

1203665 [2012] RRTA 1088 (7 December 2012)

DECISION RECORD

RRT CASE NUMBER: 1203665

DIAC REFERENCE(S): CLF2011/11634 CLF2011/202765

COUNTRY OF REFERENCE: Pakistan

TRIBUNAL MEMBER: Sean Baker

DATE: 7 December 2012

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act; and
- (ii) that the second named applicant satisfies s.36(2)(b)(i) of the Migration Act, on the basis of membership of the same family unit as the first named applicant.

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 applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants who claim to be citizens of Pakistan, applied to the Department of Immigration for the visas on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] November 2011.
3. The delegate refused to grant the visas [in] March 2012, and the applicants applied to the Tribunal for review of that decision.

RELEVANT LAW

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

Refugee criterion

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

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

7. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

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

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

Complementary protection criterion

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

Member of the same family unit

19. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include .

CLAIMS AND EVIDENCE

20. The Tribunal has before it the Department's file relating to the applicants. 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.
21. [In] January 2011, applicant 1 applied for a student visa. [In] April 2011, the applicant was granted this visa. This visa expired [in] September 2012. Applicant 1 arrived in Australia [in] April 2011. He has not left Australia since this date. [In] June 2011, applicant 2 applied for a visa to join applicant 1 as a subsequent entrant. This was granted [in]

September 2011. Applicant 2 arrived in Australia [in] October 2011. She has not left Australia since this date.

Visa application

22. The applicants applied for the visas [in] November 2011. [In] January 2012 the first applicant submitted a statement. This detailed his claims that:
 - he left Pakistan as his life was in danger from the Taliban and that they had previously killed his father [in] April 2007. The applicant fears that if he goes back to Pakistan he will be killed or prosecuted by the Taliban;
 - he claims the Taliban have previously mistreated his family;
 - he claims that insurgents in Pakistan who are in hiding and are active in targeted attacks may harm/mistreat him if he goes back to Pakistan;
 - he claims that since college he has had a passion for politics. He joined the Awami National Party (ANP) when he started his bachelors degree;
 - he claims the authorities in Pakistan are corrupt. He claims that they have been targeted and many of the security forces have been killed since 9/11. The applicant claims that according to many people the authorities have supported the Taliban;
23. Applicant one also submitted certified copies of his current and previous Pakistani passports, details of his schooling, indicating he was awarded a BA and MA from the University of Malakand, and an experience certificate that he served as a teacher at a [High School], Swat, [from] January 2006 [to] November 2007.
24. Applicant two did not submit claims of her own. She submitted certified copies of her current Pakistani passport and details of her schooling.
25. [In] January 2012 the applicants provided a detailed statement of claims. In this, applicant one claims:
 - In January 2006, he worked as a teacher in a [High School] in Swat;
 - In Mid 2006, Mawalana Fazal Ullah started his illegal campaign. He was provided with big donations to build a mosque in his village Imam Dherai. According to the applicant, Mawalana Fazal Ullah was against female education and security forces; was against women who work and people who work for government and the ANP opposed him;
 - In March 2007, when the applicant was returning home from school, he was approached by a group of Armed Taliban who asked him why he supported the ANP and also for him to join them and to stop working for the ANP and to stop teaching at the private school. The applicant replied he wished to stay with the ANP and continue his career. The applicant told his father about this;
 - The applicant's father went to the police station the next day to report the incidence but was told by the police not to make any official reports against the Taliban as they might harm him and his family;

- The applicant's father was upset about this and contacted high ranking officials and he was told they would contact the local police station to investigate the matter; Two days later [in] April 2007 at 10pm, the Taliban knocked on his door. They started beating his father. The applicant was kicked, punched and hit with a gun butt. The applicant's father was shot and killed;
- The applicant applied for a visa to visit Canada in May 2007 to visit his sister but was refused;
- The applicant continued teaching till November 2007. The applicant continued his political affiliation with the ANP. During this time, the applicant lived with [Mr A];
- The applicant claims the Taliban was sending letters to people who work for ANP and other social organisations;
- They warned all females to stop their education or be killed;
- They warned private schools to stop female education and to introduce traditional clothes over western uniform;
- In November 2007, the applicant claims he received a letter from the Taliban to stop teaching at [the High] School or get ready to be killed. The applicant resigned from his job the next day;
- In June 2008, the Pakistani army started a second operation against the insurgents. Many Taliban attacked ANP members and leaders;
- [In] August 2008, the applicant, [Mr A] and a few others were playing volleyball and were asked by the army if they knew where two Taliban commanders lived. They showed them the address and the army fired at the Taliban commanders. One of the commanders was killed;
- [In] August 2008, [Mr A]'s house was attacked, killing him, his elder brother and father. The applicant fled to his sister's house in [Village 2]; In April 2009, Pakistani army started another operation against Taliban and they asked everyone in Swat to leave and go to other cities. The applicant's family went to Islamabad. The applicant was registered as an Internally Displaced Person (IDP) and received support and food from the UNHCR. They were there until August 2009 when the Pakistani army claimed victory over the Taliban and asked everyone to go back to their home in Swat;
- When the applicant did this, he noticed his house had been completely destroyed. The applicant moved to [Town 1] [Township] (about 15km away from the village);
- The applicant claimed his life was safe again until leader of ANP Dr Shamsheer Ali was assassinated. The applicant joined a defence committee at the request of the Pakistani army to tackle the Taliban. The applicant used to do a night watch to stop any Talib members entering the community;
- [In]January 2011, the applicant applied for a student visa for Australia;

- In February 2011, the applicant received an anonymous phone call from the Taliban demanding 1.5 million rupees. The applicant was told that he had to pay this within a week or be killed. The applicant stated he did not have the money; The applicant called his [friend] who advised him to go to Karachi where he was. The applicant went to Karachi [in] March 2011; [In] March 2011, someone attacked [his friend], killing him on the spot. The applicant went back to his sister's house for a few days however he did not stay at one place and frequently changed addresses;
- The applicant's visa was granted [in] April 2011 and the applicant took the earliest available flight [in] April 2011;
- The applicant also claims his wife was unable to continue studying. The applicant's wife started teaching in [the High] School Swat however the school was approached by the Taliban threatening the females to stop working there as women should be looking after their families at home. His wife resigned from her job in June 2011;

26. Also included was:

- a print out of a blog in memory of [Mr A];
- an article from Daily Times, Pakistan reporting that three people including a former local leader of the ANP were injured in a hand grenade attack in [Town 1] Township [in] November , 2011;
- a certificate of death for applicant one's father, indicating that his father had eight bullets to his body and later died(an original of this letter is found later on the file – Df.161);
- a letter from the, [MPA], of the ANP stating that applicant one was known to the MPA since 2003, was introduced to the MPA by applicant one's father, and that he and his father were strong supporters of the ANP, that applicant one raised his voice for student rights, and that applicant one's family were targeted by extremists in recent years like may ANP members, and that applicant one's father was killed by Taliban in April 2007 (an original of this letter is found later on the file – Df. 158);
- a letter from the, [President] of the Social Welfare Resident Society, [Town 1] township, stating that applicant one shifted to [Town 1] township due to the destruction of his home and at [Town 1] township applicant one worked as a member of the Aman committee after the Pakistani army claimed victory over the Taliban. It states that applicant one did many night watches and gave whatever support he could provide to the committee (an original of this letter is found later on the file – Df. 159);
- ANP and PSF membership cards;
- A survey token from the UNHCR for the destruction of applicant one's family home.

27. At the interview with the delegate the applicants submitted:

- An article from the Pakistan Tribune, [published] January 2012, that the ANP District West [President], was killed at S.I.T.E, Karachi. The killer had not been identified; a marriage agreement and affidavit relating to the marriage of the applicants [in] June 2010; before and after photographs claimed to be of applicant one's family home after

it was destroyed by the Taliban; a letter from the United Nations World Food Programme stating that applicant one was given food items and then had marked replaced.

28. The applicants were interviewed in relation to their claims and gave answers consistent with the above.
29. [In] March 2012 the applications were refused.
30. Also on file [dated] July 2012 is notification from the applicants' migration agents that applicant two gave birth their first [child in] June 2012, with a birth certificate attached.

Review application

31. [In] March 2012 the applicants applied for review of the refusal. With the application was a copy of the delegate's decision.
32. [In] June 2012 the applicants' agent made a submission. This reiterates the claims made by applicant one above and argues that if he was returned to Pakistan he would suffer persecution including assault, kidnapping, torture and/or death at the hands of the Taliban and related Sunni extremists, on account of either cumulatively or separately:
 - His actual and imputed political opinion against the Taliban and Sunni extremist sympathizers on account of cumulatively or separately;
 - His membership of and active participation in the ANP;
 - His membership of and active participation in the [Town 1] Aman Committee (Peace Committee);
 - His political belief in a democratic society, including education for women;
 - His tertiary secular education with a strong political focus, and his employment as a teacher at a mixed gender school; and
 - His membership of a particular social group being a member of his father's family that worked for the ANP and was against the Taliban.
33. The submission included country information.
34. Attached to the submission was a statutory declaration of the first applicant, made [in] June 2012. In this he primarily addresses the concerns expressed in the delegate's decision and which led to the refusal of his claims.
35. Also attached was a report from Zama, Swat English news reporting on the killing of [a member] of the Kabal Peace committee, whilst he was in Banaras, Karachi. The article details that a number of other peace committee members have been killed in Banaras, and a report from Central Asia Online that Karachi targeted killings are linked to militant groups, detailing that dozens of members of peace committees from different parts of the tribal areas have been killed in the past.

The hearing

36. The applicants appeared before the Tribunal [in] June 2012 to give evidence and present arguments. The applicants were represented in relation to the review by their registered migration agent.
37. The applicants confirmed their personal details, and that they were citizens of Pakistan and no other country, nor did they have permission to live in another country. The applicants confirmed that they were born in Swat, Deowali.
38. I asked the first applicant if he had travelled to Canada. He said no, that his sister was living there but that he had applied for a visa in 2007 but this had been refused.
39. Applicant one then spoke about his family. He said that he had four sisters and one brother, his father had died, and his mother is a widow. He said that one sister and one brother live in Pakistan, his elder sister is married and is living in [Swat], and his elder brother is living in township Swat with his mother. Applicant one said that he had three sisters who lived outside Pakistan, one in the USA, one in the UK, and one in Canada. They had all married husbands from these countries.
40. The applicants said that they were married in [Town 1] township [in] June 2010. They confirmed that they had a daughter, born [in] in Australia.
41. Applicant one said that he had completed his bachelor's degree in political science and law, and after that had started teaching for 2 years, then when the Taliban threatened him, he stopped teaching and did his Master's degree in politics, which he completed in 2010. I asked when he had started teaching and he said he started in January 2006 and finished in November 2007. He said that he had primarily taught for the experience, and that there is little money in teaching in Pakistan.
42. Applicant one said that he had come to Australia to study and his mother had been supporting him. He said that his mother now could not afford to support them and they were receiving support from the red cross. He said that he was about to start working part time.
43. Applicant one gave evidence consistent with his protection claims and his interview with the delegate in relation to his involvement with the ANP and PSF.
44. Applicant one described the events in 2007 when he was approached by Taliban, his father's complaint to the police, and his father then being killed by the Taliban. He said that they had not gone anywhere after his father was killed as they had nowhere to go. They had applied for visas to Canada but been refused.
45. He said that in November 2007 the Taliban had sent a letter telling him to stop teaching, and he had complied, resigning the next day. I asked the applicant what he had done after he had resigned. He said that he just stayed at home as there were many Taliban, and he did not attend ANP meetings for this reason but his friend [Mr A] would tell him what was happening. Applicant one said that he did what the Taliban told him to do, he couldn't do anything, his mother told him he could not do anything, and to do what they told him.

46. Applicant one then recounted the events of August 2008, and the death of [Mr A]. He said that when he was told of this he fled to his sister's house in [Village 2], and when he was there the Taliban came looking for him at his home. Applicant one said that whilst he was at [Village 2] he saw a Taliban and so he then went to Mingora with his friend, at that time his Masters exams were near, which he attended but not regularly, until September he was in Mingora and then after that the army had cleared out the villages and his brother told him it was safe to return home so he did.
47. Applicant one then talked about what had happened in 2009, when he had returned home, Talibanisation was still growing, and there were targeted killings against ANP members. The ANP demand operations from the army, and the army told all Swat people to leave their villages, so his family went to Islamabad. He was there with his mother and brother, they were IDPs there and UNHCR were giving them food assistance. They were in tents, they had little to eat, there was another office who registered the people of Swat. He said that his family were there from May to August 2009, and after that the army told people that the operation in Swat had concluded and they had cleared the villages. His family returned home and found that their house had been destroyed. He and his family were very upset and an uncle said that they could live with them, so his family shifted to a township in the [Town 1] area. They had some financial support from UNHCR. He said that in Islamabad he had not been threatened by the Taliban.
48. I then asked applicant one about his involvement with the [Town 1] Aman committee. He said that this was a local committee made up of local Pashtun people, which had been motivated by the bombing of the home of an ANP MPA. Security was left to the Aman committees after this as the army withdrew. Applicant one serve on the committee and did night duty.
49. The applicant said that in 2010 he and the second applicant were married, they were still living in [Town 1] township. He said that he had seen and heard from people that there are still targeted killings in the night time or daytime. He said that during this time he was still doing his Aman committee duties. He said that in 2011 he applied for his student visa. During this time the Taliban were still threatening Aman Committee members and ANP members.
50. Applicant one then talked about the phone call he claimed to have received at the end of February 2011. He said that someone called him on his phone and told him that they were his friend from that time and 'we know that you are an Aman committee member and know you are doing better and leaving Pakistan and you have to give us 1.5 million rupees within a week'. The applicant said that after this he had fled to a friend's place in Karachi, then to his sister's in [Village 2] and then to some other relatives, and he had then been contacted and told that he had his visa. I asked him if he had gone for a medical check and he said he had in Islamabad. He said that he was granted his student visa [in] April 2011.
51. The applicant confirmed his statements at the interview with the delegate that he kept in contact with friends who were members of the ANP during his time in Australia. He said that one of his friends in the ANP had also fled and gone to Qatar.
52. I then spoke to applicant two. She said that she was teaching at [school], Swat in 2010. She stopped in June 2011 because the situation was not safe for women, the school

received a letter telling women to stop teaching in the school. She said there were many letters and a few times they called the school, so she decided after this particular letter that the security situation was bad and decided to stop teaching.

53. I asked the applicants if the authorities could protect them. they both said they could not, as they belonged to an ordinary family, they were not from an MPA family who they would give protection to.
54. I asked the applicants if they were able to relocate to another part of Pakistan. Applicant one said that there was no family support elsewhere as his family was still there in Swat. I put to them that they may be able to relocate to Lahore or Islamabad/Rawalpindi as they were educated and could teach there, and there was a large Pashtun population. Applicant one said that it would be difficult with his family. I put to them that there was no country information that ANP or Aman Committee members were targeted in these places, and little evidence that local Taliban pass on information to other Taliban.
55. The representative then made a submission that the fact the applicants came from Swat may make them more vulnerable in relocating. She said that country information indicated that people with the profile of applicant one have continued to be targeted in Swat valley. She said that some country information indicated that the Taliban are well organised throughout Pakistan. She said that applicant one would operate against the Taliban's interests anywhere in Pakistan, as he is educated and a teacher, and aspires to a political position.
56. [In] July 2012 the Tribunal received a further submission from the applicants' representative and articles from applicants.

FINDINGS AND REASONS

57. On the basis of the certified copies of their passports I accept that the applicants are nationals of Pakistan. On the basis of their testimony at hearing which I accept, I find that the applicants do not have a right to enter and reside in a third country.
58. I found the evidence of both applicants to be credible and reliable.
59. On the basis of this evidence, which has remained consistent through his protection visa claims, his interview with the delegate and at hearing, as well as the documentary evidence submitted by the applicants, I accept that applicant one:
 - Had a degree of involvement with the ANP and PSF during his time in Swat;
 - That he was approached by people he described as Taliban, who sought to make him join them, when he refused he was warned.
 - His father complained about this to the police and was told there was nothing they could do. His father then complained to another branch of police. Some days after this some people who the applicant claimed to be Taliban came to their door, there was an altercation and applicant one's father was shot and killed by these men.
 - In November 2007 he received a letter from the Taliban to stop teaching at [his School] or be killed. The applicant resigned from his job.

- In August 2008 with his friend [Mr A] he told an army group where to find two Taliban commanders in the village, who were killed. After this [Mr A] and members of his family were killed in reprisal.
 - From April to August 2009 he and his family were UNHCR registered internally displaced persons, living in a refugee camp in Islamabad, receiving support and food from the UNHCR.
 - His family home was destroyed and he had to move to [Town 1] Township. Here he joined the Aman committee, a form of militia, and did night watches.
60. On the basis of her evidence, as well as supporting documentation, I accept that applicant two:
- Taught at [the same school] in 2010 and stopped teaching in June 2011 when the Taliban sent threat letters to the school telling women to stop teaching.
61. In addition, the country information paints a grim picture of the current security situation in Swat. Despite the military operations of 2009, the International Crisis Group reported in October 2012 that there was a reported ‘superficial sense of security’ and also that the military relied on *jirgas* and peace committees to suppress terrorist activity.¹ Although military authorities now control the Swat Valley, terrorist attacks against Pakistani military operations continue to occur in the area. In October 2012, *Dawn Newspaper* reported that the security situation in Swat was deteriorating, with authorities arresting nearly 100 militants and seizing weapons and explosives in a bid to curb attempts by militants to reactivate militant cells in the Swat Valley.²
62. On this basis I have considered applicant one’s risk of harm if he returns to Swat. He has been politically active in the past, in the ANP and the PSF, however this has been at a very low level. He and his family have come to the attention of elements of the Taliban, possibly the TNSM, in Swat when they sought to have him join them, when they killed his father and fought with him, when they instructed him to stop teaching (although I suspect this was a general exhortation, not directed at him specifically, but at certain teachers more generally), and when he identified the homes of two local Taliban commanders for the army. He also served on the Aman committee. Cumulatively, I consider that this means that applicant one would be targeted if he returned to Swat. He would return to [Town 1] township, as he has been displaced from his family home, and would probably resume his work with the Aman committee. He has only worked as a teacher, a profession Taliban groups view with hostility. He has previously been politically active, although at a low level, but may wish to be active again. He has been identified at several times by members of Taliban groups. For all of these reasons I consider that there is a real chance he would be harmed on return – it is not remote or fanciful to consider that he would be identified and targeted for being a member of an Aman committee, a teacher, politically active, and being known for having opposed the Taliban in the past, or having been the family member of someone

¹ International Crisis Group 2012, *Pakistan: No End To Humanitarian Crises* Crisis Group Asia Report N°237, 9 October, Pp.17, <http://www.crisisgroup.org/~media/Files/asia/south-asia/pakistan/237-pakistan-no-end-to-humanitarian-crisis.pdf> - accessed 7 December 2012.

² ‘Security Forces Detain Five in Nowshera Over Attack on Malala’, 2012, *Dawn Newspaper*, 12 October, <http://dawn.com/2012/10/13/3000229/> - accessed 7 December 2012.

who had opposed the Taliban in the past, which I consider would impute him with a political opinion contrary to the aims of the various Taliban groups.

63. What applicant one fears is that he would be killed or seriously injured by the Taliban groupings in Swat. I find that this constitutes serious harm for the purposes of s.91R(2) and s.91R(1)(b). I find that this would be for the essential and significant reason of his imputed political opinion, as required by s.91R(1)(a), and that the persecution would involve systematic and discriminatory conduct, in that it would not be random but targeted towards the applicant and organised in seeking him out and doing harm.
64. The applicant fears harm from the Taliban or other armed opposition groups, non-state agents. Harm from non-state agents may amount to persecution for a Convention reason if the motivation of the non-State actors is Convention-related, and the State is unable to provide adequate protection against the harm. Where the State is complicit in the sense that it encourages, condones or tolerates the harm, the attitude of the State is consistent with the possibility that there is persecution: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [23]. Where the State is willing but not able to provide protection, the fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify an unwillingness to seek their protection: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [28]. In such cases, a person will not be a victim of persecution, unless it is concluded that the government would not or could not provide citizens in the position of the person with the level of protection which they were entitled to expect according to international standards: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [29].
65. On the basis of the independent country information I find that the Pakistani state may not be unwilling, but is unable to provide protection to the applicant in Swat. I further find that the state cannot provide a level of protection to the applicant which he is entitled to expect according to international standards.
66. On the basis of the information before me, I find that if applicant one returned to Swat, Pakistan, there is a real chance that he would be subjected to serious harm by Taliban groups, now or in the reasonably foreseeable future. He has a well-founded fear of persecution if he returned to Swat, Pakistan, now or in the reasonably foreseeable future.
67. Given this findings, I have not considered in full applicant two's claims, as she has substantially put forward claims as a member of applicant one's family unit.
68. I have considered whether the applicants can relocate to another part of Pakistan. Country information indicates that the TNSM are only in a loose confederation with the TTP and other terrorist groups, there is no credible information that they share information or hit lists of low level targets with other Taliban groupings, and there is a significant Pashtun population in Lahore or Islamabad / Rawalpindi. I do not accept that applicant one or two would be targeted by the TNSM, the TTP or any other militant group in these places. There is no country information that low-level ANP members or Aman committee members or Pashtuns generally are targeted in these cities. I therefore find that the feared persecution of harm is localised.

69. However, relocation requires a consideration of whether it would be reasonable in all of the circumstances. The applicants have limited work experience. They now have a young child, and no family outside Swat and the surrounds. The family structure is incredibly important for Pakistanis and for Pashtun in particular. If the applicants were to relocate to one of these urban conglomerations they would have few support structures, and only the possibility of finding work, and a young child to care for. In all of these circumstances, I find that relocation would not be reasonable.
70. I therefore find that applicant one has a well-founded fear of persecution were he to return to Pakistan, now or in the reasonably foreseeable future. I find that applicant two, being his wife, is a member of his family unit.

CONCLUSIONS

71. The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.
72. The Tribunal is not satisfied that the other applicant is a person to whom Australia has protection obligations. Therefore she does not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. However, the Tribunal is satisfied that applicant two is the wife of applicant one and is a member of the same family unit as the first named applicant for the purposes of s.36(2)(b)(i)). As such, the fate of her application depends on the outcome of the first named applicant's application. As the first named applicant satisfies the criterion set out in s.36(2)(a), it follows that the other applicant will be entitled to a protection visa provided she meets the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa.

DECISION

73. The Tribunal remits the matter for reconsideration with the following directions:
- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act; and
 - (ii) that the second named applicant satisfies s.36(2)(b)(i) of the Migration Act, on the basis of membership of the same family unit as the first named applicant.