

1005628 [2010] RRTA 822 (21 September 2010)

DECISION RECORD

RRT CASE NUMBER: 1005628

DIAC REFERENCE: CLF2010/7837

COUNTRY OF REFERENCE: Afghanistan

TRIBUNAL MEMBER: Wendy Boddison

DATE: 21 September 2010

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, 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] November 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa on [in] January 2010. The delegate decided to refuse to grant the visa [in] June 2010 and notified the applicant of the decision and her review rights by letter dated [on the same date].
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 applied to the Tribunal [in] July 2010 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

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 and *Applicant S v MIMA* (2004) 217 CLR 387.
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. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
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.

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. The applicant was represented in relation to the review by her registered migration agent.
20. The Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it pursuant to section 425(2)(a) of the Act.
21. The applicant is aged [age deleted: s.431(2)] and was born on [date deleted: s.431(2)] in Konar, Afghanistan. In her Protection visa application the applicant claimed that she was a member of the Pashtun ethnic group and that she was a follower of the Islam religion.
22. In summary the applicant's claims were that her sons were working for the Najibullah Government. In 1992 when Najibullah's government was overthrown by the Muhadajeen she and her children were threatened by Muhadajeen commanders, both in Kabul and in Konar province, as they were thought to be against the Muhadajeen. As their lives were in danger, with the assistance of people smugglers they fled from Afghanistan to Pakistan. The applicant lived with her stepson, [Mr A] in Pakistan. As their life in Pakistan was not safe, in 1996 the applicant along with her son and his family paid people smugglers to be taken to Germany where another son was living at that time. The applicant was recognised as a refugee in Germany, but was not issued with permanent residency. The applicant came to Australia to visit her son, [Mr A], who was an Australian citizen who was diagnosed with [cancer] in 2008. He passed away [in] 2009. The applicant did not want to return to Germany as she had no permanent status there. The applicant could not return to Afghanistan because she had no family members left in Afghanistan. There was no security for persons of her age. The Afghan authorities were unable to provide security to its citizens as there was a war going on between the Afghan government forces against Al Qaeda and the Taliban.
23. The applicant travelled to Australia on an Afghan passport issued in Bonn, Germany. In that passport was an Aufenthaltserlaubnis valid for stay in Germany until [a date in] June 2010.
24. The applicant was interviewed by the delegate [in] April 2010. She reiterated her claims that it was too unsafe for her to return to Afghanistan and that she had no family members living there who could offer her protection or who could look after her. She did not wish to return to Germany as she had only temporary residence rights there.
25. In a letter dated [in] April 2010, the applicant explained that it was impossible for her to return to Afghanistan because her life would be in danger. The applicant's late son, [Mr A] and her entire family's political ideology was opposing the Taliban and the Al Qaeda. The family strongly supported democracy, freedom of expression and human rights. These rights were violated not only by the Taliban, but by warlords, provincial rulers and even by some prominent government figures in the present Kazi Government. The applicant explained that

her family was well known in Kabul and other regions of Afghanistan for their political opinion. Her late son worked as [a government official] from [years deleted] and had written many articles regarding his political opinion, ideology and strongly opposing violation of human rights. The applicant believed she would be killed or persecuted because of her beliefs, and especially as a widowed woman. Further, as an elderly woman there was no support system in Afghanistan for her. She would not have access to basic services and would be deprived of her basic human rights being a woman. The applicant explained she only had temporary residence rights in Germany and the uncertainty that this caused her. Further she explained that she had 60 family members in Australia, including her son, grandchildren, cousins, nieces and nephews.

26. The delegate in her decision noted that the applicant was a [age deleted: s.431(2)] year old widow whose children no longer resided in Afghanistan. If she was to return to Afghanistan she would not have any male support and found that she belonged to the particular social group comprising of elderly Afghan women without male support and protection. The delegate found that she had a well-founded fear that she would be persecuted in the reasonable foreseeable future if she returned to Afghanistan for reasons of her membership of this particular social group. However, the delegate found that Australia did not owe the applicant protection obligations because she held a residence permit with current validity to [a date in] June 2010 and it would appear that she would be entitled to enter and reside in Germany for continued residence. The delegate found that the applicant had effective protection in a third country (Germany) under s.36 (3) of the Act.
27. [In] August 2010, the applicant's representative forwarded to the Tribunal a letter from the Vice Consul of the Consulate General Federal Republic of Germany, Melbourne, dated [in] August 2010, which stated: This is to confirm that the German Residence Permit No. [number deleted] issued to [applicant's name and date of birth deleted] in Konar, has expired and is no longer valid for entry to Germany. Furthermore, [the applicant] has lost her residence status according to s.51, 7 of the German Immigration Act as she left Germany and did not return within six months.

Independent country information

28. UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan United Nations High Commissioner for Refugees (UNHCR) July 2009 states:

(g) Women

Women are at particular risk of ill-treatment if perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system. Ill-treatment occurs in a variety of forms and may be inflicted by several actors, including family members. Such treatment includes domestic violence, excessive custodial sentences and degrading and inhuman treatment. While there is a limited number of women holding public office, women's rights continue to be curtailed, restricted and systematically violated. In April 2009, for instance, a Shiite Personal Status Law was passed by Parliament and signed by President Karzai. The law requires, inter alia, women to comply with their husbands' sexual requests, and to obtain permission to leave the home, except in emergencies.¹⁵² The code has yet to be implemented and is currently under review as a result of international pressure.¹⁵³

Cases of physical violence perpetrated against women and girls in Afghanistan have increased by about 40 percent in the period from March 2007 to March 2008.

Existing figures indicate that currently up to 80 percent of Afghan women are affected by domestic violence. Human rights organizations report an overall increase of cases of self-immolation and other forms of suicide. The phenomenon of female self-immolation is commonly linked to the pervasive societal discrimination against women. Survivors of sexual violence generally lack basic support mechanisms such as trauma counseling and medical treatment, as well as judicial capacity for forensics analysis. The social stigma attached to the reporting of gender-based violence in Afghanistan often prevents victims from seeking physical or psychological treatment.

Afghan women, who have adopted a less culturally conservative lifestyle, such as those returning from exile in Iran or Europe, continue to be perceived as transgressing entrenched social and religious norms and may, as a result, be subjected to domestic violence and other forms of punishment ranging from isolation and stigmatization to honour crimes for those accused of bringing shame to their families, communities or tribes. Actual or perceived transgressions of the social behavioral code include not only social behavior in the context of a family or a community, but also sexual orientation, the pursuit of a professional career, and mere disagreements as to the way family life is conducted.

Unaccompanied women or women lacking a male “tutor” (mahram) continued to face limitations on conducting a normal social life. They include divorced women, unmarried women who are not virgins, and women whose engagements to be married have been broken. Unless they marry, which is very difficult given the social stigma associated with these women, social rejection and discrimination continue to be the norm. Many Afghan women are prevented from leaving the family compound without a burqa and a male companion, who has to be a husband or a close relative. Women without male support and protection generally lack the means of survival, given the social restrictions on women living alone, including the limitations on their freedom of movement. This is reflected in the absence of solutions available to the few women able to access domestic violence shelters. Unable to live independently, they face years of quasi-detention, prompting many to return to abusive family situations. The results of such “reconciliation” are generally not monitored and abuse or honor crimes committed upon return are often done with impunity.

Forced and child marriages continue to be widely practiced in Afghanistan, and can occur in a variety of forms. Statistics show that nearly 60 percent of girls in Afghanistan are married before they reach 16 years old. Most marriages continued to be arranged by families. However, more coerced forms include ‘sale’ marriage i.e. girls sold for a fixed quantity of goods, cash or simply to settle a family debt; bad dadan, a tribal form of dispute-settling in which the offending family offers one girl for marriage into the wronged family, for instance to settle a blood debt; and badal, when two families exchange their daughters in an attempt to minimize marriage costs.

Furthermore, women’s rights activists face threats and intimidation, particularly if outspoken about women’s rights, the role of Islam or the behaviour of commanders. In areas under the control of armed anti-Government groups, there are growing indications that women face systematic societal discrimination. For example, a significant number of female medical graduates is systematically refusing to work in rural areas, due to the fear of being targeted by insurgents. These developments affect women’s access to health in a disproportionate way.

Access to education for girls is also severely curtailed. According to the Ministry of Education and aid agencies over five million school-age children (three million of them girls) have been deprived of education as a consequence of conservative customs, poverty, lack of education facilities and a culture of gender discrimination.

The deterioration of the security situation has also had a detrimental effect on education. Armed anti-Government groups have continued their systematic attacks on schools, teachers, pupils (particularly schoolgirls) and parents. According to the Afghan Ministry of Education (MoE), more than 600 primary, secondary and high schools closed due to such attacks. Up to 80 percent of schools are closed in the four southern provinces of Helmand, Kandahar, Zabul and Urozgan, with Helmand Province having only 54 schools, primarily for boys, functioning, compared to 223 schools open in 2002. Consequently, between 230,000 to 300,000 students have been deprived of an education in 12 provinces, according to MoE officials. Girls' schools are increasingly a target of attacks. Some 50 percent of security incidents at schools across the country were specifically directed against girls' schools despite the fact that they represent only 14.8 percent of the total number of primary, secondary and high schools in the country. Furthermore, female teachers are specifically targeted and higher bounties are offered for killing them. In November 2008, in a widely reported attack in Kandahar, 12 students and four teachers, all female, were sprayed with acid and suffered severe injuries.

Given the pervasive societal discrimination and the widespread sexual and gender based violence, Afghan women and girls, particularly those living in areas affected by the armed conflict or under the de facto control of armed anti-Government groups, may be at risk of persecution depending on their individual profile and circumstances. Failure to conform to conventional roles or transgression of social and religious norms may expose women and girls to violence, harassment or discrimination in Afghanistan. As such, women with particular profiles, including, but not limited to victims of domestic violence or other serious forms of violence, unaccompanied women or single heads of household, women with visible social or professional roles, such as journalists, human rights activists and community workers, may be at risk of persecution on the ground of membership of a particular social group. Where non-conformity with traditional roles is perceived as opposing traditional power structures, the risk of persecution may be linked to the ground of religion and/or political opinion. Furthermore, measures which restrict one's ability to earn a living so that survival is threatened, or severe limitations to accessing education or health services, may also amount to persecution.

...

The traditional family and community structures of the Afghan social and tribal system constitute the main protection and coping mechanism for returning Afghan refugees. The support provided by families, extended families and tribes is limited to areas where family or community links exist, in particular in the place of origin or habitual residence. Those who may face particular difficulties upon return include, but are not limited to, unaccompanied women and single heads of household; unaccompanied children; unaccompanied elderly persons; victims of serious trauma, including sexual and gender based violence; physically or mentally disabled persons; and persons requiring medical assistance (whether long or short-term), particularly women. Return to places other than places of origin or previous residence, may therefore expose Afghans to insurmountable difficulties, not only in sustaining and re-establishing livelihoods but also to security risks. Security risks may include, inter alia, arbitrary detention and arrest, targeted killings based on ethnic rivalries and family-based conflicts, besides the increasing risks being posed by the ongoing armed conflict, as detailed above. (emphasis added)

29. U S Department of State 2009, Country Reports on Human Rights Practices-Afghanistan, 11 March 2010 states:

According to a UN High Commission on Human Rights (UNHCHR) report, "unaccompanied" women were not accepted in society, so women who could not be reunified with their family had nowhere to go. The difficulty of finding durable solutions for women who ended up in a shelter was compounded by the societal attitude toward shelters, linked to the perception of "running away from home" as a serious violation of social mores. The misapprehension that safe houses were a "safe haven" for immoral women forced them to operate nearly clandestinely and in a precarious security situation. In lieu of relying on shelters, girls who sought to escape violence at home were reportedly sometimes "married" or "engaged" to older men as a means of providing them with safety; observers noted that officials across the justice sector promoted and accepted this practice.

...

Societal discrimination against women persisted, including domestic abuse, rape, forced marriages, forced prostitution, exchange of girls to settle disputes, kidnappings, and honor killings. Despite the constitutionally protected right to travel freely, many women were forbidden to leave the home except in the company of a male relative. Such cultural prohibitions meant that many women could not work outside the home, and often could not receive access to education, health care, police protection, and other social services.

30. See also Status of Women: Afghanistan Prepared by Wali M . Rahimi, UNESCO Principal Regional Office For Asia And The Pacific Bangkok, 1991 <http://unesdoc.unesco.org/images/0009/000916/091693eo.pdf> and The Status of Women in Karzai's Afghanistan by John W. Warnock <http://www.globalresearch.ca/index.php?context=va&aid=13184>.
31. The U S Department of State 2009, Country Reports on Human Rights Practices-,11 March 2010, also noted in relation to the targeting of government officials:

“As in recent years, the Taliban distributed threatening messages in attempts to curtail government and development activities. Ten jurists from Laghman province reported that judges and prosecutors routinely faced death threats and other forms of intimidation in their jobs. In addition to threats against persons working for the government or NGOs, the Taliban distributed ‘night letters’ (death threats) and text messages warning citizens not to vote in the August 20 [2009] elections, including messages to an entire village in Uruzgan.”

FINDINGS AND REASONS

32. The applicant travelled to Australia on a validly issued Afghan passport and the Tribunal finds that she is a national of Afghanistan.
33. The Tribunal accepts that the applicant's stepson, [Mr A] is a prominent Afghan political figure. The Tribunal accepts that he held the post of [details relating to the career of Mr A deleted: s.431(2)]. There are references on the internet to articles and books written by [Mr A] and his obituary also indicated that he was a prolific author.
34. The Tribunal also accepts that the applicant's sons were members of the Najibullah Government.
35. The Tribunal also finds that the applicant is aged [age deleted: s.431(2)] and is a widow with no members of her family remaining in Afghanistan. The applicant fears that if she returns to

Afghanistan she will be targeted either as an elderly woman without protection or because of her association with a family which held prominent positions in Afghan society. The Tribunal has considered whether the applicant is a member of a particular social group. A particular social group is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society (*Applicant A & Anor v MIEA & Anor* supra per Dawson, McHugh and Gummow JJ). Justice McHugh in *Applicant S* (supra) stressed the necessity of the group being cognisable within the society in the following statement:

A number of factors points to the necessity of the group being cognisable within the society. Given the context in which the term “a particular social group” appears in Art 1A(2) of the Convention, the members of the group, claimed to be a particular social group, must be recognised by some persons - at the very least by the persecutor or persecutors - as sharing some kind of connection or falling under some general classification. That follows from the fact that a refugee is a person who has a “well-founded fear of being persecuted for reasons of ... membership of a particular social group” A person cannot have a well-founded fear of persecution within the meaning of Art 1A(2) of the Convention unless a real chance exists that some person or persons will persecute the asylum-seeker for being a member of a particular class of persons that is cognisable - at least objectively - as a particular social group. The phrase “persecuted for reasons of ... membership” implies, therefore, that the persecutor recognises certain individuals as having something in common that makes them different from other members of the society. It also necessarily implies that the persecutor selects the asylum-seeker for persecution because that person is one of those individuals.(at [64])

36. His Honour added that it did not follow that the persecutor or anyone else in the society must perceive the group as “a particular social group” and explained that it is enough that the persecutor or persecutors single out the asylum-seeker for being a member of a class whose members possess a “uniting” feature or attribute, and the persons in that class are cognisable objectively as a particular social group (at [69]).
37. The Tribunal accepts that there are common characteristics that unite members of a family including shared ancestry and values. Further in the applicant’s case her family has a profile within Afghan society which makes recognisable. The country information indicates that in Afghan society there are strict culture norms that apply to the behaviour of women. In particular the need to have a male to interact on their behalf with the outside world. There are characteristics common to women without male protection. They are perceived to have transgressed social norms, they are vulnerable they have difficulty accessing services. Elderly women have the common characteristics of their age and frailty. The Tribunal finds that the applicant is a member of the particular social group of elderly Afghan women without male protection and is also a member of the particular social group of her family.
38. The Tribunal finds based on the country information set out above that there is more than a remote or far fetched possibility that the applicant would experience serious harm for reasons of her membership of both particular social groups that is a result of her family connections and because she would be an unaccompanied elderly woman with no male protection. There is real chance that the applicant would be persecuted in the reasonably foreseeable future for reasons of her membership of these particular social groups. The Tribunal finds that the

applicant has a well-founded fear that she would be persecuted in the reasonable foreseeable future for a Convention ground if she was to return to Afghanistan.

39. The Tribunal must consider the operation of s.36 (3) (4) and (5) which state:

Protection Obligations

(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.

(5) Also, if the non-citizen has a well-founded fear that:

(a) a country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

subsection (3) does not apply in relation to the first-mentioned country.

40. When the applicant arrived in Australia she was the holder of a German Residence Permit. It is clear that that permit had been renewed on a number of occasions, but her permit expired [in] June 2010 and was not renewed. The right to enter and reside in another country referred to in s.36 (3) must be an existing right and not a past or lapsed right or a potential right or expectancy.

41. The issue as to whether the right in s.36(3) could be a lapsed right arose for consideration in *Suntharajah v MIMA*. ([2001] FCA 1391 (Gray J, 2 October 2001).) In that case, the applicant held a valid UK student visa at the time of the Tribunal's decision, but claimed the visa would be cancelled on arrival in the UK because he had abandoned his course of study. The Court held that the Tribunal erred in law in failing to resolve that question. Justice Gray stated:

In my view, before it is possible to be satisfied that a person has a right to enter and reside in another country, where the possession of a current visa is the right asserted, it is necessary to examine the nature of that visa, the circumstances in which it was granted and whether the factors warranting its revocation exist. A visa cannot be said to afford a right to enter and reside in a country if it is bound to be revoked as soon as its holder attempts to make use of it by entering the country.

...

If, on arrival, [the applicant's] visa was bound to be cancelled, it could not be said that the visa constituted a right to enter and reside. Before it could come to the conclusion that the applicant had a right to enter and reside in the UK, the Tribunal was bound to resolve that question. (*Suntharajah v MIMA* [2001] FCA 1391 (Gray J, 2 October 2001) at [17]-[19].)

42. The proposition that the right to enter and reside cannot be a lapsed right is consistent with Australia's obligations under the Convention, and with Parliament's intention as reflected in Senator Patterson's 2nd reading speech. (Hansard, Senate, 25 November 1999, p 10669).
43. Similarly, the relevant right cannot be merely a potential right or an expectancy. Rather, what s.36(3) requires is an existing legally enforceable right to enter and reside. (See *MIMA v Applicant C* (2001) 116 FCR 154 at [88], "*N1045/00A*" v *MIMA* [2001] FCA 1546 (Lee J, 2 November 2001) at [22] and *WAGH v MIMIA* (2003) 131 FCR 269 per Lee J at [32], [34], [38], [41], [45].
44. Because the relevant right must be legally enforceable, it is not enough that the applicant could make some arrangement to re-enter a country, where there is no present right to enter and reside there. In "*N1045/00A*" v *MIMA* ([2001] FCA 1546 (Lee J, 2 November 2001).) Lee J held that the Tribunal had erred in applying s.36(3) on the basis that the applicant, an Iraqi national, would be able to make some arrangement to re-enter Syria, with the assistance of an invitation from friends, and not on the basis that he had an enforceable right to enter Syria. His Honour held that s.36(3) did not operate upon a conclusion that an applicant for a protection visa may take steps to seek re-entry to a third country. Rather, there had to be a conclusion that the applicant has a present right to enter that country and reside there. His Honour stated that the "right" in s.36(3) is more than an opportunity to seek the favourable exercise of a discretion. It must mean, at least, a degree of certainty in an applicant's circumstances that arises out of an entitlement exercisable by the applicant. (*N1045/00A v MIMA* [2001] FCA 1546 (Lee J, 2 November 2001) at [30]-[32].)
45. The Tribunal refers to the letter from Vice Consul of the Consulate General Federal Republic of Germany, Melbourne, dated [in] August 2010 and the following country information regarding German Residence Permits.

Non-EU nationals: Residence Permit

Two types of residency permit are:

- Limited resident permit (Aufenthaltsgenehmigung or Aufenthaltserlaubnis)
- Unlimited settlement permit (Niederlassungserlaubnis)

The validity of the limited residence permit (Aufenthaltserlaubnis) may vary depending on individual circumstances such as nationality, duration of employment contract or period of study. It is usually granted for two years and after five years an unlimited/permanent residence permit can be applied for.

Permanent residence permits (Niederlassungserlaubnis)

A Niederlassungserlaubnis is an unrestricted residence permit for permanent residency in Germany and was introduced in 2005. It can be applied for once certain conditions have been met. In some cases it is granted automatically on arrival in Germany to citizens who are accepted for political reasons or who have specific high qualifications to contribute to the German labour market, but usually it is issued once a person has completed an acknowledged period of residency in Germany.

An unrestricted residence permit (Niederlassungserlaubnis) is usually dependent on the following criteria being met:

- Minimum of five years' residence permit (Aufenthaltserlaubnis) being held

- Proof that the applicant has been employed for five years and has paid the relevant social insurance contributions into the German system
- Proof of ongoing financial support
<http://berlin.angloinfo.com/countries/germany/residency.asp>
- Proof of suitable accommodation for the applicant and their family
- Sufficient knowledge of the German language
- Basic knowledge of German legal and social systems

46. The Tribunal finds that the applicant's Residence Permit expired [in] June 2010 and is no longer valid for entry to Germany. The legal right that the applicant had to enter Germany has lapsed. The Tribunal finds that the applicant does not have a right to enter and reside in Germany. Therefore s.36 (3) is not applicable to the applicant.
47. The Tribunal finds that the applicant does have a well-founded fear of persecution for a Convention reason and that she is a refugee within the meaning of the Convention.

CONCLUSIONS

48. 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

49. 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.