



## HIGH COURT OF AUSTRALIA

Public Information Officer

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### APPLICANT S v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

The High Court of Australia today allowed an appeal by a young Afghan man who resisted being drafted into the Afghanistan army and who had been refused a protection visa.

S, an Afghan of Pashtun ethnicity, arrived by boat in 2000 aged 20, leaving behind his wife, parents and four brothers. The Taliban practised ad hoc, random and forced recruitment of able-bodied young men and thousands of young men left Afghanistan to avoid recruitment. The Taliban tried twice to forcibly recruit S for military service. The first time he paid off the recruiters, and on the second occasion S told them he needed to speak to his parents first, then immediately departed from Afghanistan with the assistance of a people smuggler.

The Immigration Department rejected his application for a protection visa, a decision affirmed by the Refugee Review Tribunal. In the Federal Court Justice Christopher Carr held that the RRT had not considered whether S was a member of a “particular social group” within the meaning of the Refugees Convention and whether he was persecuted due to membership of that group. He said the RRT should have considered whether able-bodied young men comprised a “particular social group”. Justice Carr remitted the matter to the RRT for redetermination, but the Minister successfully appealed to the Full Court of the Federal Court.

S appealed to the High Court on the ground that the Full Court had erred in requiring evidence that Afghan society perceived young able-bodied men as comprising a “particular social group” before the RRT was obliged to consider whether S was a member of that group. The High Court upheld S’s submission that evidence of Afghan society’s perceptions would be relevant to the question of whether there was a “particular social group”, but absence of such evidence was not determinative. The Court held that a group could be a “particular social group” under the Convention if the group is identifiable by a characteristic common to all members, and if that characteristic distinguishes the group from society at large.

The Minister also argued that recruitment by the Taliban did not amount to persecution as a critical element of enmity or malice was absent. The High Court held that persecution did not require this element. The Court also rejected the argument that conscription was a law of general application, as the conscription policy was ad hoc and random. Although the Taliban was in power at the time, the Court held it was not pursuing legitimate national objectives.

The High Court, by a 4-1 majority, allowed the appeal with costs and remitted the matter to the RRT for redetermination according to the judgment, although the Court noted that the RRT will also have to take into account developments in Afghanistan since its original decision.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court’s reasons.*