



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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PAKISTAN  
IAA reference: IAA19/07125

Date and time of decision: 10 October 2019 15:48:00  
N Becke, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicant a protection visa.

*Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be from Kurram Agency, Khyber Pakhtunkhwa Province (KPP), Pakistan, and a citizen of that country. On 12 December 2016 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 2 September 2019 a delegate of the Minister for Immigration (the delegate) refused to grant this visa.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 30 September 2019 the IAA received a submission from the applicant's representative ('the IAA submission'). The IAA submission reiterates claims made to the delegate that are contained in the review material. It also contains legal arguments in relation to issues before the delegate which I have noted and considered. Although prepared by a solicitor and registered migration agent, the IAA submission is not easily legible and is densely presented. Several pages do not contain paragraph breaks, which allows the IAA submission to comply with the maximum five page length set out in the Practice Direction, but is contrary to the spirit of the Direction itself.
4. The IAA submission asserts that the applicant has provided credible and detailed information throughout the SHEV application process and requests that he be afforded an interview if the IAA has issues with his credibility. During the SHEV interview the delegate put adverse information to the applicant for comment, and gave him an opportunity to confer with his then representative, who is also assisting him before the IAA. At the end of the SHEV interview the delegate advised the applicant that she would consider any further information he may wish to provide prior to her decision. Following the SHEV interview the applicant's representative sent the delegate two emails containing an explanatory letter, a lengthy submission, and documents to corroborate the applicant's evidence regarding his family, all of which I have had regard to.
5. Section 473DB of the Act provides that, subject to Part 7AA, the IAA must review decisions on the papers without interviewing the applicant. Section 473DC also provides that the IAA does not have a duty to get, request or accept any new information, whether the IAA is requested to do so by an applicant, or in any other circumstances. The IAA may only consider new information in exceptional circumstances and there is no statutory entitlement to a hearing. The IAA submission has not specified what information the applicant wishes to provide to the IAA at an interview or why it could not appropriately be provided in writing. I am satisfied the applicant has had an opportunity to respond to the concerns the delegate put to him during the SHEV interview, and I have declined to invite the applicant to an interview to provide further information about those matters.
6. The IAA submission also requests the applicant be given the opportunity to comment on any information the IAA may rely upon if it does not concur with the delegate's finding that the applicant faces serious harm, for reasons of his race and religion, in his home area of Kurram Agency. However, the issues of the applicant's race and religion were squarely at issue during the SHEV interview and the information which this decision refers are from sources of country information which were before the delegate, and which the applicant's

representative also referred to in her submissions prior to the delegate's decision. Accordingly, I have declined to invite the applicant to comment again on this information.

7. The IAA submission raises several claims, which were not before the delegate and are new information, namely:
  - The applicant is aware of other Shia students who ignored threats from Sunni extremists in Rawalpindi and who subsequently disappeared.
  - The leaders of certain mosques Islamabad and Lahore openly welcome and praise extremist groups and incite anti-Shia, and anti-Turi, sentiment.
  - Many Sunnis from the applicant's home area have been displaced and now have affiliations with anti-Shia extremist groups in other parts of Pakistan.
  - The media does not report on the full extent of the issues faced by Shia Turis in Pakistan as the media is fearful of the extremists.
8. At the outset, the IAA submission makes a general argument that its "commentary" on the delegate's decision could not have been provided earlier, as it is about the delegate's findings and whether the applicant met the requirements for the visa. Furthermore, exceptional circumstances exist to justify consideration of that commentary, because not to do so would cause the applicant to suffer severe detriment. I am not persuaded by these arguments. The new claims in the IAA submission concern the general security situation for Shia Turis in other areas of Pakistan, and the applicant's ability to relocate to any of those areas was a matter which was squarely at issue during the SHEV interview (at which his representative was present). None of the new claims constitute credible, personal information about the applicant in the relevant sense and, for the reasons discussed below, I have found it unnecessary to consider whether he can relocate to another part of Pakistan where he would not face a real chance of persecution. Given the circumstances overall, I am not satisfied exceptional circumstances exist to justify consideration of any of the new claims in contained in the IAA submission.
9. The IAA submission also refers to two online news articles from 'The Shia Post', which were not before the delegate and postdate her decision. The very brief extracts from each of the articles appear to refer to two purported recent attacks on Shias in the provinces of Punjab and Sindh. I consider the sources of the reporting are unverified given the full text of the articles has not been provided, the hyperlink for the first article does not work, and there is no hyperlink provided for the second. In any case, the two purported attacks took place a significant distance from the applicant's home area of Kurram Agency, which is the focus of this decision. Furthermore the IAA submission itself argues, "in assessing the applicant's claims, country information solely with respect to Shias is not overly relevant, given the applicant fears harm due to the cumulation of his race, religion, tribal affiliation and area of origin." Given all the circumstances, I am not satisfied exceptional circumstances exist to justify consideration of the extracts from the two news articles.

#### **Applicant's claims for protection**

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10. The applicant's claims can be summarised as follows:
  - In [year] he was born near Parachinar, in Kurram Agency, KPP. He is from a Shia village but there are Sunni villages in the vicinity and sectarian tensions are high.

- Extremist groups would attack his village with grenades and guns from a vantage point in the nearby mountains. Many of his friends were killed and his family were too scared to leave their home. It was dangerous to attend school to go out to get medical treatment or other supplies.
- In [year] he finished high school and moved to Rawalpindi to undertake a 'pre-[Subject 1]' course. He was treated with suspicion and threatened by his fellow Sunni students.
- In June 2012 he returned to his village, where the security situation remained poor.
- In July 2013 departed Pakistan legally from Islamabad using his own passport.
- He fears if he returns to Pakistan the Sunni community, the Taliban and other Sunni militant groups will target him because: he is a Shia Pashtun and member of the Turi tribe from Kurram Agency; and because of his real and imputed anti-Taliban political opinion arising from these factors.
- His fear of serious harm and/or death makes it difficult to subsist.
- He cannot relocate to another part of Pakistan as he would be easily identified as Shia and be killed.

### **Refugee assessment**

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11. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

### **Well-founded fear of persecution**

12. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
  - the person fears persecution and there is a real chance that the person would be persecuted
  - the real chance of persecution relates to all areas of the receiving country
  - the persecution involves serious harm and systematic and discriminatory conduct
  - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
  - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
  - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
13. The applicant has been consistent in stating his identity since his arrival in Australia. In support, the applicant has provided copies of his Pakistani passport, national identity card (NIC) and English language copies of his Pakistani domicile and character certificates.

14. The applicant's evidence at SHEV interview regarding his place of origin and his religious practice was detailed and spontaneous. I accept that the applicant is from a village near , Kurram Agency, KPP, is a practising Shia Muslim of Pashtun ethnicity, and a member of the Turi tribe. On the basis of the information before me I am satisfied the applicant's identity is as claimed and that Pakistan is the receiving country for the purposes of this assessment.
15. Country information before me supports the applicant's claims that from 2007 the security situation in KPP deteriorated, when sectarian conflict broke out between Sunni and Shia tribes. I accept the applicant's home village is [number] kilometres from Parachinar city, and less than [number] kilometres from the Afghan border. I accept that there are Sunni villages near the applicant's Shia village and that at times tensions between the two communities have been high. I also accept the applicant's evidence that Sunni militants travelled through his home area to reach Afghanistan, and that this also contributed to the insecurity experienced by Shia communities in the area. I also accept the applicant's evidence that people he knows have been killed by Sunni militants and that he and his family felt unsafe leaving their village to access services such as schools and hospitals. The applicant has not claimed that any such specific incidents have occurred in recent years.
16. I accept that in [year], after the applicant had completed high school, he moved to Rawalpindi to pursue further study. I accept the applicant lived in [accommodation] in Rawalpindi, where Shia students were in the minority, and that he tried to keep a low profile and focus on his studies. I accept that in 2012 the applicant was attending an Ashura commemoration in Rawalpindi when a bomb, targeting the Shia worshippers, exploded nearby. I accept the applicant's evidence that he was lucky to escape unharmed. I accept the applicant's evidence that Sunni students, including some with extremist affiliations, used to interrogate him about why he didn't pray five times a day or attend the Sunni mosque for Friday prayers, and that they pressured him to convert to Sunni Islam. When the delegate asked the applicant for specific examples of instances in which he had been directly threatened by these students, he responded that he was told he would be kidnapped and on one occasion he was followed. Although I consider the applicant's evidence was somewhat vague, I am prepared to accept this occurred and that he felt unsafe as the result of his interactions with Sunni students.
17. Although the post-SHEV interview written submission indicates that there was an escalation of the threats against the applicant, such that after two and a half years his father suggested he return home to village, the evidence before me indicates that he had completed his pre-[Subject 1] studies in Rawalpindi and then returned to Kurram Agency. On the evidence overall I consider that the applicant left Rawalpindi because he had graduated from his studies, not due to an escalation of security concerns as he has claimed.
18. During the SHEV interview the delegate noted information to suggest his sister, who has a Partner visa application before the Department, was living in Islamabad. The delegate put to the applicant that this could be construed as adverse to his SHEV application as he had previously declared that his entire family continued to reside in his home village and that only his father travels as necessary, and only as far as Parachinar, due to safety concerns. In the post SHEV interview written submission the applicant claimed that his sister had moved to Rawalpindi for a three month period so that she could complete the necessary paperwork and medical for her visa application, and that she then returned to their home village in Kurram Agency. While I accept the applicant's response to the delegate's concerns as plausible, I consider it undermines his earlier evidence that his siblings never travel outside of their home village for safety reasons.

19. The delegate also put to the applicant that financial transaction reports indicated that he had sent money from Australia to his father, which had been collected in Rawalpindi, and that this further undermined his claims regarding his family's situation. In the post SHEV interview submission the applicant claims that his father had collected the money in Rawalpindi when he made a short trip there with the applicant's mother to seek medical treatment, and that they had not told the applicant about this trip earlier because they did not want to worry him. I am prepared to accept that this is the case and that the applicant's parents remain permanent residents of their home village in Kurram Agency; however, I consider that their travel still undermines the applicant's evidence that his family are confined to their home village due to security concerns.
20. In June 2014, the year after the applicant's departure from Pakistan, *Operation Zarb-e-Azb* commenced in a number of Pakistani cities, targeting terrorist and criminal networks. The National Action Plan (NAP), established later that same year in response to an attack on a Peshawar public school in which more than 130 children died, ended Pakistan's unofficial moratorium on the death penalty, established military courts to try suspected militants, targeted sources of finance for militant organisations, took measures to restrict hate speech, and committed to policy reforms, particularly in the former Federally Administered Tribal Areas (FATA), now KPP. In 2015 and 2016 the military operations and NAP continued, with the Pakistani army targeting a wide array of militant groups in the tribal areas. In response to some major attacks in early 2017, the Pakistani government introduced *Operation Raad-Ul-Fasaad* as the successor to *Operation Zarb-e-Azb*.<sup>1</sup>
21. In 2018, the Pakistani government announced its second National Security Policy, and the Ministry of Interior is reportedly preparing NAP-2. Observers credit *Operation Zarb-e-Azb*, its successor *Operation Raad-ul-Fasaad*, and the NAP with a significant reduction in the number of violent and terrorism related attacks in Pakistan.<sup>2</sup> For example, in 2013 3,000 civilians and 676 security force personnel were killed in terrorism related attacks, but in 2018 the total number killed was 595 people, including both civilians and security personnel.<sup>3</sup> Reports from the FATA Research Centre (FRC) noted relatively few attacks in the FATA region in 2015, compared to 2014, and that most casualties in the first half of 2015 were militants or security forces.<sup>4</sup> The European Asylum Support Office (EASO) reported in 2018 that the security situation in the KPP had improved significantly since the start of *Operation Zarb-e-Azb*.<sup>5</sup>
22. Amidst the trend of declining sectarian violence, Parachinar experienced three significant attacks in the first half of 2017: on 21 January 2017 militants detonated a remote controlled improvised explosive device in a market; on 31 March 2017 a suicide bomber attacked a Shia mosque; and on 24 June 2017 two devices were detonated in a market. The three attacks killed over 120 people.<sup>6</sup> Since these attacks in the first half of 2017 there have been no more significant attacks in Parachinar.
23. The Department of Foreign Affairs and Trade (DFAT) reports that recent military operations to erect fencing and other border control measures have improved the security situation in Kurram Agency, with a 20 to 30 square kilometre 'red zone' around Parachinar now secured

<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Pakistan", 20 February 2019, 20190220093409; European Asylum Support Office (EASO), "EASO Country of Origin Information Report - Pakistan Security Situation", 16 October 2018, CIS7B8394110560

<sup>2</sup> DFAT, "DFAT Country Information Report – Pakistan", 20 February 2019, 20190220093409

<sup>3</sup> Ibid.

<sup>4</sup> DFAT, "Thematic Report- Shias in Pakistan", 15 January 2016, CIS38A801265

<sup>5</sup> EASO, "EASO Country of Origin Information Report - Pakistan Security Situation", 7 August 2017 CISED50AD5088

<sup>6</sup> DFAT, "DFAT Country Information Report – Pakistan", 20 February 2019, 20190220093409

by the military. Shia Turis in Parachinar have reported significantly fewer road attacks, as militants have been forced into the mountains.<sup>7</sup> The country information before me indicates there were no significant attacks reported in Parachinar in the second half of 2017, or 2018, or to date in 2019.

24. Given the country information, I have considered whether the applicant faces a real chance of harm as a Shia Pashtun of the Turi tribe from Kurram Agency. Pashtuns make up the second largest ethnic group in Pakistan and traditionally live among their own tribes in the former FATA and KPP. DFAT notes Pashtuns migrating to places such as Lahore and Karachi have reported ethnic profiling and harassment by local security officials. DFAT also assesses that Pashtuns may face a risk of such profiling in areas where they are in the minority, but that there is low risk of official discrimination against Pashtuns in areas where they form the majority, such as the applicant's home area and I consider his Pashtun ethnicity does not change or elevate his profile in Parachinar.<sup>8</sup>
25. The Turi tribe comprises around 500,000 people, who are not generally distinguishable from other Pashtuns by appearance, but are identifiable by tribal names, accents, and residency in known Turi areas. I accept the applicant's claim that Shia Turi communities in Kurram Agency have historically not allowed the Taliban to access Afghanistan through their territory and that they are imputed to hold an anti-Taliban political opinion for this reason, as well as because of their ethnic, religious, and tribal profile for which the Taliban also target them. Between 2008 and 2014, Turis faced significant violence. Most Turis live in and around Parachinar and Kurram Agency in small geographic areas, which renders these communities vulnerable to attack. Between 2008 and 2014 Sunni militants frequently stopped and killed Turis travelling by road outside Parachinar.<sup>9</sup> While Pakistani NICs do not indicate the bearer's religion, I accept the applicant's claim that aspects of his appearance, his name and address, his attendance at Shia mosques and participation in Shia religious ceremonies, would all identify him as a Shia Turi.
26. DFAT assesses that Shias in the former FATA face a low risk of sectarian violence (within the context of a moderate level of militant and criminal violence across the region) but that for Shias in Kurram Agency, particularly in Parachinar, the risk is higher than other parts of the former FATA. DFAT defines "low risk" as meaning DFAT has knowledge of past incidents, but insufficient evidence to conclude they form a pattern.<sup>10</sup> DFAT notes that Turis in Kurram Agency face a moderate risk of sectarian violence from militant groups, because of their Shia faith, which DFAT defines as meaning it is aware of sufficient incidents to suggest a pattern of behaviour.
27. However, operations *Zarb-e-Azb* and *Raad-ul-Fasaad*, and associated counter-terrorism activities, have significantly decreased the number and severity of attacks on Turis. DFAT notes that in the first quarter of 2018, the Turi community reported two attacks, including one involving an improvised explosive device which targeted women and children. DFAT is unable to verify these claims and does not specify where the two attacks took place. This compares to community estimates in 2017 that 200 Turis were killed and 1000 were injured during that year. Turis reported significantly fewer road attacks in 2018, as military operations have forced militants into the mountains. This has restored confidence within the community for individuals (although not large groups) to travel on the Thall-Parachinar road, although only between dawn and dusk.

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

28. While military operations have improved the security situation in Parachinar and Kurram Agency, they have also restricted freedom of movement and limited the community's access to essential services and trade opportunities. Military operations have also displaced many Turis, and some of the many who have since returned to their homes have faced extensive damage to property and crops.<sup>11</sup> During the SHEV interview the applicant told the delegate that his family continue to [work in Occupation 1] and did not indicate that they have ever been displaced or suffered damage to their property.
29. In the applicant's written SHEV statement he has also claimed to fear serious harm from the Sunni community. The applicant did not elaborate on this claim during his SHEV interview; however I accept that during his time in Rawalpindi he was harassed and threatened by Sunni students, and that on one occasion he escaped injury in a bomb blast when taking part in a Shia commemoration. However, during the SHEV interview the delegate asked the applicant if Shias in his home area are free to practise their religion and he responded in the affirmative. The applicant, a Shia Pashtun of the Turi tribe, resided in his home area until the age of nineteen (apart from two and a half years in Rawalpindi) and has not claimed that he, nor any members of his family, have ever been specifically threatened or harmed by the Taliban, other Sunni militants, the general Sunni community, or anyone else there. During the SHEV interview the applicant also confirmed that neither he nor his family have a profile in their local area.
30. The applicant has claimed that the Pakistani authorities are unable and unwilling to protect him from the Taliban, and other Sunni militant groups in Pakistan. During the SHEV interview the applicant referred to a peaceful protest which took place in Parachinar in 2010, during which he claims the Pakistani authorities fired upon the protestors, but he has not provided any corroborating evidence to support his claim in this regard. The applicant also referred to the 2014 murder of a Shia leader in Islamabad and to the 2017 Parachinar bombings, discussed above. The applicant also told the delegate that new attacks could occur in Kurram Agency at any time.
31. Yet as of February 2018 the Pakistani authorities had completed 40 per cent of military fencing in Kurram Agency which, coupled with tighter border controls, decreased the permeability of the Pakistan-Afghanistan border. Furthermore, the military has implemented a 20-30 kilometre red zone in Parachinar, which contains a smaller, second red zone in which markets and schools are located, and access to these zones requires the presentation of identity documents.<sup>12</sup> The post-SHEV interview written submission claims that the implementation of the red zone does not protect those who live outside it, such as the applicant's family, and that they are restricted from accessing services within the city, but are still at risk when moving around Kurram Agency. While I accept that entrance to the red zone requires the presentation of identity documents, and that this may cause delays, the applicant did not claim during in his SHEV application, or during the SHEV interview, that his family are currently unable to access Parachinar city, or services within it, and I do not accept this is the case. Furthermore, given the evidence before me regarding his parents' and sister's travel history, I do not accept his family are confined to his village for security reasons as he suggested.
32. Despite the three attacks in Parachinar city in 2017, the country information before me the delegate indicates that the Pakistani authorities have further enhanced security in and around the city. Nor does the country information before me contain any evidence that the

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.



Pakistani authorities are deliberately withholding protection from Shia Turis, or are unable to offer protection from terrorist elements, as the applicant has claimed. On the evidence overall I am not satisfied the authorities are unable or unwilling to provide protection.

33. The applicant has also claimed that his fear of being seriously harmed or killed on account of being a Shia Pashtun member of the Turi tribe from Kurram Agency, makes it difficult for him to subsist in Pakistan. During the SHEV interview the applicant advised the delegate that his parents and [number] siblings continue to reside on their family [property] where they [work in Occupation 1]. When the delegate asked the applicant how his father was able to support his studies in Rawalpindi for two and a half years, he responded that his father had used his income from [Occupation 1]. I also note from the transcript of the applicant's arrival interview that he was able to pay the full amount of [amount] Pakistani rupees in cash for his journey to Australia, prior to his departure. On the evidence before me I do not accept that the applicant's family are experiencing economic hardship, a denial of access to basic services, a denial of capacity to earn a livelihood, or a restriction of their movement.
34. The post SHEV interview written submission also argues that although the applicant works as a [in Occupation 2] in Australia he would be unable to do so in Pakistan due to the dangerous situation on the roads, and his religious, ethnic and tribal profile. I accept the applicant does not want to [work in Occupation 2] upon return to Pakistan because of safety concerns, as he told the delegate at the SHEV interview; however he has not claimed that he has to [work in Occupation 2] should he return to Pakistan, or that his employment options are limited to this occupation. There is no information before me to suggest the applicant would be prevented from finding paid work in Kurram Agency, and given the evidence overall I am not satisfied that there is a real chance his capacity to subsist would be threatened.
35. I accept the security situation in much of Pakistan remains fragile, and I also accept that the applicant will likely attend Shia mosques, publicly participate in Shia religious ceremonies and attend the market and other public places upon return to Pakistan. However, looking at all the information before me as discussed above, overall I am satisfied the situation in Parachinar, Kurram Agency, and KPP more widely, has improved markedly since the applicant was last there. DFAT notes, "Local observers, including officials, in Khyber Pakhtunkhwa also reported a trend of increased security, a reduction in reported killings and reduced fear within the community in 2018."<sup>13</sup>
36. Based on the applicant's personal circumstances and recent country information, I am not satisfied he faces a real chance of harm in Kurram Agency because of his profile as a Shia Pashtun member of the Turi tribe from Kurram Agency, because of any real or imputed anti-Taliban political opinion arising from these factors, because of the general security situation in the KPP, or at all.

*Returning Asylum Seeker from a Western Country (Australia)*

37. Although the applicant did not claim to fear harm on this basis, the delegate considered his profile as an asylum seeker returning from Australia. I accept that the applicant may be returned to Pakistan involuntarily, or on a temporary travel document, which DFAT indicates will attract attention from the Pakistani authorities upon arrival. DFAT also indicates that in such cases returnees are questioned and those who have departed Pakistan legally are issued with temporary documents upon arrival.<sup>14</sup> Those wanted for a crime in Pakistan or who have

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

committed a serious offence while abroad may be arrested and held on remand, or required to report regularly to police as a form of parole.<sup>15</sup> The applicant departed Pakistan legally and is not wanted for a crime in Pakistan.

38. According to the 'Minister for Overseas Pakistanis and Human Resources Development', approximately 2.5 million Pakistanis travelled overseas for employment between 2015 and 2018. Nearly 0.8 million people travelled abroad in 2014, 0.9 million in 2015, and 0.8 million in 2016.<sup>16</sup> DFAT further indicates that returnees to Pakistan do not face a significant risk of societal violence or discrimination as a result of their attempt to migrate, and are typically able to reintegrate into their respective community without issues.<sup>17</sup> Overall, I am not satisfied that the applicant would face a real chance of harm upon return to Pakistan as a returning asylum seeker from a western country.
39. Given all the circumstances, I am not satisfied that the applicant has a well-founded fear of persecution, for any of the reasons claimed, in Kurram Agency, KPP. On the basis of this conclusion I find it is unnecessary to consider the question of whether the applicant can relocate to another area of Pakistan, such as Islamabad, Rawalpindi or Karachi.
40. There is also no information before me to indicate the applicant would not be able to safely access his home area of Kurram Agency upon return to Pakistan.
41. The applicant does not have a well-founded fear of persecution within the meaning of s.5J of the Act.

#### **Refugee: conclusion**

42. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

#### **Complementary protection assessment**

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43. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

#### **Real risk of significant harm**

44. Under s.36(2A), a person will suffer 'significant harm' if:
  - the person will be arbitrarily deprived of his or her life
  - the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

45. I have concluded that the applicant does not face a real chance of harm for any reason. Based on the same information, I am not satisfied that the applicant has a real risk of suffering significant harm.
46. After having regard to the applicant's circumstances, I find that he does not face a real risk of suffering significant harm.

**Complementary protection: conclusion**

47. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

**Decision**

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The IAA affirms the decision not to grant the referred applicant a protection visa.

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

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***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

***cruel or inhuman treatment or punishment*** means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
  - (c) that is not inconsistent with Article 7 of the Covenant; or
  - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***degrading treatment or punishment*** means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***receiving country***, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

***torture*** means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

### 5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
  - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
  - (b) conceal an innate or immutable characteristic of the person; or
  - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
    - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
    - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
    - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
    - (iv) conceal a physical, psychological or intellectual disability;
    - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
    - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
  - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
  - (b) the persecution must involve serious harm to the person; and
  - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
  - (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

### 5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
  - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

#### **5L Membership of a particular social group other than family**

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
  - (i) the characteristic is an innate or immutable characteristic;
  - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
  - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

#### **5LA Effective protection measures**

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
  - (a) protection against persecution could be provided to the person by:
    - (i) the relevant State; or
    - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
  - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
  - (a) the person can access the protection; and
  - (b) the protection is durable; and
  - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

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#### **36 Protection visas – criteria provided for by this Act**

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- (2) A criterion for a protection visa is that the applicant for the visa is:
  - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
  - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
  - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (a); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant; or
  - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (aa); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
  - (a) the non-citizen will be arbitrarily deprived of his or her life; or
  - (b) the death penalty will be carried out on the non-citizen; or
  - (c) the non-citizen will be subjected to torture; or
  - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
  - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
  - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
  - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

*Protection obligations*

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
  - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

*Determining nationality*

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.