

1110889 [2013] RRTA 293 (10 February 2013)

DECISION RECORD

RRT CASE NUMBER: 1110889

DIAC REFERENCE(S): CLF2011/116951 & CLF2011/125624

COUNTRY OF REFERENCE: Pakistan

TRIBUNAL MEMBER: Gary Ledson

DATE: 10 February 2013

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 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 (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Pakistan, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] August 2011.
3. The delegate refused to grant the visa [in] September 2011, and the applicant applied to the Tribunal for review of that decision.

RELEVANT LAW

4. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of 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 to whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

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

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

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)). The expression 'serious harm' includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
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 fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
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 to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

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 to 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.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

Background

20. The applicant is a married citizen of Pakistan who was born in Swat, Pakistan on [date deleted: s.431(2)]. The applicant's parents reside in Pakistan along with his [siblings]. The applicant's wife and [children] reside in Pakistan. The applicant was a member of a ship's crew and had docked in Australian ports [number deleted: s.431(2)] times since March 2008.
21. The applicant claims to be ethnic Pashtun and his religion is Islam. The applicant can read English, Pashto and Urdu and speak Pashto. The applicant claims to have completed 10 years of education in government schools in Pakistan.
22. The applicant claims that he lived at an address in Swat Pakistan between August 2001 and until September 2009 and since September 2010 has resided in an address in Karachi.

23. The applicant has worked as a member of a ship's crew with the [company deleted: s.431(2)] since November 2003. The applicant claims to have departed on his ship from Pakistan [in] April 2011, landing in [country deleted: s.431(2)] [in] June 2011. The applicant last landed in Australia [in] July 2011 and failed to return to his ship [in] July 2011 and had been reported to the Department as a deserter.
24. The applicant has provided his Pakistani Seafarers' Identity Document with his protection visa application.

Protection Visa Application

25. The applicant lodged an application for a Protection visa [in] August 2011.
26. The applicant's claims for protection are contained in Form 866C as follows:

Question 41 - I am seeking protection from Australia so that I do not have to go back to Pakistan.

Question 42 - Why did you leave that country?

I left Pakistan as I am targeted by Taliban and Pakistan army.

Question 43 - What do fear may happen to you if you go back to that country?

I will be killed if I go back to Pakistan.

Question 44 – Who do you think may harm you/mistreat you if you go back?

Taliban and Pakistani army may harm/mistreat me if I go back to Pakistan.

Question 45 - Why do you think this will happen to you if you go back?

I was an ANP member and was also against Taliban. I found Pakistani army supporting Taliban and tell it to our ANP leader Doctor Shamsher Ali Khan and since then I have been attacked to be killed.

Question 46 - Do you think the authorities of that country can and will protect you if you go back? If not, why not?

Authorities back home are corrupt and supporting Taliban. I was also against the authorities who tried to kill me.

27. At each question the applicant has written that further detail would be provided later by way of a statement.
28. The applicant was interviewed by the delegate [in] September 2011. A digital copy of the interview is held at CLF2011/125624, un-folioed.
29. At interview the applicant provided numerous documents that confirm his identity including copies of identity cards, school results and reports of character, declaration of domicile and seaman training and familiarisation certificates.
30. The applicant also provided country information sourced from the internet which reports on militant activities against Pashtuns who have settled in Karachi.

Primary Decision

31. The delegate refused the application for a protection visa [in] September 2011.
32. In assessing the applicant's claims the delegate found that the essential and significant reason for the harm feared by the applicant was for the Convention reason of his political opinion and that the harm feared by the applicant involves serious harm and discriminatory conduct.
33. In refusing the visa application the delegate had considered the various claims made by the applicant and concluded that the applicant's claims lacked veracity, were vague, lacking in detail and were implausible.
34. The delegate went on to consider whether the applicant could relocate to another part of Pakistan to avoid the harm feared and whether state protection would be discriminatorily withheld from him.
35. The delegate concluded that he was not satisfied that the applicant had a genuine fear of returning to Pakistan and that there is no real chance of him facing persecution. The delegate found that the applicant's fear of persecution for Convention reason is not well founded.

Application for Review

36. The applicant lodged his application for review of the delegate's decision [in] October 2011. The application for review included a copy of the decision record dated [in] September 2011.
37. The matter was constituted to the Presiding member [in] February 2012.
38. [In] March 2012 the Tribunal wrote to the applicant advising him that it had considered the information before it but was unable to make a favourable decision on that information alone. Accordingly the applicant was invited to appear before the Tribunal to give evidence and present arguments in respect of the issues that arise in this matter. The hearing was scheduled [in] May at 10.30am.
39. At the request of the applicant's representative the hearing was rescheduled for [a date in] May 2012 at 1.30pm.
40. [In] May 2012 the Tribunal received a submission on behalf of the applicant from his representative. The submission includes a written submission prepared by the applicant's representative. The submission advocates that the applicant is a person to whom Australia has a protection obligation for the Convention reason of his political opinion.
41. In the alternative the representative advances that the applicant is a person to whom Australia has a protection obligation on the grounds that as a result of his removal from Australia and being returned to Pakistan he faces a real risk of suffering significant harm on the basis that he will be arbitrarily deprived of his life, or subjected to cruel and inhumane treatment. The submission include a copy of RRT decision 1108531; country information in respect of ethnic violence in Karachi, the evacuation of residents from the Swat valley as a result of fighting between the Pakistani army and the Taliban;

the assassination of Dr Shamsheer Ali Khan a member of the NWFP on 1 December 2009; RRT country advice –PAK37535, regarding Federally Administrated Tribal Areas, Parachina, Taliban, Bangash, Internal Relocation, State Protection and death certificates; The Human Rights Watch World report 2102: Pakistan and copies of media reports reporting attacks on ANP leaders.

Hearing

42. The applicant appeared before the Tribunal [in] May 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Pashto and English languages.
43. The applicant was represented in relation to the review by his registered migration agent who attended the hearing.

Oral evidence of the applicant –[Name deleted: s.431(2)]

44. The applicant told the Tribunal that he had received assistance in completing his protection visa application through a friend and the story that appears in the visa application is his own story. He believed that all statements in his application are true and correct and believed that no matters had been left out.
45. The applicant confirmed his personal details including his full name, date and place of birth, that he is a citizen of Pakistan and he has no legal right to enter another country. He confirmed his residential address in Australia and provided detail of those who reside with him at that address.
46. The applicant said that his mother and father and [a number of] siblings reside in [Location 1], Swat Pakistan. The applicant's wife and [children] live with [relative in Pakistan], which is about 1 hour by car from where his parents live.
47. The applicant was last in contact with his wife in the previous month. The applicant said that it is difficult for him to communicate with his parents and siblings because the army is living in their village. He last spoke to his parents by telephone in the previous month. The applicant said that the army is always asking his parents about his whereabouts and makes threats about him. The applicant said that the army is always scanning telephone calls and it is difficult to communicate with them.
48. The Tribunal noted with the applicant that the delegate had found that the claims that had been made were not credible and that he was put on notice that his credibility is an issue before the decision maker.
49. The applicant told the Tribunal that he had been a member of the Awami National Party (ANP) in his village. The applicant said that he opposed the Taliban and he said their leader Fazareullah would broadcast across a radio channel to villages in the Swat area. The applicant said that he was not happy because the Taliban is against the people and would not allow girls to be educated. The Taliban had destroyed the DVD and video shops. The applicant said that some of his villagers who were Taliban were aware that he opposed the Taliban because they had destroyed girls' schools. He said that one night people went to his house and took him far away and beat him. [Injuries deleted: s.431(2)]. He had been beaten on his back by their shoes. The applicant said that this

happened at the end of 2007. The applicant said that he returned to his home the next morning. He said that he remained in his home because the Taliban were everywhere. The applicant said that he then went to Karachi to join a ship and go to another because he was not safe in his village.

50. The Tribunal asked the applicant if he had any further trouble from the Taliban. He said that when he returned to his village the Taliban had control of the Swat valley. He said that there had been a fight between the army and the Taliban in May 2009 and the army had moved people out of the area for their safety. The applicant had taken his wife and children to the [District 3] because it was difficult to travel to his wife's parents' district. The applicant said that he returned to his village and the Taliban had taken over his house. The applicant had asked the Taliban if he could take his belongings and they refused. They allowed him to enter the house and found that his wife's gold and jewellery had been taken by the Taliban. The applicant said that the gold was in a suitcase in his room. The Tribunal asked the applicant why he had not taken the gold when he left the first time given its value. The applicant said that the army had told them to only take what was necessary and they had to leave in a hurry.
51. The applicant said that when he discovered that the gold was missing he approached the Taliban because he was angry with them for destroying his house and he accused them of taking his possessions. The applicant said that the people who had beaten him earlier had told the Taliban that he was a dangerous person. He said that the Taliban reprimanded him and beat him accusing him of being arrogant. He said he was blindfolded and placed in a room in his house. In the middle of the night he was put in a car and it travelled for about one hour from his village in [Location 1]. The applicant said that when he later returned to his wife she had told him that this incident happened [in] August 2009. The applicant said that he had been held for a period of one month and fourteen days. The applicant did not know where he had been held captive because he had been blindfolded. The Tribunal asked the applicant whether he recognised where he had been held when he escaped. The applicant said he thought that he had been held in a Taliban jail and he thought there had been ten men held with him. The applicant said that he escaped at night time and did not know where he was.
52. The Tribunal asked the applicant what had happened to him during the time he had been held. He said he had not been beaten or interrogated. He said that he thought he may have been held in a basement because he heard people walking above him. The applicant described the basement saying there were three doors in the basement, two near where he was and one on the other side and a wooden wall between. He said that a few days later a truck arrived at the place and he thought it was the army. These people had provided the Taliban with food, water, electrical stuff, guns and ammunition. The applicant said that he was able to see this through cracks in the wooden wall. He said the basement had no electric light and he was able to see through the cracks. The applicant said that he witnessed this sort of exchange three times.
53. The applicant said that he also overheard an army person from his village talking to a Taliban leader and this army person identified Dr Shamsher Ali Khan as the next target for the Taliban. The applicant said that he and others with him had heard this conversation. He said that he was about 4 or 5 metres away from the people involved in the conversation.

54. The applicant said that 2 days later the place had been attacked by the army using guns and bombs and this went on for about 5 hours. The Tribunal queried why the army would attack this place given that it appeared that the army was collaborating with the Taliban and this claim did not make sense. The applicant did not know why. He said after 5 hours the Taliban left and he and the others escaped. It was night time when they escaped.
55. The applicant said that he had followed a river bed for a long time and he did not know where he was going. The applicant said that he did not know how long but he ran until it was daylight and he knew he was near the Swat River near [village deleted: s431(2)]. The Tribunal asked the applicant in which direction he had walked. The applicant was not sure of the direction but he went toward the Mardan area. The applicant said that he continued to walk until night time when a truck stopped for him and took him a further 20km and he was then close to [District 3] where his wife and family lived. The applicant confirmed that he had travelled to [District 3] through Mardan. He had travelled for 2 nights and a day. The applicant said that it took him one night and another night to get to Mardan. The applicant did not know what happened to the others who had escaped with him.
56. The applicant said that he stayed with his family for 2 days and he then decided to inform Dr Shamsheer Ali Khan about the threat toward him. The applicant said that he had called the doctor and told him that he wanted to meet him. The doctor told him to come in the evening. The applicant said he [knew] the doctor and they were members of the same party. The applicant said that he had the doctor's phone number and he had travelled by flying coach to Peshawar to meet the doctor. The Tribunal asked the applicant when he had visited the doctor.
57. The Tribunal sought clarification of the timeline of the claimed events. The applicant said that he visited the doctor in September 2009. The applicant agreed that he had been captured [in] August 2009, according to his wife and that he had been held for one month and 14 days. The Tribunal suggested that the applicant would have escaped in late September 2009. The applicant confirmed that once he escaped he had travelled for 2 nights and a day to get to [District 3]. The Tribunal asked the applicant when he went to see the doctor and suggested that it was late September 2009. The applicant agreed.
58. The applicant confirmed he was a member of ANP but he did not pay fees. The applicant said that he was a member because he wanted to help [in certain work] for the elections.
59. The Tribunal asked the applicant to describe what happened at the meeting. The applicant confirmed that he met the doctor in Peshawar in a hostel with 2 of his friends and 3 others who he did not know who they were. The applicant told the doctor about the threat and wanted to meet with him privately. The applicant said that he told the doctor about his capture and told him about the discussion between the army person and the Taliban leader. The applicant said that the doctor smiled and told him that he would see what would happen. The doctor thanked the applicant for the information but he did not ask any more questions. The applicant said that the 3 others asked him more information and what had happened to him. They took his name and ID number. The applicant said that when he left the hotel the 3 men followed him and he ran and they chased him and started firing on him. The applicant said that he hid for a long time until the men left. The applicant said the next morning he contacted Dr Shamsheer Ali Khan

to tell him what had happened to him after their meeting. The applicant said that the doctor told him to go to Karachi because his life was not safe and the doctor would inform his wife where he was. He then travelled to Karachi by public bus. The applicant confirmed that these events happened near the end of September 2009.

60. The applicant said that when he went to Karachi he hid himself and the Tribunal asked the applicant why this was necessary. The applicant said that they (Taliban?) had a strong network and he would be recognised as being from Swat by his ID card. The applicant said that he would stay in a seaman's hostel in Karachi and then he would travel to wherever he was to join his ship. He travelled to the ship by plane to [shipping details deleted: s.431(2)]. The Tribunal observed that when considering the time when the applicant met the doctor in late September and that he arrived in Australia [in] October 2009 after having spent one week in Karachi did not accord with his claims. The applicant said that in September 2009 when the doctor told him to go to Karachi he could not remember which country he had sailed to and whether it was Jordan or Jeddah but he had travelled back to Karachi again and he did not return to Swat. The applicant agreed that he had arrived in Australia [in] October 2009. The Tribunal put to the applicant given the length of time he had been detained, had met Dr Shamsher Ali, gone to Karachi and sailed to Australia this did not make sense. The applicant said that he did not know the exact days and he had only a rough idea of the amount of time. The applicant said that Dr Shamsher had been killed in the beginning or end of December 2009.
61. The Tribunal asked the applicant to recall the events after he had met with Dr Shamsher Ali, had been followed and had again spoken to the doctor who had advised him to travel to Karachi because he was not safe. The applicant agreed that he feared for his life. The Tribunal noted that after that date the applicant had travelled four times to Australia and asked why he waited until July 2011 to jump ship when he had four opportunities earlier. The applicant said that he thought the situation would be better in his area and he could return. The Tribunal observed that if the applicant was as fearful for his life as claimed that he would not have sought protection earlier.
62. The Tribunal asked the applicant what prompted him to decide in July 2011 to desert his ship and seek protection. The applicant said that he did not return to his village because his life was not safe and remained in Karachi. He said that a lot of Taliban from his area had gone to Karachi so he had to move about. He then met one of the people who were at the meeting with Dr Shamsher who told him it was not safe for him in Karachi and that he should leave. He had been told that the Taliban were always looking for him. He said that 2 people came toward them on a motorbike and fired on them trying to kill them. The applicant said that his friend had been killed. The applicant said that he ran away, changed his place in Karachi and hid until he could join his ship. The name of the friend was [name deleted: s.431(2)] and he had been at the meeting with Dr Shamsher in Peshawar and [name deleted: s.431(2)] was the other person at the meeting. The Tribunal queried whether this was the first time he had raised that claim. The applicant said that he had mentioned this in his submission. The Tribunal queried whether if this claim has been made for the first time whether in fact this claim was true.
63. The Tribunal asked the applicant about his life since arriving in Australia and the expectations on ship's crew when in port. The applicant said that the crew were expected to stay on board the ship. He said that it was possible to seek permission from

the master to leave the ship but he had not done this when he left the ship. The applicant said that there was a security guard but when the guard was not looking the applicant ran from the ship. The applicant left his ship in [location deleted: s.431(2)]. The applicant said that he walked to the main road trying to get to the airport. He took the first bus to the city and asked the driver how he could get to the airport and once at the airport he bought a ticket to [Location 2]. The applicant said he had flown to [Location 2] because he had a friend there. The applicant said that he had about \$850 USD when he jumped ship. The applicant did not have access to any other money in Pakistan. The applicant said that he has not been able to send any money to his wife. He is meeting the cost of his basic needs from the ASRC. The applicants said that he is currently working for [employer and occupation deleted: s.431(2)].

64. The Tribunal asked the applicant what he thought would happen to him if he returned to Pakistan. The applicant said that either the Taliban or the army would kill him. The army would kill him because he had told others about what he had overheard when being detained and the 3 people who had chased him after his meeting Dr Shamsheer. The applicant said that 3 [people that he knew] had been killed and he was the only person at the meeting who was still alive. The applicant confirmed that the army had told the Taliban that Dr Shamsheer was to be the next target.
65. The applicant said that he would not be able to seek protection from the authorities for the harm he fears. The applicant said the government is not safe and his life is not safe. The police have no authority to protect the people and all of them are corrupt. The applicant said police are working under the command of the army.
66. The Tribunal asked the applicant whether it would be reasonable for him to relocate to another part of Pakistan to avoid the harm he fears. The applicant said that there is no safe place in Pakistan and there is no safety for the individual. Even high profile people are not safe and have bodyguards. The applicant said that it is not safe to relocate because there is no safety for him anywhere and it would be like living in a jail and his children need an education. The Tribunal asked the applicant how his family have managed over the past few years. The applicant said that his children do not go to school and his wife is living with her parents like she is in a jail and she is afraid to go out. The applicant said if his children were recognised they would be kidnapped and force him to return to Pakistan. The applicant said his family have changed where they have been living. He is scared for their safety.

Submission of the representative

67. The Tribunal asked the representative the relevance of the RRT decision to the circumstances of the applicant. The representative said that this is relevant to the matter of state protection.
68. The representative submitted that she had been advised that the applicant had a close relationship with Dr Shamsheer Ali Khan and it was known to be a close acquaintance of him.
69. The applicant is the only person at the meeting with Dr Shamsheer Ali Khan who is alive. The applicant's family still live in fear and if he were to return he would be killed. It would be difficult for the applicant to gain employment because he had deserted his ship. That the applicant has an imputed political opinion because of his

membership of the ANP. The representative submitted in the alternative that Australia would have protection obligations under Complementary Protection obligations.

70. The Tribunal agreed to accept a further submission to the Tribunal by [a date in] May 2012.

Further evidence of the applicant

71. The applicant said that the last time he had spoken to his father he said that the army had come to his house wanting him to return to Pakistan and if he would not return they would destroy his house in [Location 1]. The army are asking about his wife and children and his father and brothers are not safe there. His father is scared that his own home could be destroyed. The applicant said that his life would not be safe and he is afraid for his children and they are not able to go to school.

Post-hearing Submission

72. [In] June 2012 the applicant's representative provided a submission in respect of the applicant's claims. A plain reading of this submission suggests that this is a transcription of the applicant's evidence to the Tribunal.
73. The representative submits that the applicant is a person to whom Australia has a protection obligation for political and religious reasons and that these fears are well-founded and involve serious harm amounting to persecution and accordingly he is unwilling to avail himself of protection from state authorities because the authorities are corrupt and ineffective.
74. It is submitted that in the alternative the applicant would satisfy the grounds for complementary protection for reason that there is a real risk the applicant will suffer significant harm or be arbitrarily deprived of his life.

COUNTRY INFORMATION

75. In relation to the Taliban the BBC News South Asia, reported in Pakistan Profile (www.bbc.co.uk on 19 June 2012) that the Taliban were well established in the areas along the Afghan border, and the Pakistani forces had not maintained control in these regions.
76. The Amnesty International Report entitled *As If Hell Fell On Me: The Human Rights Crisis in North-West Pakistan* which was published in June 2010 at www.unhcr.org referred to the Talibanization in the area in the north-west Pakistan. This term referred to the ideological and cultural control by the Taliban and the inability of the Pakistani government and the Pakistani military to protect the local population from the Taliban abuses and the effect of the military operations on civilian life. The report further stated that the Pakistani Taliban in north-western Pakistan share "an extreme religiously inspired militant ideology" and the groups operate effectively and in an organised manner to pursue their goals.
77. The Amnesty International Report published in May 2012 and cited in the home office UK Border Agency Pakistan COI Report of 2012 at www.ukba.homeoffice.gov.uk refers to the targeted killings and assassinations and that one of the consequences is the restrictions on access to health services and education.

78. In relation to recent activity of the Taliban in the Khyber Pakhtunkhwa area, S. Buneri, in a 2012 article entitled *Pakistan's Swat Valley: Taliban Gone But Peace Remains Elusive* published by the Pulitzer Centre on Crisis Reporting, found that the Pakistani army and the Taliban made contradictory claims as to who had established control in this region. The Pakistani army claim the Swat district in Khyber Pakhtunkhwa was free of Taliban militants whereas the Taliban claim they are in a position to attack The BBC News South Asia, reported in *Pakistan Profile* (www.bbc.co.uk on 19 June 2012) that the Taliban were well established in the areas along the Afghan border, and the Pakistani forces had not maintained control in these regions.
79. The Pakistan Institute for Peace Studies in its *Pakistan Security report 2011* found the Khyber Pakhtunkhwa area was the third most volatile region in Pakistan in 2011 and in Swat alone there were 16 terrorist attacks and 11 deaths. In a 2012 report on the province entitled *Khyber Pakhtunkhwa Assessment – 2012* by the South Asia Terrorism Portal the reported increase in deaths of security forces as a result of militant attacks indicates that the government forces do not seem to have control over the terrorist militants. The report refers to 242 incidents of killing involving 1206 deaths, 331 of which were security forces personnel. The report concludes that the *'militants appear to have established an upper hand in the region'*
80. In relation to relocation within Pakistan the Human Rights Watch *World Report 2012: Pakistan* noted that in 2011 attacks on civilians by militant groups increased. The report found that targeted killings by the Taliban and groups associated with the Taliban occurred in every sector of Pakistani society and there had been hundreds of deaths as a consequence in the last year.
81. Further, the European Country of Information Network reported from the source of Integrated Regional Information Network at www.ecoi.net, in an article entitled *PAKISTAN: Fear of attack haunts IDPs* that Pashtoon people from the Khyber Pakhtunkhwa province were targeted and killed in Karachi and Balochistan, and had to stay within the province to avoid this ethnic based killing.
82. Amnesty International reports in its *Annual Report 2012* at <http://amnesty.org> that nearly 1 million are displaced as a result of the conflict between the Taliban and the Pakistan armed forces. It found that the Taliban and associated groups targeted and killed civilians across Pakistan.
83. An article entitled *Islamic Radicalism: Pakistan Entrapped in a Vicious Circle of Militancy and Cowardice of the State*, by Mujahid Husain reported at www.wichaar.com argues that militant groups within Pakistan are becoming stronger and are unifying, and the increasing power of the Taliban will become irresistible. The article proposes the State will become less powerful to be able to control militant groups or acts of terrorism.
84. In relation to state protection in Pakistan the Human Rights Watch *World Report 2012: Pakistan* reported that in 2011 the Taliban and groups associated with the Taliban targeted civilians and public spaces across the Pakistan. The report also noted the "breakdown of law enforcement in the face of terror attacks". Assaults and killings by the Pakistani police were reported. The report also found that the Taliban and other armed groups prevented reporting of abuses and operations.

85. The US Department of State Bureau of Democracy, Human Rights and Labor, in its report entitled *Country Reports on Human Rights Practices for 2011 Pakistan* found that killings and disappearances occurred in “nearly all areas” of the country, and the killings and disappearances were committed by “militant, terrorist and extremist groups” as well as by the armed security forces.
86. Amnesty International in its *Annual Report 2012* found the state failed to bring perpetrators to justice, and “most victims remained missing”. It reported investigations into crimes were not adequate and witnesses were not protected.
87. From the Human Rights Watch World Report: Pakistan 2012 in relation to militant attacks and terrorism states that “Suicide bombings, armed attacks, and killings by the Taliban, al Qaeda, and their affiliates targeted nearly every sector of Pakistani society, including journalists and religious minorities, resulting in hundreds of deaths. The US and others alleged that the military and Inter Services Intelligence (ISI) were complicit with these networks, claims the military and government adamantly denied.
88. In the same HRW report “Security forces routinely violate basic rights in the course of counterterrorism operations. Suspects are frequently detained without charge or are convicted without a fair trial. Thousands of suspected members of al Qaeda, the Taliban, and other armed groups—who were rounded up in a country-wide crackdown that began in 2009 in Swat and the Federally Administered Tribal Areas—remain in illegal military detention; few have been prosecuted or produced before the courts. The army continues to deny lawyers, relatives, independent monitors, and humanitarian agency staff access to persons detained in the course of military operations.”

FINDINGS AND REASONS

89. The applicant claims to be a citizen of Pakistan and arrived in Australia on a valid Pakistani passport. The Tribunal accepts that the applicant is a citizen of Pakistan and, for the purposes of the Convention, has therefore assessed his claims against Pakistan as his country of nationality.
90. In determining whether an applicant is entitled to protection in Australia the Tribunal must first make findings of fact on the claims he has made. This may involve an assessment of the applicant’s credibility and, in doing so, the Tribunal is aware of the need and importance of being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims.
91. On the other hand, as stated previously, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been established. Nor is the Tribunal obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant’s country of nationality (See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547). On the other hand, if the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make that finding with confidence, it must proceed to assess

the claim on the basis that the claim might possibly be true (See *MIMA v Rajalingam* (1999) 93 FCR 220).

The applicant's claims

92. The applicant claims that he does not want to return to Pakistan because he is being targeted by the Taliban and the Pakistan Army.
93. He claims that he is a member of the Awami National Party (ANP) and has openly opposed the Taliban on at least two occasions. Firstly in 2007 when he expressed anti-Taliban views and members of the Taliban came to his house and assaulted him. In 2009 during a military operation he and his wife were forced by the army to leave their house. Shortly after he returned to find that Taliban had occupied his house. The applicant argued with the Taliban but they allowed him to enter his house where he found many of his family belongings destroyed or stolen. He became angry when he found that his wife's gold had been stolen and argued with the Taliban who seized him and detained him. That night he was taken to an unknown location where he was held for a period of one month and fourteen days.
94. During his detention he witnessed the army providing provisions and equipment to the Taliban and overheard plans to kill Dr Shamsheer Ali Khan, an ANP leader. The army later attacked the building and after a fight of several hours the applicant and other detainees fled.
95. The applicant travelled to Peshawar and met with Dr Shamsheer Ali Khan. Two other men, the applicant claims to know, were at the meeting and three others who he did not know. The applicant related the conversation that he had overheard between the Taliban and the army members. Upon leaving the meeting the applicant was followed by the three other men at the meeting, they pursued him and he was fired upon. The applicant managed to escape. When told of the events after the meeting, Dr Shamsheer Ali Khan warned the applicant to go to Karachi. Later Dr Shamsheer Ali Khan was killed by a suicide bomber. The two others at the meeting were subsequently killed. The applicant claims that he is the only person at the meeting to be still alive.
96. Having regard to the applicant's claims which have been generally consistent across his visa application, Department interview and written and oral evidence during this review, the Tribunal finds that the essential and significant reason for the harm that he fears is for the Convention reason of his actual or imputed political opinion.
97. The Tribunal notes that the applicant's representative submitted after the hearing at page 6 that the applicant "*fears being persecuted for political and religious reasons*". The Tribunal notes that neither the applicant nor the representative has provided any evidence of past harm or claims of fear of future harm on the basis of the Convention reason of religion prior to this submission. The Tribunal reasonably concludes that this claim has been made in error and is not relevant to the current matter.
98. The applicant claims that if he were to return to Pakistan the Taliban or the army would target him and kill him. The Tribunal considers that for the purposes of s.91R(1) that such serious harm reaches the threshold set out in s.91R(2)(a), that is a threat to the person's life or liberty.

99. The applicant claims the Pakistan authorities will not be able to protect him from the harm that he fears, that the police have no authority and the authorities and the army are corrupt. Additionally it is advanced that country information strongly suggests that the Pakistani authorities are incapable of maintaining law and order and protecting its citizens from attack. It is submitted that Pakistani authorities are responsible for extremist violence and that there is country information that suggests that Pakistani authorities have links with the Taliban and as such the authorities support the activities of religious extremists which appear to operate with impunity.
100. The applicant claims that he is not able to relocate to another part of Pakistan to avoid the harm that he fears. It is submitted that the growing incidents of violence perpetrated by religious extremist throughout Pakistan combined with the lack of adequate state protection considered in light of the applicant's profile, that relocation would neither be reasonable or practicable and that there is no safe place for the applicant in Pakistan where he could sustain a livelihood.

Assessment of the applicant's claims

101. The Tribunal has found that the applicant has maintained a high level of consistency in all of his written submissions, declarations and oral evidence to the delegate and to this Tribunal. The Tribunal finds in the main that the substance of the applicant's claims regarding his confrontations with the Taliban, his detention by them and subsequent events surrounding his meeting with Dr Shamsheer Ali Khan and the death of Dr Shamsheer Ali Khan to be highly consistent, largely credible and consistent with the chronology of events in Pakistan at that time.
102. The Tribunal accepts that the applicant is a member of the ANP and that he has expressed views critical of the Taliban particularly regarding the education of girls. The Tribunal accepts through his membership of ANP that he [knew] Dr Shamsheer Ali Khan who was later a victim of a suicide bomber.
103. The Tribunal accepts that the applicant has acquired a profile as being opposed to the Taliban. The Tribunal accepts that the applicant was assaulted in 2007 by the Taliban for his open criticism of Taliban activities in his local area. The applicant's description of events in 2009 when he and his family were forced out of their home in the Swat valley is consistent with country information about these events at the time. The Tribunal accepts the applicant's claim that when he returned to his home a short time later he found the Taliban had occupied his home and had destroyed and stolen his family property. The applicant told the Tribunal that he had remonstrated with the Taliban and had been detained in a room in his house and then taken by vehicle and imprisoned in a basement which he described as a Taliban prison.
104. The applicant described his period of imprisonment in some detail during which he witnessed the overt co-operation of the army with the Taliban exchanging equipment, guns and ammunition. The Tribunal accepts these claims. The applicant described how he overheard plans between the army and the Taliban that outlined that Dr Shamsheer Ali Khan was the next target. The Tribunal accepts the applicant's claims that he was detained for a period of approximately six weeks and was only able to escape after an attack on the Taliban prison by the army. The Tribunal raised some concerns with the applicant about his lack of knowledge of where he had been imprisoned however given the applicant had been incarcerated for six weeks in a darkened basement and he had

escaped at night his disorientation is understandable. The Tribunal accepts the events that occurred soon after his escape when the applicant met with Dr Shamsheer Ali Khan in Peshawar, his pursuit after the meeting by 'others' who attempted to kill him and his subsequent flight to Karachi.

105. Having accepted the claims by the applicant the Tribunal reasonably concludes that the applicant would be of adverse interest to both the Taliban and the army, given his witnessing of their overt co-operation and his knowledge of their apparent collusion in the death of a high profile ANP member, if he were to return to Swat or the Khyber Pakhtunkhwa area more generally.
106. The Tribunal finds that the applicant fears persecution for the Convention reason of his actual or imputed political opinion in opposing the Taliban and his knowledge of the co-operation between the Taliban and the army and that his actual or imputed political opinion is the essential and significant reason for the harm that he fears. Having regard to the applicant's claims considered against the available country information, the Tribunal finds that there is more than a remote chance that the applicant would face serious harm amounting to persecution for the purpose of s.91R of the Act in the reasonably foreseeable future, should he return to Swat or Khyber Pakhtunkhwa area, for the reasons of his imputed or actual political opinion. Accordingly the Tribunal finds that the applicant's fear of harm for a Convention reason is well founded.
107. The applicant claims that the Pakistani authorities are unable to protect him from the Taliban or the army. In fact it is the army which he claims is one of his persecutors. The applicant claims that the police have no authority or power and that there are high levels of corruption at all levels of the state and in the army which gives him no confidence of being able to access adequate state protection from those who would wish to harm him.
108. The Tribunal has considered the country information cited above as well as the oral and written evidence of the applicant and finds that state protection in Pakistan fails to provide the level of protection which its citizens are entitled to expect according to international standards.
109. The Tribunal must consider whether it is reasonable for the applicant to relocate to another part of Pakistan to avoid the harm that he fears. The Tribunal considers that if it is not reasonable for a person who has a well-founded fear in part of a country to relocate to another part, then the person's fear of persecution in relation to the country as a whole is well-founded. Conversely, if it is reasonable for the applicant to relocate to another part of the country then that applicant's fear is not well-founded.
110. The question that arises is whether for the applicant, with the profile as found by the Tribunal, it is reasonable for him to relocate to another part of Pakistan such that his fear is not well-founded.
111. The applicant has claimed that whilst he has a profile in Khyber Pakhtunkhwa that his profile and Pashtun ethnicity would readily identify him in other parts of Pakistan.
112. The Tribunal has regard to country information cited above about the general security situation in Pakistan and the inability of the Pakistani authorities to curb the activities of the Taliban. This considered cumulatively with consistent country information

regarding the operation and organisation of the Taliban that indicates the Taliban has become organised and unified across Pakistan particularly against those identified by the Taliban as those opposed to 'Talibanization', paints a dim picture of the general security of citizens anywhere in Pakistan.

113. It is clear to the Tribunal that there may perhaps be parts of Pakistan which may be comparatively safer for a person with the applicant's profile. However the Tribunal finds that given his profile and his identifiable Pashtun ethnicity there is a risk of Convention related persecution anywhere in Pakistan. Having regard to the country information above the Tribunal considers that it would not only be unreasonable to ask the applicant to relocate in Pakistan in order to avoid the harm feared but that it would form an unacceptable risk to the life of the applicant if he were required to do so.
114. Having regard to all of the circumstances of the applicant, the Tribunal finds that the applicant has a well-founded fear of persecution if he were to return to Pakistan in the reasonably foreseeable future, for the Convention reason of his imputed or actual political opinion and that this is the essential and significant reasons for the harm feared.
115. There is no evidence before the Tribunal to suggest that the applicant has a legal right to enter and reside in a safe third country.

CONCLUSIONS

116. The Tribunal is satisfied that the applicant is a person to whom Australia satisfies the criterion set out in s.36(2)(a).

DECISION

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