

071781876 [2008] RRTA 9 (11 January 2008)

DECISION RECORD

RRT CASE NUMBER: 071781876

DIAC REFERENCE: CLF2007/96407

COUNTRY OF REFERENCE: Pakistan

TRIBUNAL MEMBER: Ms Philippa McIntosh

DATE DECISION SIGNED: 11 January 2008

PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant who claims to be a citizen of Pakistan, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter.

The delegate refused the visa application on the basis that the applicant was not a person to whom Australia had protection obligations under the Refugees Convention.

The applicant applied to the Tribunal for review of the delegate's decision.

The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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.

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

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.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

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.

Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

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.

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

CLAIMS AND EVIDENCE

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

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Pashto/Pushtu and English languages.

The applicant was represented in relation to the review by his registered migration agent.

Evidence submitted to the Department

The applicant made written submissions to the Department. He was not represented and was not offered an interview by the Department in relation to his refugee-related claims.

He was born in the 1970's and is now aged in his 30's. His wife (who was born in the 1980's) remained in Pakistan. He married in the mid 2000's in Pakistan. He stated that he was in telephone contact with his wife. His parents were deceased and he had a number of siblings in Pakistan.

He had worked in Pakistan for a number of years. His Pakistani passport and other documentation were in the possession of the Department. He gave his place of residence as a single address in a particular village. He stated that he had arrived in Australia in the late 2000's.

In writing he claimed to have joined the student wing of the "Awami National Party" - ANP, when he was a student himself (in the 1980's). He said that the party had been formed before the creation of Pakistan. He was a very active member. As a member of the student wing in the time of Bhutto, the party was banned and the leader Khan Abdul Wali Khan and other important leaders were jailed and prosecuted. In those days he was very young. His family members were arrested. Because of his involvement in the national ANP he was harassed by the Pakistani police and was arrested. After he made speeches against the government an arrest warrant was issued for him and he went into hiding to avoid being jailed again. He left Pakistan in order to seek protection in Australia and to save his life from the Pakistani regime.

He stated that he would provide proof of his membership of the ANP, original supporting documents and "reference letters" and a First Information Report. However he submitted no documentary evidence to the Department of his membership of the ANP or his claims to have been wanted by the Pakistan authorities for political reasons.

On the form "Personal particulars for character assessment", he provided a travel history in which he stated that he had visited Australia "[many] times" in the course of his work. He

also stated that he visited a third country in the early 2000's for a period of months for a religious event.

On that form he also stated that throughout most of the 1990's he had been farming on his own farm in a village in Pakistan, he had then been unemployed for a few years, and then held further employment before coming to Australia.

Submission to the Tribunal

A submission was received from his adviser, which stated that the applicant had a well-founded fear of persecution if forced to return to Pakistan on the basis of his political opinion.

The applicant claimed that the following factors and events caused him to flee Pakistan:

The applicant was born in the 1970's in Pakistan. He was the youngest in a family of many children, and these siblings were all living in Pakistan. His parents had passed away some years ago. He married in the mid 2000's. His wife was expecting their first child.

It was claimed that, as a student aged in his late teens, the applicant joined the Pakhtun Student Federation, which was the student wing of the Awami National Party (ANP), and was an active member. He was a leader of the PSF at his high school. He distributed leaflets about the ANP and tried to recruit other students to the ANP.

After leaving high school he stopped going to meetings of the Pakhtun Student Federation and began attending meetings of the ANP (main party).

In the mid 1990's, the applicant became the leader of the ANP in his village. He held this position until the late 1990's, when he began to have to travel more for work. He was a labourer and was often required to travel to a third country. He travelled to the third country on three occasions for work and spent a period of months there on each occasion.

As leader of the ANP in his village the applicant organized meetings, which were held on average three or four times per year. He often spoke at them. A large number of people attended. He also helped organise demonstrations against the government, and other important events.

After he stepped down as the leader of the ANP in his village, he remained a member of the ANP and attended meetings whenever he was in Pakistan.

In the early 2000's the applicant joined an overseas company that had a branch in Pakistan. The company exported goods. The number of months he worked overseas varied. He worked sometimes for most of the year, and was then given leave for the remaining months, at which time he would return to his home.

On returning to Pakistan he continued to be active in the ANP. Because of his involvement with it he was harassed by the police and arrested.

The applicant's troubles with the authorities began in the mid 2000's when he began attending demonstrations in his area. A number of parties were demonstrating against General Musharraf's government. The ANP was one such party and was the most vocal in his area.

The first demonstration the applicant attended was in the mid 2000's. It took place in the local village city square, close to a high school. There were hundreds of demonstrators. He gave a ten-minute speech and spoke about the rights of the Pashtun people, criticizing the government's policies. Police used force and tear gas against the demonstrators. They arrested some ANP members but the applicant was able to escape and fled to Karachi for a few weeks. He then returned home and went into hiding.

After this demonstration a number of police went to his home in his village searching for him. He was not there so they asked to speak to his eldest brother. They told his brother to tell the applicant to stop his activities with the ANP and stop attending demonstrations.

The second demonstration the applicant attended was a few months later in the city square of another town. There were again a few hundred demonstrators. The applicant did not give a speech at this demonstration. The police arrested about six ANP people including the applicant. He was taken to a police station where he spent one night. The next day he was released and warned that if he attended another demonstration, or continued to engage in further political activities, he would be gaoled.

The third demonstration was in another town a short time later. He had returned from working overseas the previous month. It was a large demonstration, attended by many hundreds of people. The police again used force, beating people and using tear gas. The applicant gave a speech. He was not arrested but after the demonstration the police came looking for him. He went into hiding for a few weeks and did not return home. Every second day or so the police came and asked his eldest brother, who always represented the family, where he was. They also sometimes called his wife, demanding to know where he was. They issued the first arrest warrant for him at this time. After these few weeks, the applicant left for Karachi where he a few further weeks. He then went back to work overseas.

The applicant returned from working overseas after many months. During the period when he returned to Pakistan, the police came to look for him on two occasions. They asked his brother where he was but he said he did not know. When he returned to his local district he lived in different places and with different relatives, sometimes with his wife, or cousins or brothers. He was in hiding, so moved often.

The fourth demonstration he attended was a short time after he returned to Pakistan. Many hundreds of people were present. The applicant did not speak at this demonstration. The police beat people. Three ANP people were arrested. The applicant escaped and went into hiding in another town. He stayed at the home of a relative and at a hotel.

The next demonstration he attended was a month later. Many hundreds of people joined this demonstration. The police arrived again, and used force and tear gas. No one was arrested at this demonstration. After it the applicant again went into hiding.

The last demonstration he attended before he left Pakistan was another month later. A few hundred people attended this demonstration. The police used force and tear gas. The applicant was injured when he was struck by police wielding sticks. There was still a mark where he was struck. Three ANP members were arrested. The applicant was not arrested.

After this demonstration and his injury, the applicant decided he had to leave Pakistan. He was constantly afraid and his family were under pressure from the government on account of him.

When the police came looking for the applicant after the sixth demonstration, they told his brother that there had been a number of arrest warrants issued against him and that they wanted to find him. The first arrest warrant was after the third demonstration the applicant attended, in the mid 2000's. The last arrest warrant the applicant knows of was issued in a few years later. He was not certain of the dates when the other three were issued. The applicant claimed to have a copy of the last arrest warrant.

He left Pakistan shortly after the last demonstration through his employment. He arrived in Australia as an unauthorized arrival and lodged an application for a protection visa.

Since his escape to Australia the police had been coming to question his family, his elder brother and his wife about his whereabouts. However for the past few months the applicant had been unable to contact his elder brother or his wife. He believed they had been displaced on account of the fighting between the Taliban and government in the North-West Frontier Province, and may have had to move to the mountains, so were now out of reach. He was calling home around twice each month until some months ago, which was the last time he was able to make contact with any of his family in Pakistan.

The Tribunal hearing

The applicant told the Tribunal that he had no difficulty understanding the Pashto-speaking interpreter provided to him and no objection to using this particular interpreter. The applicant's migration agent was present throughout the hearing.

The applicant submitted his original passport, an original Pakistan identity card issued in the mid 2000's, a laminated membership card of the ANP, and four pages of original documents, as well as copies of them which he said had been faxed to him by his brother in Pakistan. The documents indicated that they had been faxed on a particular date. The Tribunal understood that RACS would be providing translations of these items shortly. The four pages purported to be a) an affidavit from his brother expressing concern for his safety and saying that government agencies were after him because of his involvement in the ANP in their district (this document was in English); b) a letter from the local leader of the ANP (on letterhead, he claimed this person was the ANP secretary in the local area); c) a letter from an advocate of the "High Court and the Federal Shariat Court of Pakistan" in Islamabad, undated, (typed, on green paper, with no letterhead); and d) a police First Information Report (FIR) (handwritten, no letterhead, on green paper, with wet stamp below signature).

The applicant told the Tribunal that he had left his passport and other documentation pertaining to his work with his employer. Such documents were, he understood, handed over by his employer to the Department if a person absconded. He claimed that his passport had been given to the Department for this reason. He did not know the whereabouts of his other documents. As to why there was a record of his being interviewed by Departmental officers in which they wrote that they had sighted particular documents, he said that he had shown them certain other documents, which did not show his travel history. It was currently at the place where he was interviewed.

Of his travel history recorded in his passport, he said that in relation to his work some countries recorded the entry in the passport and some did not.

Of his family, he said that his siblings were all living in his village when he last had contact with them. His brothers were employed in various industries. His most recent contact had

been with his wife and brother, with whom he had spoken some months ago. He confirmed that his wife and this brother may have been displaced since then because of fighting between the Taliban and government forces in his province. Throughout the hearing he expressed his concern for their safety, particularly that of his wife, who was due to have their first child. He said that to his knowledge government forces were in control in his province at present.

He said that he had no relatives in any other part of Pakistan. He had some cousins who lived about 20 km away from his village, to whom he was not close, and some friends in Karachi.

As to why he had not been in touch with his other siblings in the village in recent months to find out about his wife's situation, he said that a friend in Karachi had told him that, because of the conflict, by then no one was living in the village.

He stated that he had no fear of anyone in Pakistan apart from the current Musharaf government.

He stated that no one apart from himself in his family had played any role in the ANP.

As to when he had been in Pakistan since the mid 2000's onwards, he said that in the particular year stated he had been overseas with his work for some months, then had married in Pakistan and remained there for a further period of months before returning overseas. The following year he had spent the majority of time overseas, and a period of months in Pakistan. He had then been overseas for most of the next year. He was then in Pakistan for many months before leaving there for Australia.

As to his whereabouts in Pakistan from the mid 2000's, he said that he had been in Karachi then had stayed in his village, then had returned to Karachi sometime later. His wife had remained in the village and did not come to Karachi. As to when she had fallen pregnant, he said that it was not appropriate for him to know this as a man and he had only found out after his arrival in Australia. I suggested to him that the due date of the baby, she must have conceived around a certain period, so they must have been together at that time. He indicated that he was unsure about all this.

He stated that he had spent about a week in the mountains near his village, and a further period of nights in another village, also around this time.

Of his ethnic group, he described himself as Pashtun, and named his tribe

I noted his claim that he had had various problems in Pakistan because of his membership of the ANP. I asked him how important a figure he was viewed as by the party. He responded that he was sort of leading a group, preparing meetings, doing a lot of organising for "the big leaders". He was active not just in his village, but in many other nearby towns. He was regarded as an active person, and was always called on by the leaders. I reminded him that he was away for much of the time and asked him who played this role when he was away. He said that other leaders replaced him.

I asked him where the party's head office was, and he said it was in Charsadar, about 30 km from Peshawar. I asked if there was an office in Peshawar itself, and he confirmed that there was. He stated that he had visited the latter office a number of times.

He confirmed that he had been the ANP leader in his village for a period in the 1990's. As to why he had stepped down, he said that it was because he had gone to a third country, and also

because his father had advised him to stay away from these parties. As to whether he had ever held any other elected position in the ANP since then, he said he had not. He had attended meetings after that in a variety of towns. As to whether he played any particular role, he said that he chaired the meetings and gave speeches. The most recent occasion on which he had done this was in the mid 2000's.

I noted that shortly before the hearing he had submitted copies of a letter from his brother, a letter from a lawyer in Pakistan, his ANP membership card, and various other items. As to why he had not submitted them to the Department, he said he had received them after the Department had refused his application. He also said that he had not given them to the Department because the Department did not ask for them. As to the source of the documents, he said that his brother had posted his Pakistan the identity card and his ANP membership card to him, and had faxed the other documents to him. As to how he had got the originals of the latter documents, he said that a student had brought them by hand from Pakistan, after the Department had refused his application.

He confirmed that the lawyer who had written the above letter was hired by his brother after the applicant came to Australia. As to whether he or his family had known the lawyer previously, for example whether the lawyer was a family friend, he said that he was not a family friend. As to why, therefore, a lawyer who had been approached solely in relation to arrest warrants had not referred to them in his letter, The applicant indicated that he did not know and have not been there. I told him I could infer that no warrants had been issued in relation to him. He responded that lawyers in Pakistan did what they liked. As to how the lawyer might have known, as was written in the letter, that government agencies were raiding the applicant's hideout and being helped by informers, The applicant said that maybe his brother had told the lawyer the story.

I asked him if he knew what laws it was alleged he had broken, and what crimes the arrest warrants related to. He responded that they related to organising meetings. He did not dispute that the ANP was a legal party in Pakistan, but said that the government opposed all parties. As to what the first information report he had submitted said with regard to any specific charges against him, he said that his alleged he was against the government.

I asked him why the document he had submitted purporting to be issued by the police, which he claimed was an FIR, bore no letterhead, to which he responded that that was normal in Pakistan. I told him that I doubted that the documents he had submitted were genuine. He reiterated that police stations did not use letterheads. I told him that the Tribunal had evidence that document fraud was widespread in Pakistan, so that under the circumstances I could not assume the documents he had submitted were genuine.

I asked him why the local police might be so keen to arrest him in particular. In response he claimed that he had tried to do the best for the ANP, had invited people to meetings and had performed very tough jobs.

I asked the applicant a number of questions about the ANP in order to establish whether his level of knowledge about the party was consistent with his claimed length and level of involvement with it. He correctly stated that it was a legal party in Pakistan As to when it was formed, he said that was before the establishment of Pakistan itself. As to what two parties merged to form it, he said that it was the "Pakhtunwa and National Awami Party". I told him that the evidence before the Tribunal was that it was formed in 1986 by the National Democratic Party, Awami Tehrik (People's Movement) and Mazdoor Kissan (Labourers' and

Peasants' Party). I asked him if he could explain why his evidence was so different to that before the Tribunal. He offered no explanation.

He correctly named the current ANP president as Asfandiyar Wali and his predecessor Wali Khan, also correctly stating that they were father and son. As to when Abdul Wali Khan had died, he said it was "two years ago", when he was overseas. He then said he thought it was in 2006, then said that it was "two to three" years ago. I told him the evidence before the Tribunal was that he had died in January 2006. He did not dispute this.

As to if he could name the street in Peshawar where the ANP had its head office, he said that it was in "Bilar Plaza in Sadar area of Peshawar before". I told him that the address was elsewhere, according to the website of the party (see <http://anp.org.pk/index.htm>, which said it was Bacha Khan Markaz, Pajagi Road, Peshawar). He stated that perhaps they had moved in the last few months.

He correctly stated that the ANP opposed the construction of the Kalabagh dam, saying that people in the NWFP gained no benefits from it.

As to what the primary aim or platform was for the ANP, he said that it was "an Islamic state, then Pashtuns". He said Pashtuns should have rights in their own area, such as in employment and services. I told him that the website of the party indicated that it did not want an Islamic state. He did not disagree, suggesting that maybe just the locals wanted that.

I told him that the ANP website did not refer to the demonstrations in which he claimed to have been a participant. I asked him if he could suggest any way in which the Tribunal could confirm from independent source that any of these demonstrations had taken place. He responded that they were just local demonstrations, not big. Perhaps the ANP was not informed about the local arrests.

He reiterated that he was very concerned about his family, and did not even know if they were still alive. I assured him that that would be taken into account when I was considering his responses.

I asked him what the reason was for the most recent demonstration in which he had participated. He responded that it was against the government. As to what specifically the motivating factors were for the demonstration, he said "social life, employment, services".

I told him that according to evidence before the Tribunal, a few days before that demonstration the ANP had been involved in a critical electoral battle in a nearby district. I asked him if he knew in what district it had been and how the ANP had fared. He indicated that he did not know anything of this matter. I named the particular district, and that the ANP won.

Asked to state approximately how many national and provincial elections the ANP had participated in since its formation in 1986, he said that he did not know.

As to how successful the ANP had been in the 2002 elections in the National Assembly, he said that it had won some seats. I advised him of evidence that it had not won any seats, and that this had been disastrous for the party at the time.

He stated that he had had no contact with supporters of the ANP in Australia and did not know if the ANP had a branch in Australia. He said he had been involved in no ANP-related

activities, through the internet or in any other way, since his arrival in Australia He claimed that the ANP leader had been in Australia about a month ago, but that he had been unable to see him.

As to how the recently declared state of emergency in Pakistan had affected the ANP, he said it was against the emergency and was not obeying the present government. He said he did not know how its members were being affected because his focus was on his family.

I told him that I could form the impression that he had not been involved with the ANP, and asked him if he wished to tell the Tribunal if there was any other reason why he might not wish to return to Pakistan. He responded that he would be arrested solely because of his political activities.

Of his travel to Australia, he said that his most recent journey had been directly from Pakistan. He had not visited any other countries en route.

He stated that he had never applied for asylum in any other country. As to why he had risked returning to Pakistan previously, he said that it was dangerous but he was in hiding in various areas.

Of his claim in his protection visa application that he was refused a visa to enter a fourth country, he said that he had gone to the embassy in Pakistan to apply for it but had been unsuccessful.

I advised him of evidence before the Tribunal that the Taliban had recently consolidated power in his province and overrun much of his local area. They were in control of most of the townships. I asked him what harm he feared in his home district if he returned there under these circumstances He responded that neither side were in control there. I asked him how he thought the Taliban might perceive him, and if they might regard him as generally sympathetic to their aims as he also wanted an Islamic state. He responded that they were extremists and he could not trust them.

I asked him if under the circumstances he would try to stay in Karachi, as he had before. He said he would not do so because of the arrest warrant. I put to him that he had been repeatedly travelling in and out of the country, having been issued with his own passport in the mid 2000's, and having returned to his village at various times. I suggested to him that if the police had wished to arrest him they could and would have already done so. He agreed that he had not seen the police, but said that his family had been disturbed, and questioned twice.

At this point it was agreed (because the interpreter had to leave) that the hearing would be adjourned to a later date. I advised the applicant that at the resumed hearing I would provide him with the particulars of information that may lead the Tribunal to affirm the Department's decision, and that he would have an opportunity to comment on that information. However, so that he was aware of the nature of these matters and could discuss them with his adviser in the interim if he wished, I advised him that they were that his level of knowledge about the ANP was not consistent with his claimed level of involvement with the party, and that the documentary evidence he had submitted in support of his claims might not be reliable, in part because of evidence before the Tribunal that fraudulent documentation was easily obtainable in Pakistan.

At the resumed hearing the Tribunal noted his claim that after giving a speech at a demonstration in a town in his district in the mid 2000's, the police came looking for him and

issued an arrest warrant for him. He went into hiding for a period of days then went to Karachi for a further period and returned to work overseas. Of the countries he visited after that, he said that he had visited four and named them. During the following trip he had visited seven countries. He had not visited Australia until his most recent trip. As to why he had not sought asylum in the other countries, he said that he had not trusted them. He had made no enquiries about seeking asylum in those countries because at that time he had had no problems and was having a good time.

The Tribunal told him that his failure to seek asylum, despite having the opportunity to do so on many occasions, was not consistent with his claim to fear any harm in this period. He said that over this period his employer was strict and he had not been given much latitude.

The Tribunal also told him that his knowledge about the ANP did not appear to be consistent with the evidence from other sources before it. Firstly, he had said that the ANP was formed before Pakistan created, by the Pakhtunwa and National Awami Party. The Tribunal's evidence was that it was formed in 1986 by the National Democracy Party (Awami Tahrik) and the Labourers and Peasants Party (Mazdoor Kissan) (source UK Home Office Country of Origin Information Report 2005). Secondly he had been vague as to when the previous ANP president died, saying it was two or three years ago. The Tribunal's evidence was that he had died in January 2006 (source: The Nation, 27/1/06). He responded that that was almost two years. Thirdly he had not given the correct address for the party's office in Peshawar as listed on the ANP website (see <http://anp.org.pk/index.htm>). Fourthly he did not seem familiar with the party platform, and specifically said that it wanted an Islamic state. This did not appear to be consistent with the ANP manifesto on its website (sources: International Crisis Group 2005, The Baluchistan Times 29/4/2006). Fifthly he had been unaware of an important election battle for the ANP in a district near to his own. Sixthly he did not know how the ANP had fared in the 2002 elections, in which it had won no seats. In response to this point he said that he did not have such a big position in or have experience in the party and had had little education.

I told him that taking all these concerns into account, the Tribunal could infer that he had not been a member of the ANP, and therefore that he had no fear of persecution on the basis of a perception that he held as political opinion. On that basis it would follow that he was not a refugee. He responded that he had been desperate to leave the area and the country. He asked the Tribunal who would leave his wife and children to go to another place, saying that he was scared.

I asked the applicant if he could explain why he had submitted two documents, purporting to be from different sources, but both appearing to be on green paper taken from a single writing pad. He responded that one of these documents was typical of paper used in police stations. Arrest warrants were usually on this green paper. I asked him if anyone apart from the police used such green paper as it seemed a remarkable coincidence that both were on the same colour paper. He responded that perhaps they all used the same colour paper. I told him that the Tribunal had evidence that sophisticated document fraud was widespread in Pakistan. For that reason it could not assume all the documents he had submitted were genuine. He responded that he had received these documents from his brother in Pakistan, who had told the lawyer of the applicant's situation.

It was agreed that he would make a written response to these matters and provide translations of various documents. His representative also advised the Tribunal that arrangements were being made for the applicant to have a consultation with a psychiatrist, a report from whom

would also be submitted as soon as possible. The Tribunal subsequently agreed to wait for all these materials. Documents received subsequently were:

- a) translation by an accredited translator of an identity document (the original of which had been submitted at the hearing), according to which it was issued to the applicant by the ANP in his local area. His place of birth was stated. In response to sections on the document for date of birth, marital status and mother's name was the term "not stated". His occupation was listed as "Member of the Party";
- b) translation by an accredited translator according to which it was headed [deleted] District Court Judge, was an arrest warrant against three people including the applicant, and had been issued on [date]. It referred to "criminal charges number 338 under sections 121-124A-146-149". It ordered police at [place] to arrest the individuals and bring them to court on [date];
- c) translation by an accredited translator of the document headed "... Initial report of offence assaulting police under section 154 of military act", saying that the incident occurred on [date] in [place], and naming the applicant and the other two individuals named in the above arrest warrant. It was alleged in the report that these three were armed with sticks and participated in a rally against the government in which, during speeches, they declared war against it
- d) Detailed report to the representative, from a Specialist in Psychiatry, and Senior Lecturer in Psychiatry at an Australian University, relating to the applicant. The specialist considered it

highly likely that he has several significant psychiatric problems. These include a severe major depression with severe co-concurrent anxiety symptoms and panic attacks. It is possible that his depression is melancholic or even psychotic in intensity. He also had symptoms consistent with post-traumatic stress disorder, which may overlap with the foregoing. This may be accounted for by the intense conflict situation in Pakistan that he found himself in and the physical violence that he experienced and would likely have worsened because of his intense anxiety about not knowing the fate of his family. This post-traumatic syndrome is characterised by nightmares, recurrences of the trauma situation in Pakistan and some avoidance of talking or thinking about these things. His state may be worsened by what appears to be an inner conflict about whether he should return to Pakistan to find his family or stay here in safety. The level of his dysfunction is severe. He was clearly distressed and agitated.

I would expect that his state would very significantly affect his memory and his level of concentration and attention and seriously affect his ability to recount past experiences in stressful situations such as refugee Tribunal hearings. It is also possible that he has tried to block out his traumatic experiences and being questioned about them may have been very difficult for him. Also, the time he was hit [deleted] by the Pakistani police requires further questioning and possibly medical investigation.

I think the applicant is quite seriously ill as a result of his immediate past experiences and his current predicament. I think he needs psychiatric reassessment and further management as soon as possible ...

Although I lack information about his early developmental history, I believe these symptoms are very substantially if not entirely contributed to by his immediate past and the ongoing situation for his family and him in Pakistan, with the predicament that this poses for him.

In the submission from the representative, the issues raised at the hearing with the applicant were addressed. Throughout, the tribunal was reminded that his poor mental health was such that his ability to recall events or state facts clearly should be taken into account. In brief, the responses were as follows:

- a) The applicant's response at hearing about the formation of the ANP was not inconsistent with information on the AN's website about its origins (details were provided);
- b) The applicant's evidence that the former ANP President's death had occurred about two years earlier was sufficiently precise to illustrate familiarity with the party, having regard to his mental health problems;
- c) with regard to the applicant's evidence about the office in Peshawar of the ANP, he reiterated that he had gone to an office in where he had originally stated However it was a small office and he was unsure whether it was the head office;
- d) with regard to his response that the platform of the ANP was "Islam and then Pashtuns", and the ANP website's indication that the ANP's primary purpose was not an Islamic state, it was submitted that in discussions with his solicitor he had indicated he was uncertain what the term "Islamic state" meant. It was submitted that he had limited education. Evidence was also submitted that the ANP manifesto noted that "no law shall be passed which is against the Quran and Sunnah" which was consistent with his response;
- e) with regard to his lack of knowledge about the neighbouring district election and election results nationally in 2002, it was reiterated that he had had limited education, his experience with the party had been at village level, he had not held a high position in the party and that he had spent much time outside Pakistan. It was argued that in developing countries it was common for people to be active in political parties who did not necessarily have a sophisticated understanding of the party structure and politics;
- f) with regard to the documents from Pakistan, it was stated that the applicant's brother had hired a solicitor after the applicant left Pakistan Even if these documents were considered to be fraudulent by the tribunal that should not affect the applicant's credibility as he had not been involved in true procuring them.

Evidence from other sources

According to the most recent US State Department country reports on Human Rights Practices, which relates to 2006, (2007, Pakistan report, Introduction) Pakistan is a federal republic with a population of approximately 168 million. The head of state is President Pervez Musharraf, who assumed power after overthrowing the civilian government in 1999 and was elected president in 2002. He affirmed his right to serve concurrently as chief of army staff in August 2002 through a series of controversial amendments to the 1973 constitution called the Legal Framework Order. Domestic and international observers found the 2002 National Assembly elections deeply flawed. The government was affected by internal conflicts in Balochistan and in the Federally Administered Tribal Areas (FATA). While the civilian authorities generally maintained effective control of the security forces, there were instances when local police acted independently of government authority. The government's human rights record remained poor Major problems included restrictions on citizens' right to change their government, extrajudicial killings, torture and rape. The country experienced an increase in disappearances of provincial activists and political opponents, especially in provinces experiencing internal turmoil and insurgencies. Poor prison

conditions, arbitrary arrest and lengthy pre-trial detention remained problems, as did a lack of judicial independence.

Security situation in Pakistan

Human Rights Watch recently reported that Pakistan's government under Musharraf's emergency rule had expanded a recent crackdown on its critics by detaining hundreds of opposition activists from the country's largest opposition party, the Pakistan People's Party (PPP). Members of the judiciary and others had been held in detention or house arrest since the crackdown began on November 3, including Supreme Court Chief Justice Iftikhar Chaudhry and (the since-assassinated) PPP leader Benazir Bhutto. Musharraf was trying to cling on to power by beating and jailing an ever-growing number of opposition activists, according to Human Rights Watch. "But as Musharraf fills the jails with his critics, Pakistanis are expressing their disgust at his repressive rule through continued protests." November 14 saw arrests all over the country (2007, "Pakistan: Musharraf Uses Anti-Terror Laws to Jail Critics", Human Rights Watch, 16 November, http://hrw.org/english/docs/2007/11/16/pakist17351_txt.htm, accessed 16 November 2007).

The chief of the ANP, Asfandiyar Wali, had declared that only a people's elected government could control the prevailing alarming situation of the country that emerged after the assassination of Bhutto. He warned that the situation would worsen and no general or unelected government would be able to control it if an election was not held and power was not handed over to an elected government. He asked the political leadership to take steps to bring the situation back on track because the assassination was not a tragedy only for the PPP but also for all the liberal and democratic forces, which had to unite to face the situation. "He said that the Pakhtoons were being portrayed as terrorists before the world and advised the community to prove themselves as peaceful people in the coming election, which would be a test case for them. The ANP leader further said that after the election Pakhtoons would have to appeal to the civilized world to provide books and school uniforms instead of weapons and suicide bomber jackets to their children, as the community wants peace, harmony and love." (2008, "Handing over power to elected govt only way out: Asfandiyar", The International News, 3 January, <http://www.thenews.com.pk/print1.asp?id=89126>, accessed 4 January 2008). Another article reported that, with the exception of two parties, the NWFP political parties taking part in the upcoming general elections unanimously condemned the polls' postponement till February 18. The Election Commission had announced a six-week delay in the parliamentary elections which were slated for January 8. However, EC officials argued the polls were being delayed due to violence triggered by Bhutto's assassination (Khattak D. 2008, "Political parties slam polls delay", Daily Times, 3 January, http://www.dailytimes.com.pk/default.asp?page=2008%5C01%5C03%5Cstory_3-1-2008_pg7_13, accessed 4 January 2008).

Situation in the NWFP

The NWFP is currently ruled by a coalition of Islamist political parties, the *Muttahida Majlis-e-Amal* (MMA), which have worked towards the implementation of Islamic law in the NWFP (Misra, A. 2006, 'MMA-Democracy Interface in Pakistan: From Natural Confrontation to Co-habitation?', *Strategic Analysis*, Institute for Defence Studies and Analyses website, vol. 30, no. 2, April-June, pp.389-391 <http://www.idsa.in/publications/strategic-analysis/2006/apr-jun06/AshutoshM%20isra.pdf> – accessed 2 November 2006). Numerous reports appeared to suggest that the resurgent pro-Taliban Tanzim Nifaz Shariat-i-Mohammadi (TNSM) had also been carrying out militant operations in the NWFP to further its political aims. In 2001 it

reportedly operated primarily in the tribal belt, such as (a particular district) and the adjoining districts of the NWFP. Although well established in the NWFP, it had had only limited success in expanding its activities beyond the tribal areas of the province ('Tehreek-e-Nafaz-e-Shariat-e-Mohammadi (Movement for the Enforcement of Islamic Laws)' 2001, South Asia Terrorism Portal website). Since 2004 it had been associated in news reports with a range of violent actions, including attacks on political rivals, the bombing of targets deemed to promote un-Islamic practices, staging robberies to raise finances for the organization, the harassment of human rights workers, the harassment of women attempting to participate in elections and attacks against the Pakistan military and police forces. In March 2007 the government sought to arrest radical cleric Fazalullah (TNSM leader) on charges relating to his "inviting support for a proscribed organization" and "rioting by an unruly group of people armed with deadly weapons" ('Defunct TNSM activist holds villages hostage' 2004, *The News: International* online edition, 18 October <http://www.jang-group.com/thenews/oct2004-daily/18-10-2004/main/main10.htm> – accessed 17 March 2006; 'Cinema blast in Mingora, no casualty' 2005, *The Nation* online edition, 15 May <http://www.nation.com.pk/daily/may-2005/15/index11.php> – accessed 16 March 2006; Bacha, A. H. 2004, 'Mingora: Banned religious outfits change mode of operation', *Dawn Internet Edition*, 12 December <http://www.dawn.com/2004/12/12/local24.htm> – accessed 16 March 2006; Ansari, M. 2004, 'Unholy Crusade', *Newsline* website, August <http://www.newsline.com.pk/NewsAug2004/newsbeat2aug.htm> – accessed 15 February 2005; Abbas, H. 2006, 'The Black-Turbaned Brigade: The Rise of TNSM in Pakistan', *Terrorism Monitor*, Jamestown Foundation website, vol.iv, no.23, pp.1-2 http://jamestown.org/terrorism/news/uploads/TM_004_023.pdf – accessed 15 May 2007; 'Radical Pakistani Cleric Avoids Arrest and Threatens Police' 2007, *Terrorism Focus*, Jamestown Foundation website, vol.4: no.4, 6 March http://jamestown.org/terrorism/news/uploads/tf_004_004.pdf – accessed 27 August 2007; Khan, H. 2007, 'Imam warns police against his arrest; FIR registered', *Dawn* website, 4 March 2007 <http://www.dawn.com/2007/03/04/nat11.htm> – accessed 22 August 2007).

The TNSM was suspected of involvement in widespread outbreaks of violence against military targets across the NWFP. In mid-2007 the situation appeared to have been defused, although the violence had not ceased. The International Centre for Political Violence and Terrorism Research (ICPVTR) reported a number of attacks occurring in the NWFP, in August 2007 (Shahzad, S.S. 2007, 'A new battle front opens in Pakistan', *Asia Times Online* website, 14 July http://www.atimes.com/atimes/South_Asia/IG14Df04.html – accessed 22 August 2007; 'Country Report, Pakistan, 6-12 August 2007' 2007, ICPVTR website, 6-12 August <http://www.pvtr.org/pdf/weekly%20reports/Pakistan-06-12August07.pdf> – accessed 27 August 2007; Yusufzai, R. 2007, 'Breaking the silence', *Daily Jang* website, 22 July <http://www.jang.com.pk/thenews/jul2007-weekly/nos-22-07-2007/spr.htm#2> – accessed 22 August 2007; 'Country Report, Pakistan, 20-26 August 2007' 2007, ICPVTR website, 20-26 August <http://www.pvtr.org/pdf/weekly%20reports/Pakistan-20-26August07.pdf> – accessed 27 August 2007).

(Country information deleted in accordance with s.431 of the *Migration Act* as this information could identify the applicant.)

On 4 January 2008 it was reported that the last days of 2007 were marked by major concerns about the growing influence of Taliban militias in much of Afghanistan as well as the activities of the Al Qaeda movement on both sides of the Pakistan-Afghanistan border. There were growing indications that the al-Qaida movement was increasingly active in the border districts. What was really worrying was that the movement's success in recruiting young

Pakistanis to its cause was making it less dependent on foreign paramilitaries. This was not entirely new - though in the past such paramilitaries had operated mainly across the border in Afghanistan, clashing with NATO and US troops. Now they had increased in numbers and were directing their efforts more against the Pakistani army and government, intent on destabilising the latter (Rogers, Professor P. 2008, "The Pakistan Afghanistan abyss", OpenDemocracy website, http://www.opendemocracy.net/article/conflicts/global_security/afghan_pakistan_abyss, accessed 11 January 2008).

ANP

The Awami National Party (ANP) (People's National Party) was formed in 1986 by a merger of the National Democratic Party, Awami Tehrik (People's Movement) and Mazdoor Kissan (Labourers' and Peasants' Party). It was federalist and socialist, and in 2005 was led by Khan Abdul Wali Khan (2005, UK Home Office, Country of Origin Information Report, October, Annex B). The ANP was the main moderate Pashtun party in the NWFP and was the latest incarnation of the National Awami Party (NAP) (ICG 2005, *Authoritarianism and Political Party Reform in Pakistan*, Asia Report No. 102, 28 September, p.13, 28). The ICG provides the following background on the ANP:

Reflecting Pashtun demands and grievances, its agenda focuses on maximum provincial autonomy – political, social and economic – limiting the federal government's jurisdiction to foreign policy, currency, communications and defence. Its key goals include renaming NWFP as Pakhtunkhwa (Land of the Pakhtuns) and opposition to the construction of the Kalabagh Dam. The ANP's traditional power base was eroded in the 2002 elections as NWFP-based religious parties capitalised on Pashtun resentment of U.S.-led military operations in Afghanistan's Pashtun-majority areas. Given the MMA [*Muttahida Majlis-e-Amal*] government's failure to deliver on its promises, however, the ANP could regain lost ground by revitalising its party apparatus. It could also capitalise on growing Pashtun alienation over the MMA's alliance with General Musharraf, whose government is conducting military operations in the province's tribal belt (ICG 2005, *Authoritarianism and Political Party Reform in Pakistan*, Asia Report N°102, 28 September, p.13).

The ANP is currently led by Asfandiyar Wali Khan (following the death of Khan Abdul Wali Khan, his father, in January 2006). He has continued the policy of opposing the Islamist *Muttahida Majlis-e-Amal* (MMA) coalition in the NWFP with calls for an alliance amongst the more moderate and secular parties ('Wali Khan passes away' 2006, *The Nation*, 27 January <http://www.nation.com.pk/daily/jan-2006/27/index3.php> – accessed 10 May 2006; 'Asfandiyar for Unity Among Moderate Forces to Counter MMA' 2006, *The Baluchistan Times*, 29 April). According to the ICG:

The NWFP is divided into settled areas, administered by the provincial government, and the Federally Administered Tribal Areas (FATA). Around 70 per cent of the population is Pashto-speaking and 18 per cent Hindko-speaking... In the past, secular Pashtun parties such as the National Awami Party (renamed the Awami National Party, ANP) and other moderate, secular parties such as the PPP and the PML-N had a considerable political presence, counterbalancing the religious right. In the 2002 national elections, as the moderate parties were deliberately sidelined and the mullahs patronised by the state, the JUI eclipsed them, and Deobandis now run the MMA provincial government (ICG 2005, *The State of Sectarianism in Pakistan*, Asia Report No. 95, 18 April, p.17).

The ANP's activities include renaming the NWFP to Pakhtunkhwa (Land of the Pakhtuns), opposition to the controversial Kalabagh dam project, and seeking a change in the government's Afghan policy which it considered to be the cause of violence in the tribal belt (ICG 2005, *Authoritarianism and Political Party Reform in Pakistan*, Asia Report No. 102, 28 September, p.13; 'ANP welcomes Bhasha dam, rejects KBD' 2006, *Dawn Internet*

Edition, 19 January <http://www.dawn.com/2006/01/19/nat10.htm> - accessed 23 January 2006; 'ANP seeks change in Afghan policy' 2006, *Dawn Internet Edition*, 18 January, <http://www.dawn.com/2006/01/18/nat37.htm> - accessed 23 January 2006; 'ANP seeks end to use of force in Balochistan: Need for dialogue stressed' 2006, *Dawn Internet Edition*, 15 January <http://www.dawn.com/2006/01/15/nat11.htm> - accessed 23 January 2006). One author noted that the ANP had called for a ban on all jihadi organisations in Pakistan (Ahmed, S. 2003, 'The United States and Terrorism in Southwest Asia; September 11 and Beyond', Global Research website, 14 March <http://www.globalresearch.ca/articles/AHM303A.html> - accessed 2 February 2006).

The ANP website says that the "Awami National Party's programme is to establish a prosperous, peaceful, and liberal society in Pakistan, based on democratic pluralism, cultural diversity, social justice, non-sectarianism and national sovereignty of the country" (see <http://www.awaminationalparty.org/index.htm>, accessed 22 November 2007).

Current situation for the ANP

Reports indicate that the ANP was actively campaigning against the Musharraf administration in recent months and that a number of its leaders and activists had been involved in clashes with police and/or had been arrested or detained in Peshawar and Karachi. It would appear that some of these arrests had subsequently seen the arrested persons released on bail. The ANP's leader, Asfandiyar Wali Khan, was under house arrest as of 5 November 2007. There had also been some reports of ANP members being harmed in rocket and mortar attacks in the NWFP.

In January 2007 the ANP had made some significant electoral gains in the north, leading some to identify a revived ANP as a potential challenger to the current power of the MMA parties (<http://72.14.253.104/search?q=cache:r0m4CvBCzpcJ:watandost.blogspot.com/2007/02/who-can-challenge-religious-parties-in.html+%22Who+can+challenge+religious+parties+in+Pashtun%22&hl=en&ct=clnk&cd=1&gl=au>). In October 2007 there were reports from Karachi of the arrest of a number of ANP activists "under sections 147,148,149,341,427,324, QAD". The arrests were reportedly followed by rioting. (http://www.dailytimes.com.pk/default.asp?page=2007%5C10%5C07%5Cstory_7-10-2007_pg12_3). In October 2007 *The Daily Times* reported that the ANP office in Peshawar had been hit by a rocket (http://www.dailytimes.com.pk/default.asp?page=2007%5C10%5C29%5Cstory_29-10-2007_pg1_3; <http://www.iht.com/articles/ap/2007/10/28/asia/AS-GEN-Pakistan-Rocket-Attack.php>) On 5 November 2007 it was reported that ANP president Asfandiyar Wali Khan was placed under house-arrest (<http://www.dawn.com/2007/11/05/top1.htm>) A subsequent report (10 November 2007) indicates that he remained among those detained under the state of emergency (http://www.dailytimes.com.pk/default.asp?page=2007%5C11%5C10%5Cstory_10-11-2007_pg7_12).

On 13 November 2007, it was reported from Peshawar that police used "excessive tear-gassing and baton-charge against protesting workers and leaders" of the ANP, who staged rally to condemn the proclamation of emergency in the country It was also reported that the police "arrested 25 protesters including provincial president of ANP Afrasiab Khattak and Khwaja Mohammad Khan Hoti, Hasham Babr after exchanging brawls with ANP workers"

(<http://www.inp.net.pk/engdetail.asp?nid=169511>). A few days before that demonstration it had been reported from Peshawar that police had also “tear-gassed and baton-charged protesters and arrested scores of political workers” after a procession had been staged against the actions of the Musharraf government. It was also reported that “activists of the Awami National Party and the Jamaat-i-Islami played ‘hide-and-seek’ with police at the Soekarno Chowk and the Chowk Yadgar. Police arrested three ANP workers” (<http://www.dawn.com/2007/11/10/nat4.htm>).

A 15 November 2007 report notes the anti-Musharraf government activities of the ANP as part of the All Parties Democratic Movement (APDM). The APDM includes the Pakistan Muslim League (N) and Pakistan Tehrik-i-Insaf. The report notes that the APDM has asked the Jamaat-i-Islami to stay away from its protests after the student wing of Jamaat-i-Islami helped police in the arrest of Imran Khan (<http://www.dawn.com/2007/11/16/top7.htm>). On 17 November 2007 it was reported that “three [ANP] activists” arrested in Peshawar were among the “[h]undreds of political workers [who] were arrested on Friday across the country for protesting against the emergency rule and suspension of the Constitution” (<http://news.webindia123.com/news/Articles/World/20071117/824817.html>). On 18 November 2007 it was also reported from Peshawar that a local ANP leader had been injured in a mortar attack launched by unknown assailants (<http://www.thefrontierpost.com/News.aspx?ncat=cn&nid=298&ad=18-11-2007>).

Exit from Pakistan

The procedure for obtaining a Pakistani passport appears on the website of Pakistan’s Ministry of Interior at “Requirements for obtaining a fresh passport”. This indicates that an applicant must fill out two forms, an “application form” and “challan [receipt or consignment] form”, attach 3 current passport size photographs and two copies of his or her National Identity Card (NIC), and pay a fee. Information obtained by the Research Directorate of the Immigration and Refugee Board of Canada (IRBC) from the Human Rights Commission of Pakistan is that even “individuals who have First Information Reports (FIRs) or outstanding arrest warrants against them can apply for and obtain a Pakistani passport” (‘Obtaining a Fresh Passport’ 2004, Ministry of Interior, Government of Pakistan website, Google [cache](#) of

http://www.pakistan.gov.pk/ministries/ContentInfo.jsp?MinID=20&cPath=218_313&ContentID=810 – accessed 18 January 2006; IRBC 2005, *PAK100046.E – Pakistan: Whether an individual, who has a First Information Report (FIR) or an outstanding warrant of arrest against him/her, can obtain a Pakistani passport (May 2005)*, 25 May <http://www.irb-cisr.gc.ca/en/research/ndp/ref/?action=view&doc=pak100046e> – accessed 18 January 2006).

The IRBC also indicates that “[e]xit permits are not required of Pakistani citizens by immigration authorities when exiting Pakistan”. However, as also noted, a person may be barred from leaving Pakistan if his or her name is listed on the “Exit Control List”. The list, “which is updated from time to time and kept by the Immigration/Emigration Officers at the Airport/other outposts”, is maintained pursuant to the *Exit from Pakistan (Control) Ordinance*, 1981. The Ordinance “empowers the Federal Government to prohibit any person from proceeding abroad”. “Ordinarily [the] following categories of persons are placed on [the] ECL”:

- a. Persons involved in mass corruption and misuse of power / authority causing loss to the government funds/property.

- b. Government employees involved in economic crime where large government funds have been embezzled or institutional frauds committed.
- c. Hardened criminals involved in acts of terrorism / conspiracy, heinous crimes and threatening national security.
- d. Key directors of firms having tax default / liabilities of Rs. 10 million or more [CDN \$211,900.00 ...]
- e. Only 2 -3 key directors of firms having more than Rs. 100 million loan default / liabilities [CDN \$2,119,000.00 ...]
- f. Names of persons if recommended by the Registrar, High Courts / Supreme Court of Pakistan and Banking Courts only.
- g. Drug traffickers ... (IRBC 2005, PAK100046.E – Pakistan: Whether an individual, who has a First Information Report (FIR) or an outstanding warrant of arrest against him/her, can obtain a Pakistani passport (May 2005); IRBC 2003, PAK42150.E – Pakistan: *Security measures in place and verifications made by border authorities of Pakistani citizens departing Pakistan for a country abroad (2000-2003)*, 13 November).

FINDINGS AND REASONS

The Tribunal is satisfied, and finds, that the applicant is a national of Pakistan.

Competency to give evidence in the Tribunal context often arises in a situation where the applicant has a psychiatric condition, psychological disorder or an intellectual disability which may affect their ability to recall or give evidence. Such a condition may result in inconsistent, incoherent or illogical testimony which may reflect poorly on the applicant's credibility or the reliability of testimony. The United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status* refers to the difficulties in determining the subjective element of fear with applicants who are 'mentally' or 'emotionally' disturbed. In the present case the Tribunal has carefully considered the content of the report from the specialist, and accepts on the basis of it that the applicant is suffering from serious psychiatric problems which are likely to significantly affect his memory, his level of concentration and attention and his ability to recount past experiences in situations such as a Tribunal hearing.

Therefore the Tribunal considers it likely that the applicant's oral evidence to this Tribunal, and presumably the information he has given to his adviser which has been set out in written submissions, may contain some assertions which lack cogency, not because he is being untruthful about them, but because of his significant psychiatric problems. The Tribunal must act fairly and reasonably and take reasonable steps to accommodate applicants who experience difficulty during the application or hearing, as to not do so may deprive him or her of the chance to adequately put his or her case or to be heard under common law and/or ss.425 of the Act. In the present case it has not been suggested by the applicant, his adviser or the psychiatrist that a further hearing might provide the applicant with any better opportunity to put his case than has already been provided. The Tribunal shares that view, and considers that the evidence already provided by him, coupled with the submissions from his adviser and the specialist, provide the best quality of evidence that can be obtained under the circumstances.

Nevertheless, the only witness to give evidence to the Tribunal about the events leading to his decision to seek asylum is the applicant himself. Because of his psychiatric condition his

testimony may not be reliable. The Tribunal has not had the opportunity to take oral evidence from anyone who knew him in Pakistan, or anyone who knew of his claimed political activities there. The only such evidence on that point is the documentary evidence he has provided, which will be considered below.

The Tribunal must try to establish to its satisfaction what his circumstances were in Pakistan. On the basis of his evidence I accept that he is from a town in the North West Frontier Province of Pakistan. As to his involvement with the ANP, it is possible that he has exaggerated the extent of this. However he did show some knowledge of the party, to the extent that the Tribunal can be satisfied that he was a supporter of the ANP in his area.

Of the FIR and the lawyer's letter submitted by him in support of his claims, he gave evidence that he was unsure of their provenance, saying that they had been sent to him from Pakistan by his brother after he arrived in Australia. Having regard to evidence from other sources that document fraud is reportedly widespread in Pakistan ('Forgeries play havoc with visa process' 2003, World Education Services website, sourced from *The Australian*, 29 October, <http://www.wes.org/ewenr/03Sept/AsiaPacific.htm> - accessed 28 July 2004; 'District – Teachers recruited on fake documents unearthed' 2003, *Pakistan Press International Information Services*, 4 May; Anthony, T. 2003, 'Well-forged U.S. visas not uncommon in Pakistan', *The Associated Press*, 5 January), the Tribunal does not propose to rely on these documents but, even if they are not genuine, has not inferred from this that the applicant's other claims are entirely untruthful.

He has claimed to solely fear the present government of Pakistan, led by President Musharraf. The Tribunal has noted evidence from other sources above that ANP activists have indeed recently been harassed and detained by the government. However the Tribunal has before it evidence that in the applicant's area, until very recently the TNSM and various pro-Taliban forces have been in control. The evidence suggests that they took control at some point after the applicant most recently left Pakistan. As this may point to an intensification of pre-existing factors since his departure, characterised by an escalation of events post-departure which may give rise to a well founded fear of his being persecuted on return, the Tribunal has therefore initially considered whether the applicant has a well founded fear of being persecuted in his local district by pro-Taliban forces because of his support for the ANP.

On this point the Tribunal notes the evidence of recent intense fighting between pro-Taliban and Pakistani forces close to a town which is close to the applicant's home district in which his family were living until recently. It is consistent with that evidence, and the Tribunal therefore considers it highly likely, that his family have fled from the area because of a combination of the imposition of shari'a law last year by pro-Taliban groups and the subsequent violent conflict.

However there is limited evidence available to the Tribunal about the current and recent situation in the applicant's local district, presumably in part because of the remoteness of the region and because of the limited range of sources of reliable information reporting from it. On the basis of the evidence set out above the Tribunal is satisfied that pro-Taliban or pro-al Qaeda forces were in control of the area until less than two months ago and that they have only recently retreated under pressure from government forces. It is apparent from the above sources, that pro-Taliban forces are enjoying a resurgence of influence in the region. On that basis the Tribunal cannot assume that their retreat is permanent and regards the security situation in the area from which the applicant originates as unpredictable, with the possibility

of a return of some combination of TNSM, pro-Taliban or pro-al Qaida forces in the reasonably foreseeable future.

The ANP leadership has reportedly called for an alliance amongst the more moderate and secular parties in the NWFP ('Wali Khan passes away' 2006, 'Asfandyar for Unity Among Moderate Forces to Counter MMA' 2006), and the content of its website indicates that it does not share the extremist views or aspirations of the Taliban. The Tribunal notes the evidence above that in early 2007 the ANP made significant electoral gains in the north, leading some to identify a revived ANP as a potential challenger to the current power of the MMA parties which currently rule in the NWFP. The tribunal also considers reliable the evidence that the ANP leader has continued to oppose the Islamist MMA coalition in the NWFP with calls for an alliance amongst the more moderate and secular parties. The applicant himself expressed his opposition to Islamic extremism. For these reasons the Tribunal is satisfied that supporters of the moderate ANP, including the applicant, would generally be regarded by the various religious extremist groups in his district as political opponents. Given the level of violence employed by these groups, and given the unpredictability of the security situation in his area, the chance is not remote that the applicant might be harmed because of his political opinions if he returned to that area. The risk to him may be greater than that to other supporters of the ANP because of his severe psychiatric problems, which may limit his ability to take steps to protect himself from harm, or may even attract hostile attention to him.

There is a real chance under these circumstances that the applicant might be seriously harmed by religious extremists if he returns to his local district. He therefore has a well-founded fear of politically motivated persecution in that district.

However no reports could be located by the Tribunal that would indicate that the TNSM has undertaken operations outside the NWFP, or that the TNSM have tracked down persons who have fled the NWFP to Pakistan's cities. The evidence before the Tribunal does not suggest that the applicant's fear would be well-founded if he were to relocate to some other part of the country. The Tribunal is not satisfied that it would be.

It is widely accepted that even where the feared persecution is localised, as in the present case, a person will not be excluded from refugee status merely because he or she could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him or her to do so. The High Court has endorsed this proposition, explaining that what is reasonable, in the sense of practicable, must depend upon the particular circumstances of the applicant and the impact upon that person of relocating within their country (*SZATV v MIAC* [2007] HCA 40 at [24]). As Kirby J stated, the supposed possibility of relocation will not detract from a "well-founded fear of persecution" where any such relocation would, in all the circumstances be unreasonable (*ibid*, per Kirby J at [97]). In the present case the Tribunal has had regard to the applicant's evidence, which it considers plausible, that while in Pakistan he never lived anywhere other than in his local village, that all his immediate family members were living in that village when he last had contact with them, and that they had always lived there. It is also plausible that, as he claimed, his only other relatives are living nearby, also in that district. The Tribunal is therefore satisfied that, if he were to return to Pakistan, he would have no relatives with whom he could settle outside the area in which he is at risk. I am also satisfied that his overriding current concern is for his family's safety, and that despite the dangers he would almost certainly try to locate them by returning there if he returned to Pakistan. While I accept that he has been working overseas for some years and has clearly been a self-reliant individual in that period, I have accepted the evidence from the specialist about his current psychiatric problems. In my view these

would significantly limit his ability to find accommodation and generally support himself in an unfamiliar part of the country, where he has no social network. In my view in all circumstances it would be unreasonable to expect him to relocate.

Given the findings above, I do not propose to consider his claims in relation to his fear of persecution by the Pakistani government. For the reasons set out above the Tribunal finds that the applicant has a well-founded fear of Convention-related persecution in Pakistan.

CONCLUSIONS

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

DECISION

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

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*

Sealing Officer's I.D. prrt44