



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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PAKISTAN  
IAA reference: IAA21/09300

Date and time of decision: 5 July 2021 10:10:00  
R Mikhail, 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. On 9 August 2017 he lodged an application for a Safe Haven Enterprise Visa (application for protection).
2. On 4 June 2021 a delegate of the Minister for Immigration (the delegate) refused the grant of the visa.
3. This matter was referred to the IAA on 10 June 2021.

### Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (review material).

### *Failure to attend Departmental interview*

5. Included in the review material was the following information:
  - On 27 April 2021, the applicant was invited by the Department of Home Affairs (the Department) to participate in an interview via video link in respect of his application for protection, scheduled to take place on 11 May 2021 at 2pm at the Department's Sydney office (PV interview). The invitation was sent by email to the applicant's migration agent.
  - On 4 May 2021 the delegate sent an email to the applicant's migration agent regarding the upcoming interview providing him with information about the interview and asking that he notify the Department of any changes or additions to the applicant's claims.
  - On 7 May 2021 the applicant's migration agent emailed the delegate advising that, after many attempts, he was finally able to obtain the applicant's phone number and email address. He later advised the delegate that the applicant had not been responsive to his attempts to contact him.
  - On 10 May 2021 the delegate sent an email directly to the applicant providing him information about his interview and inviting him to notify the Department of changes or additions to his claims before that interview and to submit any additional evidence.
  - On 11 May 2021 the delegate emailed the applicant's migration agent at 10.43am asking him to confirm if the applicant knew that he is expected to be at the Department that day for his 2pm interview. He also advised the agent that, if he no longer wishes to represent the applicant, then he needs to inform the Department as soon as possible.
  - On 11 May 2021 at 1.29pm the applicant's migration agent advised the Department via email that he had ended his appointment as the applicant's agent.
  - A file note from the delegate indicates that the applicant did not attend the PV interview. The delegate contacted the applicant by phone at 2pm on the day of his PV interview and asked the applicant for his location. The applicant said that he had just finished work and was heading home. When the delegate asked him why he was not at the Department for his interview, the applicant stated that he did not want to participate in an interview and wanted the interview to be cancelled. When asked for

the reason, the applicant stated that "There is no point", that his life "is messed up" and he has "been waiting for eight years". The applicant stated that he refuses to participate in any kind of interview in respect of his application - either in person, via videoconference or via teleconference. He asked for all future correspondence to be sent to his postal address.

6. On 4 June 2021 the delegate refused the grant of the visa and on 10 June 2021 this matter was referred to the IAA.
7. On 11 June 2021 the IAA sent a letter to the applicant's last known residential address and a copy to his email address, acknowledging that this matter had been referred to the IAA. Attached to that letter was information about the IAA, including an explanation on the type of information the applicant can provide to the IAA in support of his application for protection and the timeframes for providing this information.
8. To date, the applicant has not provided any information or submissions to the IAA.
9. Having considered the circumstances I outlined above, I have decided not to invite the applicant to provide further information, at interview or otherwise. I am satisfied the applicant was appropriately notified of his PV interview through communication to his migration agent who he had nominated as his authorised recipient when he lodged his application for protection. His agent only ended his appointment on the day of the applicant's PV interview. The delegate also sent an email directly to the applicant regarding his interview when it was apparent the applicant was not responding to his agent's attempts to contact him. I am satisfied he was given an opportunity to provide oral evidence to the delegate regarding his application. When the delegate contacted the applicant on the day of his interview, he did not indicate he was unaware of the interview but indicated that he did not want to attend and did not want to attend any interview in regard to his application for protection. Since this matter was referred to the IAA, he has not sought to provide any further information or submissions to the IAA in support of his claims or in response to the delegate's findings, nor requested an interview.

#### *Arrival Interview*

10. Included in the review material was a transcript and audio recording of the Irregular Maritime Arrival and Entry Interview held with the applicant when he was on Christmas Island on 10 September 2013 and again on 22 November 2014 (arrival interview). In his decision, the delegate made no reference to the arrival interview. In the event that this material was not before the delegate when he made his decision and is new information, I am satisfied there are exceptional circumstances to justify considering them as they include information relevant to the assessment of the applicant's claims for protection.

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

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11. The applicant's claims can be summarised as follows:
  - He is ethnically Pashtun and a Shia Muslim from Parachinar.
  - The Taliban blocked the roads for people to move in his region and were killing people who tried to leave the area.
  - They went to Afghanistan to get food and financial resources.

- The Taliban are killing people and are responsible for bomb blasts. Some of his family members were killed or went missing.
- He did not experience harm, but the Taliban operate in his area and Parachinar is always targeted by Sunni extremists.
- During the time of turmoil and war, he was working with the Afghan Army ([Year 1] to [Year 2]).
- The Taliban are very dangerous and are everywhere. His life will be in danger.
- He does not think that the Pakistani authorities can protect him against terrorists. He does not think that he can relocate within Pakistan to a safe area. He is a recognisable Shia Muslim due to his identity card. His dialect will also reveal his identity.

### **Refugee assessment**

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12. 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**

13. 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.
14. Country information that was before the delegate indicates that Pashtuns in Pakistan are identified by their use of the Pashto language. Pashtuns traditionally live among their own tribes and sub-tribes in Khyber Pakhtunkhwa and the former FATA. Kurram District (with a population of 619,553 in 2018) is in the former Federally Administered Tribal Areas (FATA/tribal districts). In 2018, FATA became a part of Khyber Pakhtunkhwa province (KP

Province). Parachinar is in Upper Kurram which is estimated to be around 80% Shia and most are from the Pashtun Turi tribe.<sup>1</sup>

15. In support of his identity the applicant provided a copy of his Pakistani passport and his national identity card. These documents confirm his birth and residence in Parachinar in Upper Kurram. In his arrival interview the applicant also spoke Pashto.
16. On one page of his application for protection it indicates that the applicant's parents are Afghan citizens, but I am satisfied this is a typographical error as in other parts of the application, they are referred to as Pakistani citizens consistent with his claims.
17. The applicant has been consistent in regard to his identity and has provided sufficient evidence. I accept his claimed identity and that he is a citizen of Pakistan. I am satisfied that Pakistan is the receiving country for the purpose of this assessment.
18. The applicant has indicated that he has not lived in any other area of Pakistan, other than Parachinar, and his wife, children, parents and other family members continue to reside in Parachinar. I am satisfied that if the applicant were to return to Pakistan, he will return to Parachinar in Upper Kurram.
19. I accept the applicant's claims about the security situation in Upper Kurram during the period the applicant was residing there. His claims are corroborated by country information that was before the delegate. The Kurram and Orakzai Tribal Districts in the former FATA and the Hangu and Kohat districts in the KP Province form a segment of Pakistan's Pashtun belt in which local Sunni and Shia tribes have had periodic conflicts with one another over the decades. Road networks also play into the rivalry, serving as leverage for both sides. The Kurram District is connected to Peshawar and the rest of Pakistan via the Sunni-dominated Lower Kurram area; residents of Lower and Central Kurram access Afghanistan through Upper Kurram. Since the early 1980s, tensions between the two communities have been exacerbated through the active involvement of external actors. In 2005, pro-Tehreek-e-Taliban Pakistan (TTP) militants began a presence in the Kurram. Tensions flared in 2007, beginning with clashes between Sunnis and Shia after some Sunnis chanted anti Shia statements during a joint Sunni-Shia celebration of the birth of the Prophet. By the fall of that year, Taliban militants from neighbouring areas entered the conflict, motivated by sectarian hatred, tribal rivalries, and a desire to secure routes into Afghanistan. During the course of the conflict, Shia migrated to Upper Kurram and Sunnis in Parachinar fled for Lower Kurram. During the conflict Shia Turis from Upper Kurram were denied access to Peshawar via their sole land route: the Thall-Parachinar road that passes through Sunni-dominated Lower Kurram. For much of November 2007 into 2011, Shia Turis in Upper Kurram were only able to reach Peshawar, the closest major Pakistani city, via a circuitous route through Kabul. The Pakistan Army began clearing operations in the Orakzai in 2010, and then pushed its way into Kurram. By February 2011, Sunni and Shia tribesmen from the Kurram came to an agreement. In July 2011, the Pakistan Army launched an offensive to open the Thall-Parachinar road. And in October 2011, the Sunnis and Shia reached another accord, reaffirming previous agreements. From 2007-2011, an estimated 1,500 people died in the sectarian strife.<sup>2</sup>

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

<sup>2</sup> Arif Rafiq, "Sunni Deobandi Shia Sectarian Violence in Pakistan: Explaining the Resurgence Since 2007", Middle East Institute, 1 December 2014, CIS2F827D91993; "Kurram tribal region Peace accord signed to end years of bloodshed", The Express Tribune, (Pakistan), 4 February 2011, CX317554

20. The applicant claims that, during the conflict, there were bomb blasts and one of his cousins was killed in Parachinar, one of his uncles was killed when he was escaping from Afghanistan to Peshawar and one of his cousins disappeared in Islamabad. Whilst I accept this occurred, the applicant has referred to these incidents in the context of the past general conflict in his area and has not claimed these family members were specifically targeted due to any other reason and I am not satisfied on the evidence they were. There is no other evidence to indicate his family have an adverse profile with any group.
21. The applicant has also indicated he was working with the Afghan Army in “[City]” in Afghanistan during the conflict but has provided no other details in regard to this, including his role in this work. In any event, he has not claimed a fear of harm regarding his previous work with the Afghan Army. I am not satisfied he has a subjective fear in this regard.
22. Whilst country information indicates that the general security situation in Pakistan remains complex and volatile<sup>3</sup> recent reports indicate that the security situation has significantly improved in Kurram District since the applicant left Pakistan. Another 2013 peace accord was established between the Shia and Sunni communities. Thousands of families, who had been displaced by the previous conflict in Kurram, have returned to their places of origin since 2014, including Sunni families returning to Parachinar and surrounding villages in Upper Kurram.<sup>4</sup> Since 2014 the Pakistani Army has launched a number of military operations targeting militants in the area. Military operations during 2011 to 2015 eliminated the strongholds of the Tehreek-TTP in the former FATA.<sup>5</sup>
23. Sporadic militant attacks continued to occur in Parachinar and, after several attacks against the Parachinar community by militant groups such as the LeJ, Jamaat-ul-Ahrar and LeJ Al-Alami in 2017, the government of Pakistan announced another countrywide military operation, Operation *Radd-Ul-Fasaad*.<sup>6</sup> This operation continued in 2020.<sup>7</sup> The Pakistani government has also introduced a number of development initiatives in Kurram District in recent years reflecting improved security in the area.<sup>8</sup>
24. In making this assessment, I have also had regard to country information before me about the situation of Turis in Upper Kurram as they have a very similar profile to that of the applicant as they are Shia Pashtuns and reside in Upper Kurram.
25. In its most recent report on Pakistan published in February 2019, the Australian Department of Foreign Affairs and Trade (DFAT’s 2019 report) reported that the Pakistan government started

<sup>3</sup> DFAT, “DFAT Country Information Report Pakistan”, 20 February 2019, 20190220093409

<sup>4</sup> DFAT, “DFAT Thematic Report – Shi’as in Pakistan”, 15 January 2016, CIS38A801265; “Sunni tribes start returning to Parachinar 11 years after displacement”, *Express Tribune* (Pakistan), 20 June 2018, CXBB8A1DA30592; “339,701 TDPs Families Repatriated To Native Hometowns In Erstwhile Fata”, *Urdu Point*, 9 October 2019, 20191015111832

<sup>5</sup> European Asylum Support Office (EASO), “EASO Country of Origin Information Report: Pakistan Security Situation”, 1 July 2016, CIS38A80121710

<sup>6</sup> DFAT, “DFAT Thematic Report - Shias in Pakistan January 2016”, 15 January 2016, CIS38A801265; DFAT, “DFAT Country Information Report Pakistan”, 20 February 2019, 20190220093409; “Bomb wrecks crowded market in Parachinar”, *Express Tribune* (Pakistan), 22 January 2017, CXC904066518; EASO, “EASO Country of Origin Information Report: Pakistan Security Situation”, 1 July 2016, CIS38A80121710

<sup>7</sup> Irfan U Din and Mansur Khan Mahsud, “Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2020”, Fata Research Centre (FRC), 7 January 2021, 20210113125205

<sup>8</sup> “Water supply scheme inaugurated in Kurram”, *News International*, 3 July 2019, 20190719111213; “Govt plans to explore tourism potential in Kurram, Orakzai”, *Dawn* (Pakistan), 7 January 2019, 20190110141300; “Tribal districts fetch Rs162bn in next budget”, *Dawn* (Pakistan), 16 June 2019, 20190620135442; “FAO Organizes Agriculture Expo In Districts Kurram, Parachinar Of KP”, *Urdu Point*, 28 June 2019, 20190701111457; “New academy to revive Parachinar’s lost melodies”, *Tribal News Network* (Pakistan), 20 June 2019, 20190621095542; “Public-private collaboration yielding results in Kurram district”, *News International - Pakistan*, 13 December 2018, 20190110163827

fencing the border with Afghanistan and by February 2018, the Turi community estimated 40% of military fencing in Kurram was complete, decreasing border permeability. Turis also advised that the military implements a 20 to 30 square kilometre area red zone for Parachinar, and a second, smaller red zone inside the outer red zone, in which markets and schools are located. DFAT noted that these government operations and associated counter-terrorism activities significantly decreased the number and severity of attacks on Turis. It noted that, in the first quarter of 2018, the Turi community reported two attacks, including one involving an improvised explosive device (IED) that reportedly targeted women and children.<sup>9</sup> A security report for 2018 by the Pakistan Institute for Peace Studies (PIPS) only reported the IED incident which states that in January, seven members of a family, including three women, were killed and one was injured in a landmine explosion near the Afghan border in Upper Kurram. The family was going from Muqbal to Boshara village near Parachinar to participate in the funeral of a relative when their vehicle hit the landmine. It noted that the TTP were responsible.<sup>10</sup> A media report in regards to the same incident also stated that six members of a family were martyred when their vehicle was hit by a roadside bomb in Maqbal area in the upper Kurram.<sup>11</sup> It is unclear from the above reports if there was a sectarian motive to the attack.

26. In the above report, however, DFAT observed that societal intolerance and religious extremism appear to have increased, suggesting the underlying causes of violence remain and armed groups remain a threat to Pakistan's domestic security. It assessed that attacks and violence against Turis can and may still occur and Shias in Pakistan continue to face a threat from anti-Shia militant groups. It assessed that Turis in Kurram still face a moderate risk<sup>12</sup> of sectarian violence from militant groups because of their Shia faith. It also assessed that Shia in the former FATA face a low risk of sectarian violence, within the context of a moderate level of militant and criminal violence across the region but the risk of sectarian violence for civilians in Kurram, particularly in Parachinar, is higher than in other parts of the former FATA.
27. In its annual security report for 2020, the Fata Research Centre (FRC) reported only two injuries in Kurram District in 2019. In 2020 it reported three militancy-related incidents in Kurram district which were IED attacks but did not provide any further detail.<sup>13</sup> However, media reported that in July 2020 seventeen people were injured in an explosion in Parachinar's Turi Bazaar. The cause of the explosion was an IED that had been fitted inside a vegetable cart.<sup>14</sup>
28. The above FRC report for 2020 further noted the security situation in Kurram District remained volatile in 2020 due to the growing number of land disputes in the district. For instance, in May 2020, clashes erupted between Sunni members of the Parachamkani tribe and Shia members of the Balishkhel tribes. The clashes last several days and resulted in 54 casualties (14 killings and 40 injuries). It reported that extremist elements in the districts are using the land disputes to promote sectarianism in the district. There were reports that extremist groups distributed pamphlets among Sunni community in Kurram to boycott social and business relations with the Shia community in the district. It assessed that, given the sectarian nature of conflict in Kurram, disputes over the ownership of land can potentially lead to another wave of violent armed conflict on sectarian grounds.<sup>15</sup> However, media reports indicate that the above conflict

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<sup>9</sup> DFAT, "DFAT Country Information Report Pakistan", 20 February 2019, 20190220093409

<sup>10</sup> Pakistan Institute for Peace Studies (PIPS), "Pakistan Security Report 2018", 6 January 2019, 20190121110758

<sup>11</sup> "Six of a family martyred in Kurram roadside blast", *News International - Pakistan*, 31 January 2018, CXBB8A1DA25475

<sup>12</sup> DFAT is aware of sufficient incidents to suggest a pattern of behaviour

<sup>13</sup> Irfan U Din and Mansur Khan Mahsud, "Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2020", FRC, 7 January 2021, 20210113125205

<sup>14</sup> Javid Hussain, "At least 17 injured in IED blast in Parachinar's Turi Bazar", *Dawn (Pakistan)*, 23 July 2020, 20200724103731

<sup>15</sup> Irfan U Din and Mansur Khan Mahsud, "Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2020", FRC, 7 January 2021, 20210113125205

occurred on lower Kurram and that the conflict came to an end with the efforts of local elders, administration and public representatives.<sup>16</sup>

29. Whilst similar incidents in the future cannot be discounted, I am not satisfied the above events are indicative of a material change in the security situation to the extent that the applicant would face a real chance of harm from militant or tribal attacks in Upper Kurram in the reasonably foreseeable future. The applicant has also indicated that his family still live in Parachinar and he has not claimed they have come to any harm as a result of militant activity or other sectarian conflict in the area since he left Pakistan.
30. DFAT's 2019 report also stated that, according to the media, discrimination and violence towards Shia tribes, particularly Turis, remains significant in Kurram due to state concerns regarding Iranian influence and the greater presence of the Taliban and Al Qaeda. It is unclear what DFAT is referring to and it provides no further clarification in its report. I have given this assertion little weight.
31. In the above report DFAT also noted that Pashtuns in Pashtun majority areas or locations where individuals have family or social connections face a low risk of official discrimination. It notes that Pashtuns traditionally live among their own tribes and sub-tribes in the KP Province and the former FATA. I have given weight to the fact that Upper Kurram, where the applicant will return, is a majority Pashtun area.
32. Although the applicant did not raise this claim, in his decision, the delegate considered whether the applicant would face a real chance of persecution as a failed asylum seeker and returnee from a western country.
33. In DFAT's 2019 report it notes that, in practice, returnees tend to leave Pakistan on valid travel documents and therefore do not commit immigration offences under Pakistan law. The government issues 'genuine returnees' with temporary documents when they arrive. A genuine returnee is defined as someone who exited Pakistan legally irrespective of how they entered destination countries. Those who are returned involuntarily or who travel on emergency travel documents are likely to attract attention from the authorities upon arrival. The Ministry of Interior will interview failed returnees and release them if their exit was deemed to be legal but may detain those deemed to have departed illegally. DFAT understands that 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 Pakistan on valid travel documentation 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. These people are usually released within a few days, either after being bailed by their families or having paid a fine, although the law provides for prison sentences. Those wanted for a crime in Pakistan or who have committed a serious offence while abroad may be arrested and held on remand or required to report regularly to police as a form of parole.
34. The applicant departed Pakistan legally on his own genuine passport which he has retained but which has since expired. There is a real chance he will return to Pakistan on a temporary document and involuntarily. If he were to return to Pakistan in these circumstances, it is likely he will be interviewed. Given he departed legally and that he was not of adverse interest to the

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<sup>16</sup> "Another land dispute surfaces in Kurram", *Tribal News Network (Pakistan)*, 17 January 2021, 20210118111729; Pamir Sahill and Abubakar Siddique, "Land Ownership Disputes Weigh On Pakistan's Pashtun Heartland", *Radio Free Europe/Radio Liberty*, 18 October 2020, 20201020105259; "Land dispute: Balishkhel tribesmen continue sit-in during Eid", *Tribal News Network (Pakistan)*, 5 August 2020, 20200812164428



authorities prior to his departure for any reason and he has not claimed to have committed any criminal offences in Pakistan, I am not satisfied there is a real chance his interview will be prolonged beyond the typical few hours, or he will be harmed or detained during or after this interview. I also do not consider being interviewed in these circumstances amounts to harm.

35. In the above report, DFAT notes that 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 a higher risk of financial hardship and familial shame. It 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 of having lived in a western country.
36. I have also considered whether the applicant will face harm on his return trip to Kurram District. In its 2019 report, DFAT stated that travel in parts of Pakistan is dangerous for all travellers, regardless of sectarian, religious or ethnic affiliations and travellers in remote areas of Pakistan including KP. Districts in the former FATA are at great risk of criminal or militant violence due to their isolation and the limited presence of security forces and many roads fit this profile. However, in the same report DFAT also stated Turis reported significantly fewer road attacks in 2018, as military operations have forced militants into the mountains. It noted that this has restored confidence within the community for individuals (not large groups) to travel on this road, although only between dawn and dusk. This information indicates a much-improved security situation on these roads. Despite DFAT's statement that the Turi community only feel confident to travel on the roads between dawn and dusk, I have also given weight to the lack of reports indicating regular targeting of the applicant's community on the roads in the KP Province and its surrounds, in general, in recent years and since the previous conflict in Kurram ended. I am not satisfied the applicant will face a real chance of harm on the roads returning to Kurram District and I am satisfied he will be able to safely return to Parachinar.
37. I have considered the applicant's profile as a Pashtun Shia from Parachinar returning as a failed asylum seeker from Australia and the country information before me about the security situation in Pakistan and in Kurram. On the evidence before me, I am not satisfied the applicant will face a real chance of harm from any group or person in the reasonably foreseeable future if he were to return to Pakistan.

#### **Refugee: conclusion**

38. 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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39. 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**

40. 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.

41. 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.

42. I have considered the applicant’s general profile as a Pashtun Shia from Parachinar returning as a failed asylum seeker from Australia and the country information before me about the security situation in Kurram District and Pakistan. I have found the applicant will not face a real chance of harm in Pakistan. Consequently, he will also not face a real risk of any harm in Pakistan.<sup>17</sup> I conclude that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to Pakistan, there is a real risk the applicant will suffer significant harm.

#### **Complementary protection: conclusion**

43. 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.

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<sup>17</sup> *MIAC v SZQRB* (2013) 210 FCR 505.

## Applicable law

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### **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.