

1204400 [2012] RRTA 452 (22 June 2012)

DECISION RECORD

RRT CASE NUMBER: 1204400

DIAC REFERENCE(S): CLF2012/34710

COUNTRY OF REFERENCE: Pakistan

TRIBUNAL MEMBER: Paul Millar

DATE: 22 June 2012

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.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Pakistan, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] February 2012.
3. The delegate refused to grant the visa [in] March 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 to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention), or on other 'complementary protection' grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

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

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

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

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

Complementary protection criterion

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

CLAIMS AND EVIDENCE

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

Primary application

20. The following claims were made in the primary application documents.
21. The applicant was born on [date deleted: s.431(2)] in Quetta, Pakistan. He declared his religion as Ahmadiyya Muslim. He left Pakistan [in] July 2006 as the holder of a student visa for [Country 1]. He lived in [Country 1] from [September] 2006 until [February] 2012. In this period, [in] November 2008, he sought asylum in [Country 1] and his application was refused in November 2011.
22. [Country 1] immigration authorities retained his Pakistan passport. [In] February 2012 he travelled to Australia using a false [Country 2] passport. He arrived in Australia [in] February 2012.
23. In that part of his application where required to give reasons for claiming protection, the applicant stated that he is afraid to return to Pakistan because he received threats from extreme mullahs and the Khatam – E – Nabuwat ("the nabuwat"). He is also afraid that he

could be executed under sections of the Penal Code relating to blasphemy because of his Ahmadi faith. He left [Country 1] as he was afraid that he would be deported to Pakistan.

24. In support of his claim, the applicant submitted a letter dated [March] 2012 signed by [title deleted: s.431(2)] of the Ahmadiyya Muslim Association Australia (“the Association”) (folio 56) who stated that the applicant was a member of the Ahmadiyya Muslim Community.
25. The applicant was interviewed by officers from the department on his arrival in Australia [in] February 2012. At this interview he related his fear of harm in Pakistan because of his religion. The applicant was also interviewed by an officer of the department regarding his detention and he again repeated his claim that he fears returning to Pakistan because he is Ahmadi.
26. [In] March 2012 the delegate interviewed the applicant and the Tribunal has read a typewritten transcript of that interview prepared from an audio recording on the department file. The transcript appears on the Tribunal file at folios 63-93. At the interview the applicant discussed the grounds of his protection claims as summarised above.
27. In a decision made [in] March 2012 the delegate refused the application finding that the applicant was not genuinely in fear of harm.

Review application

28. The applicant nominated [name deleted: s.431(2)] as his registered migration agent, authorised representative and recipient in relation to the review. No further evidence or submissions were lodged with the review application.
29. The applicant appeared before the Tribunal [in] June 2012 to give evidence and present arguments. The representative attended. The applicant elected to give evidence in English and did so without any difficulty.
30. The applicant comes from Lahore. The applicant's parents, his [three siblings] all live together in that city. The applicant's parents were Ahmadis at birth and so are the applicant and his siblings. The applicant's father has a business in Lahore. [Two siblings] work in Lahore and [the third sibling] is a student.
31. The applicant commenced school when he was [age deleted: s.431(2)] years old in Lahore. [He] attended a high school in that city and towards the end of the following year a teacher came to that school who was from the applicant's local area and knew that the applicant was Ahmadi. He told others at the school about this; he spoke against the applicant and the other students started bullying the applicant about his religion. Prior to that time he never told anybody that he was Ahmadi and nobody had ever asked him about it.
32. Prior to that time the applicant would attend an Ahmadi Mosque but not regularly as his father was busy with his work. The applicant said his family did not actively participate in the Ahmadi community as such and that was mostly because his father worked long hours. His mother would stay at home as would his younger siblings.
33. However, from the time the applicant began to be bullied at the high school his parents started sending him to the local Ahmadi leader and he began attending prayer meetings and classes for young Ahmadis. In the following year the applicant became more involved and was asked to help to teach religion to other young Ahmadis.

34. His friends in his local area found out about this and came to know that he was Ahmadi. They began to question him about it, disapproved and started bullying him. He had also not told his friends he was Ahmadi until they found out as a result of him taking on more religious activities within his community.
35. Finally, once the applicant completed [high school] the local Ahmadi leader said he should move to another location and continue religious activities so that he would not encounter bullying and harassment. For that reason, the applicant went to live with an uncle in another area. He attended the local Ahmadi centre in that place.
36. For the first three months he was there, he undertook a [computer] course. In that period he was also awaiting publication of his exam results from high school. However, after he had been there for only one month some of the students in this course found out that he was Ahmadi and began to follow and harass him. He thought that they had possibly seen him going into an Ahmadi mosque in the area.
37. Because of this the applicant switched to attending classes at night. The college did not have many students and the administrator wanted good relations among the students. For that reason, the college ensured he did not have any more problems. The applicant was able to complete his course. At that time the applicant had received his high school results and had applied to attend another college in this area but because he was Ahmadi that college would not accept him.
38. A Sunni Mullah at that college threatened to kill him if he tried to gain entry or if he was seen there. In addition there were people from the Nabuwat at that place who also told him to stay away. For that reason, the applicant's uncle arranged for him to attend a college in Rawalpindi about 50 kilometres from where they lived. The applicant felt safer commuting to and from this place during the day and remained living with his uncle.
39. However, the people in the village who had found out he was Ahmadi told the administrator of the college he was attending in Rawalpindi who expelled him. The applicant believes he was expelled because the college did not want any trouble from those opposed to Ahmadi. For that reason the applicant returned to living with his family in Lahore.
40. The applicant studied privately until gaining admission to a college in Lahore in 2003 where he undertook a [bachelor degree]. The applicant resumed his involvement with the local Ahmadi community by going to prayer meetings and also organising social gatherings, sports activities and excursions for the youth. For doing so he came to the attention of members of the Nabuwat in that area who started following him. When they saw him they would threaten him and tell him that he had to convert to their religion.
41. Because of this pressure on the applicant, he ceased his activities for a short period of time; about two or three months. He then resumed his activities as he missed not seeing his associates and friends in the Ahmadi community. Once he gained admission to the college to undertake his bachelors degree he would attend classes in the morning and in the evenings he would go to the prayer centre and undertake his activities as he had done before.
42. People from the Muslim Students Federation at his college found out that the applicant was Ahmadi. He is not entirely sure how they found out but they told him to stay away or they would kill him. By that time the applicant had been attending this college for approximately

four months. The applicant ceased attending classes after that and then went to a coaching centre in the evening to continue his studies so that he could gain his degree.

43. He continued his religious involvement and he continued to receive threats from the Nabuwat members in his local area. There were a few occasions they came to the family home and threatened him there. Partly because of these difficulties and because he wished to study the applicant applied for and was granted a visa to study in [Country 1].
44. The applicant undertook courses in [Country 1] from the time he arrived there in 2006. After he arrived there he was in contact with his family who said that once or twice people had come to the family home looking for him; the applicant believing these people to be the ones who had threatened him while he was in Pakistan. Although he received that news, the applicant was missing his family and he returned to Pakistan in early 2008 so he could see them. After he returned he found out from others in the area that the people who had previously threatened him had also enquired with them as to where he was.
45. Also on his return the applicant resumed going to the Ahmadi centre in his local area. He again became involved in activities with that community including organising people to go to poorer areas of the city to attend to their medical needs. For this he was involved in various organisational work including raising money. The people from the Nabuwat found out about this, began following him and began to frequently make threatening telephone calls to him.
46. They also telephoned his parents and went to his father's business threatening that the applicant had to stop participating in his religious activities. Because of these problems the applicant cut short his stay in Pakistan and went back to [Country 1] in March 2008. He resumed his studies but from that time, he learned of news in the media about threats being made against Ahmadis by more extreme groups and indicating that the safety of the community in Pakistan was becoming more imperilled.
47. This included his parents telling him not to return to Pakistan and so in November 2008 the applicant applied for asylum in [Country 1]. The applicant said that when he first went to [Country 1] in 2006 he joined the Ahmadi community in that country. In the following year he learned from members of that community that some of them had applied for and been granted refugee status on the basis of being Ahmadi and, by that means, had been able to stay permanently in [Country 1].
48. Although he knew back then about being able to apply for refugee status in [Country 1] he did not do so. At that time, the applicant's plan was to study, obtain a qualification and then employment and gain the right to live in [Country 1] permanently by that means. When put to him that he would have known there was a risk he might not gain the right to reside in [Country 1] permanently by that means, the applicant said that he did not think of this at the time.
49. He said that it was only after his trip to Pakistan in 2008 and the events that followed after that in Pakistan (the deterioration of conditions for Ahmadis) and also with the worsening economic situation in [Country 1] that he decided that pursuing permanent residence through study was not likely to be successful. In that respect, he had noticed that all of the foreign nationals in [Country 1] were the first to lose work.
50. The applicant was able to renew his student visa in [Country 1] for one more year allowing him to stay there until November 2009. He applied for asylum in November 2008. However,

for doing so he was unable to study or work and received an allowance from the government and was able to stay in a hostel. When asked why he applied for asylum in November 2008 when he had been back in [Country 1] by that time for almost nine months, the applicant said that when he returned to [Country 1] he still wanted to finish his studies in view of the money that had been spent on that to that point.

51. However, he said it was a dilemma for him but he understood that if he made a refugee claim he would not be able to study. He remained in contact with his parents throughout the time he was in [Country 1] from 2008 and they mentioned the people from the Nabuwat who had threatened him in Pakistan coming to the family home once or twice to find him.
52. He understood that one of his brothers had encountered discrimination at work because of his religion. On another occasion a threatening message was left at the family house. More recently he learned from his mother that an unknown person had telephoned the family asking if they were Ahmadis. In 2010, an Ahmadi mosque in Lahore was attacked and one of his brothers was present at that time. [An] uncle was killed in the attack.
53. While he was living in [Country 1], the applicant was involved with the Ahmadi association there and was responsible for security at the places where the Ahmadi community in [Country 1] would meet; the applicant's main task was to ensure that people who did not belong to the community did not gain entry. He had others helping him to do this and he said he also performed a similar role in Pakistan.
54. The applicant said that he left [Country 1] earlier this year because he was afraid that he would be deported to Pakistan. In this respect, the applicant said that his refugee claim had been declined by the [Country 1] government and the appellate tribunal in that country. Proceedings were commenced in the High Court seeking review of that tribunal's decision and what normally happened was that the lawyer representing him would apply to the court for an injunction to stop him being removed from [Country 1] but the representative of the appropriate minister would give an undertaking for a certain period that the applicant would not be deported.
55. Although that undertaking had been given a number of times, the applicant became aware that some Pakistani nationals had nevertheless been deported from [Country 1]. He heard of one such case himself and the lawyer representing him in the court proceedings told him of another case. The lawyer told him that if he was removed from [Country 1] without her knowledge there would be nothing she could do about it. He has not had much contact with the lawyer about his case since then as he is no longer in [Country 1]. The applicant provided the name of the lawyer assisting him in [Country 1] and the firm for which she was working.
56. Following his arrival in Australia, the applicant has had telephone contact with [senior office holders] of the Australian Association. He told those people that he had arrived in Australia and had faced problems because of his religion in Pakistan. He requested that they provide a letter to confirm that he was part of the Ahmadi community and they told him they would have to make enquiries with the country in which he previously resided about that. He understood that the Australian Association made enquiries with the association in [Country 1] and was satisfied that he was a member of the community. He said that members of the Australian Association had come to the detention centre to see him.
57. The applicant said that after he applied for asylum in [Country 1] he asked the association in [Country 1] to also issue a letter to confirm he belonged to the Ahmadi community. He said

that the [Country 1] Association would have checked with the Ahmadi community in Pakistan about that. At the hearing, the applicant produced a letter dated [January] 2009 signed by [name and position deleted: s.431(2)], Ahmadiyya Muslim Association [Country 1] who stated that according to information received [in] January 2009 from headquarters in Pakistan the applicant was an Ahmadi by birth and a bona fide member of the Ahmadiyya Muslim Community. This person stated that the applicant served in the community in Pakistan including in the local youth organisation.

58. At the hearing, the applicant produced a bundle of documents related to the court proceedings in [Country 1]. The Tribunal perused those documents and they indicated that the Refugee Appeal Tribunal in [Country 1] appears to have accepted that the applicant was an Ahmadi but found that, on its assessment of country information regarding Ahmadis in Pakistan, his fear of persecution was not well founded. These documents indicated that the claims advanced by the applicant to the bodies determining his refugee claim were similar to the claims advanced to this Tribunal regarding his life in Pakistan and his fear of persecution based on his religion.
59. The applicant also produced other documents regarding his identity (copies of pages from his Pakistan passport; copies of various identity cards issued to him while he was in [Country 1]). The representative was granted a period of two weeks to provide any further documents in support of the application. None were provided. The applicant said he does not fear any other harm in Pakistan apart from the harm he will encounter because of his religion. He said that he would not be safe anywhere in Pakistan as anti Ahmadi attitudes and maltreatment occur anywhere in the country.

Country information

60. In an earlier decision published in April 2011, the Tribunal (differently constituted) examined country information regarding the treatment of Ahmadis in Pakistan (See *1011014* [2011] RRTA 250 (4 April 2011)). No purpose would be served by setting out that discussion in full in this decision beyond recording that the Tribunal in that decision accepted that blasphemy laws in Pakistan had been used to harass Ahmadis and this was condoned by the government. More generally, the Tribunal considered that on the basis of that country information Ahmadis were at risk of persecution on the ground of their religion. The Tribunal found that this country information indicated that extremist organisations such as the Nabuwat could operate with impunity in persecuting Ahmadis and the police and State organs did nothing to protect them.
61. Since that decision was published, the Tribunal has had the benefit of considering *Eligibility guidelines for assessing the international protection needs of members of religious minorities from Pakistan* issued by the United Nations High Commissioner for Refugees (“UNHCR”) in May 2012. In these guidelines, UNHCR assessed available country information and concluded that Ahmadis were subject to the most severe legal restrictions and officially sanctioned discrimination of all religious minorities in Pakistan, in particular, being the subject of harassment and harm through blasphemy laws (see page 21). UNHCR recorded an increase in violence against Ahmadis with little protection provided by state authorities (see page 23) and concluded that Ahmadis were likely to be in need of international refugee protection on account of their religion depending on the individual circumstances of the case (see page 26).

FINDINGS AND REASONS

62. The Tribunal finds that the applicant is a national of Pakistan. The Tribunal has sighted a copy of pages from his Pakistan passport.
63. The Tribunal is satisfied on the evidence before it that the applicant does not have a legally enforceable right to enter and reside in any other country apart from Pakistan. In particular, the Tribunal is satisfied that the applicant does not have a legally enforceable right to enter and reside in [Country 1]. His visa as a student allowed him to remain there until November 2009 and documents produced regarding the court proceedings indicate to the Tribunal that the applicant was only being allowed to remain in [Country 1] while those court proceedings were on foot.
64. However, the Tribunal is willing to accept the applicant's evidence that he could well have been at risk of being deported from [Country 1] and now that he has left [Country 1] there is no certainty that he could return there to pursue the court proceedings which may well have been dismissed if he left the country.
65. The Tribunal has not made further enquiries about the status of the court proceedings in [Country 1]. The Tribunal accepts that the applicant is an Ahmadi in the light of the letter from the Australian Association, the letter from the [Country 1] Association and his own evidence.
66. The Tribunal accepts the applicant's account of events he claims occurred when he lived in Pakistan before he went to [Country 1] in 2006 and the events he claimed occurred while he returned to Pakistan in 2008. The Tribunal notes that those claims were broadly similar to the claims he advanced to [Country 1] authorities in support of his refugee claims there.
67. The Tribunal was concerned (like the delegate) that the applicant sought asylum in [Country 1] in November 2008 and not before that time. However, the Tribunal cannot be satisfied that the applicant's account of being Ahmadi and the events he claims occurred in Pakistan are false just because of any delay in making a refugee claim. The Tribunal accepts those claims as credible.
68. The Tribunal accepts the applicant left [Country 1] and came to Australia for the reasons he has given. The Tribunal has no evidence that there is some other reason that the applicant has left [Country 1] and the benefit of any doubt as to his credibility regarding this or any other claim he has made in support of his protection application, in the circumstances, is afforded to him.
69. The Tribunal finds that there is a real chance that if the applicant returns to Pakistan he will suffer serious harm which will be, if he returns to Lahore, the threats and harassment he received when he was in Pakistan. The harm he fears involves a threat to his life or liberty or significant physical harassment or ill treatment. Such harm will involve systematic and discriminatory conduct for the essential and significant reason of his Ahmadi religion.
70. The Tribunal considers that the applicant faces a real chance of suffering persecution based on his religion anywhere in Pakistan in view of the country information about the treatment of Ahmadis and in view of the manner in which the applicant has practised his religion in the past which has caused him to come to the attention of people from certain groups which harm

or oppose Ahmadis like the Nabuwat which is not restricted to any particular location in Pakistan.

CONCLUSIONS

71. 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).

DECISION

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