

1103901 [2011] RRTA 716 (22 August 2011)

DECISION RECORD

RRT CASE NUMBER: 1103901

DIAC REFERENCE(S): CLF2010/15053

COUNTRY OF REFERENCE: Afghanistan

TRIBUNAL MEMBER: Shahyar Roushan

DATE: 22 August 2011

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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 and Citizenship 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 Afghanistan, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] January 2009 and applied to the Department of Immigration and Citizenship for the visa [in] February 2010. The delegate decided to refuse to grant the visa [in] June 2010 and notified the applicant of the decision.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant sought review of the delegate's decision and a differently constituted Tribunal (the first Tribunal), affirmed the delegate's decision [in] December 2010. The applicant sought review of the Tribunal's decision by the Federal Magistrates Court and [in] April 2011 the Court set aside the decision and remitted the matter to the Tribunal to be determined according to law.
5. The matter is now before the currently constituted Tribunal (the Tribunal) pursuant to the order of the Court.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. 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.

10. 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 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
11. 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.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. 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.
14. 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.
15. 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.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

17. 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.
18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

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.

Protection Visa Application

The Form

20. According to the information provided in the applicant's protection visa application, he was born in [month and year deleted: s.431(2)] in Kabul, Afghanistan. He is Muslim and of Pashtun ethnicity. He speaks, reads and writes Dari, Pashtu and Urdu. He has completed 12 years of education and describes his profession before coming to Australia as IT Assistant. He worked in that capacity at [Institute 1] in Peshawar from June 2007 to December 2008.
21. The applicant departed Afghanistan legally through Torkham Airport [in] December 2008.

Written Statement

22. In a statutory declaration attached to his application for a protection visa and signed [in] January 2010, the applicant made the claims detailed below.

1. I was born in Kabul, Afghanistan on [date] and I am [age]. I am also known by surname '[name]', which is my family name that, due to administrative error, was not included on my passport or ID card.

2. My mother is of the Dari ethnicity and my father is a Pashtun.

...

4. When I was [age] my family and I moved to Peshawar in Pakistan due to the deteriorating condition of the country as a result of the intensification of the war against the Najiballah government.

5. I remained in Pakistan for 18 years and during this period experienced a lot of hardship and discrimination both to my family, and myself, and yet in June 2007 I managed to complete my high school studies...

6. I had a keen interest in the Western literature and culture and the English language. In 2000 I completed Higher Intermediate studies at the [school]...

7. From 2005 to 2006 I was also completed a Diploma in Information Technology...

8. In March 2005 I commenced part time tutoring in the English language at [Academy 2]...

9. In June 2007 I was able to gain employment as an IT Assistant at [Institute 1]. I worked there until November 2008...

10. Since I had graduated from high school, I had always wanted to continue my studies overseas. In or around January 2008 I applied for student visa to study in Australia.

11. In November 2008 my family and I returned to Kandahar with the hope that we would be able to start fresh and make a bright future for ourselves. We felt we had reached a dead end in Pakistan. Also in July 2008, the Coalition forces and the Afghan Army had undertaken a number of successful military operations against the Taliban, killing or capturing its military commanders and members of the 'shadow government' in the city and surrounding districts.

12. We thought it would be safe to return. I had taken two months leave from my position as IT Assistant and moved with my family back to Afghanistan.

13. After the first month of our stay we quickly realised that the conditions had not improved, rather it had remained exactly the same the only difference was that the abuse and discrimination was occurring covertly rather than overtly. The Taliban were still strong in the city, but it operated primarily through underground cells, which were fed information by their many supporters and informants

14. As my mother is Dari and my family are Dari speakers we stood out from the majority of the residents in Kandahar. Also, my family do not conform to the same idea of religion as is promoted by the Taliban. My sister is educated. My father, brother and I shave our beards. We listen to music. It became very easy for the Taliban supporters and informants in the neighbourhood to recognise our difference and the abuse began.

15. As Kandahar was a stronghold of the Taliban, there was a lot of support for the Taliban in this community and those who were not a party to their beliefs, were belittled, humiliated, and subjected to cruel and degrading punishment all due to conflicting views.

16. During my two months in Kandahar I began private tutoring lessons for young kids, teaching them basics in the English Language. My students were from the neighbourhood. I think that some people in the area became suspicious of my activities and began to spread rumours about why I was teaching English. Once when I was in a shop, one of the neighbours told me that I had sided with "western invaders" and that I was betraying the country.

17. My father was also subject to comments and other signs that people in the area disapproved of our presence. On a few occasions during December 2008, anonymous people would threaten him on street as he walked past.

18. Around the end of December an [name] consultant informed me about my visa. As the community began increasing [their] threats and abuse towards my family and I. I decided to return back to Pakistan in order to leave to Australia. I pleaded with my family to return with me but they were resilient and thought thing would calm down.

19. I arrived in Australia on [date] January 2009. When I arrived in Australia and began my studies I kept in contact with my family on a regular basis.

20. Since I have been here I have tried to remain in contact with my family. The harassment was becoming worse. Supporters of the Taliban in our neighbourhood began to say to my father that my coming to Australia was part of a training exercise and that I was giving information about the Taliban.

21. In July 2009, my brother managed to gain employment in [Company 3]. As part of his job he was required to travel between the cities and towns of the region to promote the election campaign. This made things worse. The Taliban supporters began to insist that we were traitors to the nation and that my brother was a spy for the western countries and he was on a mission to report all Taliban supporters to the authorities.

22. My father used to travel to Kabul city every 2 months to gathering the rent for our house and some shops which we rented in Kabul city. Towards the end of July 2009 he was on the way to Kabul city that a group of Taliban stopped the car just out of Kandahar and threatened him that they will kidnap my younger brother if he doesn't stop working in [Company 3].

23. In August 2009 my father told me that they had received a letter from the Taliban warning my brother to quit his job or face the consequences. The letter said "No one in your family will be safe". My father said that there had been a lot of harassment of [government] officials including beating, kidnapping and murder of staff.

24. I pleaded with them many times to return to Pakistan, but we both knew that not much would change even if they went there due to the history Afghanistan has had with Pakistan. There is a lot of animosity between the Pakistan citizens and Afghan citizens. Besides, my family had lost their residency permits and did not have any rights to reside in Pakistan for anything more than a visit.

25. Day by day things got worse for my family and every time I spoke to them it was like something new was happening to them again, more abuse, more threats and it was getting to a stage where my father actually wanted to flee the country.

26. As I continued my studies here I soon realised that it was getting harder for me to contact my family. Every time I called it would show a busy line or the phone would ring but no one would answer. I got in contact with them approximately three months ago and my father advised me that things had gotten bad, that he was being watched and that he couldn't say much but he didn't want me to ring them anymore. I instantly became worried.

27. On [date] September 2009 I received a phone call from my father. He seemed very nervous, distressed and upset and he told me that my brother had been kidnapped by the Taliban. He no longer wanted to stay in Kandahar and he wanted to get everyone out of there, before he could try and work something out for my brother. He wasn't sure where he wanted to go but he knew he had to leave. He stressed to me that I should never return back to Afghanistan because my life was in danger. He spoke with me for about 4 minutes and after that I haven't received anything from him, their phones are off and I am totally disconnected from my family. I don't know where they are, what happened to my brother and my family, whether they are alive or what is happening. I am at a complete loss and I am worried sick.

28. Due to these events I haven't been able to pay my tuition for university this semester and I have missed the classes. I have informed the university about what I am going through and have requested for a deferral of the current semester...

29. Through my brother's actions, my background and my family's beliefs we have become a target for the Taliban. Violence against people like us is increasing. I fear that if I return to Afghanistan I will be persecuted for my beliefs and subjected to beatings, kidnapping, physical harm, torture and execution

30. All these events have rendered me emotionally distressed and very worried for my family. I am seeking employment currently in order to save up money to continue my studies, but I fear desperately for the well-being of my family. I cannot return to Afghanistan...

(sic)

Other Evidence

- The following documents were provided as attachments to the statutory declaration:
 - Copies of the applicant's high school graduation certificate and academic transcript;
 - Copies of the applicant's Diploma in Information Technology and academic transcript;
 - A copy of a letter of recommendation from [Academy 2], where the applicant tutored in the English language; and
 - A reference letter from [Institute 1].
23. In support of the application, the applicant's former representative provided a submission in relation to the facts of the case and the law to be applied.

Interview with the Delegate

24. The applicant was interviewed by a delegate of the Minister [in] May 2010. At the interview, the applicant provided evidence consistent with the claims contained in his statutory declaration [in] January 2010.

Applications for Review

25. The applicant was initially represented in relation to the review by a registered migration agent, [name deleted: s.431(1)], and subsequently by [name deleted: s.431(2)].

Pre-Hearing Submissions

26. In a written submission received [in] August 2010, the applicant's former representative submitted that the applicant was 'a [age] man whose mother is of Dari ethnicity and his father is a Pashtun. It was submitted that the applicant's education and 'the fact that he has travelled overseas and has lived in Australia sets him apart from the overwhelming majority of Afghans'.
27. It was submitted that the feared being harmed by the Taliban for the reason of his imputed support for the Afghan government and foreign forces who are opposed to the Taliban. This

opinion would be imputed to the applicant because of the work of his brother for [Company 3], work which had led to his brother being abducted; the applicant's work as an English language teacher and being an educated person living overseas. It was submitted that the applicant's brother's work for [Company 3] would be viewed by the Taliban as representing the views of the entire family, illustrating that the family supported the government.

28. It was submitted that Afghanistan was 'one of the most volatile and dangerous countries in the world'. The Taliban was a 'ruthless and efficient terrorist group'. The government was widely regarded as 'corrupt and ineffectual'. There were credible reports of collaboration between members of the Afghan security forces and the Taliban. Despite large numbers of foreign troops, there was no peace. The government was incapable of providing effective protection to the applicant and relocation was not a realistic option because of the political and ethnic divisions in Afghanistan.
29. The applicant's representative also submitted a copy of The US State Department's 2009 Human Rights Report: Afghanistan, as well as extracts from the UK Border Agency report on Afghanistan, dated 8 April 2010.

The First Hearing

30. The applicant appeared before the first Tribunal [in] September 2010 to give evidence and present arguments (the first hearing). Although an interpreter was present, the applicant spoke in fluent English and the hearing was therefore conducted entirely in English.
31. The Tribunal has listened to the audio recording of the first hearing and what follows is a summary of the applicant's oral evidence to the first Tribunal.
32. The applicant confirmed that his family were ethnically Pashtun. His mother was from Kabul and spoke Dari (he clarified that she was not of "Dari ethnicity"), and his father's family originated from Kandahar and spoke Pashto. His parents had been at university in Kabul together. The whole family spoke Dari at home.
33. The applicant confirmed that he, both parents and three of his siblings were born in Kabul, and that one young brother was born in Peshawar. The applicant had gone to live in Peshawar in Pakistan when he was [age deleted: s.431(2)], and had lived in that city all his life.
34. The applicant stated that his family's sources of income had included his father's [shop] in the bazaar in Peshawar. When the family moved back to Kandahar he gave up the lease on this shop. In Kabul his father owned, and so far as the applicant knew continued to own, a house and five shops. His primary source of income had been the rent from these properties. The applicant said that he had had no contact with his family for some time so did not know what the situation was now.
35. The applicant confirmed that he had graduated from high school in Peshawar in June 2007 and gained a diploma of IT in 2006 there. He had worked as an IT assistant at [Institute 1] in Peshawar from June 2007 to December 2008. He had taken two months leave to go to Kandahar with his family, but had resigned from his job at [Institute 1] after returning to Peshawar from Kandahar.
36. In relation to his immigration status in Pakistan, the applicant stated that his family had been registered with Pakistan's Commissionerate for Afghan Refugees. They were issued with

refugee cards valid for 3 years. These had always been renewed. However his last card, the “Afghan Citizen Card”, had expired [in] December 2009 (he submitted a copy of this card to the Tribunal). Before that they had had a “Shenakht” card, which was an ID card. He stated that the Pakistani authorities had announced in 2007 that the Afghan Citizen Card would not be renewed. Therefore, like his own family, many people were trying to go back to Afghanistan.

37. The applicant was asked to list the dates when he had re-entered Afghanistan. He said that he had entered Afghanistan in November or December 2008, remaining in Kandahar for two months. He then returned to Peshawar and did not return to Afghanistan.
38. The applicant stated that he had two brothers and two sisters. In 2008, one sister had been at university in Peshawar for a year, one brother had just graduated from high school, one sister was still at high school and his youngest brother was too young to go to school.
39. He stated that his father’s source of income while the family lived in Pakistan was the rent from the house and shops in Kabul, which he owned. After they returned to Afghanistan his father travelled to Kabul every two months to collect the rent from the tenants.
40. The applicant stated that he had used his Pakistani ID card, which showed him to be a citizen of Afghanistan, when he entered Afghanistan with his family in November 2008. Many people did this and it was legal to do so. He had done it because at that point his passport was at the Australian embassy while his student visa application was being considered.
41. The first Tribunal noted that his parents, the applicant and three of his four siblings had each been born in Kabul. The applicant was asked to explain why the family would have gone to live in Kandahar, where the Taliban had a very strong presence, rather than Kabul. He stated that his father’s father was from Kandahar, and his father’s family owned agricultural lands there. His father had planned to cultivate these agricultural lands. The family had rented cheap accommodation in Kandahar. The house in Kabul was rented out so that the family did not have access to it, but in any case Kabul was extremely expensive to live in.
42. The applicant confirmed that he had exited Pakistan [in] September 2008 and re-entered Pakistan a week later via Torkham, an entry point to Afghanistan. He said that the Australian embassy had to see that he had a visa to remain in Pakistan for at least six months, and the only way he could get one was to exit and re-enter. This was the sole reason for this trip. He stated that he had stayed in Jalalabad, which was only three hours drive from Peshawar and did not go to Kabul. He had no relatives there, but had friends there.
43. The applicant was asked to explain why he had travelled to Kandahar at all during the period in which he had been awaiting an Australian visa to be issued in Pakistan. He said that, as the oldest son, it was his duty to help his father. Otherwise his father would have had to travel alone with the family. That was why the applicant took leave from the hospital.
44. The applicant confirmed that his younger brother, [name deleted: s.431(2)], who was two years his junior, had got a job with [Company 3] in July 2009. He and his brother had both studied IT in Peshawar, and his brother had got a job as an IT officer with [Company 3], which he understood required him to travel to various towns to sort out network problems.
45. The applicant stated that he did not know where any of his family members were now. His last conversation with his father was in September 2009. The applicant had rung both mobile

phone numbers used by his family, but did not succeed in contacting his family. The phones were not working and there was no option to leave a message. The family had no relatives or friends in Kandahar whom he could contact to enquire about his family. He stated that the family had been out of Afghanistan for 19 years and he had tried to contact three family friends in Kabul, but he did not succeed. He had also found the [Company 3] telephone number on the internet and had rung them two or three times, but they did not know about his brother's situation as he was not based in a specific place. They had seemed very busy and had kept telling him to call later.

46. The applicant was asked how his father knew that his brother had been kidnapped. He said his brother was travelling in a car when the car was stopped and he was kidnapped. When asked again how his father knew this, he said other people in the car had informed his father. He emphasised that he only had a short conversation with his father and could not ask details.
47. In relation to the telephone call from his father in September 2009, the applicant said that it was very brief. His father had said he was calling from a public telephone, and that people were watching and he could not talk for long. He had told the applicant that his brother had been kidnapped by unknown people. His father sounded very stressed. He said he was trying to leave Kandahar, but did not know where he would go. The applicant said that his father had his mobile phone number but had not called him again.
48. The applicant stated that most people in Kandahar were Pashtun. His family spoke Dari at home and, after 19 years absence from Afghanistan, they looked and sounded different. They thought the situation had changed, but after a month they realised that it had not. He noted that Kandahar is where the Taliban are based. The first Tribunal put to the applicant again that it found it odd that the family had decided to return to Kandahar. He stated that the family had no option. Rents are really high in Kabul and the house they owned was under a lease contract. The second reason his father wanted to return to Kandahar was that he wanted to work on the land.
49. The applicant stated when the family moved to Kandahar, they did not leave the house much. After that, to keep busy he started teaching children English at the family's rented home. However, when if he went out, wearing jeans, and being shaven, people were strange with them. He tried to speak in Pashto, but he spoke the language with the 'wrong accent'.
50. The applicant was asked what he thought would happen to him if he were to return to Afghanistan via Kabul. He stated that even President Karzai is not safe in Afghanistan. His father advised that if he were to return to Afghanistan he would be killed by the Taliban, because the family is well-known now. When he moved to Kandahar, the situation progressively got worse. He taught English and his brother worked for [Company 3]. The Taliban believe that if anyone helps the government deserved to be 'finished'.
51. The applicant stated that if he were to return to Afghanistan, he would not go to Kandahar or any other city. He was asked what would happen if he were to remain in Kabul immediately after his return to Afghanistan. He stated that he could not live in Kabul by himself. If he tried to rent a room, people would want to know where his family was. This would create problems as he would have to explain. He would be unable to lie to people about his family. Everyone would ask questions, including the local police. Taliban are everywhere and they could find him. He was asked why he would have to tell everyone his true family history. He stated because everyone knows about the situation of Afghans in Pakistan.

52. The applicant stated that the Taliban people had warned his brother, and his family, and now his brother had been kidnapped. If they could do that to his brother they could do it to the applicant. It might be even worse if people knew he had been in Australia, as they might think he was an 'agent' It was put to him that he knew little of the current situation in Kabul as he had not been there since the age of three. The applicant had agreed.
53. The applicant's representative made brief oral submissions, stating that the applicant was a member of a tiny minority of Pashtuns who had lived outside Afghanistan. His background was very different to most Afghans. In Kabul the police might suspect him of being a spy for the Taliban, on the basis of allegations made about him by people. In any case the police were known to have been infiltrated by Taliban sympathisers, which would make the applicant more vulnerable.

Evidence Received after the First Hearing

54. [In] October 201, pursuant to s.424A of the Act, the first Tribunal sent a letter to the applicant. The letter stated in part:

Your claims are identical in many respects to those of another applicant before this Tribunal who, according to information available to the Tribunal, also arrived in Australia on a student visa and with whom you were sharing an address in Sydney before each lodging Protection visa applications. You have not named this person to the Tribunal as someone you have ever known. The claims made by both you and the other applicant include that you were brought up in Peshawar, that your family returned to Afghanistan, that your brother worked briefly for [Company 3] in 2009, that he disappeared, that your father rang to tell you this, that your family then disappeared, that you have had no contact with your family since then and that you do not know their whereabouts.

In light of these similarities, the Tribunal could therefore infer that these claims are untrue.

The Tribunal could infer from this that you have not been truthful when you claim your family disappeared in 2009, and that in fact you are in contact with them and could live with them if you returned to Afghanistan.

The Tribunal could therefore infer that if you did so you would not have a well-founded fear of Convention-related persecution there.

55. [In] October 2010, the applicant submitted a statutory declaration, signed [in] October 2010, in response to the first Tribunal's letter. The applicant provided the following comments in his statutory declaration:

...

2. I came to Australia on a student visa; however I have had to defer my studies because I have lost all contact with my father, who was supporting me. I am currently working as a Sales Manager which requires me to travel constantly between Sydney and the countryside.

4. My immediate response to this information [in the first Tribunal's letter of [date] Oct 2010] is bewilderment. I have no idea who is-the applicant that the RRT is referring to in its letter.

5. Ever since arriving in Australia on [date] January 2009 I have lived at [Address 4]. I found out about this place before I even travelled to Australia, since the consultant in Peshawar who helped me organise my student visa also organised this accommodation for me.

6. The property at [Address 4] is owned by a man called [Mr A], who is originally from the Philippines. Attached are photographs of the property obtained from maps.google.com.au/. As can be seen, it consists of three separate buildings. The front building is a single story town house in which I lived, with [Mr A]. My room was approximately under the letter "A" on the aerial photograph, and we shared all of the facilities in the house. We gained access to the house by the front door, which can be seen in the second photograph, above the letter "A". Although I have come to know [Mr A] very well during the time that I have shared with him, I have not spent very much leisure time at the house, because I have either been studying at the university or working.

7. Behind the main building is what I now know to be a garage which has been converted into two rooms, with share facilities. I was aware that these rooms were rented out by [Mr A], however I never knew who was living there and I never saw the tenants from the garage because they gained access by way of the laneway down the side of the townhouse. The tenants from the garage never came into the townhouse and I never spoke with nor socialised with them. I would not even be able to recognise them. The first time that I ever went into the garage was yesterday, when I visited [Mr A] to ask him for a letter about the tenants and he showed me the garage, which is now empty.

8. Behind the garage is a small building which is rented out to a JP from the Philippines, [Mr B]. I came to know [Mr B] because he came to the main house to visit [Mr A] as they are both from the same country

9. My response to the particular matters raised in the letter from the RRT are as follows.

10. I have no idea who this person could be. Unless that person is identified I cannot even say whether I have heard of his or her name, nor check with [Mr A] whether he or she ever lived at [Address 4].

11. Again, I have no idea who the RRT is talking about. Even if that person lived at [Address 4] I wouldn't have known him or her because he or she did not live in the townhouse where I lived.

12. I have never been asked by the RRT to name people that I have known. Without knowing who this person is I cannot say whether I know him or her.

13. Hundreds of thousands of Afghans were bought up in Peshawar at the time that I was bought up there. It is only natural that many of the Afghan refugees in Australia will include those bought up in Peshawar.

14. Many thousands of Afghans were returning to Afghanistan in 2008/2009 because of news that it was becoming safer. In addition, we had to return to Afghanistan then because our Pakistan ID cards were due to expire around then. Attached is a copy of my ID card showing that it was due to expire on [date] December 2009.

15. I do not know exactly how many Afghans worked for [Company 3] in 2009, but it must have been many hundreds. I do know that it was not at all unusual for staff of [Company 3] to be kidnapped by the Taliban. I have searched the internet and have found a number of articles proving that this was the case.

16. Of course the head of the family would have the task of calling other family members to pass on any bad news. This would be the same for all Afghan families.

17. Again, this simply confirms what is likely to happen to families who are known or suspected by the Taliban to be supporting the election. Once my brother had been targeted our whole family was at risk. This would be the same for any family who had a member targeted by the Taliban for their involvement in the elections.

56. The applicant also submitted a letter from [Mr A], dated [in] October 2010, and a letter from [Mr B], dated [in] October 2010.
57. In his letter, [Mr A] stated that he was the owner of the house in [Address 4], which has been separated into three sections: the main town house that includes 3 bedrooms, a kitchen and a bathroom, where he and the applicant live; a granny flat where different tenants have been renting there since it was built and a small room where a JP named [Mr B] is living.
58. [Mr A] stated that the applicant does not know any of the tenants who were living in the granny flat as its totally separate section. Since the granny flat was built more than 10 tenants have rented it for 'a while' before leaving. The applicant has rented a single room in [Mr A]'s house since [January] 2009. He stated that he knew the applicant well, and knew what had happened to his younger brother and family. He was working in a carpet shop as he had had to give up his studies. This was because he was disconnected from his family so could not pay his university fees.
59. In his letter, [Mr B], a resident of one of the other dwellings since 2006, stated that the applicant had been residing in the main house with its owner, who was from the Philippines. He stated that he had spent time in the main house and got to know the applicant. He said that several people had lived during different periods in the granny flat at the back of the main house.

The Second Hearing

60. Following the remittal of his case, the applicant submitted a statutory declaration made [in] August 2011. In his statutory declaration, the applicant provided the following additional information.
61. The applicant was 'very conscious' that the first Tribunal had rejected his account that his family had returned to Kandahar in late 2008, that his brother [name deleted: s.431(2)] had worked there for [Company 3] and disappeared in late 2009, and that he had since lost contact with his family. As a result, in April 2011, he telephoned a family friend, [Mr C], in Peshawar. [Mr C] is an Afghan from Kabul who was known to the applicant's family knew while they were living in Peshawar.
62. The applicant was aware that [Mr C] made regular trips back to Afghanistan, and he asked him if he was due to make a trip soon. When he was told by [Mr C] that he was due to return to Afghanistan in about one month, the applicant asked him if he could also make a trip to Kandahar to see if he could find out anything about his brother and his family. [Mr C] agreed, as long as the applicant paid his expenses.
63. [In] April 2011 he transferred AU\$400 to [Mr C] in Peshawar.
64. In early May 2011, [Mr C] telephoned him from Kandahar and told him that he had spoken with the applicant's family's former neighbor, [Mr D], and found out that he was the person who in 2009 had reported to police that the applicant's brother had been kidnapped and his

family had disappeared. [Mr D] had agreed to go to the police to obtain a copy of the report of their disappearance.

65. [In] May 2011, the applicant transferred AU\$300 to [Mr C] in Kandahar. He found out through [Mr C] that [in] May 2011, [Mr D] made a written request to the police for a copy of the report of his brother's kidnapping and that the police provided [Mr D] with a copy of his letter to the police dated [in] October 2009 reporting the kidnapping of his brother and the disappearance of his family; and a letter from [Company 3] to the police reporting the kidnapping of his brother. These documents were subsequently sent to him by [Mr C].
66. While [Mr C] was in Kandahar he also asked about the whereabouts of the applicant's family. Neither [Mr D] nor anyone else had any idea where they were.
67. The applicant has still not heard anything about the whereabouts of his brother or the rest of his family.
68. The applicant submitted copies and translations of the following documents:
 - Letter from [Mr D] to the police, dated [in] May 2011, requesting a photocopy of a report of the kidnapping of the applicant's brother;
 - Letter from [Mr D] to the police, dated [in] October 2009, reporting the kidnapping of the applicant's brother and the disappearance of his family;
 - Letter from [Company 3] to the police, dated [in] September 2009, stating that the applicant's brother, an 'IT officer' of [Company 3], was kidnapped at [time deleted: s.431(2)] pm [in] September 2009 by an unknown group on a trip to the [province deleted: s.431(2)];
 - Character reference from the applicant's employer in Australia, [name, position and business deleted: s.431(2)].
69. The applicant appeared before the Tribunal [in] August 2011 to give further evidence and present arguments. The applicant provided his evidence in English.
70. The applicant was asked about his movements and residential addresses. He stated that he first arrived in Australia on a Student visa [in] January 2009. The applicant stated that he was born in Afghanistan in [month and year deleted: s.431(2)]. He moved to Peshawar, Pakistan with his family in approximately 1991. He resided in Peshawar until the end of 2008 when his family decided to move back to Afghanistan. The family decided to return to Afghanistan because the family's right to remain in Pakistan was expiring. In addition, his family had thought that it would be safe for them to return to Afghanistan.
71. The applicant stated that in November 2008, the family crossed the border and passed through Jalalabad and Kabul on their way to Kandahar. Towards the end of December he received a phone call from the Australia embassy informing him that he had been issued with a Student visa. He then returned to Peshawar in preparation for his trip to Australia. He explained that he entered Afghanistan in September in order to obtain entry and exit stamps on his passport. He required the stamps in order for the Pakistani government to issue him with a visa, which, in turn, was a necessary step in order for him to obtain his Student visa for Australia.

72. The applicant was asked about his education and work history. He stated that he graduated from high school in 2007. He also completed a diploma in IT while he was completing his secondary schooling. Following his graduation from high school, he began working at [Institute 1] as an IT Assistant. He was employed at the Institute until the end of 2008 when he came to Australia. During the two months he was in Kandahar, he was on leave from the Institute. Shortly after he came to Australia, he was forced to abandon his studies. In Australia he has been working the 'carpet industry' He is currently the store manager at the [business deleted: s.431(2)], a carpet retail store in Sydney.
73. The applicant was asked about his family. He stated that his father is Pashtun and his mother is Tajik. He has two brothers and two sisters. His parents resided in Kabul until 1991. His father owned a complex, consisting of a residential house and five shops in Kabul. His father had a small shop in Peshawar and he also relied on the rent from the Kabul properties in order to support the family. The last time he spoke to his father was in September 2009 to inform him about his brother's disappearance. Since then he has had no further contact with his family. He is not sure what has happened to his family. He has often wondered if the family have moved away from Kandahar why they have not contacted him.
74. The applicant was asked why he had never expressly stated that his mother is Tajik or that he is half Tajik. He stated that all official documents showed that he is Pashtun and he always identified himself as Pashtun because his father, the head of the family, was Pashtun. He was never previously asked about this and there was no reason for him to deliberately conceal it.
75. The applicant was asked why the family had decided to settle in Kandahar in 2008. He stated that there were two reasons why the family had moved to Kandahar. First, the property in Kabul was leased out and that income from the property was the family's only source of income. His father was concerned that by terminating the leases, the family would find it difficult to survive. In addition, Kabul was an expensive city to resettle the family in. Secondly, the family owned agricultural land in Kandahar and his father had thought that he could work on the land to generate income. Initially, his father travelled to Kabul every two months to collect the rent from his properties in Kabul, but the applicant was uncertain if his father had made alternative arrangements before the family's disappearance.
76. The applicant was asked why he did not want to return to Afghanistan. He stated that he will not be secure and will be killed if he were to return. The family stood out in Kandahar. Having returned to Kandahar after 18 years, the family was easily recognisable as outsiders. The males were clean-shaven and females were educated. This is why his brother was kidnaped and his family disappeared. If he were to return to Kandahar, he will suffer the same fate as his brother. He taught English in Kandahar and as a returnee from Australia his life would be at risk.
77. He was asked why he would be unable to return to Kabul. He stated that Taliban are everywhere. He would not be secure in Kabul and the same thing will happen to him. It would not be easy for him to rent a place in the absence of his family. He will be asked many questions and soon people will find out about his family. The fact that he taught English in Kandahar, his stay in Australia and his brother's employment with [Company 3] could attract attention.
78. The Tribunal raised with the applicant the information previously put to him in the first Tribunal's s.424A letter. He stated that the identity of the other applicant was never disclosed to him and that his case was refused only after a decision was made in relation to the other

applicant whom he did not know. There were many hundreds of thousands of Afghans who lived in Peshawar and some of them may have come to Australia. In relation to his residential address, he stated that the house is partitioned into three residential areas and he lived in the main house. His landlord had told him that many different tenants had lived at the granny flat since it was built. At the time when he received the first Tribunal's s.424A letter, no one lived at that address. Other than those he had previously named, he did not know anyone else at that place.

79. The applicant provided an account of how he had obtained the recent documents he had recently submitted to the Tribunal consistent with the contents of his statutory declaration.
80. The applicant's representative questioned the suggested similarities between the applicant's account and the other Afghan applicant before the first Tribunal. He submitted that both applicants were previously represented by the same representative and that certain specific and key elements of the two accounts were in fact different. He submitted that information in the first Tribunal's s.424A letter was not sufficiently particularised to allow to the applicant to provide detailed or adequate comments.

FINDINGS AND REASONS

81. Having sighted the applicant's passport at the hearing, the Tribunal is satisfied that the applicant is national of Afghanistan.
82. The applicant's claims are based on the Convention ground of imputed political opinion. In essence, the applicant, an ethnic Pashtun, claims that he was born in Afghanistan, but moved to Pakistan with his family when he was [age deleted: s.431(2)]. His family returned to Afghanistan in 2008 and decided to reside in Kandahar. During the short period of time the applicant resided in Kandahar before travelling to Australia, he taught English to the children in his neighbourhood. In September 2009, the applicant was informed by his father over the telephone that his younger brother who was employed with [Company 3] had been kidnapped. Following this conversation, all contact between the applicant and his family ceased and he is now unaware of their whereabouts. The applicant fears harm by Taliban and their supporters for the reasons of his family's perceived support for Afghanistan's government and his perceived embodiment of anti-Taliban values as a western educated, clean shaven young man who has been away from Afghanistan for a significant period of time.
83. As noted above, some key aspects the applicant's claims relating to his brother were similar to claims put forward by another Afghan applicant before the first Tribunal, who had resided at the same address the applicant resides in. In his response to the first Tribunal's s.424A letter, the applicant stated that he did not know that another Afghan was living at the premises and claimed that he had never met him. It appears implausible that the other applicant would falsely claim to have lived at a certain address, at which he received correspondence from the Department and the Tribunal. It is also implausible that if another Afghan had lived on the same premises the applicant resided in, the applicant and his landlord were completely ignorant of this fact. Whilst the applicant's denial of having any knowledge of a fellow Afghan of a similar age from Peshawar residing at the same address in Sydney may raise further questions in relation to the reliability of the applicant's evidence regarding other residents in the [Address 4] premises, the Tribunal does not consider this lack of reliability to necessarily extend so far as to undermine the credibility of the applicant's entire case.

84. While the claims put forward by the applicant are similar, but not identical, to the other applicant, on the basis of similarities in the accounts of the two applicants, the Tribunal is unable to make a confident ruling that either applicant had adopted elements of the other's account. Even if the Tribunal were to conclude that one applicant may have adopted elements of the other's account, there is insufficient evidence before the Tribunal to satisfactorily establish that the applicant was the party at fault. The Tribunal is not prepared to rely on the similarities on the two accounts and the fact that the applicant's protection visa application was lodged after the other applicant had lodged his to impugn the applicant's credibility.
85. Throughout the process, whether in writing or orally, the applicant has provided a consistent account of his family history and experiences. The documents submitted prior to the second hearing further support the applicant's claims. The Tribunal has no reason to doubt the genuineness of these documents or the legitimacy of the manner in which they were obtained in Afghanistan. The Tribunal, therefore, accepts the applicant's account of his and his family's experiences.
86. The Tribunal accepts that the applicant and his parents left Afghanistan for Peshawar in Pakistan when he was [age deleted: s.431(2)]. The applicant's account of the voluntary repatriation of Afghan refugees in Pakistan during 2008 was consistent with information obtained from other sources by the Tribunal. In support of his application for a protection visa, the applicant submitted a copy of an 'Afghan Citizens Card' with the expiry date [in] December 2009. According to the sources consulted, the card is a Proof of Registration (PoR) card issued to Afghan refugees in Pakistan by the UNHCR with the approval of the Pakistan government. PoR cards distributed in 2006 permitted card holders to legally reside in Pakistan until 30 December 2009. The Pakistan government initially aimed to complete the repatriation of Afghan refugees in Pakistan by 30 December 2009. In July 2007 the Pakistan Minister for the States and Frontier Region confirmed the government's intention that all Afghan refugees would be repatriated by the end of 2009. This announcement may have suggested to Afghan Refugees that in 2007 the Pakistani government did not intend to renew or extend PoR cards. (Department of Foreign Affairs and Trade 2010, *PAKISTAN: Conditions for asylum caseloads: Afghan refugees*, 19 July; United Nations High Commission for Refugees 2009, 'Fact Sheet: UNHCR Pakistan Registration Information Project for Afghan Citizens (RIPAC)', October; Zeick, M. 2010, 'The Legal Status of Afghan Refugees in Pakistan, a Story of Eight Agreements and Two Suppressed Premises', *International Journal of Refugee Law*, vol.2. no.2, p.263; Afghanistan Research and Evaluation Unit 2009, *Searching For My Homeland: Dilemmas Between Borders, Experiences of Young Afghans Returning "Home" From Pakistan and Iran*, July, pp. 4 & 57 http://www.areu.org.af/index.php?option=com_docman&Itemid=&task=doc_download&gid=686; Human Rights Commission of Pakistan 2010, *State of Human Rights in 2009*, Human Security Report Project website, February, p.290 http://www.humansecuritygateway.com/documents/HRCRCP_AnnualReport2009.pdf; and Pakistan to send back all Afghan refugees by 2009' 2007, *Organisation of Asia-Pacific News Agencies*, 30 July). The Tribunal accepts that the applicant and his family had voluntarily returned to Afghanistan towards the end of 2008.
87. The first Tribunal found it difficult to believe that, because of the dire security situation in Kandahar in 2008 and particularly the strong presence of Taliban in that city, the applicant's family had decided to settle in Kandahar as opposed to Kabul, where the applicant's family had resided before moving to Pakistan and his father was the owner of residential and commercial properties. However, the Tribunal finds the applicant's reasons for his family's

decision to move to Kandahar persuasive. In the Tribunal's view, after 18 years of absence from Afghanistan, the family's links with Kabul may have been tenuous. The Tribunal accepts that following the applicant's family's move to Afghanistan, the applicant's father had considered the rent from his properties in Kabul as the family's only source of income. Ending the lease contract with the tenants may have created financial problems for the family in Kabul, where the cost of living is high. The Tribunal also considers it reasonable that the applicant's father had wished to cultivate agricultural land owned by the family in Kandahar in order to generate income.

88. The Tribunal accepts that the applicant had stayed in Kandahar for two months in late 2008 and that during this time he had taught English to children in the neighbourhood. The Tribunal accepts that the family had stood out among the locals in Kandahar not merely because of their long absence from the country and inability to reflect the prevalent local cultural nuances, but also because the males in the family were clean-shaven and all family members, including females, were educated.
89. The Tribunal further accepts that in 2009 the applicant's brother was employed by [Company 3] as an 'IT officer'. [Information and website deleted: s.431(2)]. It is, therefore, not unlikely that the applicant's brother who had qualifications in IT was amongst the many thousands who had been employed by [Company 3] in 2009. This conclusion is further supported by the letter from [Company 3], submitted by the applicant prior to the second hearing.
90. The Tribunal accepts that the applicant's family's appearance and profile, as well as the applicant's brother's employment with [Company 3] would have brought the family to the attention of the Taliban and their supporters in Kandahar. The UNHCR has stated that 'there is a systematic and sustained campaign by armed anti-Government groups to target civilians associated with, or perceived as supporting, the Afghan Government or the international community, particularly in areas where such groups are active' (UNHCR 2010, *UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, December, <http://www.unhcr.org/refworld/pdfid/4d0b55c92.pdf>). UNHCR's Guidelines identify Afghanistan's southern region, particularly in Kandahar, as one of the areas where the Taliban have targeted civilians. On the basis of the evidence before it, including the documents submitted by the applicant prior to the second hearing, the Tribunal is prepared to accept that the applicant's brother was kidnapped in 2009 and the rest of his family have disappeared since. The Tribunal accepts that the applicant has had no contact with any member of his family since September 2009.
91. The Tribunal accepts that the applicant was raised and educated in Pakistan. Other than in his early childhood and a period of just over two months in late 2008, he has not spent any time in Afghanistan. He has lived in Australia since January 2009 and speaks English fluently. He is clean shaven and his appearance may easily invoke perceptions that he is 'western' or influenced by the west. The Tribunal accepts that due to his long absence from Afghanistan he may also lack knowledge of intricate aspects of Afghan cultural and behavioural norms. The Tribunal is cognisant of information before it suggesting that negative perceptions within the general society may often be directed at particular returnees who are visibly different — physically or culturally — and are easy targets for harassment by their peers (Saito, M, 2008, 'The Challenges of Resettling in Afghanistan' in *From Disappointment to Hope: Transforming Experiences of Young Afghans Returning "Home" from Pakistan and Iran*, Afghanistan Research and Evaluation Unit, Briefing Paper Series, November, p8). The applicant's characteristics, in addition to his family's profile and history, including his

brother's past employment with [Company 3], may bring the applicant to the attention of Taliban and their supporter in or on route to Kandahar.

92. The Tribunal, therefore, cannot rule out the possibility of the applicant facing serious harm if he were to return to Kandahar. In other words, the Tribunal is satisfied that there is a real chance that the applicant could face abduction, threats to his life or liberty, significant physical harassment and ill-treatment. The Tribunal is satisfied that the harm the applicant would be subjected to involves 'serious harm' as required by paragraph 91R(1)(b) of the Act. The Tribunal is satisfied that the applicant's imputed political opinion is the essential and significant reason for his fear of persecution as required by paragraph 91R(1)(a) of the Act. The Tribunal is satisfied that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves selective harassment for a Convention reason.

The Tribunal has considered whether it would be reasonable for the applicant to relocate to Kabul. The applicant was born in Kabul, his parents resided there before moving to Pakistan and his father owned property in that city. Other than these tenuous connections, the applicant has no other links to the city. The Tribunal, however, is cognisant of UNHCR's 2009 Eligibility Guidelines that:

The traditional extended family and community structures of Afghan society continue to constitute the main protection and coping mechanism. Afghans rely on these structures and links for their safety and economic survival, including access to accommodation and an adequate level of subsistence. Furthermore, the protection provided by families and tribes is limited to areas where family or community links exist. As documented in studies on urban vulnerability, the household and the extended family remain the basic social network in Afghanistan and there are indications that existing traditional systems of sharing and redistribution are less effective in the extended urban family. It is, therefore, unlikely that Afghans will be able to lead a relatively normal life without undue hardship upon relocation to an area to which he or she is not fully protected by his/her family, community or tribe, including in urban areas of the country (UNHCR 2009, *UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, July, <http://www.unhcr.org/refworld/docid/4a6477ef2.html>).

93. The Tribunal has found that the applicant is unaware of his immediate family's whereabouts and that he has had no contact with them. The Tribunal is satisfied that the applicant has no close relatives in Kabul or anywhere else in Afghanistan. The Tribunal is satisfied that it would not be reasonable for the applicant to relocate internally.
94. For the reasons outlined above, the Tribunal is satisfied that the applicant's fear of persecution is well-founded.
95. The Tribunal is satisfied that the applicant does not have a legally enforceable right to enter and reside in any country other than his country of nationality, Afghanistan. The Tribunal finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act (see *Applicant C v Minister for Immigration and Multicultural Affairs* [2001] FCA 229; upheld on appeal, *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154).

CONCLUSIONS

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

DECISION

97. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.