dated 26 May 2016 in which he elaborates upon his claims, address specific concerns raised by the delegate (for example his role in the peace committee) and clarified the reasons he returned to Swat in 2007 from [Country 1] and from visiting Australia in 2012 (discussed in more detail below), among other things.
18. Other material provided by the applicant to the Tribunal in support of the review application includes:
 - A translated copy of a letter from [Mr A], Vice President, [Committee 1] [Village 1] dated [in] May 2016 attesting to the applicant's membership of the committee from 2009 until 2013 and "vital role" in establishing the committee and cooperating with the Pakistani army. [Mr A] also confirms in his letter that the applicant's son – [Child 1] – was a member of the committee until 2011, performing night patrols to help detect the Taliban.
 - Copies of photographs purportedly of the applicant's remaining brothers in [Village 1].
 - Copies of prescriptions for various medicines purportedly prescribed for the applicant's brothers in [Village 1].

- A copy of a report from a consultant psychiatrist dated [in] May 2016 in relation to the applicant.
 - A copy of a letter from a psychologist dated [in] May 2016 in relation to the second named applicant.
 - A copy of an article about the attempted murder of a member of the village defence committee, [Mr A], [Village 1] dated [in] 2016.
 - A translated copy of the original letter from [Committee 1] to the applicant, dated [in] July 2013.
 - A translated copy of the letter allegedly from the Taliban to the applicant (undated).
19. In his oral evidence to the Tribunal the applicant said he worked as [an Occupation 1] from around [year] until [year] (in his statutory declaration to the Tribunal he stated that this usually involved working being [at his workplace] for around nine months of the year, with some months off which he spent in [Village 1]). In [year] he had arranged to be deployed on [an assignment] leaving from [Country 1] however due to flight delays en route he missed his [transport]. He then stayed in [Country 1] until 2007, returning to [Village 1] after his application for asylum there was rejected.
20. The applicant told the Tribunal the reason he stayed in [Country 1] for so long (from [year] to 2007) was that he had a problem with his [Relative 2] who supported Sufi Mohammad which resulted in death threats. The applicant explained that Sufi Mohammad was the leader of the Sharia law movement in Swat. Concerned, his [Relative 3] asked the applicant to talk to his [Relative 2] about the risks of being involved in such a group, which he did at the beginning of 2001 at his home in Swat. This was not well-received and the applicant told the Tribunal a week later he was told by his [Relative 3] that he needed to leave the country because [Relative 2] had told a follower (of Sufi Mohammad) about the applicant and threatened him. The applicant stated in his statutory declaration to the Tribunal that because of these problems with his [Relative 2] and the Sufi Mohammad group he made arrangements to depart Swat in 2001. It was also the reason he remained in [Country 1] for so long however the applicant acknowledged that it was not what he told the [Country 1] authorities in relation to his asylum application (which caused the delegate to doubt his credibility). On review the applicant explained that he saw an agent sometime after he had arrived in [Country 1] who applied for protection for him (the applicant stated that he did not know what he included in the application). However the applicant did not tell the agent the real reason that he feared returning to Swat – that is because of his [Relative 2's] involvement with the Sufi Mohammad group (who, the applicant learnt whilst in [Country 1], had gone to fight for the Taliban in Afghanistan) – fearful that he would be considered a terrorist given his [Relative 2's] allegiance and the timing; that is just after September 11. Given the Tribunal found the applicant's evidence credible overall (discussed further below), it accepts the applicant's explanation as to why he (or his agent) fabricated his claims when he applied for asylum in [Country 1] in the past and does not draw an adverse inference from this fact.
21. The Tribunal accepts the applicant's claims that his [Relative 2] was heavily involved with Sufi Mohammad's group and joined the Taliban in Afghanistan. It accepts the applicant warned him about his involvement some time in 2001 and his [Relative 2] threatened him with death. However, as this occurred over 14 years ago, and on the applicant's own oral evidence to the Tribunal he has had not received any further threats from his [Relative 2] or the group since then, including after returning to Swat in 2007 and remaining there for five years, the Tribunal finds remote the chance the applicant would be seriously harmed by his

[Relative 2] or members of Sufi Mohammad's group on return to Pakistan now or in the reasonably foreseeable future because he had spoken to him in 2001.

22. The applicant told the Tribunal that the Sufi Mohammad group has since changed to the TTP with Sufi Mohammad's son-in-law, Fazalullah, its leader, which the Tribunal accepts. The Tribunal will consider the risk the applicant faces from the Taliban and specifically Fazalullah's followers if he returns to Swat below (elsewhere) in the decision record.
23. The applicant said after his application for asylum was refused in [Country 1] he returned to Swat in 2007, stating that he had no other option even though the situation was not conducive. Work was difficult, given the security situation. He said he was involved with the establishment of a peace committee in his area around 2009 and remained actively involved until he left Swat in mid-2013 (apart from the three months he was visiting Australia in early 2012). His role involved liaising with the army; negotiating safe passage (for example) with the army and Taliban; and developing a night patrol watch list, among other things. In his statutory declaration provided to the Tribunal the applicant identified other duties, such as helping the army identify bodies and pointing out Taliban properties.
24. As well, in his oral and written evidence to the Tribunal, the applicant described his role assisting the army and negotiating between the army and Taliban as one of the elders who remained in [Village 1] after the army offensive (to reclaim Swat from the Taliban) in 2009. This included an incident when the army reneged on their promise to the applicant and other elders to pass through their area – in effect to travel and then go – by creating army posts and launching attacks against the Taliban. Some Taliban were killed as a result and they held the applicant and the others responsible.
25. The applicant said he experienced some problems with the Taliban whilst living in Swat prior to his involvement with the peace committee, as follows:
 - One time in 2007, not long after his return from [Country 1], he was assaulted by Taliban members (he stated Fazalullah followers in his statutory declaration provided to the Tribunal) whilst walking his daughter home from school. His daughter was also grabbed and thrown to the ground – a lesson because she was not supposed to go to school (the applicant said at that time women were not allowed out of the house). After this incident his daughter stopped going to school.
 - In 2008 whilst tending their farmland the applicant and his son, [Child 2], were fired upon by TTP (they managed to escape, unharmed). When asked if he thinks they were targeted specifically the applicant replied “yes” because a few days prior his son had said disparaging words about the Taliban to some people at their [business 1].
 - In 2009 the applicant's eldest son, [Child 1], was kidnapped by the TTP whilst visiting his maternal grandparent's home, purportedly in a bid for him to join them. [Child 1's] grandfather was able to secure his release a few days later following the payment of 500,000 rupees. [He] was beaten and tortured during that time, resulting in a fractured wrist.
26. The Tribunal accepts the applicant's claims in this regard noting his consistent evidence throughout the visa application and review process. That is it accepts that he was assaulted by Taliban members in 2007 because his daughter attended school. However the applicant's daughter stopped going to school thereafter and the applicant did not indicate that he experienced any further problems from the Taliban in relation to this incident. The Tribunal therefore finds remote the chance that he would be seriously harmed by the Taliban on return in relation to this incident which occurred around nine years ago with no follow up.

The Tribunal accepts the applicant and his son were fired upon by the Taliban whilst tending their farmlands sometime in 2008, noting that the Taliban controlled large parts of the district at that time. The applicant's assertion that they were specifically targeted because his son had spoken disparaging words about the Taliban in public a week or so prior is, in the Tribunal's view, purely speculative. The applicant did not claim there was any further threats or harm by the Taliban directed at him or [Child 2] in relation to this incident and the Tribunal finds remote the chance that he would face serious harm on return to Swat from the Taliban in respect of this incident which occurred eight years ago.

27. Finally, the Tribunal accepts the applicant's claim that his son was abducted by the Taliban in 2009 in the circumstances described. However given he was released (once payment was made) and the applicant has not indicated that he or his son experienced any further problems, the Tribunal finds remote the chance the applicant would face serious harm in relation to this incident which occurred seven years ago, prior to the military establishing control in Swat, on return to Swat now or in the foreseeable future.
28. The applicant told the Tribunal that due to the worsening security situation, and ongoing militant activities including targeting of peace committee members and others, he and his family decided they needed to leave Swat and were making the necessary arrangements when, in July 2013 he received a letter from the vice president of his peace committee advising him to be careful and limit his movement because of targeted killings against committee members. A week later he received a letter from the Taliban at his home who said he would be killed because of his involvement in the peace committee, sending his [children] to study in foreign countries, and supporting women's education and freedom (with respect to his daughter). He (and his remaining family members in Swat) left the country shortly after.
29. There are some concerns the Tribunal has with the applicant's claims to fear serious harm from the Taliban for the following reasons. These include the fact that he (and his wife) returned to Swat from visiting his [children] in Australia in March 2012, despite his claims to have been attacked and fired upon by the Taliban in 2008 (and his son abducted in 2009) and that peace committee members had fallen victim to targeted attacks, including the murder of his friend and peace committee member [Mr B] in 2010. At hearing the applicant said he was fearful at the time but as they had left his youngest son (the third named applicant) in [Village 1] they had to return. His other son, [Child 3], was also still in Swat. The Tribunal is also concerned that after his (and his wife's) return to Swat in March 2012 they did not leave until July 2013, over a year later, despite his [temporary] visa being granted in February 2012. The applicant explained at hearing and in his statutory declaration provided to the Tribunal that it was important for him to get his entire family out (of the district) together. Whilst he and his wife's [temporary] visas were granted in February 2013, and his son ([name]) in April 2013, [Child 3's] student visa was not granted until June 2013, which is the reason they delayed leaving [Village 1].
30. The Tribunal is also concerned that two of the applicants [children] having left Swat to study in Australia, returned to visit there, despite the applicant's claims to fear harm from the Taliban (and his family members). That is according to the applicant's oral evidence to the Tribunal [Child 2], who left Swat in [year], returned twice: he thinks in 2012 and possibly in 2014 or 2015. The applicant said [Child 2] returned the second time because his wife was sick (he referred to mental health problems) and they did not stay in Swat district, instead in another district near Peshawar. His eldest son, [Child 1], left Pakistan in 2011 and returned to Pakistan in 2013, because his mother (the second named applicant) was sick at the time and the situation was very bad. The applicant said [Child 1] stayed with them for around two months and hardly left their house.

31. Despite these concerns the Tribunal found the applicant to be a credible witness and understands his desire to ensure all of his family members were safely out of Swat before he and his wife left in mid-2013. The applicant's account of his past experiences in Swat, including incidences involving the Taliban as set out above, and his role within the peace committee and negotiator between the army and Taliban was detailed, spontaneous and straightforward. His oral evidence to the Tribunal was also consistent with his written claims provided to the Department and Tribunal on these matters, corroborated by the oral evidence of his wife and son (the second and third named applicants). He did not appear to embellish his claims on these matters. As well his oral evidence was consistent with his detailed written claims provided to the Tribunal and his oral and written evidence to the Department. Further, his claims are broadly supported by country information, which indicates that peace committees (also known as Aman or Lashkars) have been present in the area since 2008. News reports also from September 2008 refer to peace committee members in [Village 1] holding talks with the security forces and militants in the area.³
32. For these reasons the Tribunal accepts the applicant's claims that he was a member of the peace committee in [Village 1] from 2009 until 2013; that he was assaulted by Taliban members in 2007 whilst bringing his daughter home from school; that he and his son were fired upon by Taliban members whilst on their land in 2008; that his son, [Child 1] was kidnapped by the Taliban in 2009 and held for three days before being released; and that he received a threatening letter from the Taliban in July 2013. The Tribunal also accepts the applicant's claims to have received a letter from the vice president of the peace committee in July 2013 warning him to be careful given targeted killings. The Tribunal has had regard to the translated copies of both letters, and given them some weight given the Tribunal found the applicant's evidence overall credible. The Tribunal has also given weight to a more recent letter from the vice president of the peace committee, as well as a copy of his membership card (on the Departmental file).

Real chance of persecution in the foreseeable future

33. Given this finding about the applicant's past profile and experiences in Swat, the Tribunal has gone on to consider if he faces a real chance of serious harm from the Taliban for any Convention reason on return.
34. The Tribunal has accepted that the applicant was active as a peace committee member in [Village 1] from 2009 until mid-2013. It accepts that he received a threatening letter from the Taliban in mid-2013 about his role in that committee and that the deputy head of his committee warned him (and other members) via letter around the same time to be careful given targeted killings of other members. The Tribunal accepts the applicant's claims that members whom he knew, including [Mr B], have been killed by the Taliban in the past. The applicant told the Tribunal that the peace committees still exist and if he returns he will have no choice but to get involved again. The Tribunal accepts the applicant will become involved with a peace committee on return to Swat, given his past role and position as a community elder and commitment in this respect.
35. It has been submitted⁴ that the applicant has a well-founded fear of being persecuted on return to Swat due to his membership of various particular social groups (that is: 'former/current members of citizens 'defence committees' in Swat; 'Liberal/secular residents in Swat'; and 'Returnees from Western countries') and his actual or impute political opinion (pro-military and pro-Pakistani government and anti-Taliban (informed by his work with the peace committee and augmented by his lengthy stay in Australia). Country information from a variety of sources confirming the ongoing activities of the TTP in Swat targeting Pakistani

³ [Deleted.]

⁴ In a written submission provided to the Tribunal dated 31 May 2016

government personnel alongside perceived civilian opponents is referenced in the written submission, as well as a differently constituted tribunal decision⁵ referencing country information about, among other things, ongoing militancy in Swat valley, which the Tribunal has taken into account.

36. For following reasons the Tribunal finds that the applicant faces a real chance of serious harm on return to Swat on imputed (anti-Taliban) political opinion grounds as a member of a peace committee and village elder. It is therefore unnecessary to consider the other claims and submissions.
37. DFAT reports that the most potent security threat in Pakistan remains the Taliban insurgency based in FATA and Khyber Pakhtunkhwa which, combined with the war on terrorism, has claimed more than 57,000 lives since 2001 in Pakistan.⁶
38. Militants in Swat operate under the umbrella of the *Tehrik Nifaz-e-Shariat-e-Muhammadi* (TNSM), which has been operationally linked to the *Tehrik-e-Taliban Pakistan* (TTP). Independent information before the Tribunal indicates that, despite the defeat of militants in Swat (operating under the umbrella of the TNSM) by the Pakistan military in April 2009, sporadic attacks by the group against military and civilians suspected of cooperating with the military, including peace committee members continue.⁷
39. A May 2014 report by the *Voice of America* on Pakistan military operations targeting TTP strongholds in neighbouring Buner District, noted that many Swatis and Buneris were 'doubtful of official claims that the areas had been cleared of militants' and that Pakistan military operations against militants in the Malam Jabba mountains of Swat in May 2014, were a 'clear indication of militant presence in the region'.⁸ Similar reservations were expressed by Brian Cloughley, a South Asia analyst for IHS/Jane's *Sentinel*,⁹ who stated that the Taliban in Swat were defeated but 'still have presence there', citing a recent attack on security personnel in the region. Cloughley characterises the Taliban in Swat as being 'down but...not out'.¹⁰ Most notably, the TTP's presence in Swat was referred to by Haji Adeel, Chair of Pakistan's Senate Standing Committee for Foreign Affairs, when he noted in a speech at Parliament House (in 2013) that the Taliban have become active in Swat again.¹¹
40. There is also significant evidence of militant attacks against peace committee members¹². Since July 2014, there is information that Taliban militants remain active in the district and continue to carry out sporadic 'hit and run' type attacks against peace committee members

⁵ AAT [deleted case number]

⁶ DFAT 2016 *DFAT Country Information Report Pakistan* 15 January

⁷ See *The Pakistani Taliban issues paper*, DIBP, January 2015, p.52; Khaliq, F, 'Return of militancy: Army launches operation in Swat – again', *Express Tribune*, 6 September 2011, available at <http://tribune.com.pk/story/246049/return-of-militancy-army-launches-operation-in-swat--again/>; and 'With Taliban's revival, dread returns to Swat', *New York Times*, 26 July 2014, available at http://www.nytimes.com/2014/07/27/world/asia/with-talibans-revival-dread-returns-to-swat.html?_r=0

⁸ Jan, S 2014, 'In Buner Another Reminder of the Taliban', *Voice of America*, 14 May <<http://blogs.voanews.com/durand/2014/05/14/in-buner-another-reminder-of-the-taliban/>>

⁹ 'Brian Cloughley Bio' n.d., *Brian Cloughley* <<http://www.beecluff.com/>>

¹⁰ Cloughley, B 2014, 'It's Time to Strike', *The News International*, 19 May <<http://www.thenews.com.pk/Todays-News-9-250919-It-is-time-to-strike>>

¹¹ 'Senate body terms Taliban conditions for talks impractical; says Taliban active again Swat' 2013, *Pakistan Today*, 17 September <<http://www.pakistantoday.com.pk/2013/09/17/national/senate-body-terms-taliban-conditions-for-talks-impractical-says-taliban-active-again-in-swat/>>

¹² Hashim, A 2014, 'Killings target anti-Taliban leaders in Swat', *Al Jazeera*, 20 November <<http://www.aljazeera.com/indepth/features/2014/11/pakistan-killings-target-anti-taliban-leaders-swat-201411208203415596.html>>

and army patrols.¹³ Between September and December 2014 there was reported to have been a 'spike' in Taliban attacks against peace committee members.¹⁴ Over the same time period, small groups of Taliban fighters have been infiltrating back into Swat from sanctuaries in the Afghan provinces of Kunar and Nuristan, and militant cells have been operating in the Kabal, Matta, Charbagh and Miadam areas of Swat.¹⁵

41. An investigative report by *Al Jazeera* in late 2014, suggests the number of village defence committee (VDC) fatalities in the Swat Valley is much higher than reported by the military and other sources,¹⁶ referring to at least 22 VDC members having been killed in targeted attacks across the valley this year alone. The *Al Jazeera* report refers to a theme that is common to a number of other articles which refer to complaints from Swat Valley residents about the continuing insecurity and the inability of the state to provide protection from the Taliban, and portrays a prevailing atmosphere of fear and instability in the region.
42. Military spokesperson Lieutenant-Colonel Aqueel Malik has stated that there are approximately 3000 peace committee members in Swat, of whom 22 are highly placed on a Taliban hit-list. He states that the Taliban target tribal leaders because they are 'soft targets' and peace committee members because 'these people worked closely with law enforcement agencies [and the army] in order to end terrorism.'¹⁷ According to a December 2014 report by *Newsline Pakistan*, attacks on people working with peace committees in Swat have continued during the past few years.¹⁸
43. A recent article in the *Friday Times* reports that at least 120 target killings and other attacks of violence have been reported in Swat since the completion of military operation in 2009; that the prime targets include members of the peace committees; and that most of the targeted killings have taken place in [two named] tehsils of the district. The article refers to a Peshawar-based journalist, originally from Swat, stating that the law and order situation has worsened; that every week an incident of targeted killing is reported from the region; and that "the Taliban have returned to the valley as target killers and are taking revenge from all those who sided with security forces."¹⁹
44. In 2016, there have been further security incidents in the Swat Valley, with fatal attacks on VDC members, police and people with an anti-Taliban profile,²⁰ including separate incidents

¹³ Rehman, Z & Walsh, D 2014, 'With Taliban's Revival, Dread Returns to Swat Valley', *The New York Times*, 26 July <http://www.nytimes.com/2014/07/27/world/asia/with-talibans-revival-dread-returns-to-swat.html?ref=asia&_r=1>; Rehman, Z 2014, 'Swat - An Unquiet Calm 2014', *Dawn*, 21 September <<http://www.dawn.com/news/1133198>>; 'Trouble in Paradise', *Newsline (Pakistan)*, 13 December <<http://www.newslinemagazine.com/2014/12/trouble-in-paradise/>>

¹⁴ 'Killing spree - Village defence committee member shot dead' 2014, *Express Tribune, The (Pakistan)*, 28 October <<http://tribune.com.pk/story/782493/killing-spreed-village-defence-committee-member-shot-dead/>>

¹⁵ Rehman, Z & Walsh, D 2014, 'With Taliban's Revival, Dread Returns to Swat Valley', *The New York Times*, 26 July <http://www.nytimes.com/2014/07/27/world/asia/with-talibans-revival-dread-returns-to-swat.html?ref=asia&_r=1>; Rehman, Z 2014, 'Swat - An Unquiet Calm 2014', *Dawn*, 21 September <<http://www.dawn.com/news/1133198>>

¹⁶ 'Killings target anti-Taliban leaders in Swat', *Al Jazeera*, 30 November 2014, available at <http://www.aljazeera.com/indepth/features/2014/11/pakistan-killings-target-anti-taliban-leaders-swat-201411208203415596.html>

¹⁷ Hashim, A 2014, 'Killings target anti-Taliban leaders in Swat', *Al Jazeera*, 20 November <<http://www.aljazeera.com/indepth/features/2014/11/pakistan-killings-target-anti-taliban-leaders-swat-201411208203415596.html>>

¹⁸ 'Trouble in Paradise', *Newsline (Pakistan)*, 13 December <<http://www.newslinemagazine.com/2014/12/trouble-in-paradise/>>

¹⁹ "Restoring Swat's lights", *Friday Times, The*, 29 July 2016, <http://www.thefridaytimes.com/tft/restoring-swats-lights/>

²⁰ See 'Target killings: An unending wave in Swat', *Morning Post*, 19 January 2016, available at

in late May 2016, where VDC members and police were assassinated in attacks in Bara Bandai and Manglore.²¹

45. Country information also indicates that peace committee members in [Village 1], the applicant's home area, have been attacked by militants in recent years. A curfew was imposed in areas of Swat, including [Village 1], in September 2014 following the killings of several peace committee members by militants.²² In April 2010 two peace committee members in [Village 1] were killed and three injured by 'assailants' according to [two sources]²³; the latter identifying the victims as [two specific names].²⁴
46. More recently, in early June 2016, there were reports about village defence committee member [Mr A] (the referee in the letter from the applicant's peace committee provided to the Tribunal) in [Village 1] area, escaping an attempt on his life in the [Subdivision 1] of Swat district (as submitted by the representative).²⁵
47. The Center for Research and Security Studies recently released a report for the period April – June 2016 in which it is stated that police officials appear to be the main target of violence in KPK, followed by political activists belonging to the ANP and the pro-government peace committee members. It is stated that Swat and Lakki Marwat have suddenly emerged as the main targets of violence.²⁶
48. The country information clearly indicates that despite the military gaining control of Swat in 2009 and some resultant improvements in the overall security situation, the Taliban continue to launch attacks against military targets and those they consider support the Pakistani authorities, including peace committee members.
49. The Tribunal accepts the activities of the applicant (and his son) in opposing the Taliban through their activities in the peace committee and directly assisting the army would make the family known to and of adverse interest to militants in the area. The Tribunal considers that this assessment is borne out by the threat letter from the Taliban directed at the applicant and his family in mid-2013, received just prior to their departure from Pakistan. The Tribunal accepts that if the applicant returns to his home in Swat, there to be a real chance that he will be known to the Taliban and other extremists in Swat Valley and imputed with a political opinion that supports the Pakistani army and opposes the Taliban. Given the applicant's long participation in the peace committee and active role assisting the military in post-conflict activities in the region, the Tribunal accepts there to be a real chance that the profile of the applicant and his family extends through Swat Valley and Khyber Pakhtunkhwa province.

<http://morningpost.today/eng/?p=884>; 'Shangla DSP killed in Swat', 13 April 2016, *Dawn*, available at <http://www.dawn.com/news/1251789/shangla-dsp-shot-dead-in-swat>; 'ANP leader killed in Swat', *Dawn*, 11 April 2016, available at <http://www.dawn.com/news/1251377/anp-leader-killed-in-swat>; 'Two policemen shot dead in Dherai', *Dawn*, 12 January 2016, available at <http://www.dawn.com/news/1232410/two-policemen-shot-dead>

²¹ See 'Village defence body member, guard shot dead', *Dawn*, 24 May 2016, available at <http://www.dawn.com/news/1260354>; 'Policeman killed and two others injured in Swat attack', *Dawn*, 25 May 2016, available at <http://www.dawn.com/news/1260467/policeman-killed-two-others-injured-in-swat-attack>

²² 'Indefinite curfew continues in northwest Pakistan's Swat district' 2014, *The Economic Times*, 18 September <http://articles.economictimes.indiatimes.com/2014-09-18/news/54068108_1_northwest-pakistan-north-waziristan-indefinite-curfew>

²³ [Deleted.]

²⁴ [Deleted.]

²⁵ [Deleted.]

²⁶ Security Report: April - June 2016, *Center for Research and Security Studies*, 28 July 2016, CIS38A80121410, p.18

50. The country information cited above establishes that there is more than a remote possibility that as a peace committee member and village elder, the applicant may be at risk if he returns to the Swat district and KPK more broadly. In these circumstances the Tribunal accepts that should the applicant return to his home in Swat district or elsewhere in Khyber Pakhtunkhwa now or in the foreseeable future, there is a real chance he will face serious harm from the Taliban or other extremists as per s.91R(1)(b). The Tribunal further finds that the essential and significant reason for the harm would be the applicant's actual or imputed anti-Taliban political opinion as per s.91R(1)(a) and that the conduct feared by the applicant is systematic and discriminatory as per s.91R(1)(c).

Availability of state protection

51. In this case, the harm that the applicant fears is from non-state agents. Harm from non-state agents may amount to persecution for a Convention reason if the motivation of the non-State actors is Convention-related, and the State is unable to provide adequate protection against the harm. Where the State is complicit in the sense that it encourages, condones or tolerates the harm, the attitude of the State is consistent with the possibility that there is persecution: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [23]. Where the State is willing but not able to provide protection, the fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify an unwillingness to seek their protection: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [28]. In such cases, a person will not be a victim of persecution, unless it is concluded that the government would not or could not provide citizens in the position of the person with the level of protection which they were entitled to expect according to international standards: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [29]. Harm from non-State actors which is not motivated by a Convention reason may also amount to persecution for a Convention reason if the protection of the State is withheld or denied for a Convention reason.
52. It is submitted on behalf of the applicant that the applicant will be unable to avail himself of effective state protection in relation to the harm he fears from the Taliban. Country information is referred to indicating the inability or unwillingness of the Pakistani authorities to curb the TTP and other militants. The applicant has stated that the Pakistani authorities cannot protect him from being killed by the Taliban.
53. DFAT state that Pakistan's army and paramilitary forces regularly conduct counter-insurgency operations in the FATA and remote parts of Khyber Pakhtunkhwa to increase government control in these areas and a large number of people have been arrested on terrorism-related charges since the commencement of the National Action Plan in December 2014. However DFAT state that successful prosecutions of those responsible for politically-motivated or sectarian violence are rare and (as noted by the International Crisis Group) only a small number of those arrested under the NAP belong to extremist groups.²⁷
54. According to a December 2014 report by *Al-Jazeera*, the network of military checkpoints across Swat has done little to prevent the Taliban from carrying out targeted killings or to help security forces arrest those responsible. Khwaja Khan, a local political leader who is reported to be on the Taliban's hit list, claims that the attacks have occurred 'in close proximity to checkpoints' and that the response of the security forces has been ineffective.²⁸

²⁷ DFAT 2016 *DFAT Country Information Report Pakistan* 15 January at 5.2

²⁸ Hashim, A 2014, 'Killings target anti-Taliban leaders in Swat', *Al Jazeera*, 20 November <<http://www.aljazeera.com/indepth/features/2014/11/pakistan-killings-target-anti-taliban-leaders-swat-201411208203415596.html>.

55. A recent report issued by the United States Department of State's *Overseas Security Advisory Council*, states that:

Pakistani authorities have only minimal control of many areas of KP province and FATA, including the Swat Valley and North and South Waziristan. These areas offer terrorists, extremists, and militant groups a safe haven to prepare, train, and carry out attacks. The FATA and Swat Valley are lawless and should be avoided.

The presence of al-Qai'da, Islamic State (ISIL), Afghan and Pakistani Taliban elements, and other indigenous militant sectarian groups, and geographic proximity to the Afghanistan border, continue to pose a danger. Targeted attacks against government officials, property, military, law enforcement, and soft targets (educational facilities) are common. Consulate Peshawar receives reports that indicate IED strikes, targeted assassinations, and bombings throughout the region occur on a weekly basis.²⁹

56. Although a number of sources indicate that the authorities control most parts of the Swat Valley, the information before the Tribunal, referred to above and in the independent information provided by the applicant's representative, indicates that the situation in the KPK region remains dangerous and volatile, with continuing terrorist attacks being undertaken by the Taliban. While the security situation appears to have been tempered by the presence of the army, there are clear indications that militants remain active in the area and that little is done in response to attacks on residents by militants. Given the long-standing nature and seriousness of the violence in the Swat Valley, together with information indicating that the authorities in Pakistan are struggling to contain that violence, the Tribunal finds that the level of protection available to the applicant from the Pakistani authorities in the Swat Valley does not meet the level of protection which citizens are entitled to expect as discussed by the High Court in *MIMA v Respondents S152/2003* (2004) 222 CLR 1. It follows that the Tribunal finds that the applicant faces a real chance of persecution for reasons of his political opinion if he returns to his home in [Village 1] or elsewhere in Khyber-Pakhtunkhwa, now or in the reasonably foreseeable future.

Relocation

57. In *SZATV v MIAC* (2007) 233 CLR 18 the High Court endorsed the proposition that a person will not be excluded from refugee status merely because he or she could have sought refuge in another part of the same country, if under all the circumstances it would not be reasonable to expect him or her to do so. The Court further held at [24] that what is reasonable, in the sense of practicable, must depend on the particular circumstances of the applicant and the impact upon that person of relocating within their country. As Kirby J stated at [97], the supposed possibility of relocation will not detract from a "well-founded fear of persecution" where any such relocation would, in all the circumstances, be unreasonable.
58. Having accepted that the applicant has a well-founded fear of persecution in [Village 1] and Khyber Pakhtunkhwa, the Tribunal must consider whether the well-founded fear of persecution extends to the country as whole, and if not, whether it would be reasonable for the applicant to relocate to a part of Pakistan where he does not have a well-founded fear of persecution.
59. The Tribunal is satisfied that the applicant, as a citizen of Pakistan, has the right to relocate within Pakistan. The range of factors which may be relevant in any particular case to the

²⁹ United States Department of State *Overseas Security Advisory Council*, 30 March 2016, 'Pakistan 2016 Crime and Safety Report: Peshawar' available at <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=19396>

question of whether relocation is reasonably available will be largely determined by the case sought to be made out by an applicant.³⁰

60. It is submitted on behalf of the applicant that the TTP's extensive networks operate throughout Pakistan and that no region is immune from their threat. A number of violent incidents occurring throughout Pakistan by the Taliban or others affiliated with them are listed in the representative's written submission to the Tribunal. It is submitted that country information confirms a close connection between the Punjabi Taliban and the TTP/former TNSM in the KPK. The Tribunal has considered these submissions. However the Tribunal considers that the applicant's activities with the peace committee and as a community elder are localised to his home area of Swat and Khyber Pakhtunkhwa and that the harm as a result he fears is localised to those areas. On the information before it, the Tribunal does not accept that the Taliban or other extremists that may be inclined to target the applicant in [Village 1] or the Swat district more generally will pursue him to other parts of Pakistan, for example Islamabad or Rawalpindi, on the basis of his own political opinions and activities. None of the independent sources before the Tribunal indicate that members of peace committees have been targeted for harm in Islamabad or Rawalpindi for example. On the evidence before it, the Tribunal does not accept that the applicant's actual or imputed political views make his relocation to Islamabad or Rawalpindi, for instance, unsafe for the applicant.
61. It is also submitted that relocation is not reasonable in the applicant's case because of his (and his wife's) mental health concerns and given they would be required to fend for themselves in another region of Pakistan without family and social support. It is submitted that without intensive psychological and medical care in a stable environment, the applicant's mental state is likely to deteriorate irretrievably. Also that Pakistan lacks adequate psychiatric care.
62. The Tribunal accepts the applicant has suffered significant trauma as a result of events in Pakistan, including the abduction of his eldest son and direct attacks and threats by the Taliban against the applicant himself. The Tribunal accepts that the applicant's home is located in [Village 1], Swat where the Tribunal has found he cannot safely return.
63. Medical evidence before the Tribunal indicates that the applicant has been receiving treatment for mental health conditions – specifically [two conditions] – from a psychiatrist since June 2014 when he was referred by his GP for assessment given his [specified symptoms]. He was on [medication] at the time. He has self-reported that his [condition] worsened when caught up in fighting in Pakistan in 2009 and had to take medications. His psychiatrist stated in a letter dated [in] May 2016 provided to the Tribunal that the applicant will need continued and long-term psychiatric treatment and his treatment requires both psychological methods and medication. He stated that his prognosis depends on the outcome of the current stressors he faces and noted that the applicant is already incapacitated with his current mental state.
64. The Tribunal accepts the applicant has ongoing mental health problems that will impact on his ability to relocate, including his ability to find employment and housing. It also accepts that his wife (the second named applicant) has been receiving treatment from a psychologist in the form of [treatment] for symptoms of [two conditions] since early March 2016, as evidenced by a letter from her psychologist (dated [in] May 2016) provided to the Tribunal. The applicant is [age] years of age and whilst he has had employment experience in the [Occupation 1] industry and as a farmer, given his age (and mental health conditions) it may be very difficult for him to secure work outside Swat Valley where he has no family or social supports. In these circumstances, the Tribunal does not consider it reasonable to expect the

³⁰ *Randhawa v MILGEA* (1994) 52 FCR 437 per Black CJ at 443; per Whitlam J at 453.

applicant to relocate himself or his family to another part of Pakistan to escape the harm he fears in [Village 1], Swat and Khyber-Pakhtunkhwa.

65. Having regard to the above, the Tribunal finds that the applicant faces a real chance of persecution if he returns to Pakistan in the reasonably foreseeable future, for the Convention reason of his political opinion. For all of these reasons 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).

CONCLUSION

66. For the reasons given above the Tribunal is satisfied that the first named applicant is a person in respect of whom Australia has protection obligations. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a).
67. The Tribunal is not satisfied that the other applicants are persons in respect of whom Australia has protection obligations for the purposes of s.36(2)(a) or (aa). However, the Tribunal is satisfied that the second named applicant is the wife of the primary applicant and third named applicant is his son and are members of the same family unit as the first named applicant for the purposes of s.36(2)(b)(i). As such, the fate of their application depends on the outcome of the first named applicant's application. It follows that the other applicants will be entitled to a protection visa provided the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa are met.

DECISION

68. The Tribunal remits the matter for reconsideration with the following directions:
- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act; and
 - (ii) that the other applicants satisfy s.36(2)(b)(i) of the Migration Act, on the basis of membership of the same family unit as the first named applicant.

Nicole Burns
Member