

1214575 [2012] RRTA 1139 (19 December 2012)

DECISION RECORD

RRT CASE NUMBER: 1214575
DIAC REFERENCE(S): CLF2012/160129
COUNTRY OF REFERENCE: Afghanistan
TRIBUNAL MEMBER: Roger Fordham
DATE: 19 December 2012
PLACE OF DECISION: Adelaide

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Afghanistan, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] July 2012.
3. The delegate refused to grant the visa [in] September 2012, and the applicant applied to the Tribunal for review of that decision.

RELEVANT LAW

4. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

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

8. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression 'serious harm' includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
11. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
12. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
13. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
14. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

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

Complementary protection criterion

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

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.
20. Together with his application for a protection visa the applicant provided a statutory declaration, dated [July] 2012, in which he stated:
21. I am a citizen of Afghanistan and I do not have a right to citizenship of a right to reside in any other country.
22. I call myself Tajik and a Shia Muslim. My lawyer has been discussing this with me because she pointed out that my name and tribe are [Name A]. I agree that my parents are [Name A] but I have also called myself Tajik and I do not know what this actually means.
23. There are other [Name A] families in the village but they are not related to me.
24. I am [age] years old at the present time as my birthday is [date]. I was born in [a village], [Province 1, in the Eastern zone], Afghanistan. I am the oldest boy in the family and I have [a number of siblings] who live with my mother. We have [land on which we grow [fruit]]. There are [a number of] trees and there is a stream for the irrigation. We would take the fruit off the trees and then the fruit would be collected by a dealer who would take it to the market.

25. I did not go to school in [town]. Instead my father taught me at the night. My father taught me reading and writing. My siblings did attend the school. I decided I did not like school and so I helped my father.
26. I worked in [a town], half an hour by car from my village. I worked in a [shop] for about 2 years and I was employed by [name] to help him with the general shop work. I travelled to and from the [shop] and earned a certain amount a month.
27. My father was an army officer in the Afghan National Army. He was wearing army uniform and he was working in [Province 1]. I never asked him what he did. He had a gun with him. I have a photo of him in his army uniform.
28. He was coming from the army base to our house when he was kidnapped by the Taliban. We heard this because my father called to our house and told us to leave. We moved into my mother's brother's house which is in the village of [name] about 20 minutes away. This was the last time we ever heard from my father.
29. My mother went with my [uncle], to the army post to find out about my father. She did not receive a positive answer but that the army was looking for him.
30. The rest of my family are living with my [uncle] and there is no one in my house at the moment. My mother made the arrangements for me to leave Afghanistan and she was helped by my uncle to find me a safe passage out of Afghanistan.
31. It was only two days after we heard from my father that he had been kidnapped that the family had moved out of their house.
32. I fear returning to Afghanistan because of my religion and because my father, who is an army officer, is missing. Being the son of this man I am also at risk.
33. I cannot move anywhere else in Afghanistan because I am very young, uneducated and have no family support anywhere outside of [Province 1].
34. The applicant was interviewed by a delegate of the Minister whose decision reflected the interview and cited independent material, relevant to this matter.
35. The delegate's decision
36. The delegate questioned the applicant on details of his village and his practice of his faith.
37. He demonstrated to her satisfaction that he had come from the area he claimed he was from and that he did practice his faith as a Shia Muslim.
38. In regard to his status as a [Name A] [details relating to the applicant's name deleted: s.431(2)].
39. That report indicates that generally the [Name A]'s did not suffer discrimination. However, during periods of conflict they have been executed though more for reasons of their social and political status rather than racial discrimination.
40. The delegate accepted for the purpose of the decision that the applicant was the son of a military person but, did not accept that he was a commander.

41. She found that Tajiks are, for the most part Sunni by faith though there is a Shia minority and she accepted that he was part of that minority.
42. She further found that Tajiks constitute between 25 to 30 percent of the population and that, Tajiks, as a race most are Sunni Muslims and, at the present time are “riding high” though there are claims of forced expulsions by the Taliban of ethnic minorities such as the Tajiks and “harassment of these minorities throughout Taliban-controlled areas. She also found that, in the Pashtun belt of Ghazni and Logar that Tajiks and Pashtuns seem mostly well integrated and many Tajiks fight alongside the Pashtun in the insurgency but, on the other hand that Tajiks had been suppressed with many killed in the aftermath of Mazar I Sharif in 1998. (See: CX277694; CX196243; CX278255; CX206076)
43. The delegate found credibility issues in regard to the applicant’s claims that his father jhad been kidnapped by Taliban and was able to call his wife and, while the delegate accepted that the applicant’s father was in the military that he did not have the rank of commander.
44. The delegate also found that the applicant’s younger brothers did not face being targeted and she was of the view that, in his absence they would have been. He stressed that his position as the eldest son was part of the reason he believed he would be targeted.
45. She also found that no one would know he was Shia by his name or appearance.
46. [In] December 2012 the Tribunal received a submission from the applicant’s adviser. It was submitted that he had a well-founded fear of persecution for reasons of his;
 - a. Ethnicity as a Tajik
 - b. His religion as a Shia Muslim
 - c. His imputed political opinion as a supporter of the Karzai government and its foreign allies and;
 - d. His membership of a particular social group variously describes as;

Failed asylum seeker; Close family member of a member of the Afghan National Army.
47. The submission asked the Tribunal to consider the claimant’s evidence as coming from a minor or, at least, a very young person.
48. In regard to the attitude of the Taliban towards members of the Afghan National Army the submission quotes from a presentation Threat Matrix Reports, US begins withdrawing forces from Kunar’s Pech Valley and Al Qaeda never left Kunar, and other problems with US intel, and LWJ report, Governor: Most of Nuristan under Taliban control.
49. The submission states that, “[t]his report suggests that the Taliban are in fact targeting the family members of Afghan National Army soldiers and that in at least one case, they have seen great propaganda value in live captives of the security forces.
50. An article in this material states, “ A Taliban commander in northeastern Afghanistan who has been hunted by US forces for years and has voiced his support for a Qaeda said recently that the Afghan security forces have now become the number one target for his forces. Haji

Dawran Safi , a commander in the Pech district in the eastern province of Kunar who is also known as Qari Dawat, told Al Jazeera that dismantling and infiltrating the Afghan Army and police is the top priority of the Taliban.”

51. It was also submitted that the Danish Fact Finding Mission to Afghanistan found that whether or not family members of government workers are targeted is dependent on the education levels of the community. In general this meant that the more educated a community was the less likely it was that families would be threatened.
52. Another report cited of 2 April 2012 titled Afghan Forces, families are prime target for Taliban, say commander at pg 5 of the submissions states;
 - a. The Taliban are also working to infiltrate the Afghan Army and police and have threatened the families of members of the security forces...
53. The submission also provided a number of independent reports of increased insurgent threats in [Province 1]. [Report details deleted: s.431(2)]
54. In regard to relocation it was submitted that Kabul was the most likely place to consider but that a report from Amnesty International of January 2012 “Fleeing War, Finding Misery”, the plight of the internally displaced in Afghanistan, at p 27 reported on lack of livelihood, lack of shelter, lack of security. A UNHCR representative was quoted as saying that a failure to address the issue of livelihood and reintegration was the biggest mistake ever made.
55. It is submitted that the applicant has no savings, no contacts in Kabul, no place to live and no guarantee of employment.
56. The applicant appeared before the Tribunal [in] December 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Dari and English languages.
57. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
58. As the adviser’s submission had stressed the young age of the applicant I put to him that I was aware of what he had claimed his age to be and what DIAC had determined it to be. I said that I found age determination to be far from an exact science and whether he was under eighteen or over eighteen I was prepared to accept that he was about [age deleted: s.431(2)] years of age.
59. I acted within the Tribunal’s guidelines of dealing with minors in taking evidence from the applicant and, having listened to the delegate’s interview and having considered the submissions I informed him that there were issues I could readily accept.
60. I accepted that he was of Afghan nationality, that he was of the Tajik ethnic group and that he was Shia by faith.
61. I asked the applicant if he was aware of any Taleban presence in [Province 1] and he said that he was but that they operated under cover and were clandestine in their dealings in the region.

62. I asked how long his father had been a member of the Afghan National Army and he replied that he had joined the armed forces when Taliban fell as a consequence of the foreign invasion of 2001.
63. He was vague about his father's role in the army and said that he "taught" other soldiers and when I asked if he taught military tactics or other matters he said that he believed it was other matters.
64. I put to him that it seemed that he was close to his father since he had claimed his father taught him rather than him attending school.
65. He said that he worked in the family's orchards picking [fruit] during the day and studied with his father at night but, he said that his father told him little of what he did in the army.
66. I ascertained that he was the oldest son in the family and [age differences with another sibling deleted: s.431(2)].
67. I asked if he was of fighting age himself and he said that he was but said he didn't specifically know of any boys his age who were fighting.
68. I asked what, if any cultural expectations there were of the eldest son in a Tajik family. He said that, in the absence of the father the eldest son assumed the responsibilities of the head of the house. In areas such as religious practices the eldest would be responsible to see that these were observed and, when it came to issues such as marriage for the younger girls, together with the mother the eldest son would be responsible.
69. I put to him that, having listened to the taped interview with the delegate, I was concerned about the veracity of his claim that his father had called his mother after his capture by Taleban. I said that it seemed implausible that Taliban would allow such to happen.
70. He responded by saying that someone had assisted his father in this regard.
71. He said he had no direct knowledge of the situation as he was not in the house when his mother received the call so he could only relate what she had told him and, that was very little as she always became upset.
72. I asked when he had last spoken to his mother and he said he had called her by phone twenty days prior to the hearing. When I asked if he had asked her for further information on his father he said that she became upset and he got nothing further.
73. I told him that, like the delegate I accepted that he was Tajik, was Shia, was [Name A] and from [Province 1] but, that I had difficulty accepting his claim that his father had been able to call when he was captured by Taliban.
74. I adjourned the hearing and allowed the applicant time to consult with his adviser.
75. Following the adjournment the applicant maintained his account that his father had called his mother but was unable to provide any further details.
76. The adviser provided oral submissions to the effect that Taliban is not always consistent in how it treats captives. She said that people generally believed that Taliban killed their prisoners outright but, as she had included in her written submissions that is not always the

case, there have been instances where Taliban has sought to intimidate by showing captured prisoners or allowing them limited contacts, such as the claimed phone call, in this case to strike fear into the people or to intimidate them.

77. I asked if the applicant had anything further to add and, as he did not, I concluded the hearing.

78. COUNTRY INFORMATION

79. Afghanistan is an Islamic republic with a strong, directly elected presidency, a bicameral legislative branch, and a judicial branch. Widespread fraud and irregularities marred the September 2010 parliamentary elections, with observers concerned that the transparency of the electoral process would be undermined by President Hamid Karzai's 2010 appointment of a special tribunal, not envisioned in the constitution, to adjudicate the disputed election results. In 2009 citizens voted in their second presidential election. The constitutionally mandated Independent Elections Commission (IEC) declared Karzai president for a second term, after his challenger withdrew from a run-off election. Allegations of fraud also marred those elections. Civilian authorities generally maintained control over the security forces, although there were instances in which security forces acted independently.

80. The most significant human rights problems were: a) the continued dispute over President Karzai's appointed tribunal, which was not settled until August, when the president recognized that the sole authority to adjudicate election results lay with the IEC; b) widespread violence, including armed insurgent groups' killings of persons affiliated with the government and indiscriminate attacks on civilians, and credible reports of torture and abuse of detainees by security forces; c) pervasive corruption; and d) endemic violence and societal discrimination against women and girls, despite considerable improvements in women's health and maternal mortality.

Other human rights problems included extrajudicial killings by security forces – for example, the Afghan National Police (ANP) in Kandahar was implicated in several cases of torture and extrajudicial killings; poor prison conditions; ineffective government investigations of abuses and torture by local security forces; arbitrary arrest and detention; prolonged pretrial detention; judicial corruption and ineffectiveness; violations of privacy rights; restrictions on freedom of speech and of the press; some limits on freedom of assembly; restrictions on freedom of religion; limits on freedom of movement; abuse of children, including sexual abuse; discrimination and abuses against ethnic minorities; trafficking in persons; societal discrimination based on race, religion, gender, and sexual orientation; abuse of worker rights; compulsory and bonded labor; and child labor, including forced child labor.

Widespread official impunity for those who committed human rights abuses was a serious problem. The government was either unwilling or unable to prosecute abuses by officials consistently and effectively.

The Taliban and other insurgents continued to kill record numbers of civilians, using improvised explosive devices, car bombs, and suicide attacks. The Taliban increasingly used children as suicide bombers. Antigovernment elements also threatened, robbed, and attacked villagers, foreigners, civil servants, and medical and nongovernmental organization (NGO) workers. *U.S State Department Country Reports on Human Rights practices 2011*

In regard to the current situation in [Province 1]. [Articles deleted: s.431(2)]

81. Many sources refer to a Taliban shadow government and, to the strength of Taliban in today's Afghanistan:

- a. The picture is of an underground government by local fighters, organized under the Taliban's banner, who have established the rudiments of a civilian administration to complement their shadowy combat force. They run schools, collect taxes and adjudicate civil disputes in Islamic courts. And when they fight, their gunmen and bomb makers are aided by an intelligence and support network that includes villagers, who signal for them and provide them shelter, and tunnels in which to elude capture or find medical care. <http://www.ndtv.com/article/world/afghanistan-s-hidden-taliban-government-83965> downloaded 10 December 2012.
- b. During the year there were reported abuses targeted at specific religious groups by terrorist organizations, including al-Qa'ida and Taliban networks. As in previous years, killings of religious leaders and attacks on mosques were attributed to al-Qa'ida and Taliban members. Sources reported that

FINDINGS AND REASONS

82. Country of Reference
83. The applicant has a good working knowledge of the area he claims he is from. He speaks fluent Dari and provided evidence through a Dari interpreter. His knowledge of the situation politically is sound and he provided a copy of an Afghan Taskera.
84. In the absence of any contradictory evidence I find that the applicant is a national of Afghanistan and that he does not have any rights to enter in and/or reside in any other country. This being the case, I find that the country of reference in this matter is Afghanistan.
85. The applicant's claims
86. The applicant claims to be a Tajik and [Name A] and that his religion is Shia. He has been consistent in his claims to be Tajik and speaks Dari. He is from a part of Afghanistan common to Tajiks therefore as was the case with the delegate I accept that he is Tajik.
87. His name contains the name [Name A] which indicates that he is a [Name A], one who is [details deleted: s.431(2)]. [Aspects of the name deleted: s.431(2)].
88. He has claimed that his father is in the Afghan National Army and that this puts him at opposition to the Taleban. He has claimed that his father is a commander and this was disputed by the delegate. The problem was that he was unable to give a full description of what his father did in the army and, this was the case at the Tribunal hearing. However, he has been consistent and, although the delegate found that his answers in regard to his father's appearance and his uniform were "generic" I find that this is not surprising for a person as young as the applicant and, in a country where information could put him at risk.
89. In any event, the delegate accepted that his father was in the army and, whether or not his father was a ranking officer I accept that his father was in the army.
90. I have difficulty accepting the applicant's claims that his father was able to call his mother and inform her that he had been taken captive by the Taliban. However, in any event, I do accept that his father is a member of the Afghan National Army.
91. Thus, I find that the applicant's profile is that of a youth of fighting age, who is a Tajik and a Shia, with a name that elevates his religious status and, who is the son of a member of the military.
92. Since he comes from a village in [Province 1], where he has lived all his life I have formed the view that his identity as described above would be known or could easily be discovered by the people in that area.
93. The situation in [Province 1]

94. For the past year the independent material cited above shows that the security situation in that province has deteriorated to the extent that, in one report, 80% of the province is now under the influence of Taliban. This is consistent with the claims of the applicant in that regard.

95. The undisputed history of the Taliban is that it is a body of Sunni fundamentalists who have a notorious reputation for trying to eliminate Shia, who they regard as “infidels” and heretics.

- a. The Taliban—from the Arabic word for student, “taleb”—are fundamentalist Sunni Muslims, mostly from Afghanistan’s Pashtun tribes. The Taliban dominates large swaths of Afghanistan and a large part of Pakistan’s Federally Administered Tribal Areas.

The Taliban seek to establish a puritanical caliphate that neither recognizes nor tolerates forms of Islam divergent from their own. They scorn democracy or any secular or pluralistic political process as an offense against Islam. The Taliban’s Islam, however, a close kin of Saudi Arabian Wahhabism, is far more perversion than interpretation. The Taliban’s version of Islamic law, or Sharia, is historically inaccurate, contradictory, self-serving and fundamentally deviant from prevailing interpretations of Islamic law and practice. (emphasis added)

There was no such thing as a Taliban until the Afghanistan’s civil war in the wake of Soviet troops’ withdrawal in 1989, after a decade-long occupation. But by the time their last troops withdrew in February 1989, they’d left a nation in social and economic shards, 1.5 million dead, millions of refugees and orphans in Iran and Pakistan, and gaping political vacuum that warlords attempted to fill. Afghan mujahideen warlords replaced their war with the Soviets with a civil war.

Thousands of Afghan orphans grew up never knowing Afghanistan or their parents, especially their mothers. They were schooled in Pakistan’s madrassas, religious schools which, in this case, were encouraged and financed by Pakistani and Saudi authorities to develop militantly inclined Islamists. Pakistan nurtured that corps of militants as proxy fighters in Pakistan’s ongoing conflict with over Muslim-dominated (and disputed) Kashmir. But Pakistan consciously intended to use the madrassas’ militants as leverage in its attempt to control Afghanistan as well.

As Jeri Laber of Human Rights Watch wrote in the New York Review of Books of the origins of the Taliban in refugee camps (recalling an article he’d written in 1986),

Hundreds of thousands of youths, who knew nothing of life but the bombings that destroyed their homes and drove them to seek refuge over the border, were being raised to hate and to fight, “in the spirit of Jihad,” a “holy war” that would restore Afghanistan to its people. “New kinds of Afghans are being born in the struggle,” I reported. “Caught in the midst of a grownups’ war, the young Afghans are under intense political pressure from one side or another, almost from birth.” [...] The children that I interviewed and wrote about in 1986 are now young adults. Many are now with the Taliban.

<http://www.proud2bindian.in/terrorism-india/2910-history-taliban-who-they-what-they-want.html>
(downloaded 18 December 2012)

96. Equally, the Taliban see the Afghan National Army as being politically opposed to them. I accept the independent material above to the effect that Taliban target families of member of the Afghan National Army.

97. In considering whether or not the applicant has come to or, more importantly, faces a real chance of coming to the adverse attention of the Taliban such that he could face serious harm in the reasonably foreseeable future. I am satisfied that any such chance cannot be dismissed as remote or insubstantial and thus constitutes a real chance.

98. In determining whether or not this amounts to persecution for the purposes of the Convention I am bound by the terms of the Migration Act at s.91R.

99. “For reasons of” political opinion or religion the Act states at 91R (1)(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution;

100. In the current matter I am satisfied that the applicant’s elevated religious status as a Shia together with his relationship to his father which accords with the terms of S.91S of the Act

since any harm to his father is for reasons of his imputed political opinion in the eyes of the Taliban accords with the terms of sect.91R(1)(a) and the essential and significant reasons are religion and his membership of a particular social group of members of a family whose head is a member of the Afghan National Army.

101. Sect.91R(1)(b) and (c) state that the persecution must involve serious harm and that it must be systematic and discriminatory. The practices and philosophies of Taliban are both discriminatory and systematic.
102. Finally, sect.91R(2)(a) and (b) are met since Taliban's history of slaughter or imprisonment of Shia are well documented. An incident in 2001 shortly before their collapse advises:
 - a. At least 300 people were massacred by Taliban forces last month when they re-took a remote area in central Afghanistan inhabited by Shia Muslim Afghans who are opposed to the Sunni Taliban, United Nations officials fear.
 - b. Pakistani and Arab extremists were also involved in the massacre, witnesses said. Kofi Annan, the UN Secretary General, announced on Jan 19 that "more than 100 people may have been killed, including Afghan humanitarian workers", when the Taliban recaptured Yakawolang, a small town in the Hazarajat region that had been captured a week earlier by the anti-Taliban United Front.
<http://www.telegraph.co.uk/news/worldnews/1321553/Taliban-fighters-massacre-300-Shia-Muslims.html> (downloaded 18 December 2012)
103. I accept the independent material to the effect that, although there was a period where Afghanistan was free of Taliban influence this has eroded in recent times to the point where much of the country operates in a dual system with Taliban running a shadow government.
104. I am satisfied that the applicant faces a real chance of persecution for the Convention reasons of his religion and his relationship to his father, member of a particular social group.
105. There are still two questions I need to ask myself.
106. (1) Can the applicant be protected from the harm he fears by the state?
107. (2) Since the agent of persecution is a non-state body can he find protection by moving to another area ?

State Protection

108. The Applicant's fear of persecution is not at the hands of the state but, at the hands of Taliban and associated groups. These are non-state agents and raise the question as to whether or not the state could protect the Applicant from any harm he may fear at their hands. However, the country information before me advises that, in many areas, they operate an incredibly powerful shadow or parallel government which the state is powerless to work against.
109. A United Kingdom Guidance Note: Afghanistan June 2012 advises:

Protection in Afghanistan generally is compromised by high levels of corruption, ineffective governance, a climate of impunity, lack of official impetus for the transitional justice process, weak rule of law and widespread reliance on traditional dispute resolution mechanisms that do not comply with due process standards, all of which contribute to a deteriorating human rights situation in the country.¹¹ Official impunity and lack of accountability were pervasive, as were abuses of power by unofficial, traditional militias. There was limited independent, judicial, or external by NDS and ANP officials, including torture and abuse.¹² The International Crisis Group reported that the Taliban and other insurgents had taken advantage of the corruption in the Afghan security agencies and infiltrated entire units of the police and

110. Professor Maley, in his report also quotes:

- a. recent reports to the UN Security Council, on Afghanistan by the Secretary-General: 'The deterioration of Afghanistan's security situation has continued, with 2009 being the most volatile year since the fall of the Taliban in 2001, averaging 960 security incidents per month, as compared with 741 in 2008. The situation worsened in January 2010, with the number of security incidents 40 per cent higher than in January 2009 ... Overall, the intensification of the armed conflict in the south, and its expansion into areas previously considered stable, made 2009 the worst year for civilian fatalities since the fall of the Taliban regime in 2001' (The Situation in Afghanistan and its Implications for International Peace and Security. Report of the Secretary-General (New York: United Nations, A/64/705 - S/2010/127, 10 March 2010) paras.23, 24) [emphasis added]. In his second 2010 report, the Secretary-General stated that 'Overall, the number of security incidents increased significantly, compared to previous years and contrary to seasonal trends ..

111. Given the volatility and insecurity in Afghanistan, together with corruption and the state's inability to protect itself from Taliban and other insurgents and its unwillingness or inability to prosecute abuses by its own officials I find, the state, could not protect the Applicant.
112. Since I have found that the Applicant would face a real chance of serious harm amounting to persecution if he returned to his former home in [Province 1]. The remaining question is whether or not he could find protection from the persecution by relocating.

Relocation

113. The logical place to relocate is Kabul since it is the capital and the most heavily defended part of the country. However, having never been to that area, having no contacts and, at a time when the stability and the economy of the whole country is uncertain it is not reasonable to find that he could relocate to and remain in that, or any other region in Afghanistan. In addition to the state of the country I accept the advice and the independent material provided by the applicant's agent to the effect that the applicant would not be able to be housed or to subsist in Kabul without support and there is no indication that he would be able to receive support if he did relocate there. This being the case, I find it is not reasonable to expect that the Applicant could find protection from the harm he fears by relocating to another area in Afghanistan.
114. I am guided by Kirby J in the matter of SZATV v MIAC (2007) 233 CLR 18 at [80]-[81];
 - a. [I]nternal relocation will not be a reasonable option if there are logistical or safety impediments to gaining access to the separate part of national territory that is suggested as a safe haven. Nor if the evidence suggests that there are other and different risks in the propounded place of internal relocation; or where safety could only be procured by going underground or into hiding; or where the place would not be accessible on the basis of the applicant's travel documents or the requirements imposed for internal relocation.

115. In the Applicant's case I accept the submissions from his adviser and I am satisfied that "there are logistical or safety impediments to gaining access to the separate part of national territory that is suggested as a safe haven." Thus, the suggestion that the Applicant could relocate does not pass the test of reasonableness.
116. In summary, I find that the applicant, as a member of a minority race and religious group, faces a real chance of systematic serious harm in a discriminatory manner for reasons of his race and religion.
117. I further find that he could not find protection from this serious harm through either state protection or by relocating to another area.
118. Accordingly I find that the applicant is a refugee.

CONCLUSIONS

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

DECISION

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