



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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PAKISTAN  
IAA reference: IAA20/07986

Date and time of decision: 3 April 2020 11:32:00  
S MacKenzie, 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 a 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 a citizen of Pakistan. He arrived in Australia [in] May 2013 as an unauthorised maritime arrival. On 27 April 2017 the applicant lodged a valid application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV).
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 2 March 2020, on the basis that the applicant did not face a real chance of serious harm or a real risk of significant harm upon return to Pakistan.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material).
4. On 2 April 2020, the IAA received a written submission by email from the applicant's representative (IAA submission). The IAA submission comprises argument on issues before the delegate and also refers to claims and evidence that were before the delegate, and are part of the review material. I have had regard to the submission.

### Applicant's claims for protection

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5. The applicant's claims can be summarised as follows:
  - He is a Shia Turi male of Pashtun ethnicity from [Village 1] (near Parachinar) in Kurram District, in the province of Khyber Pakhtunkhwa (KP);
  - Between 2000 and 2013, he lived and worked in [another country];
  - Life in Pakistan was dangerous due to sectarian conflict between Shias and Sunnis;
  - [An age] year old boy from the applicant's village was killed in an explosion;
  - Due to the violence, the applicant's family live in a constant fear of harm and do not live freely;
  - His late father had a [business] and was a well-known businessman in Parachinar. Due to his work, he was considered a prominent member of the community;
  - If returned to Pakistan, the applicant fears he will be killed in an explosion or a targeted killing;
  - He fears he will be harmed by militant groups like the Taliban, Islamic State, Lashkar-e Jhangvi (LeJ), and Sipah-e-Sahaba Pakistan (SSP) due to:
    - his religion
    - his race
    - his tribal identity
    - his place of origin
    - his profile as a family member of a prominent Shia
    - his time spent in the west (Australia).

## Refugee assessment

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6. 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

7. 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.
8. Since his arrival in Australia, the applicant has consistently claimed to be a Shia of Pashtun ethnicity and a member of the Turi tribe. He has also consistently claimed to be a Pakistani citizen from [Village 1] (near Parachinar) in Kurram District. Country information indicates the applicant’s village is [in a certain direction of] Parachinar city.<sup>1</sup> In his interview with the delegate on 21 October 2019 (SHEV interview), the applicant advised that Parachinar is about [distance] from his village. The applicant has also provided a number of documents as evidence of his identity, including his Pakistani national identity card. On the evidence before me, I accept that the applicant’s identity is as claimed and that he originates from this part of Pakistan. I find Pakistan to be the receiving country for the purpose of this decision.
9. Country information indicates that the Kurram region has a history of violence between Sunni and Shia groups. Department of Foreign Affairs and Trade (DFAT) reports that between 2008 and 2014 Turis (who are also Shia), who mostly live in Parachinar, faced significant violence. The information before me also indicates that the conflict destroyed much of the area’s health, education and agriculture infrastructure, while the closure of the Thall-Parachinar road devastated trade and development work in Kurram, severely damaging the economy. I accept the applicant’s claims in respect of the historical security situation and conflict in and around his home area and the broader region. I also accept that a child from his village lost his life in an explosion. I further accept that the applicant faced challenges returning to Pakistan between 2000 and 2013 to visit his family, as a result of the security situation in Kurram. In the SHEV interview, he said that when returning to Pakistan through Afghanistan

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<sup>1</sup> [Source deleted.]

in 2009 or 2010 a boy threw a stone at the convoy of eight to 10 vehicles resulting in the breaking of glass.

10. As summarised above, the applicant's claims as to why he fears returning to Pakistan were initially outlined in a statutory declaration, dated 2 February 2017, which accompanied his SHEV application (SHEV statement). Similar claims were advanced in the SHEV interview and reiterated in an undated 31 page written submission from his representative provided to the delegate by email on 21 November 2019 (post-SHEV interview submission).
11. In its most recent report, DFAT assesses that Shias continue to face a threat from anti-Shia militant groups including LeJ, SSP, and factions of the Tehreek-e Taliban Pakistan (TTP). DFAT also assesses that most Shias in Pakistan face a low risk of sectarian violence, but that the risk varies depending on geographical location and for members of specific groups. For example, DFAT assesses that 'high profile' Shias in Pakistan face a 'moderate risk' of violence. DFAT defines 'moderate risk' as it is aware of sufficient incidents to suggest a pattern of behaviour. In the former FATA (Federally Administered Tribal Areas) of which Kurram Agency is a part, DFAT assesses that Shias face a 'low risk' of sectarian violence. DFAT defines 'low risk' as it is aware of incidents but has insufficient evidence to conclude they form a pattern. In respect of KP, DFAT assesses that the province has a low level of sectarian violence, within the context of a moderate level of militant and criminal violence across the region, but notes that the risk of sectarian violence for civilians in Kurram Agency, particularly Parachinar, is higher than in other parts of the former FATA. I accept the applicant's evidence that his village is about [distance] from Parachinar.
12. As noted in the post-SHEV interview submission, there were insurgent attacks in Parachinar in 2017. DFAT reports that in the first half of 2017 there were three attacks targeting members of the Turi tribe in Parachinar due to their Shia faith, with more than 120 people killed. However, in 2018 there was a decrease in reports of attacks against Turis due to the improved security situation in Parachinar and Kurram Agency. DFAT assessed that this trend would likely continue in 2019, noting that KP had seen a significant reduction in militant violence in recent years and that the security situation in Parachinar had improved. DFAT assesses that Turis face a similar risk of official discrimination as other Pashtuns based on ethnicity, and no additional risk of official discrimination based on their religion. DFAT also refer to unnamed media that reports that discrimination and violence towards Shia tribes, particularly Turis, remains significant in Kurram Agency due to state concerns regarding Iranian influence and greater presence of the Taliban and Al Qaeda, and that Turis face some risk of violence if travelling for pilgrimage on the road to Iran or Iraq. Overall, DFAT assesses that Turis in all of Kurram Agency face a 'moderate risk' of sectarian violence from militant groups due to their Shia faith.
13. In the post-SHEV interview submission, the representative drew attention to the 2019 United States Commission on International Religious Freedom (USCIRF) report, covering 2018, which states 'the government of Pakistan failed to adequately protect these groups (religious minorities, including Shia Muslims), and it perpetrated systematic, ongoing, egregious religious freedom violations'. In terms of specific incidents involving Shias, the report refers to an incident in 2018 where extremists targeted a Shia Muslim seminary with a terrorist attack, leaving nearly 30 people dead and 50 injured. The South Asian Terrorism Portal's Pakistan Assessment 2019, referred to in the post-SHEV interview submission, reports this incident occurred in November 2018 in Lower Orakzai District, KP. The USCIRF report also referred to incidents involving the killing of two Hazaras in Balochistan Province in April 2018, and a May 2018 BBC article about the purported harassment, arrest, and torture of nearly 140 Shias at the hands of Pakistan's security agencies.

14. In the post-SHEV interview submission, the representative also referred to sectarian violence statistics across Pakistan from the Center for Research and Security Studies (CRSS) Annual Security Report 2017. The more recent July 2019 CRSS report, considered by the delegate, and consistent with other reporting about the decrease in attacks and improved security measures across Pakistan, reports that two Shias were killed as a result of sectarian violence in the first half of 2019. No sectarian violence was recorded in KP during the same period. In its 2019 assessment, South Asian Terrorism Portal reported that 'the fruits of successful SF [Security Force] operations are visible in terms of declining terrorism and related fatalities' in KP.
15. In his SHEV statement, the applicant stated that his father, because he operated a [business], 'is a well-known business man in Parachinar' and that because his father is a 'prominent member' of the community the applicant was at an increased risk of harm as a member of a 'prominent Shia family'. In the post-SHEV interview submission, the applicant clarified that his father is deceased and closed the business in 2007 due to illness and the security situation. According to the applicant, his late father sold [products] in Parachinar which made him 'well known' and 'respected' in the wider Shia community, thus giving him 'prominence'. The applicant instructs that he believes that had his father not died, it is likely he would have faced harm due to his prominence as a businessman and member of the Shia community. The representative submits it is plausible that the applicant would be considered 'prominent' in the community.
16. In 2019, DFAT reported that Pashtuns were the second largest ethnic group in Pakistan, comprising 15.4% of the population. DFAT assessed that Pashtuns in Pashtun majority areas, like KP, or locations where individuals have family or social connections face a 'low risk' of official discrimination.
17. In the SHEV interview, the delegate asked the applicant whether there were any reasons why he could not return to Pakistan. In response, he referred to two recent incidents in Kurram and provided the delegate two sources of information.
18. The first is a Dawn article, dated 16 October 2019, which reported that a feud between two families resulted in the killing of a man and his son from Lower Kurram 13 kilometres east of Parachinar. The incident reportedly sparked riots in Sadda town and hundreds of protesters blocked the main Thall-Parachinar road on 15 October 2019. Country information indicates that Sadda is in Lower Kurram.<sup>2</sup> The protesters reportedly set fire to three cars owned by members of Turi Bangash tribes. One person expressed a concern that vested interests were trying to turn a dispute between two families into a sectarian issue to disturb the peaceful environment in Kurram.
19. The second source of information is a number of social media (Facebook) posts reporting that a large number of Taliban were in Parachinar on around 10 October 2019. The articles indicate that the Taliban were captured and in the custody of the Pakistan Army. The source of the information on Facebook is not stated.
20. Having had regard to all of the information before me, including the country information, I accept that Shias have been targeted and attacked in Kurram and Parachinar by anti-Shia elements in the past. In the post-SHEV interview submission, the representative submits that because DFAT assess that Turis in Kurram Agency face a moderate risk of harm, that this equates to a 'real risk'. However, having considered the weight of independent reports

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<sup>2</sup> United Nations Office for the Coordination of Humanitarian Affairs, "Overview - Kurram Agency", 8 November 2012, 20190520124628

before me about the attacks on members of the Turi tribe and/or Shias, the improved security situation, and the implementation of security measures in KP and across the country, I am not satisfied the applicant faces a real chance of harm for the reasons claimed.

21. I note the post-SHEV interview submission that 'many attacks' in Pakistan are not reported. In 2019 DFAT indicated some journalists self-censor due to threats and harassment and I accept not all incidents are reported in Pakistan. However, I have before me a range of country information (including that provided by the applicant through his representative) about the situation in his home area and the country more broadly. These reports are from within and outside Pakistan, including from DFAT, USCIRF, Pakistan Institute for Peace Studies, European Asylum Support Office, South Asia Terrorism Portal and CRSS.
22. The country information does not indicate that Shias in [Village 1] or Parachinar are unable to practise their religion or travel safely between the two areas. I also give weight to the applicant's evidence that his family continue to live in [Village 1] without apparent difficulty, although I acknowledge his evidence (and reiterated in the IAA submission) that his family live in fear and stay home most of the time to keep safe. I also note the applicant's evidence that his family continue to work on their farm land.
23. The applicant claims that he has an increased risk of harm in Pakistan as a member of a 'prominent Shia family'. As noted above, DFAT assesses that 'high profile' Shias in Pakistan face a moderate risk of violence. However, I find it difficult to accept that the applicant's late father, [who] closed his business some 13 years ago would be considered high profile or 'prominent', or that the applicant's family is now perceived as such. I note the applicant's evidence in his SHEV application that his siblings and step siblings all resided in Pakistan. In the SHEV interview he confirmed that [number] siblings now lived abroad. However, there is no claim or evidence to indicate that his siblings or other family members faced harm at any time as a result of the applicant's late father's prior employment or status in the community. Further, while I acknowledge that the applicant has predominantly lived outside of Pakistan since 2000, he has not claimed to ever faced any threats or harm on this basis when he returned to visit his family in [Village 1] or Parachinar. I consider the post-SHEV interview submission that the applicant believes that had his father not died it is likely he would have faced harm due to his prominence as a businessman and member of the Shia community, to be speculative.
24. I acknowledge DFAT's assessment that the risk of sectarian violence for civilians in Parachinar ([distance] from the applicant's village) is higher compared to other parts of the former FATA. I also acknowledge there has been a history of sectarian violence in Kurram Agency, including near the applicant's home area, and I cannot discount the possibility that further attacks may happen in the future. I also acknowledge that information in the review material indicates that LeJ and Islamic State have threatened Shias in Parachinar in recent years. However, on the information before me, I find the chance that the applicant would be harmed by the Taliban or other extremist groups like LEJ, SSP and Islamic State now or in the foreseeable future due to his religion, his ethnicity, his tribal identity, his place of origin, as a Shia Turi, as a Shia Turi from [Village 1], as a Shia Turi from Kurram Agency, or any combination of these profiles, to not rise to a real chance. Nor am I satisfied the applicant faces a real chance of harm in connection with his late father's former employment, his prior status in the Shia community, or as a member of a 'prominent Shia family'. I note DFAT's assessment that there exists a moderate level of militant and criminal violence in the wider province of KP; however, there is no indication in the country information that this is an issue affecting the applicant's home or surrounding area. I am not otherwise satisfied that the applicant faces a real chance of harm on this basis. The applicant has not claimed to have experienced harm or

discrimination on account of his Pashtun ethnicity previously and, on the information before me, I am not satisfied he faces a real chance of harm in his home area, where Pashtuns form a significant majority, for this reason. I am not satisfied the applicant faces a real chance of harm due to his profile as a 'Shia Pashtun from the Kurram District' as claimed in the post-SHEV interview submission. Nor am I satisfied that, in [Village 1], the applicant will be imputed as a person opposed to the Taliban and other Sunni militants/extremists on account of his faith, his ethnicity, his tribal affiliation and/or his area of origin, or because his community 'stood up to the extremists', as claimed in the post-SHEV interview submission, or any combination of these factors, and be harmed on this basis. I am not satisfied that the applicant faces a real chance of harm in Pakistan due to an imputed political opinion.

25. The delegate considered whether the applicant could safely access his home area if returned to Pakistan. As noted above, I have accepted that he faced challenges returning to Pakistan between 2000 and 2013 to visit his family, as a result of the security situation in Kurram and because he had to travel through Afghanistan. In the IAA submission, the representative states that the applicant, in response to the delegate's decision, maintains that militants still have a strong presence on the roads near his village. In its most recent report, DFAT state that the overall security situation for all Pakistanis has improved in line with increased security across Pakistan, including in Kurram Agency. However, DFAT assess that travel in parts of the country is dangerous for all persons, regardless of sectarian, religious or ethnic affiliations. It assesses that in remote areas, such as KP and the former districts of FATA, persons are at greater risk of criminal or militant violence due to their isolation and the limited presence of security forces. In respect of road travel near the applicant's home area, DFAT report that between 2009 and 2014 Turis were frequently stopped along the Thall-Parachinar road linking Kurram Agency and Peshawar, but that by 2018 these attacks had significantly declined due to military operations that forced militants into the mountains. This restored confidence within the community for individuals to travel on the Thall-Parachinar road during daylight hours. DFAT's 2019 reporting on incidents involving Shias on the Thall-Parachinar road is consistent with its 2016 report about Shias in Pakistan, which indicates that there have been no major incidents on that road since 2014. I acknowledge the Dawn article the applicant provided that reported the blocking of the main Thall-Parachinar road on 15 October 2019, which also reported the setting on fire of three cars owned by members of Turi Bangash tribes. However, there is no credible information before me to indicate this incident was a targeted attack, sectarian in nature, or indicative of a return to militants stopping Shias on the roads as they did between 2009 and 2014. The country information before me does not indicate that Shias and/or members of the Turi tribe are being targeted on the roads to Kurram from areas like Islamabad or Peshawar (where the applicant could re-enter Pakistan, via the airport). While the absence of recent attacks by militants against the Shia or the Turi population on the roads leading to [Village 1] from these areas does not preclude the possibility of future attacks, when I consider the frequency of such attacks, and the improved security situation and security measures in the country, I consider the chance that the applicant will be involved in an incident or attack on the road, or put at additional risk because of his tribal, ethnic, religious, or other claimed profile, to be remote. Further, on the information before me, I am not satisfied the applicant faces a real chance of harm on the roads returning to his home area from criminal or other non-sectarian violence. Like the delegate, I am satisfied the applicant is able to safely access his home area.
26. In the post-SHEV interview submission, the applicant's representative stated that the applicant's fear of harm due to his imputed political opinion is exacerbated by his time abroad in the west (Australia). It is submitted that if returned to Pakistan he would be considered to be a 'supporter of the west'. It is further submitted that extremists are against western ideology. As noted above, I have already determined that the applicant does not

face a real chance of harm as a person opposed to the Taliban and other Sunni militants/extremists or due to an imputed political opinion.

27. In 2017, DFAT reported that western influence is pervasive in many parts of Pakistan. DFAT also reported that western films and music are widely available, and western-branded retail chains operate throughout the country. Both Urdu and English are official languages, and English is taught in many schools and is widely spoken among Pakistan's elite. Many Pakistanis have relatives in western countries and many more aspire to migrate abroad. Those living abroad return to Pakistan frequently to visit relatives. DFAT assessed that persons aren't subject to additional risk of discrimination or violence on the basis of spending time in a western country or because of perceived western associations, despite a generally increasing conservatism and religiosity across the country. Similarly, in 2019, DFAT assesses that returnees to Pakistan do not face a significant risk of societal violence or discrimination as a result of their attempt to migrate, or because they lived in a western country. DFAT note that many wealthier families pursue overseas education opportunities for their children, particularly in western countries. DFAT also indicate that returnees are typically able to reintegrate into Pakistani community without repercussions stemming from their migration attempt. On the information before me, I am not satisfied that, on return to Pakistan, there is a real chance that the applicant will be perceived as a 'supporter of the west' or imputed with a pro-western profile due to his time in Australia/the west now, or in the foreseeable future.
28. In her email of 21 November 2019, the applicant's representative provided two letters from the applicant's general practitioner, both dated 11 November 2019. The first is a letter of support confirming that the applicant was suffering from 'depression and anxiety disorders' and that he required ongoing management of the condition. The doctor indicated that resolution of the applicant's visa application would improve his mental state. The second letter is a referral for opinion and management. He notes a mental health care plan has been arranged for the applicant. In the post-SHEV interview submission, the representative states the referral is to a psychologist and I accept this to be the case. I note the applicant made no mention that he was suffering from a mental health condition in his SHEV statement or in the SHEV interview, although I note his evidence in the SHEV interview that he had only recently learned that his mother had passed away about six to eight months prior. The applicant also confirmed that he was engaged in ongoing employment 40 to 50 hours per week.
29. According to the post-SHEV interview submission, the applicant's mental health is relevant to the issue of relocation. As noted above, the applicant made no mention that he suffered from a mental health condition in the SHEV interview, including when he was asked about reasons why he could not relocate. The representative stated in the post-SHEV interview submission that the applicant would not receive the appropriate treatment upon relocation. She also submitted that due to a lack of medical treatment and support network he would be further vulnerable to serious harm upon relocation. The issue of the applicant's health and relocation is reiterated in the IAA submission. However, I note that, like the delegate, I have not found that relocation is necessary in this case. I also consider that if returned to [Village 1] he would be reunited with his family.
30. Unlike other claims, the representative did not refer to any country information in the post-SHEV interview submission to support her assertion about the lack of appropriate treatment for mental health in Pakistan.
31. In 2019, DFAT reported that basic health care in Pakistan is free despite factors that reduce quality and accessibility. DFAT report those factors as limited capacity, lack of funding, corruption, slow economic growth and overarching governance challenges. Many religious



and secular charities are said to provide health services and focus their support on the specific needs of their community or sect. A 2019 US Department of State report indicated that persons in the settled areas of KP had 'regular access to health care' and other social services.

32. There is no indication in the IAA submission as to the current status of the applicant's health condition, which appears to have been first diagnosed in November 2019, after the SHEV interview. Further, it is not clear on the evidence whether he requires ongoing treatment. While I accept the applicant may require further treatment for his psychological condition on return, he has not expressly claimed that he would be denied medical treatment in Pakistan and information in the review material does not indicate that mental health factors such as his would contribute to a person having a risk profile, or that medical treatment in Pakistan is intentionally withheld for any of the s.5J(1)(a) reasons. I give weight to reporting that health treatment is available in Pakistan, that the applicant would be returning to live with his family, and I note his doctor's opinion that resolution of the immigration process would improve his condition. I am also satisfied that any harm the applicant may possibly face due to a lack of being unable to readily access health care services in Pakistan would not be for the essential and significant reason or reasons of his race, religion, nationality, membership of a particular social group or political opinion. The weight of material before me indicates it is rather attributed to country wide capacity and resource constraints and indicates these are general conditions that affect the Pakistan population. Accordingly, s.5J(1)(a) and 5J(4)(a) of the Act would also not be satisfied.
33. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

#### **Refugee: conclusion**

34. 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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35. 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**

36. 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.

37. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
38. I accept the applicant may need further treatment in relation to his psychological condition. However, having regard to the evidence before me, I am not satisfied that this condition, or the environment to which he would be returned to would, individually or cumulatively, lead him to be arbitrarily deprived of his life, have the death penalty applied, or be tortured. As noted above, country information indicates that health services are available in Pakistan. I accept the country information that indicates that there are factors that reduce the quality and accessibility of health services. However, the information before me indicates this due to country wide capacity and resource constraints and not due to an intention to inflict pain or suffering, or severe pain or suffering or cause extreme humiliation.
39. I have otherwise found that the applicant does not face a real chance of any harm in Pakistan for the reasons claimed. Based on the same information, and for the reasons set out above, I find he does not have a real risk of suffering significant harm in Pakistan.
40. 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**

41. 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.

...

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

...

- (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.