

1103300 [2011] RRTA 770 (8 September 2011)

DECISION RECORD

RRT CASE NUMBER: 1103300

DIAC REFERENCE(S): CLF2011/18325

COUNTRY OF REFERENCE: Pakistan

TRIBUNAL MEMBER: Diane Barnetson

DATE: 8 September 2011

PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Pakistan, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] December 2010 and applied to the Department of Immigration and Citizenship for the visa [in] February 2011. 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] April 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 Migration Regulations 1994.

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.

CLAIMS AND EVIDENCE

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

20. The applicant appeared before the Tribunal [in] July 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Urdu and English languages.

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

Protection visa application

22. In the protection visa application, the applicant wrote that he was a citizen of Pakistan, born [date deleted: s.431(2)] in Gujranwala, Pakistan. He belonged to the Shia ethnic group and was of the Islamic religion. He married in 2008. He attended a government high school, completing his studies in March 1983. He worked on his own farm.

23. The applicant indicated that he lived in China from [a date in] January 2004 to [a date in] July 2004 and in Korea from [a date in] July 2004 to [a date in] August 2008. He arrived in Australia on a visitor visa, which was issued [in] October 2010. His current passport was issued [in] August 2007. He indicated that this was an extension of the passport.

24. In a written statement provided with the protection visa application forms, the applicant wrote that his father was very religious and dedicated his life to Shia Islam, through Tehreek Nifaz-e-Fiqh Jafariya Shia Islam.

25. When the applicant finished year 10, he helped his father in helping community members. His family was very popular because of their religious beliefs. However, terrorist groups, Sipah-e-Sahaba and lashkar-e-Jhangvi) threatened the family and wanted them to stop working for Tehreek Nifaz-e-Fiqh Jafariya Shia Islam. His father refused. [In] June 1993, a group of four people, whom he named, killed the applicant's father when he came out of daily prayer. Hundreds attended the funeral and the applicant was made "president" of his religion. The killing was reported to police but no-one helped them. The terrorist groups started killing leaders from other parts of the city. They attacked the applicant with a gun and he was hit with a bullet on the back of the foot. He was injured but alive.

26. A couple of weeks later he and his family went to Lahore to attend a religious seminar. A bomb blast killed more than 40 people and injured hundreds. He received multiple fractures of the left arm. When he returned to his home, he was threatened by the terrorist groups. It was a very hard time for my family. In 2004 he obtained a visa for China and moved there.

He then moved to South Korea. He lived there for four years and a few months. In the meantime some of his family members moved here and he lost touch with them. He was very upset and decided to return to Pakistan. He went to Karachi to live with a friend. He was [age deleted: s.431(2)] by then. His friend forced him to marry one of his relatives, in December 2008. He had a daughter in [year deleted: s.431(2)]. He was married in Gujranwala but returned to Karachi.

27. The two terrorist groups have ties to the Taliban and they are searching for the applicant as he knew from his friends. They found out he was in Karachi. He moved again and the terrorists were trying to find his wife and him. His friends helped him get a visa for Australia.

Review application

28. No further information was provided with the review application. [In] July 2010, the applicant's representative sent the Tribunal a further statement from the applicant, together a written submission, setting out extensive and detailed country information relevant to the applicant's claims, and referring to earlier Tribunal decisions. In that submission, the applicant's representative submitted that the information established that:

- The security and political situation in Pakistan was very volatile and dangerous
- Human rights violations in Pakistan continue despite government promises to curb it
- Liberal minded Pakistanis face harassment from Pakistan authorities, militants and terrorist and Islamic fundamentalists
- There is impunity for human rights abusers in Pakistan
- There is near collapse of the rule of law and democratic values in Pakistan
- Sectarian violence is endemic in Pakistan
- Shia Islamic believers face harm at the hands of hardline Sunni Muslims
- Sunni Muslims in Pakistan consider Shia's as non-Muslims
- Taliban followers continue to target Shia's in Pakistan
- Taliban adherents have significant influence especially in the government's security and armed forces and presence throughout Pakistan and consider Shia Muslims as non-Muslims

29. The representative also argued that the applicant would face serious harm in Pakistan because of his being in a minority Muslim sect: Shia Muslims; and also because of his membership of a particular social group or groups:

- member of a family unit which engaged in promoting Shia Islam
- People who preach Shia Islamic principles
- People seen as holding views against Taliban's religious ideologies

Hearing

30. At the hearing, the Tribunal took the applicant through his visa application. He indicated that a friend, who had made claims as a refugee, helped him, as he was familiar with the form and spoke the same language. The friend filled out the form on a computer, with the applicant answering the questions from him. The applicant wrote out the claims in a statement in his own language and the friend translated it and typed it in English, then the applicant signed it.
31. The Tribunal referred the applicant to the question in the visa application form where the information that the applicant was Shia was written in pen by hand. It explained that this could lead the Tribunal to conclude that this was added later only to strengthen his claim and that this may lead to the Tribunal concluding that he was not Shia Muslim. He responded that the person writing the form probably made a mistake and added it later.
32. The applicant confirmed the details in the application regarding his education. He worked on his father's land growing wheat and rice and it was successful. He has four brothers and a sister who are in Pakistan. His mother is alive but his father was murdered. The applicant had difficulty recalling the date of the murder. He said he has not had any contact with his family in Pakistan for many years. He was in Korea when the Shias were attacked and his family left home and have gone somewhere, he does not know where. He has no family in Australia.
33. After his father was murdered, he went to Karachi and lived with a friend for 4-5 years, at a Shia religious centre. The Tribunal asked how soon after his father's death he went to Karachi. He said after a lengthy pause that he could not remember. He was [age deleted: s.431(2)] when he went to Karachi and so it would have been about 1994. The Tribunal asked whether, if he stayed there for 4-5 years, he was there until about 1998 or 1999. He said he did not remember. The Tribunal asked where he was living when he left for Korea and he said he had returned to Gujarat but is not sure how many years this was before he went to Korea, possibly 3-4 years.
34. The Tribunal referred to the applicant's written statement. He said that he wrote this in Urdu and his friend then translated it into English. He gave the Tribunal the original written in Urdu.
35. The applicant said that he started working with his father at [age deleted: s.431(2)] when he finished school. He gradually joined the activities. Initially he just preached for the Shia faith. He was in the Gujarat [unit deleted: s.431(2)] The unit is like a suburb. He did this 2-3 days a week in the evenings. His father was very active, working in [unit deleted: s.431(2)]. He invited people to join Shia faith. He was threatened a few times because of this. Then he was murdered in the mosque.
36. The Tribunal asked what happened to the applicant after this. He said that he started working in his father's place, inviting people to the Shia faith. This then meant that he became a target. He was threatened, was told to stop or he would be killed. He then went to Karachi, where he stayed for 4-5 years. He really cannot remember when he went to Korea, maybe a year later or maybe many years later. When he was in Karachi he worked in a cold store where fruit and potatoes were stored. He still used to be threatened and two or three times he was attacked. He managed to escape. The attacks were by the same group who killed his

father. He knows because the same individuals were involved. The Tribunal asked the nature of the attack and he said that they shot at him. It was just to scare him and he was not injured.

37. He initially went to China for six months then to Korea. There were a lot of people from his area in China and he did not feel secure there so he left. He was able to manage as he had saved money from work.
38. In Korea he did some minor jobs and got food from the mosque. He was there for about four years.
39. He returned to Pakistan in August 2008. He thought things would be alright by then. In Lahore he rang a friend about his family and no-one knew where they were so he went to Karachi. He married in December 2008. He did not know his wife; his friend in Karachi was one of her relatives and he arranged the marriage. They married in Gujarat; he first met her at the ceremony. He stayed in Gujarat for a week or two then returned to Karachi in early 2009. He stayed there for a year. His wife then became pregnant and went back to Gujarat in early 2010, about January 2010. The applicant did not return with her. He went back in [month and year deleted: s.431(2)] when his wife had the baby.
40. His enemies knew he returned and they shot at him and hit him in the left foot. This was [in] March 2010 and he was admitted to hospital [in] March 2010. He was in the market close to his home and there were a lot of people there. A shot was fired and he was hit. Some people took him to hospital and he was there for 10 days and discharged [in] March 2010. He did not report the shooting to police because he was afraid.
41. The applicant went back to Karachi after a week or two; his wife and child did not, they stayed with her parents. He went to Lahore in September 2010. There was a large gathering at the Shia religious centre and there was a bomb blast. His wife and her parents were there, having travelled from Gujarat for the gathering. His left arm was fractured and 40 people were killed and many injured. A butcher bandaged his arm and put on a rough splint and he did not get any medical treatment. The arm took about a month to heal. He stayed in Lahore for this time then went back to Karachi. While he was in Lahore his father's murderers found out he was there and they threatened his friend. His friend asked him to leave. He went to stay in the Shia religious centre.
42. He contacted the head office of the Shia and they arranged for him to travel to Australia. This was about early October 2010.
43. The Tribunal asked why the applicant had sought a visa for Singapore. He said that he got it just in case he did not get into Australia. He then found there was no refugee visa in Singapore. This was before he was injured.
44. The Tribunal raised with the applicant certain issues regarding his claims and evidence and explained the significance of these in terms of its decision about his application for protection, specifically in relation to its assessment of his reliability as a witness. The Tribunal also explained that it may reach a different conclusion to the Department on all issues.
45. The Tribunal first raised the issue of the date of his father death. In the statutory declaration dated [in] July 2011 he said that his father was killed [in] July 1993; in his original statement

he said it was [in] June 1993 and at the hearing he said it was [in] September 1993. The FIR states it as being [in] July 1993.

46. The Tribunal also raised that the FIR included the background to the killing of his father. This indicated that his father had been arrested and sentenced for a murder of another person. On appeal he was released in 1981. The killing of the applicant's father was then motivated by revenge by the earlier victim's family. This indicates that this was a personal matter rather than because of his religious principles. This may lead the Tribunal to form the view that the applicant's father's killing was not due to his religious beliefs.
47. The applicant said that the false case was made against his father because of his religious beliefs. The Tribunal indicated that the applicant's brother gave this information and there was no mention of any religious issue.
48. A further matter was the injury to his foot. In the original statement he appeared to indicate that this happened after his father was killed in 1993 but before he left for China in 2004. In the statutory declaration he says it was [in] March 2010. In the Department interview he indicated that it was in 2008.
49. In the original statement he indicated that the injury to his arm occurred after his father was murdered and before he left for China in 2004. In the Department interview he said that he was injured in a bombing incident in 2009. In the statutory declaration and at the hearing he says the injury occurred [in] September 2010.
50. Given the significance of such events it would be expected that the victim would remember with some specificity when it occurred, rather than within a range of 13 years as appears the case here. This may adversely affect the Tribunal's assessment of his credibility as a witness.
51. The applicant said that because he had so much stress he has lost contact with his family. He really cannot explain how much stress he was undergoing at the moment. He cannot sleep at night and cannot eat. He gave the Tribunal a script for Temaze. The applicant said that his doctor diagnosed him as having extreme stress.
52. In the hearing the applicant said that he was attacked by his father's actual murderers. In the previous statement he said only that he had been threatened.
53. The Tribunal also raised that there was information given to the Tribunal which he had not previously raised. He told the Tribunal that after his father was killed he lived in Karachi for 4-5 years but had not mentioned this previously. He had also not mentioned previously that he had worked in Karachi. This was significant and may lead to an adverse finding on his credibility as a witness. The applicant said that no-one had asked him before about these things. The Tribunal indicated that the protection visa application form asked for employment details and that the applicant said "farm work" but had not mentioned any other employment, although this was asked. He said that he made a mistake when answering the questions.
54. The passport shows he has a visa for Singapore. He said he got this in case he could not get entry here. His life was in danger and he thought he might hide there. Then his life was threatened and he did not go. The Tribunal pointed out the inconsistency in this and the applicant said that somehow the date for the visa expired and also he found that there was no refugee visa in Singapore. The Tribunal asked why he applied when he did and whether this was before or after he was injured. He said it was before he was injured.

55. The Tribunal asked the applicant about relocating to another area of Pakistan. It referred to the information provided by the applicant's representative which showed that it would be difficult to live safely elsewhere in Pakistan if he was in fact being targeted as he claimed. He said that he could not live safely anywhere.
56. The applicant's representative asked for additional time to provide further information and the Tribunal allowed seven days.
57. After the hearing, the applicant's representative requested additional time until [a date in] August 2011, to which the Tribunal agreed. A further statutory declaration from the applicant was provided [in] August 2011. In that, he responded to the issues raised at the hearing. A medical certificate from [doctor deleted: s.431(2)] dated [in] August 2011 was provided, stating that the applicant was on prescribed medications.
58. [In] August 2011 the applicant's representative sent the Tribunal a report from [doctor deleted: s.431(2)] dated [in] August 2011. This indicated that the applicant had attempted to hang himself two weeks ago and was depressed and anxious. He had nightmares and insomnia. She recommended hospitalisation for specialist assessment and treatment. She had prescribed Diazepam. She stated that the applicant said he was getting worse over the last three months. She reported his symptoms as having nightmares, getting up and walking the streets, insomnia, not eating, an attempted suicide, an inability to think clearly. On examination he was distressed and agitated and looked sleepless. Because of the language issue she was unable to assess whether he had any psychotic symptoms.
59. A report from [doctor deleted: s.431(2)], from dated [in] August 2011, stated that the applicant had been admitted to the psychiatric unit. He had been referred by the local doctor. The assessment on the unit was that he had features consistent with Post Traumatic Stress Disorder (PTSD) due to his experiences in Pakistan. He has started taking medications for this. It was expected that he would remain in hospital for four weeks.

FINDINGS AND REASONS

60. The Tribunal is satisfied, on the basis of the applicant's current passport, that he is a citizen of Pakistan. He is outside that country at this time.
61. The Tribunal is required to determine whether the applicant has a well-founded fear of persecution in Pakistan and, if so, whether this is for one or more of the convention reasons. When determining whether an applicant is entitled to protection in Australia, a decision-maker must first make findings of fact on the claims he or she has made. This may involve an assessment of the applicant's credibility. When assessing credibility, it is important to be sensitive to the difficulties often faced by asylum seekers. The benefit of the doubt should be given to asylum seekers who are genuinely credible but unable to substantiate all of their claims. That said, the Tribunal is not required to accept uncritically any or all allegations made by the applicant. In addition, 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. Indeed the Tribunal is not obliged to accept claims that are inconsistent with independent evidence regarding the situation in the applicant's country of nationality. *Randhawa v Milgea (1994) 52.FCR.437 at 451, per Beaumont J, Selvadurai v MIEA and ANOR (1994) 34.ALD.347 at 348 per Heerey J and Kopalapilli v MIMA (1998) 86.FCR.547.*

62. The Tribunal is required to make a determination as to whether the applicant has a well-founded fear of persecution for a convention-related reason if he were to return to Pakistan.
63. The Tribunal has taken into consideration the evidence that the applicant has provided to the Department of Immigration that formed the applicant's claims for protection, along with the material submitted to the Tribunal at review.
64. The Tribunal has some concerns about the applicant's reliability as a witness. He has given contradictory evidence on a number of issues, most significantly the date of his father's death, the reason for his father's death, the dates of his two injuries, his movements between various parts of Pakistan. He was also quite vague on a number of matters.
65. However, it is clear from the subsequent medical information that the applicant has been under a great deal of stress, sufficiently severe to lead to an attempted suicide. The report from [doctor deleted: s.431(2)] indicates that the applicant said he was unable to think clearly. He has insomnia and a lack of appetite. This appears to have been on-going for some time. Given these factors, the Tribunal is of the view that the vagueness of the applicant's evidence and the omissions and contradictions could be due to his mental state and not to any lack of credibility as a witness. If the contradictions and omissions in his evidence are discounted, the essential claims made by the applicant have remained consistent over time. He appears to have made the same claims when being examined by the two doctors in [town deleted: s.431(2)].
66. The Tribunal is therefore prepared to accept the applicant's evidence unless it is contradicted by independent evidence.
67. The applicant claims that he is Shia Muslim, as was his father. The Tribunal accepts this.
68. The applicant claims that he was active in the Shia religious faith with his father from the time he left school. He tried to bring people to the faith, as did his father. Because of this, they were threatened by terrorist groups, Sipah-e-Sahaba and Lashkar-e-Jhangvi. In 1993 his father was killed by four people, members of Sipah-e-Sahaba, whom the applicant named. When the Tribunal questioned this information as opposed to the information in the FIR about a blood feud, the applicant said that the original charges against his father were false and made because of his religious activities. When he was cleared on appeal, he was killed for the same reason.
69. The Tribunal is satisfied that the applicant's father was killed in 1993, based on the information in the FIR. It accepts as feasible that the reason for the killing was his religious activities, as the applicant claimed. More specifically, the killing was motivated by the fact that he was successful in an appeal against a conviction for murder and the original charges were false and made because of his religious activities.
70. There is a medical report indicating that the applicant had a firearm injury to his foot and an injury to his upper arm. The Tribunal is satisfied that the applicant has suffered the injuries to his arm and foot as claimed.
71. There is no evidence, other than that of the applicant, that these injuries were inflicted because of his being targeted by members of a terrorist group who had previously murdered his father. However, there is evidence before the Tribunal to indicate that Shia Muslims are targeted by the majority Sunnis in Pakistan. The Tribunal is also of the view that, having

accepted that the applicant's father was killed by specific individuals because of his religion, it is open to it to find that the applicant could be targeted by these same individuals. The Tribunal finds that the applicant has been attacked and injured by anti-Shia groups because of his religion.

72. The Tribunal considered whether the applicant would be able to live safely in another area of Pakistan. However, the information before the Tribunal indicates that the security and political situation in Pakistan is very volatile and dangerous. Sectarian violence is endemic in Pakistan. Sunni Muslims in Pakistan consider Shia's as non-Muslims. Shia Islamic believers face harm at the hands of hardline Sunni Muslims. Such conditions prevail throughout Pakistan and as a consequence the applicant could not relocate to avoid the harm he fears. The Tribunal finds that it would not be reasonable for the applicant to relocate to avoid the risk of harm.
73. The Tribunal considered whether the applicant would be given adequate state protection, as the harm he fears is at the hands of terrorist organisations. However, the information before the Tribunal indicates that there is near collapse of the rule of law and democratic values in Pakistan and there is impunity for human rights abusers.
74. As the Tribunal has found that that the applicant would face serious harm if he returned to Pakistan because of his religion, it is not necessary for it to consider the other Convention related claims made in relation to his of his being in a minority Muslim sect, Shia Muslims; or because of his membership of a particular social group or groups, being membership of a family unit which engaged in promoting Shia Islam; people who preach Shia Islamic principles; and people seen as holding views against Taliban's religious ideologies
75. The Tribunal finds that the applicant would experience serious harm as defined in the Migration Act upon return to Pakistan. The Tribunal accepts that the applicant would face a real chance of persecution for a Convention-based reason if he was to return to Pakistan. It follows that the applicant does have a well-founded fear of persecution for a Convention-based reason.
76. Subsection 36(2) of the Act, which refers to Australia's protection obligations under the Refugees Convention, is qualified by subsections 36(3), (4) and (5) of the Act. These provisions apply to protection visa applications made on or after 16 December 1999.
77. Under these provisions, 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.
78. 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.
79. There is no information before the Tribunal to indicate that the applicant has a right to enter and reside in a third country.

CONCLUSIONS

80. 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

81. 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.