



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

PAKISTAN
IAA reference: IAA20/08089

Date and time of decision: 28 April 2020 15:32:00
S McNeill, Reviewer

Decision

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

Visa application

1. The referred applicant (the applicant) claims to be a national of Pakistan. He arrived in Australia [in] July 2013 and on 20 July 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV application).
2. On 30 March 2020 a delegate for the Minister for Immigration (the delegate) refused to grant the visa.

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).
4. On 20 April 2020 the IAA received a submission from the applicant. The submission presents mostly argument in response to the delegate's findings and which, I have considered. It also reiterates the applicant's claims for protection.
5. Under the Practice Direction (a copy of which was emailed to the applicant on 3 April 2020), new information must be clearly identified, its relevance explained and an explanation must be provided in writing as to why firstly, the information could not have been given to the Department before the decision was made, or, secondly, the information is credible personal information which was not previously known and may have affected the consideration of the applicant's claims, had it been known. These aspects of the Practice Direction reflect the requirements s.473DD of the Act, and the applicant's compliance assists the IAA in assessing whether those requirements are met.
6. The applicant has not identified any new information in his submission; however, I am of the view the following constitutes new information (*italicised*):
 - In presenting argument as to why he has been nominated as a future *Malik*, he is according to his parents more capable of this role because he has lived in a more educated community and environment here in Australia. They believe he has problem resolution skills and has the influence over their villages having lived in Australia. He still helps resolve things over the phone or Skype. ... if he stayed here in Australia, he will still carry on the responsibilities of his role as Malik, over the phone or Skype as usual.
 - In presenting argument that the Taliban and other extremist organisations are all Sunnis and most of the police stations and hospitals have Sunni officers or Sunni doctors the applicant states *one of his friend's father was shot and after a lot of struggle and wait he was given a death certificate and cause of death was mention (sic) as NATURAL. He argued, but nothing moved.*
7. The applicant's role as a future *malik* was central to his claims for protection. This, the applicant discussed with the delegate at this SHEV interview held on 28 January 2020. At this point in time, or prior to the decision being made, the applicant could have provided this further information regarding him being considered capable of the role of *malik* because of his time present in Australia and that he helped resolve things over the phone and with Skype. The applicant has not provided any examples of this, he has not stated when he has done

this and without an explanation it is not apparent to me that this information could not have been provided prior to the decision being made. Furthermore, given the lack of contextual detail, that no information has been provided as to when this occurred, what matters he helped resolve, and aside from his assertions of being seen to possess certain skills for why he would need to be consulted given he is only considered a future *malik*, I am not satisfied that it has any credible basis. In addition, it also appears to contradict his oral evidence at his SHEV interview that his younger brother or someone else in the family would take over as *Malik* if he did not return to Pakistan.

8. Likewise it is unclear when his friend's father was shot and when the attempts to obtain a death certificate occurred. The applicant has not stated when this incident happened or what relevance it bears in particular to his claims for protection beyond possibly being a reflection of Sunni/Shia relations. The applicant was advised prior to his SHEV interview in writing and also orally at this interview that it was his responsibility to put forward all his claims and supporting information and evidence prior to a decision being made. I am not satisfied this information could not have been provided prior to the decision being made. Nor am I satisfied on what has been provided and the other information before me, that it would have any material impact on the assessment of the applicant's claims. In all circumstances, I am not satisfied there are exceptional circumstances for considering this new information.

Applicant's claims for protection

9. The applicant's claims can be summarised as follows:
 - He was born in [year] in [Village 1], Parachinar, in Upper Kurram of Kurram district, Khyber Pakhtunkhwa province, Pakistan.
 - He is a Shia Muslim of Pashtun ethnicity of the Turi tribe.
 - Throughout his childhood, his grandfather was one of the leaders in his village and his role was to mediate disputes. When his grandfather dies, his father will take on the role and after that, he as the oldest son, would become a leader of the village.
 - His grandfather was well known to Afghans and Pakistanis in his area. He believes some of the people he knew and who had a good relationship with became Taliban members, were able to identify his grandfather and family to the broader Taliban group. His grandfather received threats on a number of occasions from the Taliban because he and other leaders refused to give the Taliban access to the road which led from Peshawar into Afghanistan.
 - Their village is near the Afghan border and the Taliban has been active in his area since 2004. When the Taliban first came in they killed a number of people and blocked off the village from the rest of the area. They were unable to get adequate food and medical supplies because the roads were blocked. It was dangerous to leave as the Taliban would frequently attack convoys.
 - He owns a small farm located approximately [distance] from his village. He farmed [various] things and could support his family. The road to the farm became increasingly dangerous.
 - His problems began around 2008 after his cousin was killed. His cousin owned a small farm near his. One day he heard gunfire. He knew the Pakistani army was in the area fighting the Taliban near his and his cousin's farm. At the end of the fighting the army

took his cousin's body to a checkpoint, the militia notified them the Taliban had killed his cousin and they could collect his body.

- The farm is located in a valley with mountains on one side where the Taliban have strongholds from where they would monitor the roads and shell and launch rockets. After this the fighting increased and he did not feel safe to travel to his farm.
- He was confined to his home. He feared if he left his home and village the Taliban would kill him because of his Shia faith, his grandfather was the leader of his village and because he will eventually become a leader.
- The fighting continues even to this day, between 2015 and 2017 there were a lot of explosions near his village. His family including his wife and children cannot leave the village as it is not safe. The Taliban still attack the roads and many of the public facilities including schools, public buildings and markets.
- He fears being targeted on his return because he is seen as a future leader of his village and because he has gone to a western country. If he moved to a different location in Pakistan he would be recognised by his face, his dialect as someone from Parachinar and as a Shia. His name indicates he is a Shia. He would have to show his identity card and to get access to housing and employment.

Refugee assessment

10. 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

11. 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.
12. There is no issue as to the nationality of the applicant. I accept that the applicant is a national of Pakistan and that Pakistan is the receiving country for the purpose of this review.

13. The applicant's SHEV interview was undertaken on 28 January 2020. Based on the documentary and oral evidence before me, I accept the following in the relation to the applicant. He was born in [year] in [Village 1], Parachinar, Kurram in the Khyber Pakhtunkhwa province of Pakistan. Kurram is one of seven agencies (now districts) that make up the former Federally Administered Tribal Areas (FATA) but is now part of Khyber Pakhtunkhwa, one of Pakistan's four provinces.¹ I accept the applicant is married and has [number of] children, [ages specified] who currently reside in his village in his father's household. His mother passed away from [medical condition] while he has been in Australia. He has [number of siblings], one brother is working in [Country 1], and one is in his village and the other in Parachinar.
14. The applicant in his SHEV application claimed to be a Turi Pashtun; however, at his SHEV interview he stated his ethnicity was Duperzai when asked. I agree with the delegate that the applicant seemed confused regarding the concept of ethnicity. Like the delegate I conclude that the Duperzai are a sub tribe of the Turis. The applicant's has consistently claimed to be a Shia Muslim (SHEV application, arrival interview of 9 August 2013 and SHEV interview). Information in the review material indicates Turis are a Shia Pashtu tribe² and given his statutory declaration included with his SHEV application was prepared with the assistance of a solicitor and registered migration agent and an interpreter in the Pashto language; I accept the applicant is a Shia Muslim of the Turi tribe, Duperzai subtribe and an ethnic Pashtun.
15. Pakistan has the world's sixth largest population, with over 200 million citizens. Muslims comprise of 96.28 per cent of the population, Sunnis the majority with 85 to 90 per cent and Shias between 10 to 15 per cent. Article 20 of the Constitution provides that 'subject to law, public order, and morality, - (a) every citizens shall have the right to profess, practise and propagate his religion; and (b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions'. Article 2 establishes Islam as the state religion and Articles 41(2) and 91(3) require that the president and prime minister be Muslim. Nevertheless, religious intolerance is said to be growing in Pakistan, and minorities, including Shia, face societal discrimination and attacks from extremist groups.³
16. Pashtuns comprise an estimated 15.4 per cent of the population, making them the second largest ethnic group in the country. Pashtuns traditionally live among their own tribes and sub-tribes in Khyber Pakhtunkhwa.⁴ The majority of the population of Khyber Pakhtunkhwa is Pashtun and Sunni Muslim.⁵ Kurram district is the only district in the FATA with a significant Shia population. The applicant's village of [Village 1] in Parachinar is located in Upper Kurram, one of the three administrative units of Kurram District. The other two are Lower Kurram and Central Kurram. Kurram District has a population of almost 620, 000.⁶ Shia are said to comprise around 40 per cent of the population of the Kurram District. Upper Kurram from, where the applicant originates, is estimated to be about 80 per cent Shia.⁷ Most Shias in the Kurram District are from the Turi tribe, particularly in Parachinar (Kurram's largest city) and the Turi tribe is unique in that it is exclusively Shia Pashtun tribe of around 500, 000. There are also small communities in the major cities in other parts of Pakistan, including Islamabad. Turis are

¹ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Pakistan', 20 February 2019, 20190220093409.

² DFAT, 'DFAT Country Information Report Pakistan', 20 February 2019, 20190220093409.

³ Ibid.

⁴ Ibid.

⁵ DFAT, 'DFAT Thematic Report - Shias in Pakistan January 2016', 15 January 2016, CIS38A801265.

⁶ European Asylum Support Office (EASO), 'Pakistan Security Situation', 30 October 2019, 20191031160110.

⁷ DFAT, 'DFAT Country Information Report Pakistan', 20 February 2019, 20190220093409, 3.109; Marian Abou Zahab, "'It's Just a Sunni-Shiite Thing': Sectarianism and Talibanism in the FATA of Pakistan", Hurst & Company, 1 January 2013, CIS29402.

not visually distinguishable but they can be identifiable because of distinctive names and accents, and because they largely live within a small, well-defined area.⁸

17. At his SHEV interview the applicant said his village of [Village 1] was about [distance] from Parachinar. There were around [number of] households when he left but now there were about [number] to [number]. His [uncles], father and grandfather lived in his village and his wife lived in his father's household. His father was not working but supporting himself from farming. [Details of siblings deleted]. He himself had not received an education and had been working on the family farm [before] his departure growing [produce]. His father had [worked] in [Country 1] for 30 years but now was at home.
18. The applicant stated he practised his religion in Pakistan by doing prayers, processions and during Muharram they beat their chest with chains. He attended mosque while in Australia only once every one to two months to pay his respects as he was working. Since his arrival he had been working in [Industry 1] with a [specified] company. People from Parachinar had contacts here and he got in touch with them when he came. He had sent money home to his family every three months or sometimes twice a month.
19. Asked about his grandfather's role, the applicant said he is a *malik* like a leader of the village and he was appointed by the government. There were around 10 people in his village and they were all appointed by the government. Asked how he was appointed by the government the applicant said he didn't know, he only knew *Maliks* were appointed by the government. Asked his responsibilities, the applicant said his grandfather was like an elder and if there was a dispute they would sit together and resolve the problems. His grandfather also took part in meetings with the government. People were not answerable to him but he is known as a *Malik*. If one needed to get an ID card or apply for a passport, his signature (as a *Malik*) is required. His grandfather was one of 10 people in his village that could provide this service. His grandfather was about [age] to [age] years old. When he passed away, his father would take over the role and then he would. His father currently attended meetings near the Afghan border or in Peshawar. Asked whether his father and grandfather had been preparing him for the role, the applicant said 'no'. Asked if he remained in Australia who would take over the role, the applicant said he didn't know but his younger brother or someone else in the family.
20. Country information in the review material indicates the tribes which inhabit the North Western part of Pakistan are led in their affairs by their respective tribal leaders usually known as *Maliks*. The mechanism through which these *Maliks* represent the common tribal people is known as the Maliki system which was started in 1890 by a British officer. In this way they could indirectly maintain law and order through their own leaders. Their duty was to identify those were causing disorder, and at the time they were given monetary benefits. The Maliki is hereditary and it goes to the son after the death of his father. With the passage of time the power of the *Malik* has started to curtail. In settled areas, the Maliki system has diminished but in tribal areas it is still prevailing. In settled areas, the *Maliks* perform very few functions like revenue collection and attestation of documents. *Maliks* are mostly rich and usually have big agricultural land; they enjoy certain powers, authority and respect.⁹ *Maliks* are administrators and manage during peacetime and possess influence but the power lies with the *Jirga*.¹⁰

⁸ DFAT, 'DFAT Country Information Report Pakistan', 20 February 2019, 20190220093409.

⁹ Danish Ahmad and Dr. Anwaar Mohyuddin, 'Role of Malik in Pukhtoon Tribal Areas ', Journal of Studies in Social Sciences, 1 January 2013, CIS36DE0BB2882

¹⁰ Center for Research and Security Studies, 'FATA Tribes: Finally out of Colonial Clutches? Past, Present and Future', 1 June 2018, CIS7B839418820.

Information in the review material indicates tribal elders (*Maliks*) have been targeted by the Taliban militants such as the Tehreek-e-Taliban Pakistan (TTP) including in Parachinar.¹¹

21. The applicant demonstrated some knowledge of the role of *Maliks* and I accept that his grandfather is a *Malik* and that one day his father will take on the role and given it is a hereditary position. It is plausible the applicant himself as the oldest son may also be in line sometime in the future. While the applicant stated his grandfather is approximately [age] to [age] years old, I am satisfied he is more likely to be older given his father's year of birth is [year] is recorded making his father around [age] years old. Other than state his grandfather was staying in the house, which is not surprising given his age, the applicant has not claimed his grandfather has been threatened with anything recently. I am willing to accept his grandfather received threats on a number of occasions around 2008 given the country information states *Maliks* have been targeted by Taliban militants and it was the *Maliks* or tribal elders who made the decision to not allow the Taliban passage through their area onwards to Afghanistan. The applicant has not claimed his father has been threatened or targeted for harm on account of the fact that he is next in line.
22. The applicant claimed that after his grandfather started receiving these threatening calls, his cousin was killed. His cousin had a farm close to his and one day (although he did not recall when) he heard gunfire and he knew the Pakistan army was in the area fighting the Taliban. After the end of the gunfire, the army took the body and left it at a checkpoint. Militia came to the village to notify their family that his cousin had been killed by the Taliban and they could collect the body. At his SHEV interview when asked about the circumstances that led to his cousin's death, the applicant said they had farming fields near the Afghan border and he was there when the firing happened and he was shot.
23. Asked for more detail, the applicant said because his grandfather was a *Malik* who was known in Afghanistan and in Pakistan, and in Parachinar there were Taliban. Asked how he was known when there were ten other leaders doing the role, the applicant said these others were known and they had also been harmed as well. Their people had been killed in Afghanistan, on the road and in the roofs. After the fighting in 2007 his grandfather was receiving threats, he was not telling them for a whole year. The main issue was the Taliban were asking for access for a route to Afghanistan because they were going there for Jihad and to fight against NATO; however, they were lying and killing women and children. When they were denied access, his grandfather started receiving threats. The Afghan border is [distance] from their house. There are farm field and then mountains and his cousin was shot in the farm fields in the morning. His cousin hadn't taken part in any fighting he was working on the farm.
24. The applicant thought he was at home when it happened and it was in 2008. Since the threats his grandfather was restricted to the house and didn't go out anymore. The delegate put to him that given this happened in 2008, why then did the applicant choose to leave Pakistan when he did (May 2013). The applicant said he wanted to leave at the time but it was too dangerous, at that time a lot of people were being shot on the road and the road was completely shut down. Asked what he experienced directly himself before he left Pakistan, the applicant said he was very frustrated and couldn't go out or do anything so he decided to come to Australia. Asked again what he did in the five year period before he came to Australia, the applicant said he stayed at home because of the fighting which continued until 2014, 2015. He also worked on some of their farm land. They had farmland towards the Afghan border which

¹¹ Qandeel Siddique, 'Tribal Elders: Living on a Sword's Edge', Tushar Ranjan Mohanty, South Asia Intelligence Review, 30 August 2010, 20200317110623; 'Tehrik-e-Taliban Pakistan: An Attempt to Deconstruct the Umbrella Organization and the Reasons for its Growth in Pakistan's North-west', Human Security Gateway, Danish Institute for International Studies, 1 January 2010, CIS19710

was more irrigated and fertile and also towards Sadda, but it had less water. Their father was also sending them money to survive. At the time he left for Australia his siblings were also staying at home.

25. The applicant said it was not only his grandfather's decision to deny access to the Taliban, there were a lot of people involved in the decision. The delegate noted he had been in Australia since 2013 and questioned how the Taliban would know he would be *Malik*. The applicant said the Taliban had left Parachinar but they were everywhere now, Islamabad, Karachi and Peshawar. If he returns from Australia he would have to live in a small room and have a very restricted life with no freedom. The Taliban would find out about his return as they lived in the same area. They would want to take revenge even 10 years later. He was used to having freedom after being in Australia and would want to travel to Peshawar, Lahore, Karachi and Rawalpindi and they would identify him as being from Parachinar. If he went to a hotel, he would need to present his ID card and his [name] would identify him as a Shia. Asked about living in another area in Pakistan, the applicant said he could not live there, Saudi Arabia was a Wahhabi country and they funded the Madrassas in Pakistan to preach against them. Anyone from Parachinar was at risk not just him.

26. Country information in the review material reports on a history of communal tensions and sectarian conflict between the Sunni and Shia groups and along tribal lines in the Kurram District. Kurram District is strategically important as it shares a border with the Afghanistan. Upper Kurram has access to Afghanistan and it is also the most fertile area of the district. Peshawar and the rest of Pakistan are connected through lower Kurram. There are long standing disputes over forests, land, hills and water resources. In 2001 following the toppling of the Taliban regime in Afghanistan and the invasion of the international coalition led by the US, the Afghan Taliban settled in the former FATA. Since then, the nature of the sectarian conflict has changed and once again Kurram became strategically important because of its shared border with Afghan provinces of Khost, Paktia and Nangarhar. The conflict is not tribal or sectarian per se but it is instigated by the Taliban supported by criminal elements, who want access to Afghanistan and they use tribal and sectarian differences to fuel the conflict and keep the government out.¹²

27. The Taliban and Al Qaeda gained significant ground in the former FATA. The Tehrik-e-Taliban Pakistan (TTP) (an umbrella organisation for predominantly Pashtun Sunni militant groups) is the largest banned group; it and its various networks remain Pakistan's greatest security threat. They maintain a separate identity to the Afghan Taliban but are ideologically aligned. Sectarian violence erupted in April 2007 after Sunnis chanted anti-Shia slogans during a procession in Parachinar. The sectarian violence saw the forced closure of roads in Kurram including the Thall-Parachinar road that links Peshawar to Afghanistan and one cause of the closure was the Turi elders' refusal of the TTP's request for access to the road. The Turi leaders believed the TTP was likely to draw unwanted military attention to the Kurram and they suspected the TTP of wanting to take over the area. The Taliban angered by this started using Kurram as a launching pad into attacks in Afghanistan and targeting Shias.¹³

28. Groups such as the TTP targeted Turis and other Shia tribes for their Shi'a faith and militants frequently stopped and killed Shia travelling on the Thall-Parachinar road. Sunni militant groups instigated road blockades causing food and medicine shortages in Upper Kurram.

¹² Arif Rafiq, 'Sunni Deobandi Shii Sectarian Violence in Pakistan: Explaining the Resurgence Since 2007', Middle East Institute, 1 December 2014, CIS2F827D91993; Marian Abou Zahab, "'It's Just a Sunni-Shiite Thing': Sectarianism and Talibanism in the FATA of Pakistan', Hurst & Company, 1 January 2013, CIS29402.

¹³ Mansur Khan Mahsud, 'The Battle for Pakistan: Militancy and Conflict in Kurram', New America Foundation, 1 April 2010, CIS18543.

Between 2008 and 2014, thousands of civilians were killed (both Shia and Sunni), villages burned and many were displaced in sectarian clashes, including bombings and targeted attacks.¹⁴ By the end of 2011, an estimated 1500 to 3000 people had been killed before the Shias and Sunnis reached an accord and the Pakistan Army launched an operation to open the Thall-Parachinar road.¹⁵ Country information also confirms [Village 1], close to the border with Afghanistan, experienced rocket and missile attacks around the period the applicant claimed.¹⁶

29. On the information before me, I accept the applicant's grandfather received threats in approximately 2008 and this was because of his role as one of many *Malik* or tribal elders to deny the Taliban passage to Afghanistan. I accept his cousin was killed in approximately 2008. I am not satisfied the applicant's cousin was specifically targeted by the Taliban because his grandfather was a *Malik*. Based on the applicant description of the event in his SHEV application, I am persuaded that his cousin was killed in cross fire when fighting occurred between the Taliban and Pakistan army. I am not satisfied the applicant was personally known to the Taliban or had a profile with the Taliban as a future *Malik*. I accept that during the five year period prior to his departure from Pakistan in 2013 the applicant led a relatively restricted life due to the sectarian violence prevalent in that period but was able to undertake some farming. I also accept that he was prevented from traveling because of ongoing conflict and the road south of Parachinar leading to Peshawar was blocked.
30. Pakistan's security situation has however changed manifestly since the applicant departed seven years ago in 2013. In 2014 the Pakistani military launched security operations to combat terrorism and sectarian violence. In June 2014 Operation *Zarb-e-Azb* targeted terrorist groups including the TTP and extended into the former FATA and Khyber Pakhtunkhwa. In December 2014, after the deadly attack on the Army school in Peshawar in which 132 children died, the Pakistani authorities introduced the National Action Plan (NAP). The combination of military operations and the NAP formed a civil-military effort to combat terrorism, separatist and criminal groups across Pakistan. The NAP 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 FATA.¹⁷
31. Observers credit Operation *Zarb-e-Azb* and the NAP with a significant reduction in the number of violent and terrorism related attacks in Pakistan. Operation *Zarb-e-Azb* and associated anti-terrorism activities led to a decrease in the number and severity of attacks on Turis in 2015 and 2016. However, three large scale attacks carried out by militants occurred in the first six months of 2017 in Parachinar. These three bombings killed more than 120 people. DFAT assesses that these attacks targeted Turis because of their Shia affiliation.¹⁸
32. The Pakistani military launched further military operations in 2017, *Radd-ul-Fassad* and *Khyber IV*. The military's focus was not only the Kurram District but other areas of the former FATA

¹⁴ Marian Abou Zahab, "'It's Just a Sunni-Shiite Thing': Sectarianism and Talibanism in the FATA of Pakistan', Hurst & Company, 1 January 2013, CIS29402; Arif Rafiq, 'Sunni Deobandi Shii Sectarian Violence in Pakistan: Explaining the Resurgence Since 2007', Middle East Institute, 1 December 2014, CIS2F827D91993; DFAT, 'DFAT Country Information Report Pakistan', 20 February 2019, 20190220093409.

¹⁵ Arif Rafiq, 'Sunni Deobandi Shii Sectarian Violence in Pakistan: Explaining the Resurgence Since 2007', Middle East Institute, 1 December 2014, CIS2F827D91993.

¹⁶ 'Troops trade fire along Afghan border', Dawn News Group - Pakistan, 17 May 2007, CX296868; '27 killed in Kurram Agency', Dawn News Group - Pakistan, 27 December 2007, CX296874; 'Rockets fired from Khost land in Kurram', Pajhwok Afghan News - Afghanistan, 15 March 2008, CX296876

¹⁷ DFAT, 'Pakistan Country Information Report 1 September 2017', 1 September 2017, CISED50AD5515.

¹⁸ DFAT, 'DFAT Country Information Report Pakistan', 20 February 2019; DFAT, 'Pakistan Country Information Report 1 September 2017', 1 September 2017, CISED50AD5515.

and other provinces including Punjab. Operation *Khyber IV* targeted various groups including ISIL connections across the border in Afghanistan's Nangarhar province. Local observers, including officials, in Khyber Pakhtunkhwa reported a trend in increased security, a reduction in reputed killings and reduced fear within the community in 2018. The frequency of sectarian attacks has reduced annually since the launch of Operation Zarb-e-Azb and the NAP.¹⁹ The counterinsurgency operations have contributed to a higher level of security in the Khyber Pakhtunkhwa province in the long run.²⁰

33. Since June 2017 there have been no more attacks of scale in Parachinar. DFAT reported in the first quarter of 2018, the Turi community reported two attacks, including one involving an IED that targeted women and children. This compares to community estimates that 200 Turis were killed in and 1000 injured in 2017.²¹ The Pakistan Institute for Peace Studies (PIPS) reported one incident in Kurram in 2018, when reportedly on 30 January 2018 seven members of a family including three women were killed and one injured in a landmine explosion near the Afghan border in Upper Kurram.²² This incident is possibly that referred to in DFAT's 2019 report.
34. The FATA Research Centre (FRC) in its 2019 noted with the exception of the South Waziristan district, a significant decline in terrorism incidents and resultant casualties. Only one terror incident in Kurram was recorded with two injuries and no casualties recorded. The majority of casualties in the former FATA were security forces not civilians. This represented a 67 per cent decrease in violent incidents compared with three recorded in 2018, and an 89 per cent decrease in casualties (zero killed and two injured) compared to eight killed and 13 injured in 2018.²³ Information before me indicates this one incident in 2019 involved two members of the security forces were injured in a clash with militants in the Marghan Ali Sherzai area of Kurram.²⁴ There is no information before me of any militant attacks against Shia Turi in Kurram in 2020.
35. Whilst the FRC states tribal elders or *Maliks* are still a target of militant groups, information in the referred material suggests no tribal elders have been injured or killed since 2017 with the most recent attack on a tribal leader occurring in 2014 over 6 years ago.²⁵ I note whilst the applicant has claimed his grandfather has kept a low profile restricted to the house, he has not claimed his grandfather has been threatened with harm since 2008. Furthermore there is no evidence his father has been targeted or threatened because his father will inherit the role of *Malik* from his grandfather. The information in the referred material does not suggest that family members of *Maliks* or tribal elders have been targeted. I find the chance of the applicant facing harm from the Taliban or other Sunni militant groups, because he is the grandson of a Turi Shia *Malik* from upper Kurram, is remote.
36. The information before me overwhelmingly demonstrates the security situation has vastly improved since the applicant departed Pakistan in 2013. The military operations have disrupted the militant groups, weakened their operational capacity, and caused a loss of terrorist training infrastructure, hideouts and safe havens and the gradual loss of support

¹⁹ DFAT, 'DFAT Country Information Report Pakistan', 20 February 2019.

²⁰ EASO, 'Pakistan Security Situation', 30 October 2019, 20191031160110.

²¹ DFAT, 'DFAT Country Information Report Pakistan', 20 February 2019, 3.16.

²² Pakistan Institute for Peace Studies (PIPS), 'Pakistan Security Report 2018', 6 January 2019, 20190121110758.

²³ Irfan U Din and Mansur Khan Mahsud, 'Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2019', FRC, 13 January 2020, 20200122123739.

²⁴ EASO, 'Pakistan Security Situation', 30 October 2019, 20191031160110.

²⁵ Irfan U Din and Mansur Khan Mahsud, 'Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2019', FRC, 13 January 2020, 20200122123739; 'Attack on Tribal Elders in Pakistan', South Asia Terrorism Portal, South Asian Terrorism Portal, Attack on Tribal Elders in Pakistan'.

within the Pashtun communities has deprived them from local recruits and sources of terror funding. Groups such as the Taliban and al-Qaeda have reportedly left the former FATA. Many militants have been killed or fled to Afghanistan.²⁶ DFAT reports military operations have improved the confidence of Turis within the community for individuals (although not large groups) to travel on the Thall-Parachinar road, but only between dawn and dusk. By February 2018, the Turi community estimated 40 per cent of military fencing in Kurram was complete, decreasing border permeability. Continuing security measures and tighter Afghanistan-Pakistan border controls also restrict movement. The military has also implemented a 20 to 30 square kilometre area red zone in Parachinar, and a second, smaller red zone inside the outer red zone, in which markets and schools are located. Security forces have issued cards to access the red zones, which can be obtained by residents on presentation of identity documents. Since these measures were introduced there have been no further attacks reported in Parachinar.²⁷

37. Turis face some risk of violence while traveling by road to Iran and Iraq on religious pilgrimage, although DFAT understands the government provides security assistance for such journeys.²⁸ Other reports indicate the government's efforts were visible in the 2019 commemorations observed by Shia Muslims during Muharram, which passed without incident during amidst tight security to protect participants in the public procession.²⁹ A *jirga* attended by Sunni and Shia elders and law enforcement officials was held to review security arrangements for Muharram processions in Kurram.³⁰ Information also indicates the Pakistani and Khyber Pakhtunkhwa governments appear committed to developing the newly merged former FATA districts. The federal government has announced spending focused on tourism, sports, culture and youth services in the former FATA to create job opportunities and alleviate poverty and this reflects its focus to maintain security and stability in the region.³¹

38. I am mindful that while DFAT notes a trend of decreased reports of attacks against Shi'a Turis in 2018 due to the improved security situation in Kurram and this trend was likely to continue in 2019, although attacks and violence against Shi'a Turis can and may still occur. The FRC noted although Kurram remained peaceful in 2019 it believed it to be one of the most vulnerable districts given its geographical proximity to the volatile bordering province of Nagarhar in Afghanistan, the sectarian nature of its conflict and its proximity to North Waziristan and Khyber districts, where militants are still able to conduct activities.³² DFAT assesses Shi'a Turis in Kurram still face a moderate risk of sectarian violence from militant groups because of their Shi'a faith. Moderate risk meaning DFAT is aware of sufficient incidents to suggest a pattern of behaviour.³³ The basis of this assessment is however not clear and is not reflected in the weight of the other recent country information which points to a continuing downturn of violence against the Shia in the area. Taking into account the ongoing significant downward trend in violence and attacks by militant groups in general and that there have been no attacks in Kurram for over two years now (including DFAT's own reporting on actual incidents), I am not

²⁶ Ibid; DFAT, 'DFAT Country Information Report Pakistan', 20 February 2019; Irfan U Din and Mansur Khan Mahsud, 'Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2019', FRC, 13 January 2020, 20200122123739.

²⁷ DFAT, 'DFAT Country Information Report Pakistan', 20 February 2019.

²⁸ Ibid.

²⁹ 'Muharram in Pakistan: Daring to observe Ashura', Global Voice, 14 September 2019, 20191022151801; 'Ashura observed across Pakistan amid tight security arrangements', Dawn (Pakistan), 10 September 2019, 20191022152039.

³⁰ 'Elaborate security measures ordered for Muharram processions', Dawn (Pakistan), 04 September 2019, 20190920140615s

³¹ 'KP Govt Develop Rs5120m In Development Plan For Promotion Of Tourism, Culture, Sports In Erstwhile Fata', Urdu Point, 22 September 2019, 20190930103107; 'Newly Merged Areas Of KP On Road To Peace, Development', Urdu Point, 08 October 2019, 20191009103852; 'People have great expectations from new tribal representatives', Tribal News Network (Pakistan), 11 August 2019, 20190813094848.

³² Irfan U Din and Mansur Khan Mahsud, 'Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2019', FRC, 13 January 2020, 20200122123739.

³³ Ibid.

satisfied DFAT's 'moderate risk of violence' accurately reflects the current or reasonably foreseeable situation in Kurram.

39. As noted Pashtuns are the second largest ethnic group in Pakistan. The applicant will return to a majority Pashtun area. Article 28 of the Constitution provides that 'any sections of citizens having a distinct language, script language or culture shall have the right to preserve and promote the same, and subject to law, establish institutions for that purpose.' Article 25(1) states that 'all citizens are equal before the law and are entitled to protection of law.' Pashtuns are represented at all levels of society in Pakistan and historically Pashtuns have dominated employment in the transport sector. Pashtun's are well represented in the security forces. DFAT has assessed that Pashtuns do not face a higher risk of violence than other groups based on ethnicity. DFAT has reported that some members of the Pashtun community, particularly in Lahore, have claimed to have been harassed by police and security forces and to have had difficulty obtaining documents. Since the commencement of the most recent security operations in Pakistan, large numbers of Pashtuns have been arrested across the country on suspicion of terrorism activities –due largely to the fact the Taliban's support base is primarily Pashtun. Hundreds of Pashtuns were also arrested in the lead-up to a proposed (later cancelled) large scale protest in early November 2012. Members of the Pashtun community to DFAT community leaders are typically able to secure the release of Pashtuns who have been arrested without firm evidence of wrongdoing.³⁴
40. DFAT's most recent report states that some Pashtuns face a medium risk of official discrimination in the form of terrorism related and racial profiling by security officials in areas where Pashtuns are a minority, such as the Punjab. Some Pashtuns have paid bribes as high as AU\$5500 to avoid being listed as terrorists. The report however does not indicate the frequency of such incidents but it does state these issues apply to Pashtuns migrating within Pakistan and especially to Karachi and Lahore, the applicant would be returning to Kurram in Khyber Pakhtunkhwa province, which is majority Pashtun. DFAT assesses that Pashtuns in Pashtun majority areas where individuals have family or social connections (like the applicant) face a low level of social discrimination.³⁵ I also note the applicant is a Shia Pashtun, not a Sunni, and to that extent I am not satisfied he would be seen as affiliated with a Sunni terrorist organisation. I am not satisfied he faces a real chance of being racially profiled by the authorities or being imputed with any adverse profile as a Pashtun or Pashtun Shia of the Turi tribe. I am also not satisfied, if he were to travel to other parts of Pakistan and if he were to present his ID card at a hotel which indicates his village and Shia name he would face a real chance of any harm on this basis.
41. In relation to general discrimination, according to DFAT, societal discrimination in Pakistan tends to manifest in the form of positive discrimination in the form of nepotism or patronage in favour of one's own family, tribal or social group. Shi'as are represented in the professional community including medical and legal professions. DFAT has no evidence of systematic discrimination against Shi'a in gaining employment in the public service, police, military or the private sector. However, some Shi'a perceive discrimination against Shi'a gaining roles at higher levels of some organisations. Overall, DFAT assesses Shi'as do not generally face significant levels of discrimination when seeking employment based on their religious affiliation. Sunni and Shi'a attend the same public and private education institutions. Shi'a are well represented in parliament and regularly contest elections for mainstream political parties. DFAT assesses there are no barriers to preventing Shi'a from actively participating in democratic processes in Pakistan. DFAT assesses that Turis face no additional risk of official

³⁴ DFAT, 'Pakistan Country Information Report 1 September 2017', 1 September 2017, CISED50AD5515.

³⁵ DFAT, 'DFAT Country Information Report Pakistan', 20 February 2019.

discrimination based on their Shi'a religion. Turis tend to live in enclaves with other Turis, mitigating societal discrimination. The applicant has not claimed he or his family have suffered any such discrimination in relation to employment or education in the past.

42. The applicant has only ever lived in Parachinar in Upper Kurram where he spent the majority of his working life farming. Given his family including his wife and [children], his father, grandfather and [number of his] siblings continue to reside there, and still own their farm lands and he has maintained contact with his family while in Australia, that he does not wish to live elsewhere, I am satisfied the applicant would very likely return to his place of origin if returned to Pakistan. Given security has been established in his area and the roads including the Thall-Parachinar road remains open, I am not satisfied he will be restricted in his area and prevented from traveling to other parts of Khyber Pakhtunkhwa or Pakistan in general.
43. Taking into account the active involvement of the Pakistani authorities, its various military operations over an extended period of time and its engagement in developing the former FTA, that there is no information before me to suggest this will not continue for the reasonably foreseeable future, the downward trend in violence and attacks by militant groups in general and that there have been no attacks in Kurram for over two years now, that the Taliban are no longer operating in Kurram district, the applicant's own evidence his family remain in the area and have not experienced any harm over a ten year period, that upper Kurram is a Turi Shia Pashtun majority area, and despite being the grandson of a *malik* or tribal elder, I am satisfied the risk to the applicant of suffering discrimination or other harm including from the Taliban or other Sunni militant groups, or more broadly general violence, because he is a Shia Pashtun of the Turi tribe from Parachinar, from a *malik* family, in the Kurram district, is remote and does not amount to a real chance. I am not satisfied the applicant faces a real chance of any harm on these bases on his return to Pakistan now or in the reasonably foreseeable future.
44. The applicant claimed to fear harm on account he has gone to a western country. I accept the applicant has resided in Australia, a western country, for almost seven years and that he has sought asylum. On the information before me, I accept the applicant departed Pakistan lawfully from Islamabad on his own lawfully issued passport.
45. DFAT understands that people who return to Pakistan voluntarily and with valid travel documentation are typically processed like any other citizen returning to Pakistan. People returned to Pakistan involuntarily are typically questioned upon arrival to ascertain whether they left the country illegally, are wanted for crimes in Pakistan, or have committed any offences while abroad. Those who left on valid travel documents and have not committed any other crimes are typically released within a couple of hours. Those found to have contravened Pakistani immigration laws are typically arrested and detained and released in a few days after being bailed by their family or having paid a fine. Those wanted for a crime in Pakistan or who have committed a serious offence abroad may be arrested and held on remand, or required to report regularly to the police as a form of parole.³⁶
46. The applicant left on a valid travel document and he has not claimed to have committed a crime in Pakistan or any offence here in Australia. If he is returned involuntarily, I accept he may be briefly questioned to determine if he left illegally or have committed an offence and then released. I am not satisfied he will be subject to any other interest. The information does not indicate the authorities mistreat or otherwise harm people being questioned in this situation.

³⁶ DFAT, 'DFAT Country Information Report Pakistan', 20 February 2019.

47. Returnees are typically able to reintegrate into Pakistani community without repercussions stemming from their migration attempt, although involuntary returnees who took on debt to fund their migration attempt tend to face higher risk of financial hardship or familial shame. Western influence is pervasive in Pakistan. Western films and music are widely available and western-branded retail chains operate throughout the country. Many Pakistanis having relatives in western countries and aspirations themselves to migrate to the West. Over six million Pakistanis live outside of Pakistan, with significant numbers living in the United States or United Kingdom. Wealthy Pakistani families commonly send their children to western countries. DFAT assesses that returnees to Pakistan do not face a significant risk of societal violence discrimination as a result of their attempt to migrate or because of having lived in a western country or because of perceived western associations (such as clothing), despite a generally increasing conservatism and religiosity. English is an official language of Pakistan and taught in schools, further evidence of the influence of western culture. DFAT does not indicate that this risk is different in the former FATA or other parts of Pakistan.³⁷ The applicant has not claimed to be in debt or to fear financial hardship because of his travel to Australia and as already noted he has been working in Australia. While there are some articles in the referred material to suggest an element of anti-Western sentiment exists in Pakistan³⁸, taking all this into consideration, I am not satisfied the applicant faces a real chance of any harm on account of his having claimed asylum in Australia a western country or as a returnee, or returned asylum seeker from the west and because of his Shia Muslim Turi identity and family background. I am also not satisfied he will be imputed with a pro-Western, anti-Taliban political opinion on account of his having sought asylum in Australia or as a returnee from a western country.
48. I am not satisfied the applicant faces a real chance of any harm for the reasons claimed, now or in the reasonably foreseeable future, should he return to Pakistan.
49. I am not satisfied the applicant has a well-founded fear of persecution in Pakistan.

Refugee: conclusion

50. 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

51. 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.

³⁷ DFAT, 'DFAT Country Information Report Pakistan', 20 February 2019; DFAT, 'Pakistan Country Information Report 1 September 2017', 1 September 2017, CISED50AD5515; 'Pakistan: CI150313142225972 – Western Values – Returnees', Country of Origin Information Services Section (COISS), 23 March 2015, CRE6D907989.

³⁸ 'Maulana Fazl asks voters to reject parties promoting western culture', Tribal News Network (Pakistan), 10 July 2018, CXBB8A1DA31210; 'JI Condemns 'Dance In Burqa' At Function In Nishtar Hall', Tribal News Network (Pakistan), 06 January 2018, CXBB8A1DA181.

Real risk of significant harm

52. 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.

53. 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.

54. I have found that the applicant does not face a real chance of harm for any reason on return to Kurram District in Pakistan. The requirement for there to be a "real risk" of significant harm applies the same standard as the "real chance" test. Accordingly, for the same reasons I have concluded the applicant does not face a real chance of harm, I find that there is not a real risk of significant harm to him in the foreseeable future were he to return to Pakistan.

Complementary protection: conclusion

55. 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

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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.