

1104075 [2011] RRTA 835 (28 September 2011)

DECISION RECORD

RRT CASE NUMBER: 1104075

DIAC REFERENCE(S): CLF2010/108534

COUNTRY OF REFERENCE: Afghanistan

TRIBUNAL MEMBER: Charlie Powles

DATE: 28 September 2011

PLACE OF DECISION: Melbourne

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship (the delegate) to refuse to grant the applicant a Protection (Class XA) visa (the visa) under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Afghanistan, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] May 2009 and applied to the Department of Immigration and Citizenship (the Department) for the visa [in] August 2010. The delegate decided to refuse to grant the visa [in] April 2011 and notified the applicant of the decision.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] May 2011 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Regulations.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

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

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of

former habitual residence. 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.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.
19. Under s.36(2) of the Act, where a non-citizen in Australia has a right to enter and reside in a third country, that person will not be owed protection obligations in Australia if he or she has not availed himself or herself of that right unless the conditions prescribed in either s.36(4) or (5) are satisfied, in which case the s.36(3) preclusion will not apply.
20. The Full Federal Court has held that the term 'right' in s.36(3) refers to a legally enforceable right: *MIMA v Applicant C* (2001) FCR 154. Gummow J has suggested in *obiter dicta* that the 'right' referred to in s.36(3) is a right in the Hohfeldian sense, with a correlative duty of the relevant country, owed under its municipal law to the applicant personally, which must be shown to exist by acceptable evidence: see *MIMIA v Al Khafaji* (2004) 208 ALR 201 at [19]-[20].
21. In determining whether these provisions apply, relevant considerations will be: whether the applicant has a legally enforceable right to enter and reside in a third country either temporarily or permanently; whether he or she has taken all possible steps to avail himself or herself of that right; whether he or she has a well-founded fear of being persecuted for a Convention reason in the third country itself; and whether there is a risk that the third country will return the applicant to another country where he or she has a well-founded fear of being persecuted for a Convention reason.

CLAIMS AND EVIDENCE

22. The Tribunal has before it the Department's files relating to the applicant's protection visa and student visa applications. 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.

Application for a protection visa

Application forms

23. The applicant provided the following information in support of his application with his protection visa application forms lodged, as noted above, on 12 August 2010.
24. The applicant is a [age deleted: s.431(2)] -year-old man, born on [date deleted: s.431(2)] in Kabul, Afghanistan. He acquired Afghan citizenship at birth and claims to be of the Tajik ethnicity and a Muslim. He speaks Dari and English and also reads and writes English.
25. The applicant's father continued to reside in Afghanistan. The applicant's mother's whereabouts were unknown. The applicant has two unmarried sisters who also continued to reside in Afghanistan. The applicant has never married and has no children.

26. Between 2005 and May 2009, the applicant was living in Peshawar, Pakistan. He attended secondary school in Peshawar.
27. The applicant was granted a Subclass 572 Student visa [in] April 2009, which was valid until [a date in] 2010. He arrived in Australia [in] May 2009 as the holder of an Afghan passport, issued [in]2008, which expired [in] May 2011.
28. After arriving in Australia, the applicant studied at [Institution A] .
29. The applicant provided hand written answers in English to the questions on his protection visa application forms about his reasons for claiming protection in Australia.
30. At Question 41 of Part C of the protection visa application forms, the applicant stated he is seeking protection in Australia so that he does not have to go back to "*Pakistan, Afghanistan*".
31. In response to the question "Why did you leave that country?", the applicant stated: "*I left Pakistan to come to Australia to study. I cannot return to Pakistan for reasons I will detail in my statutory declaration, to be provided. I have a well-founded fear of persecution in Afghanistan due to events that have arisen since my arrival in Australia. I fear persecution from Islamic fundamentalists for my imputed political opinion & my Western ideas. The government is unable & unwilling to protect me. A detailed statutory declaration and submissions will be provided.*"
32. In response to the question "What do you fear might happen to you if you go back to that country?", the applicant stated: "*I fear serious harm in the form of kidnapping, death and torture. A detailed statutory declaration & submissions will be provided.*"
33. In response to the question "Why do you think this will happen to you if you go back?", the applicant stated: "*I fear this because this has happened to my family in Afghanistan. My family were residing in Pakistan as refugees, however it became too dangerous for them to stay there so they fled back to Afghanistan, where I believe my father has been kidnapped. My mother's and my sister's whereabouts are currently unknown.*"
34. In response to the question "Do you think the authorities of that country can and will protect you if you go back? If not, why not?", the applicant stated: "*No, the government of Afghanistan is not willing or able to provide me with protection.*"
35. In answer to Question 57 of Part C of his protection visa application forms, the applicant stated that he believes his family was registered with the United Nations High Commissioner for Refugees while residing in Pakistan.
36. The following relevant documents were provided with the protection visa application form:
 - a. A certified copy of the applicant's Afghan passport, indicating that:
 - i. it was issued by the Consulate General of Afghanistan in Peshawar, Pakistan on [in] 2008 and extended on [in] 2008 until [May] 2011;
 - ii. the applicant was granted a visa to Pakistan [in] November 2008, valid until [February] 2009, allowing him to visit Pakistan twice for a maximum duration of 30 days for each day;

- iii. the applicant departed Pakistan [in] November 2008 and entered Pakistan [three days later];
 - iv. the applicant was granted a further visa to visit Pakistan [in] December 2008, valid until [November] 2009, allowing the applicant to make multiple visits to Pakistan with a maximum duration of one year for each stay;
 - v. the applicant was granted a Subclass 572 visa [in] April 2009 in Islamabad;
 - vi. the applicant departed Pakistan [in] May 2009, entered and departed the United Arab Emirates [the same day] and arrived in Australia at Melbourne Airport on [the next day].
 - b. A certified copy of a Registration of Afghan Citizens in Pakistan card claimed to be in the name of the applicant; and
 - c. a form appointing[name deleted: s.431(2)], a lawyer at Victoria Legal Aid, (the representative) as the applicant's exempt agent and authorised recipient for the purposes of his protection visa application.
37. On 26 August 2010, the applicant sought financial assistance under the Asylum Seeker Assistance Scheme. In applying for that assistance, the applicant signed a form stating that:
 - a. he had in the past relied on his father, who owned a shop in Pakistan, for financial support;
 - b. his family had fled harassment in Pakistan and returned to Afghanistan after the applicant arrived in Australia;
 - c. he had learnt from his mother that his father had been kidnapped in Afghanistan; and
 - d. he has now lost contact with his mother and last spoke to her in May 2010.
38. The applicant was granted assistance under the Asylum Seeker Assistance Scheme [in] September 2010.
39. On 20 October 2010, the applicant provided the Tribunal with a statutory declaration made by him in English with the assistance of an accredited Dari interpreter on 8 October 2010. In that declaration, the applicant states as follows:
 1. *I am making this statutory declaration to provide information about my fear of persecution in Afghanistan.*
 2. *I fear serious harm in Afghanistan from Islamic militants. I fear this harm because of my imputed political opinion, namely an assumption that I am pro-West because of my association with my father and his Western-style business, and because I have lived for some time now in Australia. I also fear harm on the basis of my religion, namely that I will be perceived as anti-Islam for the same reasons.*

Family Background

3. *I was born on [date deleted: s.431(2)] in Kabul, Afghanistan. I am not sure which area in Kabul I used to live because my family left there and moved to Pakistan when I was very young. When I was growing up in Pakistan my parents sometimes used to talk about life in Afghanistan, but I had no memory of the country so it was hard for me to know where they were talking about.*
4. *I am of the Tajik ethnicity. I am a Sunni Muslim. In Afghanistan the two languages that are officially spoken are Pashto and Dari. I speak both Pashto and Dari, and can also speak some Urdu because I studied it in Pakistan. My friends at school spoke Pashto and Urdu. I also learned to speak English at school because nearly all of my subjects were taught in English. My native tongue however is Dari.*
5. *My father's name is [name] (DOB: [date]) and my mother's name is [name] (DOB [date]). Both of my parents grew up in Kabul.*
6. *I have two sisters. My older sister's name is [name] (DOB [date]). My younger sister's name is [name](DOB [date]).*
7. *I have never met any of my extended family, but my parents sometimes used to talk about the rest of the family. They used to talk mainly about my paternal grandfather [name]. I never met him. All I know about him is that he was killed.*
8. *My family sometimes used to talk about other family members who were left in Afghanistan, none of whom I have ever met or spoken to. My paternal grandmother's name was [name]. I know that she is dead, though I'm not sure when or where or how she died. I don't know my maternal grandmother's real name but when she was discussed she was referred to as [name], which is a nickname. I'm not sure if she's now dead or alive. I don't know anything about my maternal grandfather, including his name. I remember my parents talking about an uncle in Kabul, however I don't know what his name is. I don't know where any of my other family members lived in Afghanistan.*
9. *When we were living in Pakistan my parents didn't talk about the extended family very much because they were so far away. I used to ask my parents questions about my family and Afghanistan when I was little, but as I got older I was focused on my study and didn't want to think about life in Afghanistan. My parents sometimes talked about returning to Afghanistan when it became stable, so I always had in the back of my mind that one day I would return to Afghanistan one day, but otherwise I was fairly happy living in Pakistan and very focused on my life there.*
10. *When I was little I used to ask my parents why we lived in Pakistan given that we were Afghani. They explained that it was because of the war in which my grandfather died. I'm not sure which war they were referring to (because I was very young). I don't know very much about the history of Afghanistan, but I know that Afghanistan has more or less been in a constant state of war for 30 years, so I don't know exactly when he was killed. I know that my grandfather was not a soldier and was not involved in the fight, and that he was killed suddenly and unexpectedly. He was a civilian casualty. After he was killed my parents were scared and they felt that it was*

too dangerous to remain in Afghanistan because of the war. They told me that everything was destroyed during the war, including our house.

Move to Pakistan

- 11. When I was about one year old or less my family moved to Pakistan. We lived in Peshawar, the capital of North West Frontier Province (now called Pukhtunkhwa).*
- 12. The first place we lived in was in [suburb deleted: s.431(2)], a suburb. We were there for 3 years. We lived in a house. I don't have a clear memory of it because I was very young when we lived there. There were a lot of other Afghani people living in this area.*
- 13. Then we moved to [suburb deleted: s.431(2)], also a suburb of Peshawar. It was my father's decision to move to this area, I'm not sure why. We also lived in a house there. There were also a lot of other Afghani people living in this area.*
- 14. I went to primary school and high school in Peshawar. I had a very good experience going to school. I had good friends who were both Pakistani and Afghani at school. I also knew some of the Afghani people living in the area in which we lived, however they were just acquaintances, neighbours, people that you talk to in the street. My closest friends when I was growing up were Pakistani. It was at school that I learned to speak Urdu and English, and I learnt to speak Pashto from living in Pakistan and talking to my friends.*
- 15. I started at Peshawar [school deleted: s.431(2)] when I was 5 years old. I studied there for 10 years. After finishing year 10 I went to [school deleted: s.431(2)], where I studied for 2 years and where I completed Year 12. I used to get good marks. I did well in Urdu, English and science.*
- 16. My sisters also went to school in Pakistan. I had a good relationship with sisters, and would describe my childhood as quite happy. My parents also seemed happy in Pakistan. They also learned to speak Pashto. They didn't have Pakistani friends, but they had some Afghani friends that came to our shop and sometimes to our house when we had celebrations like Eid (end of Ramadan). They learned to speak Pashto so they could communicate with people in the community.*
- 17. In terms of my religious practice, I went to the mosque whenever I had the time. I still prayed five times a day however even if I couldn't make it to the mosque. My parents went to the mosque whenever they could make it, the same as me, but they also prayed five times a day in accordance with Islamic practice. Sunni Islam is the main religion in Peshawar. Our family was committed to Islam, but we were not an extremely religious family.*
- 18. My father owned a shop in [name deleted: s.431(2)] Road in Peshawar. He opened the shop in 1999. Before that he had another shop in the same area. He had to relocate his business to the second shop in 1999 because the lease on the first shop expired. The shop was called "[name deleted: s.431(2)]".*
- 19. Both shops sold the same produce, namely [Western clothes] and other [products] etc*

My father also had [mannequins] which he dressed up [in Western clothes] to put in the shop window to attract customers. Initially he bought all of his products from wholesalers in Peshawar and then sold them in retail in his shop. When he made enough money however he used to travel to China to buy the goods directly from there. He travelled to China twice, and he also went to Thailand once, which were the countries where all of his goods were made except for the [products] which were made locally. China and Thailand are thought of as Western countries in Pakistan.

20. *I am not sure if my father worked in this business in Afghanistan before we moved to Pakistan. He was very successful in his business in Pakistan. Our family was not wealthy but we were middle-class, lived comfortably and always had enough money to pay for school fees, etc.*
21. *The [clothes] sold by my father were Western style [clothes]. This style of [clothes] was popular amongst wealthy, educated, open-minded people who lived in the city, which included both Pakistani and Afghani customers. He had both Muslim and Christian customers. The business did not appeal however to everyone, Sometimes he got told by people that the goods he sold were not appropriate and were not consistent with Islam, because the [clothes] were Western style and some of them [details deleted: s.431(2)] . I don't remember my father suggesting he had ever received any threats or warnings when I lived in Pakistan, rather just comments made to him by strangers passing by his shop and expressing their disapproval to him. I remember however that once someone threw a rock at the shop window and the window was broken. When we saw that the window had been broken we assumed it was caused by someone who disapproved of the mannequins in the window. The worship of idols is forbidden in Islam, and some fanatic, extremist Muslims think that mannequins in windows are placed there for worship rather than to attract customers. I find it hard to believe that some people think like this, but I witnessed it when I lived in Pakistan.*
22. *My mother worked as a housewife. She never helped in the shop.*
23. *While my childhood was mostly a happy one and despite the success of my father's business, in Pakistan we did experience constant difficulties integrating with the community because of our ethnicity. We were harassed by the community at large because we were refugees, and by the authorities who wanted us to leave. We used to get hassled by police because we didn't have any identification because we were Afghanis.*
24. *The hassling from the authorities increased as the situation in Pakistan became more perilous, especially with the increase in terrorism and suicide bombings. It became particularly bad around 2005. Police began patrolling the streets and were suspicious of everyone, but they were particularly suspicious of us because we were Afghani and they therefore associated us with terrorists. When we got issued with a card from UNHCR confirming our refugee status (which was like an ID card) they hassled us less. I got my card from UNHCR in 2007. I also had student ID from school, and I would show both to police when asked for ID. As I said, when I got the ID I was hassled less by the authorities.*
25. *Other than the police, Pakistani people in the community generally would say to us*

"you're Afghans, why don't you go back to your own country". They would swear at us and were prejudiced against the Afghani people in Pakistan. I experienced this the entire time that I lived in Pakistan, as did other Afghani people. This prejudice was very common, it would happen nearly every day. I was happy at school and at home, but when I went out to go shopping or for other reasons, that's when I experienced the harassment. Again, the harassment became worse with the higher incidence of suicide bombings. I never experienced anything more than verbal harassment, nor did my family. I got the sense that many Pakistani people felt that Afghani people were a burden on them, probably because we took their jobs, used their resources, etc. Again, I also think that they blamed us for the increase in terrorism and the danger it put the community in.

26. *When we first moved to Peshawar when I was little it was a relatively safe place to live and we did not really worry about terrorism. The suicide bombings and terrorism started in 2005 because Pakistan was providing support to America in the war against Afghanistan. The situation became worse and worse until 2007-2008 when Benazir Bhutto (the female president) was killed. Life became very dangerous. The number of suicide bombings increased even more at that time. Before her assassination there were sometimes suicide bombings but not a lot. After her death however, because of the lack of stability in the country, I didn't feel safe because it always seemed that on the news there had been another bombing.*

27. *I remember that there was a bomb blast in Peshawar in 2007 when a police commissioner was killed. Peshawar seemed to be one of the worst places in Pakistan for suicide bombings. Most of the bombings were by the Taliban. They were targeting civilians and government officials, sometimes they even bombed the mosques. I was scared because it seemed so indiscriminate, ie- they were killing everyone.*

28. *My father's business suffered a bit as the situation in Peshawar deteriorated. It did not have a massive impact however, it just wasn't running as successfully as previously.*

Move to Australia to study

29. *When I was nearing finishing my second year at college, I was looking at university options. My father and friends suggested to me that I should consider going to Australia to study. With their encouragement I decided that was what I wanted to do.*

30. *The process of organizing a student placement was quite difficult and it was very expensive: my father spent a lot of money on school fees, plane fares, etc. It took a long time to organise the visa but it wasn't too difficult. I experienced no problem getting my passport or visa to go to Australia.*

31. *My father paid for everything. I was the only son in my family so while it was expensive, it didn't put too much of a burden on the family.*

32. *Before I departed for Australia I was both excited and sad. I didn't want to leave my family but I was very excited about going overseas to study and achieving my goals and aims.*

33. *I arrived in Australia [in] May 2009. My flight went via Dubai. I was only there for a few hours (maybe 9 hours) in transit.*
34. *I didn't know anyone in Australia except one family who used to be our neighbours in Pakistan, who were also Afghani. It was arranged that I would stay with them in [Suburb 1] while I was living in Australia. After one month I moved with them to a house in [suburb].*
35. *I studied [Subject C] at [Institution A].*

Change in circumstances in Pakistan since arrival in Australia

36. *When I first arrived in Australia I was speaking to my parents once or twice a week on the phone. It was uncommon for me to not speak to them at least once per week. They didn't tell me much about what was happening there because they were concerned that it would worry me and therefore impact on my studies.*
37. *I quickly realised however that things were getting worse in Pakistan from watching the news and reading the newspaper, Naturally I was worried about my family. Roughly two months after I arrived in Australia they returned to Afghanistan. They told me about one month before they left that this was their plan because the situation in Pakistan was becoming so dangerous and because my father's shop was taken forcibly, though I'm not sure who took it. I was surprised when they told me that the business was taken because even though I knew the situation was unstable, I wasn't expecting that the shop would be taken. My parent decided it was better to move back to Afghanistan because the situation was so unstable in Pakistan. They thought that Afghanistan would be more stable because of the presence of international troops. They said that there were rebel groups that were giving them a hard time and targeting them. There are different rebel groups that operate in Peshawar, but I don't know which group was hassling them. Most of the rebel groups in Peshawar however are Islamic fundamentalist groups. When I say "targeting" them I mean that they were verbally harassing my father, making derogatory comments towards him because he was Afghani and expressing their disapproval about the shop because they thought it was anti-Islam. I assume it was one of these Islamic fundamentalist rebel groups that took the shop because they thought it offended Islam.*

Family's return to Afghanistan

38. *In late June 2009 my parents and sisters returned to Afghanistan. They returned to Kabul, and were living in [Suburb name deleted: s.431(2)]. I don't know if they knew anyone on their return, they didn't tell me. When they first returned they were happy to be back in Afghanistan, and I understood that life was going okay.*
39. *My father did not have a shop in Afghanistan, but he started a business buying [Western clothes] etc (ie. the same produce that he had sold in Pakistan) wholesale and selling them to retail shops. It seemed that his business was going well.*
40. *I still spoke to my family once or twice a week when they returned to Afghanistan. Sometimes they called me, sometimes I called them.*

41. *I didn't realise that there was anything wrong until my mother called me in May 2010 and told me that my father had been kidnapped and that they were very scared because there were no other men to look after her and my sisters. She assumed he was kidnapped because he was missing. At that time he had been missing for maybe 3 days up to one week. She was very scared and told me that she and my sisters needed to leave. She was crying a lot and I had difficulty understanding her properly.*
42. *My mother did tell me however that my father had been receiving threats from Islamic fundamentalists because of his business in Kabul. He began to receive the threats after he started the business in Kabul and once it started to prosper. I don't know how often he was being threatened. They were phone threats. Someone called him and told him what he was doing was anti-Islamic and that he was spreading Western ideas in Afghanistan. They told him if he did not give up the business they would kidnap him. My mother didn't mention how many times the threats had happened, but they occurred more than once and over a period of time.*
43. *My mother said that my father didn't take the threats seriously initially but later on he started to become concerned. He didn't change anything about the business though. The whole family was concerned about the threats. My mother tried to persuade my father to scale down the business, but it was difficult because it was their livelihood and the whole family was dependant on his income. Because of the threats though my mother wanted the business to be as limited as possible just so they could survive.*
44. *When my father went missing my mother assumed that he had been kidnapped because of the threats that he had been receiving.*
45. *I also spoke to my sisters after my father went missing. They were also very upset and scared and were crying.*
46. *That was the last time that I spoke to my mother and sisters. I have tried to call them many times since but no one has ever answered. The phone is no longer connected. The phone number I always contacted my family on was a mobile family number which my parents shared. There was no system at the time for landline telephones in Kabul.*
47. *The last time I spoke to my mother she said that she and my sisters would not stay in Afghanistan. I don't know if they left the country or what has happened to them. She didn't say where they intended to go, just that it was not safe to stay in Afghanistan.*
48. *I am very scared that I will have to go back to Afghanistan. I am scared because my father has been kidnapped and may have been killed. I am also not sure if my mother and sisters have also been killed. If I go back the same thing may happen to me. I am certain that the reason my family have gone missing is because of my father's business and its association with Western ideas which offends Islamic fundamentalists.*
49. *I am also scared that Islamic fundamentalists would target me if I returned to Afghanistan not just because of my association with my father and his business but because I have been living in Australia. I have embraced the Western lifestyle and can speak English. I remember that Islamic fundamentalists in Pakistan believed that Muslims that travelled overseas to Western countries would become corrupted and*

would convert to other religions, start drinking alcohol and embrace everything that is forbidden in Islam. They believed that just by going overseas a person would become anti-Islam. I am sure that Islamic fundamentalists in Afghanistan would think the same way.

50. *It would make no difference whether I return to Kabul or another part of Afghanistan in terms of the persecution that I fear. Kabul is the place in Afghanistan which is more educated and open-minded than the rest of the country. Even so, every day in Kabul there are still kidnappings, suicide bombings and the presence of the Taliban is felt there. Even in Kabul people are afraid and are living in the shadow of Islamic fundamentalists like the Taliban. I know this from the media, reading the newspaper, looking at the internet, etc. If I was forced to move to another part of Afghanistan however, the people outside of Kabul are even more uneducated and ignorant, and Islamic fundamentalism is even more prevalent. There are many Islamic fundamentalists that live in the villages outside of Kabul, and the Taliban is more powerful in these areas. I am therefore even more fearful of persecution in these areas outside of Kabul.*

51. *Apart from a few months when I was a baby, I have never lived in Afghanistan. Now that my family have gone missing in Afghanistan I do not know anyone there. I would have no support at all. Even if I have some remaining family in Afghanistan, I don't know who they are or how I would contact them- I wouldn't have a clue where I would go or how I could live there. I don't know how I would support myself. I can speak Dari but I can't write anything in that language other than my name and the names of my family members. I have no idea about how society operates, whether I would need to have family support in order to be accepted or to get a job, etc. It is like I would be a foreigner in Afghanistan. I think I would be incredibly vulnerable if I was forced to return to that country and that adds to my great fear of persecution. People would see that I am all alone without any friends or family, and that I have been in Australia, and they would be very suspicious of me.*

40. Provided with the statutory declaration was a Police Certificate from the Australian Federal Police for the applicant dated [2010] indicating that he did not, at that time, have a criminal record in Australia.
41. [In] October 2010, the representative provided a written submission in support of the application for a protection visa. In that submission, the representative referred to the applicant's statutory declaration of the same date and submitted that, in light of his claims and the country information referred to in the submission, Australia owes the applicant protection obligations. In particular, the representative claimed the applicant will face a real chance of serious harm on the basis of an imputed political opinion that he and his father "have both expressed tolerance if not appreciation for Western ideals, customs and practices"; and an imputed religious belief that he is anti-Islamic because of his father's business and the length of time the applicant has spent living in Australia, including attending an educational institution.
42. Further, the representative submitted the applicant was not at risk of persecution at the hands of the Afghan government authorities but from Islamic fundamentalists such as the Taliban. The representative submitted that, given the country information indicating the high level of corruption and the inadequacy of the police force in Afghanistan, the Afghan government and

authorities would be unable to protect the applicant from Islamic fundamentalists such as the Taliban. The representative also suggested that because the applicant has spent several years in Australia, his father ran a Western business and he has no family connections in Afghanistan he may be suspected of being a spy for the Afghan government.

Interview with the delegate

43. The applicant was interviewed by the delegate with the assistance of a Dari interpreter [in] March 2011. The representative attended the interview. The Tribunal has listened to the audio recording of the interview.
44. The following further documents were provided in support of the application:
 - a. A colour copy of the Registration of Afghan Citizens in Pakistan card claimed to be in the name of the applicant;
 - b. A copy of an Afghan national identity card for the applicant, together with a translation;
 - c. Copy media article from The New York Times dated 28 January 2011 entitled "Deadly attack by Taliban in Kabul sought to kill head of Blackwater";
 - d. Copy media article from "globalpost" dated 14 February 2011 entitled "Afghanistan war: new attack rocks Kabul's sense of security"; and
 - e. Seven colour photos of the exterior and interior of what appears to be a [Western clothes] shop, together with a one page brochure for a [Western clothes] shop.

Delegate's decision

45. The delegate refused the application for a protection visa because he was not satisfied that Australia owes the applicant protection obligations. The delegate found the applicant claimed to fear harm because he is Tajik and a Sunni Muslim, because of his association with his father and his father's [Western clothes] business, and because he has adopted Western values and behaviours. The delegate identified the applicant's claims as fearing harm as a result of his race, religion, imputed political opinion and membership of particular social groups comprising his family and "Westernised returnees". However, the delegate did not accept that the essential and significant reason for the harm feared by the applicant was his membership of the particular social group of "Westernised returnees."
46. The delegate found the applicant's evidence in writing and at interview to be reliable and consistent. The delegate accepted the evidence provided by the applicant about his father's business in Peshawar to be credible. The delegate also accepted that the applicant genuinely holds "Western" values and behaves accordingly. The delegate accepted that the applicant's father was likely to have been targeted because he operated a Western – style business. However, the delegate found that the risk of the applicant facing harm because of his association with his father or his father's business was remote because a year had passed since his father and other families went missing, there was no information to suggest the abductors were aware of the applicant living abroad and there was little possibility of his personal information being passed onto fundamentalist groups on his return.

47. The delegate assessed the available country information as indicating that the capacity of the Afghan government and international forces to provide adequate protection in Kabul had recently increased and so found there was not a real chance he would be persecuted by Islamic fundamentalists in Kabul because of his Western values and behaviours because he is perceived to be pro-Western. In relation to the applicant's claim that he would be denied the capacity to subsist in Kabul as a Tajik Sunni Muslim, the delegate found there was no country information suggesting the applicant would face economic harm in Kabul because of his ethnicity or religion.

Application for review

48. As noted above, the applicant lodged an application for review with the Tribunal [in] May 2011 and appointed the representative as his adviser and authorised recipient for the application for review.

49. The application for review was constituted to the presiding member [in] June 2011.

50. [In] July 2011, the Tribunal sent a letter to the applicant advising him that it had considered the material before it but was unable to make a favourable decision on this information alone and inviting him to appear before the Tribunal to give evidence and present arguments relating to the issues arising in his case [in] August 2011.

51. [In] August 2011, the Tribunal received a letter dated [in] August 2011 from the representative in which a number of further submissions were made in support of the application for review. In her submissions, the representative referred to the claims made by her on the applicant's behalf during the interview with the delegate that the applicant fears persecution on the basis of his membership of the particular social groups comprising his family and "returnees from the West". She further submitted that the applicant, based on comments made by him during the interview, was also claiming he would face persecution on his return to Afghanistan for reasons of his political opinion.

52. The representative also submitted that recent country information indicates the Afghan government and international forces are becoming increasingly incapable of providing protection and security in Kabul and that there are many incidents of abduction and attacks against individuals in Kabul that go unreported. She submitted there are a number of factors that would make the applicant vulnerable to adverse attention from fundamentalist Islamic opposition groups in Kabul, including his connection with his father, who is likely to have been abducted and killed by one of these groups; his lack of family connection or other supports in Kabul; his status as a recent returnee from the West; and his "westernised" personal and political beliefs.

53. Enclosed with the letter dated [in] August 2011 were copies of the following online media articles:

a. [article name deleted: s.431(2)] and

b. "Night-time attack paralyzes Kabul" dated 28 June 2011 from "globalpost".

54. On 26 August 2011, the Tribunal accessed the applicant's page on the online social media service "Facebook" and printed a number of photographs and extracts from that page. The

Tribunal also printed out the results of an online search of the directory “Afghan Yellow” for the name “[name deleted: s.431(2)]”.

Tribunal hearing

55. The applicant appeared before the Tribunal [in] August 2011 to give evidence and present arguments. The Tribunal also received oral evidence from [Mr B] by telephone. The Tribunal hearing was conducted with the assistance of an interpreter in the Dari and English languages. The representative also attended the hearing. An observer from the Asylum Seeker Resource Centre (ASRC) also attended the hearing, with the applicant’s consent.
56. Before the hearing, the applicant provided the Tribunal with a letter dated [in] August 2011 addressed to him from the Australian Red Cross (the Red Cross) stating that he had sought assistance from the Red Cross with tracing the location of his family. The applicant also provided:
 - a. copies of correspondence sent on his behalf to [Institution A] by the representative and the ASRC and correspondence from [Institution A] in relation to his inability to pay course fees to [Institution A];
 - b. his Certificate III in [Subject C] from [Institution A]; and
 - c. copies of online media reports in relation to corruption in the Afghan police force and the release of five would-be suicide bombers by the Afghan government.
57. In response to questions from the Tribunal, the applicant provided the following evidence in support of his application at the hearing.
58. The applicant confirmed his full name, place and date of birth. He stated that he has parents and two sisters, one older and one younger, but he does not know where they are. He stated the last time he saw them was in Pakistan in May 2009. None of his grandparents are still alive, his mother has no siblings and he heard that his father had one brother but he, the applicant, has never met him.
59. The applicant confirmed that he had left Kabul about one year after he was born when his father decided to take his family to Peshawar in Pakistan because of the deteriorating security situation in Afghanistan. The applicant remained living with his family in Pakistan until he came to Australia in May 2009. He and his family lived in Pakistan without lawful permission until approximately one year before the applicant came to Australia at which time they were first granted a temporary visa to remain in Pakistan as refugees.
60. His father ran his own business in Pakistan: a shop that sold [Western clothes] and [other products]. His father sometimes travelled overseas, to China, to source goods for his shop. His family lived on the property rented for his father's shop. His father also owned houses in Kabul, which were rented out.
61. The applicant completed primary and secondary schooling in Pakistan and travelled to Australia to study at [Institution A]. His father paid for his studies in Pakistan and Australia. The applicant’s only employment before coming to Australia was helping in his father's shop while not at school. He assisted with dealing with customers and never dealt with the people who supplied goods to his father's business.

62. He was raised a Sunni Muslim. His family were not particularly religious. They said their prayers regularly and occasionally went to mosque.
63. After arriving in Australia, the applicant began studying a Diploma of [Subject C]. He completed the first year of his studies by the end of June 2010, by which time he had qualified for a Certificate III in [Subject C]. The applicant had initially enrolled at the [Institution D] to study computer science but decided to change his course because it was too far for him to travel to study at [Institution D]. The applicant was unable to continue his studies after June 2010 because his father's disappearance meant he could no longer pay the course fees. The applicant was, at the time of the hearing, working at a factory 50 hours a week as a factory hand. He had started working there in November 2010 and was earning approximately AU\$800 per week. He did not receive any income from anywhere else. He had saved around AU\$3000. He did not own any property in Australia or overseas and, he stated, owned a car, being a Toyota [car] worth about AU\$15,000, which he had bought a few months after starting work.
64. When the applicant first arrived in Australia he lived with Afghan family in [Suburb 1], Melbourne. His family had known the family he stayed with in Australia because they were neighbours in Peshawar. The applicant stated that he was not certain how the husband of that family came to Australia but that he, the husband, had come to Australia first and then sponsored his wife and children. He stated that the husband was already living in Australia when the applicant's family and the other family met. The applicant stated that as far as he knew his family had not contacted the other family after they had come to Australia but before the applicant had come to Australia but that his family knew that the other family were here in Melbourne. The applicant stated he did not know any other people living in Australia before he came here nor had he, since he had come to Australia, met any other people here who had known his family in Pakistan or Afghanistan.
65. The applicant stated that he had been intending to complete his studies in Australia but in May 2010 received a telephone call from his mother. During that telephone call she told him that his father had been abducted. The applicant was mortified and was unable to continue with his studies. He stated that he had been in regular contact with his family before that time by telephone. He stated he would call them on a mobile telephone that the family kept at home. He stated that he had spoken to them on a different telephone number from the mobile phone number they had used in Pakistan because Sim cards were different between Afghanistan and Pakistan. He stated that he had never sent anything to or received anything from Afghanistan or Pakistan by post.
66. The applicant explained that after the applicant had come to Australia, at around the end of June 2009, his parents and sisters returned to Afghanistan. He stated that he understood they had done so because the situation in Pakistan had become volatile for Afghan refugees. He stated that his father's shop had been taken from him. He states he did not know much about what had happened to his father's shop in Peshawar. He stated that his father had been under a lot of pressure and not feeling safe so they had decided to return to Kabul. He stated that as far as he knew his father had not been fearing harm from any particular person in Peshawar but that it was no longer safe for Afghan refugees in Peshawar.
67. The applicant stated that he understood that his family had owned a house in Kabul where they had lived before they fled Afghanistan but that that house had been destroyed during fighting in Kabul. He stated that he understood that his father had bought another house in Kabul during one of his return visits and had rented that house out. He stated that when his

family returned to Kabul in 2009 they lived in a house rented in the Kabul suburb called [suburb deleted: s.431(2)] and then later bought a house there.

68. After his family returned to Kabul his father supported the family by working as a wholesaler of [Western clothes]. As far as the applicant knew, his father did not open a shop to sell [Western clothes]. The applicant stated that as far as he knew his father did not have an office or place that he worked from to run his business.
69. The Tribunal asked the applicant what his mother told him about what had happened to his father when he and his mother spoke on the telephone in May 2010. The applicant stated that his mother was crying and sounded devastated because she hadn't seen his father for a week. He stated that he tried to comfort her but couldn't do anything else. The Tribunal asked the applicant whether he asked his mother what she had been doing to try and find out where his father was. The applicant stated that his mother had been really scared about her own safety because his father had received threatening phone calls and that she felt she had to look after her daughters. He stated that she told him that his father had received two telephone calls but that his father didn't take them seriously. He stated that his father went to work and didn't come home. His mother waited patiently but after a while decided she had to call the applicant and tell him what happened.
70. The Tribunal asked the applicant whether he knew where his father kept the money he used for his business in Afghanistan. The applicant stated he had no idea. The Tribunal asked the applicant if his father still had any money or investments in Pakistan. The applicant stated he did not know. The Tribunal asked the applicant whether he knew if his mother had done anything else to find out where his father was. The applicant stated she was a woman with two young girls and because of the threatening phone calls she hadn't done anything. The Tribunal asked the applicant if he had suggested to his mother that she do anything to find out where his father was. The applicant stated he would have suggested something if his mother and sisters had had a male caretaker there but he knew that they could not put themselves in more danger so he did not suggest anything.
71. The Tribunal asked the applicant whether he himself attempted to undertake any enquiries as to where his father was. The applicant stated that he did. He asked friends what he should do and approached the Red Cross. The Tribunal noted that the letter provided by the applicant prior to the hearing from the Red Cross stated that he contacted them in September 2010. The applicant confirmed this. The Tribunal asked the applicant if he spoke to anyone at the Red Cross before September 2010. The applicant stated that he did not. He stated that he was very distressed after he had spoken with his mother and could not think straight for about a month. He stated it took him a while to talk about what he had been told and find out about the Red Cross.
72. The Tribunal asked the applicant if he did anything else to find out where his father was. The applicant stated that he did not. He stated he was hoping and praying he would hear good news about his father, or hear from his mother, but unfortunately he lost contact with his mother and has not heard anything from her. The Tribunal asked the applicant whether he considered contacting anyone else in Afghanistan by telephone to find out about his father. The applicant stated he did not know anyone else in Kabul. He stated that he knew an Afghan man called Muhammed who lived in Australia and had told him about his father. He stated that Muhammed had gone back to Afghanistan for a visit and so the applicant contacted him in February 2011 to ask him if he could try and find out about his, the applicant's, father. He

stated that Muhammed was still in Afghanistan but that the applicant had not heard anything from him.

73. The Tribunal asked the applicant whether he had thought about trying to call the police and Kabul about his father. The applicant stated that he did not think of doing this because the police in Kabul are completely corrupt. He felt that even if he had tried to find a contacted the police and Kabul, he would be asked why he was living overseas. He stated that the police and Kabul can't even help the people living there.
74. The Tribunal asked the applicant whether he had considered calling hospitals in Kabul to find out if his father was there. The applicant stated that he had not thought about this because his father had been very healthy. He stated that he was certain that something bad had happened to his father because of the threatening phone calls he had received. He stated that after he lost contact with his mother he became more certain that someone was after them.
75. The Tribunal asked the applicant if, when he had spoken with his mother in May 2010, he had arranged to speak with her again. The applicant stated that he had. He stated his mother had been very scared, that she had told him that she did not feel safe and that she had to find another place to go. The applicant stated that he tried to call her again the next day at the telephone number was disconnected.
76. The Tribunal asked the applicant whether he took any steps to try and find out where his mother and sisters were. The applicant stated he couldn't think of doing anything else. He stated that he was sure they were trying to get out and find a safer place to live and he hoped they would contact him.
77. The Tribunal asked the applicant whether there were people who knew his family still living in Peshawar. The applicant stated there were some. The Tribunal asked the applicant whether he had ever considered contacting those people in Peshawar to see if they had been contacted by his family. The applicant stated that he himself had not had close contact with those people in Peshawar and so he did not have their contact details. The Tribunal asked the applicant if he had contacted anyone in Peshawar to try to find out if his family had returned. The applicant stated that he had tried calling the number of the landlord of the house where he and his family had lived in Peshawar but that that number was disconnected.
78. The Tribunal asked the applicant whether he had taken any other steps try and find out about his family. The applicant stated that he couldn't think of anything else to do. He stated that he had contacted the Red Cross and told them about his family. He stated that he told them the suburb in Kabul where his family had been living but because he could not provide an exact address the Red Cross told him there was not much they could do. He stated that he was devastated and heartbroken because the Red Cross had been his only hope.
79. The Tribunal asked the applicant if he had any records of the telephone calls he had made to Afghanistan. The applicant stated he had used Telstra phone cards and did not have any other records.
80. The Tribunal asked the applicant if he had continued with his studies. The applicant stated that after he heard what had happened in May 2010 he had a lot of difficulties. He stated that after he completed his first year of studies there was no one who can pay for the rest of his course. The Tribunal asked the applicant if he had spoken to anyone at [Institution A] about the difficulties he was having with completing his course. The applicant stated that he had

been trying to keep everything to himself and hoped he would hear from his mother. He stated that he spoke to one of his classmates who is a close friend of his. His classmate's name is [name]. He finished his studies after two years. The Tribunal asked the applicant if he had contact details for [his classmate] but the applicant stated that he did not.

81. The Tribunal asked the applicant if he had spoken to anyone else about the problems he was having in May or June last year. The applicant stated that he had spoken about it with the family he was living with at the time but that he had moved out of that house in November 2010. The applicant confirmed that the family was still in Australia and provided, at the Tribunal's request, contact details for that family, referring in particular to the father of that family, [Mr B]. The Tribunal asked the applicant if it could call [Mr B] by telephone at the hearing. The applicant agreed.
82. The Tribunal received oral evidence from [Mr B] by telephone at the hearing with the assistance of a Dari interpreter.
83. [Mr B] stated that he had come to Australia from Afghanistan to seek protection as a refugee in 2000, had been granted a permanent protection visa and was now an Australian citizen. He confirmed that he had first met the applicant when he picked him up from the airport when the applicant first arrived in Australia. He confirmed that the applicant had been living with him for about 18 months but that the applicant had lost all his financial support because of difficulties with his family. [Mr B] stated that the applicant had lost contact with his family four or five months before he stopped living with [Mr B] and that, as far as he knew, the applicant had been unable to make contact with them since then and certainly had not been able to do so while he was still living with [Mr B]. [Mr B] noted that as the applicant had his own income now and was no longer living with him, he could not say what had happened since the applicant stopped living at his house.
84. The Tribunal noted that the applicant had claimed that he feared harm in Afghanistan because of his political opinion. It asked the applicant to explain why he feared being harmed for that reason. The applicant stated that he had been raised to be broadminded and to express his views. He stated that his father had told him that he wanted him, the applicant, to be educated to learn how to differentiate between right and wrong and to say no to violence and fighting. The applicant stated that as far as he knew in the current situation in Afghanistan people know nothing except fighting. He stated that there you are unable to express your views freely and you are not allowed to follow your dreams. He stated that in Afghanistan people just do what they like and there is no freedom of speech and no liberty to speak of.
85. The Tribunal asked the applicant if he had ever publicly expressed his political beliefs in the past. The applicant stated that he had spoken to people when he went to different organisations in Australia, like the ASRC. He stated that he speaks his mind but otherwise before he came to Australia no one gave him an opportunity to talk about his ideas and opinions. He stated that in Afghanistan children are not encouraged to go to school but rather to fight and engage in conflict. The Tribunal asked the applicant to provide an example of when he had ever publicly expressed these political opinions. The applicant repeated that he had never been given the opportunity to do so but that he would do so if he could if he were to return to Afghanistan. He stated that he always expressed his views to his friends. He stated that when he was at school in Peshawar he would give speeches before the class on different topics. He stated that he was one of the few students who would do this at the teacher's request.

86. The Tribunal discussed with the applicant a number of documents contained in the file for the applicant's student visa application. The Tribunal noted that translations of property ownership certificates in the applicant's father's name provided in support of his student visa application indicated that his father had purchased properties in Kabul in 1998 and 1999 and that he had leased these properties, in one case, on a four-year lease from February 2006 and, in another case, on a three-year lease from January 2008. The Tribunal also noted that Afghan identity card provided by the applicant was issued in Kabul [in] 2005. The applicant confirmed that his father had obtained an Afghan identity card for the applicant during a visit to Kabul in 2005 and stated that, to the best of his knowledge given his youth at the time, the applicant believed his father had travelled to Kabul to purchase the properties referred to in the documents provided in support of his student visa application. The applicant stated that to the best of his knowledge after his family returned to Afghanistan his father sold both the properties to provide financial support for himself and his family.
87. The Tribunal asked the applicant if he knew whether his father had conducted any business in relation to bridle goods in Kabul before he returned to Kabul in 2009. The applicant stated that as far as he knew his father, before 2009, had not taken any into or out of Afghanistan and that no one in Afghanistan would have known before 2009 that his father was engaged in the [Western clothes] business.
88. The Tribunal asked the applicant whether he would have access to any financial resources himself if he were to return to Kabul. The applicant stated that as far as he knew he would not. The Tribunal asked the applicant if he knew whether there were any other assets or investments relating to his father's business that he might still be up to access, such as bank accounts. The applicant stated that he knew nothing about his father's assets or other savings and that he thought his father had had a few savings in a bank but that he did not know anything more.
89. The Tribunal asked the applicant what he would do to support himself if he were to return to Kabul. The applicant stated that the thought of returning to Kabul was frightening but that if he went back he would have to run some kind of business to survive. He states that when people return to Kabul they are not asked their name and date of birth but asked who their father and grandfather is. He stated that he would probably have to run some kind of [Western clothes] business because that is the only work he has done in the past. The Tribunal asked the applicant if he would seek out his father's business contacts to obtain financial support or assistance with starting a business if he were to return to Kabul. The applicant stated that he would not necessarily do that but he was giving it as an example. He stated that if he had an income he would only wish to be able to continue his studies.
90. The Tribunal discussed the extracts from the applicant's page on the "Facebook" social media website which the Tribunal had printed earlier on the day of the hearing. The applicant confirmed that one of the photos from the site shown to him by the applicant is a photograph of him in his father's shop in Peshawar. He explained that that photo was taken one day when he was at the shop after finishing school. The Tribunal referred the applicant to other photographs from the site which showed the applicant with a BMW Coupe. The Tribunal noted there were a number of references to the BMW on the site, apparently written by the applicant, stating that he had bought a new car and was planning to race it.
91. The applicant stated that the BMW belonged to a friend of his who had purchased the car under the applicant's name. The applicant stated he did not know how much the car was purchased for but that it was registered in his name and the financial documents were in his

name. He stated that he pays regular instalments to the vendors of the BMW which are taken out of his bank account. The applicant claimed that his friend then reimburses him for the instalments that are paid out of his own bank account.

92. The Tribunal advised the applicant that it found it difficult to believe that, if the applicant was in such financial difficulties he claimed, he would be able to purchase a BMW and found his explanation for how he had come to purchase it very unusual. In the circumstances, the Tribunal suggested that the applicant provide as much documentary evidence as possible to explain how he had come to purchase a BMW. The Tribunal explained to the applicant that it considered his current financial circumstances relevant to the question of what his circumstances would be if he were to return to Afghanistan and so relevant to the question of whether he may or may not come to the attention of individuals who may seek to harm him if he were to return to Afghanistan.
93. The Tribunal also referred the applicant to searches it had conducted in relation to the applicant's father's business. The Tribunal noted that a search of the online directory "Afghan Yellow" conducted on 26 August 2011 referred to a [Western clothes] business operating in Kabul with the same name as the applicant's father's business in Peshawar, "[name deleted: s.431(2)] ". The applicant stated that the name of his father's business means "[name deleted: s.431(2)] " and so is a generic name for a [Western clothes] business.
94. The Tribunal asked the applicant whether he thought if he were to return to Kabul but faced a risk of harm from people who are not part of the Afghan government and security forces, he would be effectively protected from that harm by the Afghan government and security forces. The applicant stated that, although the government is spending lots of money, their security forces did not protect other people. He stated that security forces just look after themselves. The Tribunal asked the applicant if he thought the police might choose not to help them and if so why. The applicant stated that if he sought help from the police they would ask who he was and where he was from and that when he said he was from Australia it would be held against him. He stated that he would be treated as someone who had betrayed his country and fled overseas. He stated that the authorities in Kabul are corrupt.
95. After brief oral submissions in support of the application from the representative, the Tribunal agreed to allow the applicant to provide further documents in support of his application on or before [a date in] September 2011.

Post-hearing submission

96. [In] September, the Tribunal received a letter from the representative enclosing bank statements and other financial documents for the applicant and his housemate; a statutory declaration from the applicant's housemate dated [in] September 2011 and a range of documents relating to loans for car financing, car insurance receipts, vehicle registration certificates and transfers relating to a BMW Coupe and a Toyota Camry.
97. The letter states that the applicant apologises for the evidence he gave at the hearing as he "was feeling quite faint and unfocused on that date because he was fasting, on top of already feeling quite stressed".

Country information

Targeting of individuals identified as pro-Western or as selling Western-style goods in Afghanistan and Kabul in particular

98. Both individuals perceived to be pro-Western and businesses providing Western-style goods and services, particularly for the expatriate community, continue to be targeted by fundamentalist Islamic elements in Afghanistan, including in Kabul.
99. Sources report attacks on foreigners and individuals in Kabul who are perceived to be associated with the international community, including the North Atlantic Treaty Organisation (NATO)-led International Security Assistance Force (ISAF). In July 2011, provincial governor and presidential adviser, Jan Mohammad Kahn, was killed by two gunmen at his home in Kabul. A parliamentarian was also killed in the attack. Kahn was known to have ties to the United States (US) and was thought to be working with the US on military night raids. A fellow of the Institute for Policy Studies in Washington has suggested that the assassination may have been “the Taliban’s way of sending a message to the US”.¹
100. Further afield, on 6 August 2011, 38 people, including eight Afghans, were killed when an ISAF helicopter was brought down in Wardak province, west of Kabul. Witnesses and the Taliban claim that the helicopter was brought down by insurgent fire. The incident followed two separate attacks in which an additional four ISAF soldiers were killed.² In early April 2011, 17 people affiliated with the United Nations (UN), including UN workers and security guards, were killed in northern Mazar-e Sharif and Kandahar during protests against the burning of a Koran by an American Pastor Wayne Sapp. The Taliban denied responsibility for the attacks.³
101. Also at the national level, the UN Assistance Mission to Afghanistan (UNAMA) reported that throughout 2010, “[p]ersons and relatives of persons perceived to be supportive of the Government of Afghanistan and/or international military forces...were targeted and killed.” Aid workers and international NGO workers were also targeted for killings, abductions and intimidation.⁴
102. The United Nations High Commission for Refugees (UNHCR) has also stated that Afghan nationals working for “some UN agencies or international and local non-governmental organizations reportedly face intimidation, attacks, abduction and death at the hands of the Taliban and other armed anti-Government groups, particularly in areas where these groups are active” Politically and criminally motivated abductions of NGO staff by anti-Government forces are reportedly commonplace, and increased “significantly” during 2010.⁵

¹ ‘Senior Karzai aide killed in Kabul attack’ 2011, Al Jazeera, 17 July

<http://english.aljazeera.net/news/asia/2011/07/20110717171459321200.html> – Accessed 4 August 2011

² ‘US probes Afghanistan special forces helicopter crash’ 2011, *BBC News*, 7 August

<http://www.bbc.co.uk/news/world-south-asia-14435854> – Accessed 8 August 2011

³ ‘Afghanistan: Deadly Kandahar protest at Koran burning’ 2011, *BBC News*, 2 April

<http://www.bbc.co.uk/news/mobile/world-south-asia-12944851>

⁴ United Nations Assistance Mission to Afghanistan 2011, *Afghanistan Annual Report 2010 Protection of Civilians in Armed Conflict*, March, p. iii

<http://unama.unmissions.org/Portals/UNAMA/human%20rights/March%20PoC%20Annual%20Report%20Final.pdf> – Accessed 31 March 2011

⁵ United Nations High Commissioner on Refugees 2010, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 17 December, p. 12–13

<http://www.unhcr.org/refworld/docid/4d0b55c92.html> – Accessed 31 March 2011

103. In February 2009, the Department of Foreign Affairs and Trade (DFAT) advised that according to its sources, returnees were more likely to be accused of spying for foreign troops, and would not be safe in areas controlled by anti-government elements (AGEs) as “they would be targeted primarily as a result of their residence in a western country.” DFAT’s sources tended to describe attacks affecting returnees in light of other factors such as robbery, pre-existing family enmity and suicide bombings.⁶ However, Kabul city is not an area which is considered to be under AGE control.
104. Women who are involved in the entertainment industry have also been at risk of being threatened by radical elements. Mozdah Jamalzadah is a talk show host who is highly likely to be perceived as pro-Western: Jamalzadah was raised in Canada, wears Western-inspired clothing, and is popularly known as ‘the Afghan Oprah’.⁷ In a February 2011 interview, Jamalzadah described herself as a target living under virtual house-arrest. Jamalzadah did not specify who is targeting her, but stated that she is aware of “many threats”.⁸ A Canadian news website states that Mozdah has had a “flood” of death threats and travels with armed guards.⁹
105. In 2005, another female television host, Shaima Rezayee, was shot and killed in her Kabul home. Rezayee wore jeans, and aired videos of Western and other foreign film clips. She was dismissed from her job following criticism from religious leaders and a statement that her program was “anti-Islamic” from Afghanistan’s Council of Ulema¹⁰ (a government-sponsored advisory body of 3,000 mullah from across the country).¹¹ No reports were located identifying the killer or killers, however, it is suspected that her murder may have been an honour killing.¹² The *New Yorker* reports that a male music television host was also assaulted – the report does not specify by whom – and later granted asylum in Sweden.¹³ The owner of Tolo TV, which has aired western music clips and Afghanistan’s first soap opera, is known to be “pro-American” and has been accused of spying for the west. Reports do not state who the accusers are.¹⁴
106. Businesses providing Western-style goods and services have been attacked by fundamentalists in Kabul. Recent examples include the following:

⁶ DIAC Country Information Service 2009, *Country Information Report No. 09/14 – CIS Request No. AFG9509; Situation for Hazaras in Ghazni, Uruzgan and Dai Kundi Provinces*, 3 February

⁷ ‘Connect the World’ 2011, *CNN*, CNN Transcripts website, 17 February <http://transcripts.cnn.com/TRANSCRIPTS/1102/17/ctw.01.html> – Accessed 8 August 2011; Macdonald, N. 2010, ‘Mozdah: The Oprah of Afghanistan’, *Macleans.ca* website, 17 December <http://www2.macleans.ca/2010/12/17/the-oprah-of-afghanistan/> – Accessed 8 August 2011

⁸ ‘Connect the World’ 2011, *CNN*, CNN Transcripts website, 17 February <http://transcripts.cnn.com/TRANSCRIPTS/1102/17/ctw.01.html> – Accessed 8 August 2011

⁹ Macdonald, N. 2010, ‘Mozdah: The Oprah of Afghanistan’, *Macleans.ca* website, 17 December <http://www2.macleans.ca/2010/12/17/the-oprah-of-afghanistan/> – Accessed 8 August 2011

¹⁰ Ibid; United Nations Educational, Scientific and Cultural Organization 2005, ‘UNESCO Condemns Murder of Afghan Music Presenter Shaima Rezayee’ UNESCO website, 23 May http://portal.unesco.org/ci/en/ev.php-URL_ID=19150&URL_DO=DO_TOPIC&URL_SECTION=201.html – Accessed 9 August 2011

¹¹ Nakamura, D. & Partlow, J. 2010, ‘Afghan government struggling to keep support of Islamic council’, *The Washington Post*, 12 September <http://www.washingtonpost.com/wpdyn/content/article/2010/09/10/AR2010091003451.html> – Accessed 16 August 2011

¹² See fn 8

¹³ Auletta, K. 2010, ‘The Networker’, *New Yorker*, Volume 86, Issue 19, 5 July

¹⁴ *ibid*

- *BBC News* reported that, in late June 2011, the Intercontinental Hotel was attacked by gunmen and, four suicide bombers. The hotel is frequented by Westerners, and the attack occurred prior to a conference regarding the transfer of power from ISAF to Afghan security forces. The Taliban claimed responsibility.¹⁵
- On 14 February 2011, two armed guards were killed in a suicide attack outside the Safi Landmark hotel in central Kabul.¹⁶ The Taliban claimed responsibility for the attack,¹⁷ however the Jamestown Foundation states that the Haqqani network was found to be responsible.¹⁸
- On 21 May 2011, insurgents attacked a military hospital in Kabul. The Taliban claimed responsibility, stating that “foreign trainers and Afghan doctors who work with them” were the primary targets.¹⁹
- On 28 January 2011, nine people were killed in a suicide attack in a Kabul supermarket popular with foreign workers. The Taliban claimed responsibility for the attack, which reportedly targeted the head of private security company, Blackwater. According to the Afghanistan NGO Safety Office, the Haqqani network was also likely involved.²⁰
- In August 2010, two suicide bombers attacked a compound used by foreigners in Central Kabul. Five Afghans were killed.²¹

107. Recent reports suggest that western-style goods are popular with Kabul residents. The international presence, and subsequent increases in population and wealth in Kabul over the past ten years, has reportedly led to an “explosion of conspicuous consumption”. Popular western-style items sold in Kabul include energy drinks, cars such as BMWs and Hummers, and flat screen televisions.²² Skinny jeans, western haircuts and Che Guevara t-shirts are also

¹⁵ Sarwary, B. 2011, ‘Kabul’s Intercontinental Hotel attacked by gunmen’, *BBC News*, 29 June <http://www.bbc.co.uk/news/world-south-asia-13947169> – Accessed 4 August 2011

¹⁶ Afghanistan NGO Safety Office 2011, “The ANSO Report”, Issue 67, 1-15 February – Accessed 1 April 2011

¹⁷ Peter, T. 2011, ‘Kabul suicide attack: does uptick in violence signal a fresh Taliban campaign?’, *Christian Science Monitor*, 14 February <http://www.csmonitor.com/World/Asia-South-Central/2011/0214/Kabul-suicide-attack-does-uptick-in-violence-signal-a-fresh-Taliban-campaign> – Accessed 24 May 2011

¹⁸ Jamestown Foundation 2011, *Terrorism Monitor, Volume IX, Issue 31*, 4 August, UNHCR Refworld website <http://www.unhcr.org/refworld/docid/4e3b9f272.html> – Accessed 10 August 2011

¹⁹ United Nations Assistance Mission to Afghanistan 2011, *Midyear Report 2011 – Protection of Civilians in Armed Conflict*, July, p. 14 <http://unama.unmissions.org/Portals/UNAMA/Documents/2011%20Midyear%20POC.pdf> – Accessed 4 August 2011

²⁰ Peter, T. 2011, ‘Kabul suicide attack: does uptick in violence signal a fresh Taliban campaign?’, *Christian Science Monitor*, 14 February <http://www.csmonitor.com/World/Asia-South-Central/2011/0214/Kabul-suicide-attack-does-uptick-in-violence-signal-a-fresh-Taliban-campaign> – Accessed 24 May 2011; ‘Taliban supermarket attack kills nine, but misses American target’ 2011, *The Age*, 30 January <http://www.theage.com.au/world/taliban-supermarket-attack-kills-nine-but-misses-american-target-20110129-1a90d.html> – Accessed 1 April 2011; ‘Timeline – Major attacks in the Afghan capital’, 2011, *Reuters*, 29 June <http://in.reuters.com/article/2011/06/29/idINIndia-57975920110629> – Accessed 4 August 2011

²¹ ‘Timeline – Major attacks in the Afghan capital’, 2011, *Reuters*, 29 June

<http://in.reuters.com/article/2011/06/29/idINIndia-57975920110629> – Accessed 4 August 2011

²² ‘Afghans enjoy a new prosperity but fear for a future without the coalition’ 2011, *The Observer*, 5 June

popular amongst the young and affluent.^{23 24} Bush Bazaar, a market named after the former US president, sells Western goods and is frequented by locals. Products such as American food rations and military uniforms often arrive at the bazaar via the black market.²⁵ No information was located to suggest that insurgent attacks against Bush Bazaar or other Kabul stores are conducted purely on the grounds that they sell western goods.

108. There are, however, reports of music stores being attacked outside of Kabul. In April 2011, two people were injured when insurgents bombed a CD shop in Nangarhar. According to the Institute for War and Peace Reporting (IWPR), at least 15 other stores across Nangarhar had previously been targeted in what was thought to be a campaign by insurgents who regard music as un-Islamic. A further eight stores had reportedly closed as their owners were afraid of Taliban reprisals. The Taliban has denied the attacks. The IWPR describes these stores as selling movies, Pashtun music, and Koranic recitals. It is plausible, therefore, that outlets for western music may also be targeted.²⁶

109. [Information about Western clothes shops deleted: s.431(2)]

Level of effective state protection in Kabul

110. Sources report that protection is more available in Kabul than in other areas of Afghanistan, but is nevertheless limited. Nationally, state protection is said to be compromised by corruption, ineffective governance, a culture of impunity, a weak rule of law and a widespread reliance on traditional dispute resolution.²⁷

111. The city of Kabul is said to be relatively secure compared with other areas of Afghanistan, including the wider Kabul province.²⁸ On 14 August 2011, *BBC News* reported that militants had stormed a provincial governor's compound in [suburb deleted: s.431(2)], killing at least 19 people. [Suburb deleted: s.431(2)] is located an hour's drive north-west of Kabul, and is "usually relatively peaceful". The Taliban, who claimed responsibility for the attack, have recently attacked well-protected sites or figures.²⁹

112. In March 2011, the UK Home Office reported that Kabul has largely been insulated from the worst of the violence witnessed in Afghanistan over the last decade, and was comparatively well-protected:

²³ Arbabzadah, N. 2011, 'Kabul street style: a new generation is quietly reviving the Afghan capital's urban fashion culture', *The Guardian UK*, 7 August <http://www.guardian.co.uk/lifeandstyle/2011/aug/07/kabul-street-style> – Accessed 8 August 2011

²⁴ Doherty, B. & Geraghty, K. 2011, 'Kabul: the best of times, the worst of times', *Sydney Morning Herald*, 30 July <http://www.smh.com.au/world/kabul-the-best-of-times-the-worst-of-times-20110729-1i42f.html> – Accessed 8 August 2011

²⁵ Lawrence, Q. 2011, 'Afghans Divided On When U.S. Troops Should Leave', National Public Radio, 23 June <http://www.npr.org/2011/06/23/137360742/afghans-divided-on-when-u-s-troops-should-leave> – Accessed 9 August 2011; Boone, J. 2009, 'Afghanistan: Kabul shoppers offered US goods in the Bush Bazaar', *The Guardian*, 5 May <http://www.guardian.co.uk/world/2009/may/05/afghanistan-outlook> – Accessed 8 August 2011

²⁶ 'Music Shops Silenced in Nangarhar' 2011, Institute for War and Peace Reporting website, 4 April

²⁸ Cunningham, E. 2011, 'Spate of Kabul suicide bombs blamed on nearby valley', *The National*, 17 February <http://www.thenational.ae/news/worldwide/south-asia/spate-of-kabul-suicide-bombs-blamed-on-nearby-valley?pageCount=0> – Accessed 24 May 2011

²⁹ 'Afghanistan: Many die in assault on governor's compound' 2011, *BBC News*, 14 August <http://www.bbc.co.uk/news/world-south-asia-14520520> – Accessed 16 August 2011

*The U.S. military and Afghan security officials claimed to have killed or captured hundreds of would-be assailants around Kabul during 2010, significantly blunting the effectiveness of insurgent forces looking to target the capital. A series of checkpoints known as the 'Ring of Steel' has been erected around Kabul's perimeter to provide the capital with an extra layer of protection.*³⁰

113. The Afghan National Army (ANA) has lead responsibility for security in Kabul province, while in most of the rest of the country, security responsibility is still deferred to international forces.³¹ The ANA continues to receive support from US Special Forces in Kabul.^{32 33} According to the UK Home Office, the capability of Afghan security forces in Kabul has improved in recent years. The police force responsible for Kabul had grown from 5,000 to 18,000 officers, and the Afghan army had established a division of 7,000 soldiers to help protect the capital.³⁴
114. According to Jane's Sentinel, police have reportedly been able to represent the authority of the central government within the main cities, despite being largely ineffective in rural areas.³⁵ According to the US Department of State (USDOS), Afghanistan's formal justice system is relatively strong in urban centres.³⁶ Additionally, UK Home Office reported that authorities in Kabul, including the North Atlantic Treaty Organisation (NATO)-led International Security Assistance Force (ISAF) are, in general, willing to offer protection to citizens.³⁷ In 2009, it was reported that 50 police officers in Kabul had been made responsible for human rights reporting, including on internal police matters.³⁸
115. Also in March 2011, the IWPR stated that Kabul had experienced a 17 per cent reduction in serious crimes over the previous six months. The head of criminal investigations within the Kabul police attributed the reduction to improved information gathering, recruitment and training techniques, corruption-related suspensions, and new police powers to open fire on suspects who attempt to escape police. Female officers have also been recruited, allowing female suspects to be searched during house searches.³⁹

³⁰ UK Home Office 2011, *Operational Guidance Note: Afghanistan*, March, p. 2

<http://www.unhcr.org/refworld/docid/4d8b3a232.html> – Accessed 4 April 2011

³¹ Oxfam 2011, *No Time to Lose: Promoting the Accountability of the Afghan National Security Forces*, 10 May, p.7 <http://www.oxfam.org/sites/www.oxfam.org/files/afghanistan-no-time-to-lose-20110510-en.pdf> – Accessed 8 August 2011

³² Katzman, K. 2011, 'Afghanistan: Post-Taliban Governance, Security, and U.S. Policy', Congressional Research Service, 15 April, p. 24, <http://www.unhcr.org/refworld/pdfid/4db92b5b2.pdf> – Accessed 17 May 2011

³³ Nissenbaum, D. & Shukoor, H. 2010 'Afghan capital enjoys relative calm amid security crackdown', *McClatchy Newspapers*, 20 October <http://www.mcclatchydc.com/2010/10/20/102338/afghan-capital-enjoys-relative.html> – Accessed 25 May 2011

³⁴ UK Home Office 2011, *Operational Guidance Note: Afghanistan*, March, p. 2

<http://www.unhcr.org/refworld/docid/4d8b3a232.html> – Accessed 4 April 2011

³⁵ UK Home Office 2011, *Operational Guidance Note: Afghanistan*, March, p. 40

³⁶ US Department of State 2011, *Country Reports on Human Rights Practices for 2010 – Afghanistan*, 8 April, Section 1(e)

³⁷ UK Home Office 2011, *Operational Guidance Note: Afghanistan*, March, p.3

³⁸ UK Home Office 2010, *Country of Origin Information Report: Afghanistan*, 5 November, p. 42

³⁹ Institute for War and Peace Reporting 2011, 'Open Season for Kabul Police', UNHCR Refworld, 14 March <http://www.unhcr.org/refworld/docid/4d7f25492c.html> – Accessed 1 April 2011

116. A March 2011 report by the United Nations Secretary-General states that Afghan security forces have been successful in limiting insurgent attacks in Kabul.⁴⁰ In July 2011, Afghan security forces uncovered plans to attack Kabul International Airport. It is thought that insurgents may have planned to take passengers hostage as part of the attack.⁴¹ Results from an Asia Foundation survey reported that 34 per cent of Central/Kabul respondents never feared for their personal safety, or for that of their families.⁴² However, the survey also reported that at 21 per cent, the Central/Kabul region has the highest proportion of respondents who state they have “no confidence at all in government law enforcement services”.⁴³
117. Despite the apparent improvements in the security situation in Kabul, the ability of Afghan authorities to provide adequate protection remains limited.⁴⁴ Nationally, “UNAMA documented 1,462 civilian deaths in the first six months of 2011, an increase of 15 per cent over the same period in 2010”.⁴⁵ DFAT travel advice, dated 1 May 2011, warns that serious terrorist attacks occur regularly in major Afghan cities including Kabul.⁴⁶ In 2011 thus far, there have been numerous cases of civilian casualties resulting from insurgent attacks in Kabul. Nine civilians were killed and 17 injured in an attack on the Intercontinental Hotel on 28 June 2011.⁴⁷ Six people were killed and twenty-three medical students were injured in a suicide attack on a military hospital in May 2011, despite the fact that the hospital was considered to be a well-guarded facility prior to the attack.⁴⁸ An attack on the ‘Finest’ supermarket in Kabul, which killed nine people and wounded 15, further indicated a “disconcerting level of Taliban surveillance even in Kabul”.⁴⁹

⁴⁰ United Nations Security Council 2011, *Report of the Secretary-General on the situation in Afghanistan and its implications for international peace and security*, Reliefweb website, 9 March, p. 2

http://reliefweb.int/sites/reliefweb.int/files/resources/94CABEE471231EBA49257855001B58CD-Full_Report.pdf – Accessed 23 May 2011

⁴¹ ‘Afghan security forces say foiled Kabul airport plot’ 2011, *Reuters*, 26 July

<http://in.reuters.com/article/2011/07/26/idINIndia-58462020110726> – accessed 4 August 2011

⁴² The Asia Foundation 2010, *Afghanistan in 2010: A Survey of the Afghan People*, 9 November, p. 29

⁴³ The Asia Foundation 2010, *Afghanistan in 2010: A Survey of the Afghan People*, 9 November, p. 35

⁴⁴ UK Home Office 2011, *Operational Guidance Note: Afghanistan*, March, p. 2

⁴⁵ United Nations Assistance Mission to Afghanistan 2011, ‘Midyear Report 2011 – Protection of Civilians in Armed Conflict’, July, p. 14

<http://unama.unmissions.org/Portals/UNAMA/Documents/2011%20Midyear%20POC.pdf> – Accessed 4 August 2011

⁴⁶ Department of Foreign Affairs and Trade (DFAT) 2011, ‘Safety and Security’ in ‘Travel Advice: Afghanistan’, 1 May <http://www.smartraveller.gov.au/zw-cgi/view/Advice/Afghanistan> – Accessed 17 May 2011

⁴⁷ United Nations Assistance Mission to Afghanistan 2011, ‘Midyear Report 2011 – Protection of Civilians in Armed Conflict’, July, p. 18

<http://unama.unmissions.org/Portals/UNAMA/Documents/2011%20Midyear%20POC.pdf> – Accessed 4 August 2011

⁴⁸ United Nations Assistance Mission to Afghanistan 2011, ‘Midyear Report 2011 – Protection of Civilians in Armed Conflict’, July, p. 18

<http://unama.unmissions.org/Portals/UNAMA/Documents/2011%20Midyear%20POC.pdf> – Accessed 4 August; King, L. 2011, ‘Afghan suicide blast leaves 6 dead; The attack on a well-guarded Kabul hospital raises new fears about security’, *Los Angeles Times*, 22 May 2011

⁴⁹ United Nations Assistance Mission to Afghanistan 2011, ‘Midyear Report 2011 – Protection of Civilians in Armed Conflict’, July, p. 18

<http://unama.unmissions.org/Portals/UNAMA/Documents/2011%20Midyear%20POC.pdf> – Accessed 4 August 2011; ‘Taliban supermarket attack kills nine, but misses American target’ 2011, *The Age*, 30 January

118. Both the Taliban and the Haqqani network have been linked to attacks in Kabul.⁵⁰ According to the US Department of Defense, the Haqqani network is the most significant threat in the east of Afghanistan and continues its efforts to “expand its influence in Kabul and its environs in order to conduct attacks in the capital”.⁵¹ A 10 February 2011 article from the *New York Times* reported that “[a] cell of suicide bombers active in Kabul was run for three years by a Taliban commander operating from the city’s main prison”.⁵²
119. The UK Home Office has clearly stated that single women or female heads of households in Kabul without male support networks do not have effective protection.⁵³ In 2010, the UNHCR reported that conservative elements, allegedly opposed to the education of girls in Kabul and other areas, had increased their attacks on schools, teachers and pupils.⁵⁴
120. ISAF and Afghan forces are themselves often the targets of attacks, and in the past 12 months, suicide bombers have attacked a range of targets including a Kabul police compound, a minibus carrying intelligence personnel, and a bus carrying Afghan army officers. Civilian casualties also occurred during these attacks.⁵⁵ In February 2011, a suicide bomber attacked a census office in Kabul while civilians waited to collect identity cards. The *New York Times* reported that the target was the local district Governor, whose office was next door to the census office, while a Taliban spokesperson claimed the aim was to derail a recruitment program for the Afghan Local Police.⁵⁶ Stores in Kabul have also illegally produced and sold military and police uniforms which had enabled a string of attacks by insurgents disguised as Afghan service personnel.⁵⁷

FINDINGS AND REASONS

Country of nationality

121. The applicant claims to be a citizen of Afghanistan. He arrived in Australia on an apparently valid Afghan passport, issued to him in Afghanistan by the Afghan government, and stating that he is a national of that country. The Tribunal finds on this basis that the applicant is a national of Afghanistan, and has assessed his claims against that country.

Well-founded fear of persecution for a Convention reason

Assessment of Protection claims

<http://www.theage.com.au/world/taliban-supermarket-attack-kills-nine-but-misses-american-target-20110129-1a90d.html> – Accessed 1 April 2011

⁵⁰ Sahak, S. & Rivera, R. 2011, ‘Five Arrests In Attack On Hospital In Kabul’, *New York Times*, 23 May <http://www.nytimes.com/2011/05/24/world/asia/24afghanistan.html> – Accessed 24 May 2011; Sarwary, B. 2011, ‘Kabul’s Intercontinental Hotel attacked by gunmen’, *BBC News*, 29 June <http://www.bbc.co.uk/news/world-south-asia-13947169> – Accessed 4 August 2011

⁵¹ US Department of Defense 2011, *Report on the Progress Toward Security and Stability in Afghanistan*, April, p.55, <http://www.defense.gov/news/1231rpt.pdf> – Accessed 18 May 2011

⁵² Nordland, R. & Sahak, S. 2011, ‘Afghan Government Says Prisoner Directed Attacks’, *New York Times*, 10 February http://www.nytimes.com/2011/02/11/world/asia/11afghan.html?_R=3 – Accessed 23 May 2011

⁵³ UK Home Office 2011, *Operational Guidance Note: Afghanistan*, March, p. 5

⁵⁴ United Nations High Commissioner for Refugees 2010, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, December

⁵⁵ ‘Timeline – Major attacks in the Afghan capital’, 2011, *Reuters*, 29 June <http://in.reuters.com/article/2011/06/29/idINIndia-57975920110629> – Accessed 4 August 2011

⁵⁶ Rubin, A. 2011, ‘31 Killed in Suicide Attack on Afghan Census Office’, *New York Times*, 21 February <http://www.nytimes.com/2011/02/22/world/asia/22afghanistan.html> – Accessed 31 March 2011

⁵⁷ Rivera, R. 2011, ‘Afghan police seek to stop illicit trade in uniforms’, *New York Times*, 23 April

122. The applicant has made claims against Afghanistan based on the Convention grounds of religion, actual and imputed political opinion and membership of particular social groups.
123. The applicant fears harm at the hands of the fundamentalist Muslim militant groups which can broadly be referred to collectively as the Taliban whom he claims operate with impunity throughout Afghanistan. The applicant claims there are principally two elements to his profile that will give rise to him facing a real chance of being persecuted by the Taliban if he were to return to Afghanistan. These elements are:
- the length of time he has been living in a Western country and outside Afghanistan; and
 - the nature of his father's business selling [Western clothes].
124. The applicant claims that these elements of his profile will result in him facing a real chance of being persecuted on the basis of:
- religion because he will be seen to be a moderate and secular Muslim;
 - imputed political opinion because he will be seen to support the presence of Western security forces in Afghanistan and as allied with those forces; and
 - membership of particular social groups comprising his membership of his father's family and "returnees from the West".
125. The applicant also claims to personally hold political opinions critical of the current state of Afghan society and claims that he would express those political opinions if he were to return to Afghanistan.
126. The Tribunal accepts the difficulties of proof faced by applicants for refugee status. In particular there may be statements that are not susceptible of proof. It is rarely appropriate to speak in terms of onus of proof in relation to administrative decision making: see *Nagalingam v MILGEA & Anor* (1992) 38 FCR 191 and *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 357; 6 ALD 6 at 10. The United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992, at paragraph 196-197 and 203-204 recognises the particular problems of proof faced by an applicant for refugee status and states that applicants who are otherwise credible and plausible should, unless there are good reasons otherwise, be given the benefit of the doubt. Given the particular problems of proof faced by applicants a liberal attitude on the part of the decision maker is called for in assessing refugee status.
127. However, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. Moreover, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. In addition, the Tribunal is not obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547.
128. The Tribunal accepts the applicant's evidence as generally credible. The Tribunal notes that while the applicant was clearly reluctant to reveal at the hearing his having undertaken a

significant and perhaps reckless financial commitment in purchasing a BMW, he has been able to provide a substantial range of documentary evidence corroborating his explanation of how and why he has done so. In the context of claims being made for which there is very little possibility of independent corroborative evidence being provided, the Tribunal, in assessing the applicant's credibility generally, gives significant weight to the fact that the information provided by him at the hearing in relation to his financial circumstances, and his purchase of a BMW in particular, could be corroborated.

129. Based on the information provided by the applicant to the Department and Tribunal, including at the interview with the delegate and at the hearing, and by [Mr B] at the hearing (giving significant weight to the fact that [Mr B] was contacted without warning to give evidence to the Tribunal and so is unlikely to have planned the evidence he gave), the Tribunal accepts that:
- a. the applicant has only lived one year of his life in Afghanistan;
 - b. the applicant has no family connections in Afghanistan other than those of his immediate family;
 - c. the applicant's father has worked for many years running a business selling [Western clothes] in Pakistan;
 - d. the applicant's father has travelled from Pakistan to Kabul on a number of occasions while running his business in Pakistan and owned several properties in Kabul;
 - e. the applicant's family returned to live in Kabul on or about June 2009;
 - f. the applicant's father sold the properties he owned in Kabul in order to financially support his family;
 - g. the applicant's father engaged in business dealings related to [Western clothes] while living in Kabul since June 2009; and
 - h. the applicant has lost contact with his family since approximately May 2010.
130. The Tribunal found the evidence the applicant provided in relation to his claim that his father had been abducted and possibly killed by the Taliban to be vague and generalised. However, the Tribunal accepts this is so because of the limited information the applicant has about what may have happened to his father and the rest of his family in Afghanistan. Given the extremely limited information before the Tribunal, the Tribunal is unable to discount a range of explanations for why the applicant's father had not been in contact with his wife for a period of time, as stated by the applicant at the hearing, including that he may have suffered some form of accident. As a result, the Tribunal is unwilling to infer that the applicant's father was kidnapped or killed either by the Taliban or any other party. Nor is the Tribunal willing to infer that if the applicant's father has been harmed that he suffered that harm for a Convention reason.

Risk of Serious Harm Capable of Amounting to Persecution

131. The Tribunal finds that the available country information set out above indicates that it is mainly high profile Afghans identified as supporting the presence of Western forces in

Afghanistan, or as otherwise religiously or politically westernised, such as parliamentarians, provincial governors and entertainers who have been harmed by the Taliban. However, the Tribunal notes the reports of businesses selling Western-style goods and services having been attacked in Kabul and does not accept that the risk of harm at the hands of the Taliban faced by Afghans of a lower profile who are identified as supporting the presence of Western forces in Afghanistan, or as otherwise religiously or politically westernise, must in all cases be merely remote or far-fetched.

132. The Tribunal finds that the simple fact of having lived in a Western country for a significant period is unlikely to lead to an individual being identified as supporting the presence of Western forces in Afghanistan, or as otherwise religiously or politically westernised. However, the Tribunal finds that there are a number of elements of the applicant's particular profile that increase the chance of him being so identified and facing a chance of suffering harm as a result. These elements are:
- a. His father having run a [Western clothes] business in Pakistan and undertaken further business dealings relating to [Western clothes] in Kabul since June 2009;
 - b. The applicant's lack of family or other personal support in Kabul;
 - c. The applicant's basic lack of familiarity with Kabul having only lived there as a baby; and
 - d. The applicant's employment history and completion of a tertiary qualification in Australia.
133. The Tribunal finds that there is a real chance that the applicant will be identified as the son of his father if he were to return to Kabul, particularly in the course of his having to seek employment or other financial and personal assistance without any familial support. Given the extremely serious forms of harm a person may suffer if they come to the adverse attention of the Taliban in Afghanistan, including in Kabul, and the distinctly volatile security environment in Kabul, the Tribunal finds that while the chance that the applicant may come to the attention of and be so identified by the Taliban may be low it is not so low as to be remote or far-fetched. The Tribunal also finds there is a real chance that his father will have been identified as a dealer in [Western clothes] and so be seen to be a moderate Muslim and opposed to the beliefs held by the Taliban, and that there is a less than remote chance the Taliban would impute the applicant with similar beliefs as a result.
134. Further, the Tribunal finds that it is likely the applicant would have to rely on his employment history and tertiary qualification obtained in Australia while seeking employment in Kabul if he were to return there and that doing so may increase the chance of him coming to the attention of the Taliban as a returnee from the West who has become politically and religiously westernised.
135. Further, the Tribunal finds it not unlikely that, given his employment history and tertiary qualification and lack of other sources of familial or financial support, the applicant would seek employment with one of the many Western government, non-government or private organisation and companies now operating in Kabul and that doing so may further increase the chance of the Taliban imputing him with a pro-Western, anti-Taliban political opinion. The Tribunal finds that to expect the applicant to deliberately not seek employment with one

of these organisations in Kabul in order to avoid increasing the chance of him coming to the attention of the Taliban would arguably be to require the applicant to act discreetly in a way inconsistent with *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.

136. In light of the above, while the Tribunal finds that each of the elements of the applicant's profile set out at paragraph 131 above alone may not sufficiently increase the risk that that the applicant will be identified by the Taliban as supporting the presence of Western forces in Afghanistan, or otherwise as either religiously or politically westernised, the Tribunal finds that cumulatively these elements will increase the chance of the applicant being so identified to a degree that is not merely remote or farfetched.
137. Accordingly, the Tribunal accepts that there is a real and not remote chance the applicant may suffer serious harm at the hands of the Taliban if he were to return to Kabul or any other part of Afghanistan now or in the reasonably foreseeable future.

Convention nexus

138. The Tribunal finds that the essential and significant reason that the applicant risks being persecuted in Kabul and throughout Afghanistan are his imputed political opinion as a supporter of the presence of Western forces in, and in opposition to the conduct of the Taliban in, Afghanistan and his imputed religious belief as being a moderate or secular Muslim. The Tribunal finds that the applicant will be imputed with these political opinions and religious belief as a result of the elements of his profile referred to at paragraphs 131 – 136 above.

Availability of state protection

139. The Tribunal finds that the available country information referred to above indicates that, while the level of security situation in Kabul is higher than elsewhere in Afghanistan, the ability of Afghan authorities to provide adequate protection remains limited. As a result, the Tribunal finds that the Afghan police and security forces are unable to provide a sufficient level of protection even in Kabul to prevent the Taliban from operating with a degree of impunity that would place a person with the applicant's profile at risk of a real chance of harm at their hands.
140. Having made this finding, the Tribunal considers it unnecessary to consider the applicant's claims to face a risk of harm as a result of his membership of any particular social group.

Conclusion on Persecution

141. The Tribunal considers that, taking all the information together, there is a real chance that the applicant will encounter serious harm capable of amounting to persecution for reasons of his imputed political opinion and religious beliefs in the reasonably foreseeable future should he return to Afghanistan

Internal relocation

142. The Tribunal is satisfied that in the present case the risk of Convention persecution exists in the country as a whole and that safe relocation within Afghanistan is therefore not reasonably open to the applicant.

Safe third country

143. The Tribunal finds that the applicant left Afghanistan with his family in the early 1990s and resided in Pakistan with his family from that time until he came to Australia in 2009. The Tribunal accepts that until approximately 2008 the applicant had no lawful permission to remain in Pakistan and that after 2008 he was granted a series of temporary visas that allowed him to reside in Pakistan for limited periods of time. The Tribunal accepts that the last Pakistani visa held by the applicant expired on or about November 2009. The Tribunal does not accept that the "Afghan Citizen Proof of Registration" card issued to the applicant grants him a right of entry to Pakistan.
144. Accordingly, the Tribunal finds that the applicant has no legally enforceable right to enter and reside Pakistan either temporarily or permanently and so finds that the applicant has no right to enter and reside in any safe third country for the purposes of s.36(3) of the Act or of Article IE of the Convention.

CONCLUSIONS

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

DECISION

146. 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.