



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

PAKISTAN

IAA reference: IAA22/10377

Date and time of decision: 17 November 2022 13:53:00

S Kamandi, 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 Pashtun and a Sunni Muslim from Kurram Agency, Khaybar Pakhtunkhwa (KPK), in Pakistan. He arrived in Australia [in] July 2013 and on 6 March 2017, lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. A delegate of the Minister for Immigration (the delegate) refused to grant the applicant a visa on the basis that he was not a person in respect of whom Australia owed protection obligations. The delegate was satisfied that the applicant faced a real chance of persecution in his home area in Kurram Agency but was not satisfied that he faced a real chance of persecution or was at a real risk of significant harm in all areas in Pakistan and decided that it was reasonable for the applicant to relocate to Lahore, Rawalpindi, or Islamabad.
3. The matter was referred to the Immigration Assessment Authority (IAA) which made a decision affirming the delegate's decision on 14 August 2018. The IAA was not satisfied that there was a real chance that the applicant would suffer serious harm or was at a real risk of significant harm in the Kurram Agency for any of the claimed reasons.
4. The applicant applied for judicial review of the IAA's decision and [in] 2021, the Federal Circuit Court of Australia dismissed the application. The applicant appealed the matter to the Federal Court of Australia (FCA). [In] August 2022, the FCA set aside the IAA's decision and remitted the matter to the IAA to be determined according to law. The FCA found that the IAA fell into jurisdictional error by misapplying the real chance test.

Information before the IAA

5. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). This review material includes a number of documents which have been identified as information not provided to the IAA when the matter was originally referred in 2018. This includes documents relating to consular access, a detention notice, applicant's biographic details confirmation form, and an administrative form to update the applicant's name and date of birth. There are no concerns regarding the applicant's identity, including his name and date of birth. As these documents are administrative in nature, I do not consider them relevant to the assessment of the applicant's claims for protection.
6. On 30 April 2018, the IAA received a submission from the applicant's former representative. The submission primarily presented arguments in response to the delegate's finding that it was reasonable for the applicant to relocate within Pakistan. As noted above the delegate found that the applicant faced a real chance of persecution in Kurram Agency but was not satisfied that the applicant faced a real chance of harm in all areas in Pakistan and found that it was reasonable for the applicant to relocate. As explained in the reasons below, relocation is ultimately not an issue for consideration in this review, but I will consider any aspects of the submission that relate to the assessment of the applicant's risk of harm if returned to Kurram Agency. I note that the applicant presented his evidence regarding his claims and why he fears returning to his home village in Kurram Agency in his statement attached to his SHEV application. He also had the opportunity to discuss his claims at the SHEV interview and his representative provided the delegate with a post interview submission setting out why the applicant feared returning to his village in Kurram Agency. As the IAA previously found that the applicant did not face a real chance of harm in Kurram Agency, the 2022 submission to the

IAA, includes further submissions in this regard. Having regard to all of this, I am satisfied that the applicant has had ample opportunity to raise his claims and provide evidence in support of his claims relating to Kurram Agency. As such I have decided to proceed with this review without obtaining new information from the applicant on this issue.

7. The 2018 submission references country information reports which were before the delegate and are not new information. The submission also references and includes some information extracted from reports that were not before the delegate. These aspects of the submission are new information. These include a reference to the 2016 Human Rights Watch Report, hyperlinks to New York Times news reports published in 2018, and references to a 2015 report published at www.aawaz.org.pk (footnoted in the submission). The IAA was not provided with copies of these reports.
8. It is submitted that a 2016 Human Rights Watch Report found that several police officers openly admitted to the practice of false or fake encounter killings, in which the police stage an armed exchange to kill an individual already in custody. In referencing the New York Times news reports, it is said that by the Karachi police's own estimation, 184 criminals and 73 terrorists were killed in 480 police fake encounters in 2017, with majority of these incidents orchestrated under the pretext of fighting terrorism but targeting Pashtuns in tribal areas. It is reported that Pashtuns in Pakistan demanded that their safety be guaranteed in Karachi and other areas through demonstrations, including in the capital city of Islamabad. While the New York Times news reports post-dated the delegate's decision and could not have been provided to the delegate, the 2016 Human Rights Watch report was published in 2016 and pre-dates the delegate's decision. The information in these reports is general country information reporting on the situation at the time. I am not satisfied that the requirements of ss.473DD(b)(ii) are met. The information extracted in the submission is now very dated and relates to police "fake encounters" in Karachi in 2017 and the targeting of Pashtuns by police under the pretext of fighting terrorism in 2018. The applicant has provided the IAA with more recent information which reports on the situation of Pashtuns in Pakistan, police corruption and the government's counter-terrorism activities in more recent years. I accept that the 2018 New York Times news reports could not have been provided to the delegate, I am nevertheless not satisfied that in the circumstances s.473DD(a) of the Act is met for either publication.
9. The 2015 Aawaz report is referenced and was provided to counter the delegate's finding that the applicant did not have to return to his home area (where the delegate found the applicant faced a real chance of serious harm) to renew his National identity Card (NIC). It is submitted that the information relied upon by the delegate overlooked the special circumstances for computerised renewal/unblocking of NIC of people from regions such as FATA and other Provincially Administered Tribe areas. The report pre-dates the delegate's decision and the issue surrounding the applicant's renewal of his NIC was an issue that was discussed at the SHEV interview. It is not explained why this information was not provided to the delegate prior to his decision. The information extracted is not personal information in the relevant sense. It is provided in response to the delegate's decision which found that the applicant faced a real chance of serious harm if returned to his home region in Kurram Agency, which as set out below, is not the conclusion reached in this review, and I do not consider this information to materially assist in assessing the applicant's claims if returned to Kurram Agency. I am not satisfied that either limb of s.473DD(b) are satisfied or that there are exceptional circumstances to justify considering the new information.
10. In support of the applicant's submission that it is not reasonable for him to relocate to the Punjab area, it is submitted that he risks racial profiling and discriminatory conduct by the authorities given he has spent over four years in a western country. It is submitted that living

in a western country has resulted in a change in his characteristics and general personality including his dress sense, manner of speaking, manner of practising his religion and general demeanour, all compounding factors that would place the applicant at risk of being targeted. This is information and claims that were not presented to the delegate during the course of the SHEV interview or in the post-interview submission. Given that the applicant had ample opportunity to discuss why he could not relocate to another area, including to Punjab, and that his representative provided the delegate with further submissions in this regard, no explanation is provided why this information was not presented to the delegate. At the SHEV interview, the applicant indicated that he was practising his religion and has lived a simple life in Pakistan and in Australia. He did not indicate that having lived in Australia impacted or changed the manner he spoke, dressed, or practised religion or that his demeanour had changed. I am not satisfied that this information could not have been provided to the delegate or accords with the applicant's evidence presented at the SHEV interview. Given that it is not submitted that this is an issue that the applicant would face if returned to his village in Kurram Agency, a majority Pashtun area, and given that relocation is not a matter arising in this review, I do not consider this information material to the assessment. I am not satisfied that there are exceptional circumstances to justify considering the new information.

11. On 4 October 2022, the IAA received an email from the applicant's representative, attaching a further submission, and country information reports which include the 2022 Department of Foreign Affairs and Trade (DFAT) report on Pakistan, a news report in Aljazeera published on 29 September 2022, the CIA World Factbook on Pakistan updated on 28 September 2022, an article in Arab news published on 29 6 September 2022, and what is described as "a webpage about Kurram Agency containing population data".
12. The submission refers to claims and information presented before the delegate and puts forward arguments in response to the delegate's and the previous IAA decision. The submission also provides arguments and extracts information from the reports provided to the IAA and includes submissions that the new information satisfied the requirements of s.473DD of the Act. I have had regard to the submission in assessing the new information and undertaking this review.
13. The country information and news reports provided to the IAA were not before the delegate and are new information. It is submitted that these documents could not have been provided to the delegate and are relevant to the current situation in Pakistan and the applicant's claims. It is also submitted that given the length of time since the making of the delegate's decision, there are exceptional circumstances to justify considering these documents.
14. The DFAT report and news reports published in Arab news and Aljazeera all post-date the delegate's decision and I am satisfied that they could not have been provided to the delegate and meet the requirement of s.473DD(b)(i) of the Act. The delegate considered the 2017 DFAT report¹ which was current at the time. Since the delegate's decision, DFAT has published further reports, the most recent being the 2022 report.² DFAT reports are prepared specifically for the purposes of the assessment of protection visa applicants' claims. The news report published in the Aljazeera reports on recent clashes between the Pakistani government and the Taliban in the northwest of the country and the news report published in Arab news reports on extortion demands by militants in the area. While there are references to some identifiable individuals, the information within these reports largely relate to the situation in Pakistan and cannot be classed as credible personal information in the relevant sense. Nonetheless, given

¹ DFAT, "Pakistan Country Information Report 1 September 2017", 1 September 2017, CISED50AD5515.

² DFAT, "DFAT Country Information Report – Pakistan", 25 January 2022, 20220125094359.

purpose of the DAFT report in assessing protection claims and it and other reports currency and subject matter, I am satisfied that there are exceptional circumstances to justify considering these reports.

15. The CIA World Factbook report is said to have been updated on 28 September 2022, which post-dates the delegate's decision. The report includes information about Pakistan, including information about its geography, ethnic groups, population, environment, government structure, economy, and military and security. The applicant's submission has made a reference to the report in terms of reasonableness of relocation for the applicant in that he only speaks Pashto which in accordance with this report is only spoken by eight per cent of Pakistanis. The information in this report is general information, not credible personal information in the relevant sense. Information about Pakistan's military, government structure, economy, security situation and population, including ethnic groups and languages are also reported on in the reports before the delegate and the recent DFAT report. Information about the applicant's ethnicity and language is undisputed and the issue of relocation does not ultimately arise for consideration in this review. Given these matters, and despite the fact the report updated in September 2022 could not have been provided to the delegate and satisfies s.473DD(b)(i), I am not satisfied that the requirements under ss.473DD(b)(ii) or (a) are met.
16. The document referred to as "a webpage about Kurram Agency containing population data" appears to have been obtained from the KPK Board of Investment and Trade website and includes general information about Kurram Agency, including information about the population and housing growth in the district between the years of 1998 and 2007, and the area's industries and tourism. The submission indicates that according to the information on this website, the applicant is from a small village in a relatively sparsely populated area in Pakistan and that the Taliban militants that threatened him in the past could still be around and may remember the applicant on return. The information has been obtained from a publicly accessible website. With the currency of the information unclear, it is not apparent whether it could have been provided to the delegate in 2017. The information is general in nature and not personal information in the relevant sense. The document does not reference the applicant's village nor provides any information about its population, although it does indicate that there has been growth in the general population in the district, including in rural areas. I am not satisfied that the information is supportive of a conclusion that due to the size and population of the applicant's village, Taliban militants who threatened the applicant in the past could have remained in the area and may recognise him on return. Given these matters, I am not satisfied that the requirements under ss.473DD(b) or (a) are met.

Applicant's claims for protection

17. The applicant's claims can be summarised as follows:
 - The applicant is a Sunni Muslim and of Pashtun ethnicity. He was born in and resided in the village of [Village], Kurram Agency in KPK.
 - The applicant did not attend school and is illiterate. He is married and has [children].
 - Prior to 2007, the Sunnis and Shias in the applicant's area lived in peace and had cordial relationships with each other. The applicant run a store in [a] market in [City] with his brother assisting him in management of stock and finances relating to his business. He had many Shia customers and would supply them with commodities, which they paid for in instalments.

- When sectarian clashes erupted, the Taliban ordered Sunni businessmen not to deal with their Shia customers and to cut ties with the Shia population. The Shia population faced hardship in receiving [products] and the applicant decided not to abandon his Shia customers and supplied them with [products] in secret.
- The Taliban found out about the applicant's relationship with the Shia community and sent him a message ordering him to immediately stop doing business with the Shia people and repent. The applicant continued to supply his Shia customers with [products]. He would drop the supplies at an intermediary home from where the Shias would pick them up. This was effective for a long time, until the applicant's cousin, who had links with the Taliban, informed the Taliban about the applicant's business dealings with the Shias.
- The Taliban came to the applicant's shop and mistakenly took the applicant's brother. They called the applicant and told him that the Taliban leader wanted to see him at their centre in Parachinar.
- The applicant fled the country with the help of the Shia people. After the applicant's departure, the Taliban tortured his brother and released him after village elders intervened and a ransom was paid. His brother assured the Taliban that he would hand over the applicant if the applicant returned home.
- The applicant fears that he would be harmed for reasons of his past dealings with the Shia community.
- The applicant fears that his cousin, who holds a grudge against the applicant and his family due to their success, would harm him and inform the Taliban of his return.
- The applicant fears harm for reasons of his [Tribe] of Pashtun ethnicity. Pakistani police and security agencies engage in discriminatory treatment and racial profiling of Pashtuns in Pakistan. Pashtuns in the KPK area are the subject of extrajudicial killings and disappearances based on perceptions that all Pashtuns are terrorists.
- The applicant also fears harm as a returnee from a western country.

Refugee assessment

18. 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

19. 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.
20. The applicant has consistently claimed that he was born and resided in [Village], Parachinar, Kurram Agency in KPK. The delegate was provided with his Pakistani identity documents. The applicant has also consistently claimed that he is a Sunni Muslim and of Pashtun ethnicity. At the SHEV interview, the applicant gave evidence with the assistance of a Pashtu interpreter and confirmed his place of residence in Kurram Agency and that he is practising Sunni Muslim. I accept that the applicant is from Kurram Agency in Pakistan and that he is a Sunni Muslim of Pashtun ethnicity, and that Pakistan is the receiving country for the purposes of this review.
21. The applicant is married, and a translation of his marriage certificate indicates that he married his wife in [Year 2] in their [village] in Kurram Agency. The applicant's evidence is that he has [children] and that they remain in [Village] with his wife and reside at their family home. His parents are deceased, and he has one younger brother who also remains in [Village] in Kurram Agency. The applicant has consistently claimed that he did not attend school and is illiterate. At the SHEV interview, the applicant explained that he did not attend school because he had to look after his family and worked at his father's farm. He stated that the farm was a family farm where they grew vegetables and food for livestock. His SHEV application indicates that from [Year 1] to [Year 2], the applicant worked in farming, and that from January [Year 2] he operated his own [store] in [a] Market in [City], selling and delivering groceries. The applicant confirmed this at the SHEV interview. I accept the applicant's evidence in this regard.
22. In his SHEV statement, the applicant claims that prior to sectarian conflict in 2007, the Shias and Sunnis in his area lived in peace and had cordial relationships with each other. The Taliban did not approve of such relationships with Shia people and ordered Sunni Muslims to cut their ties with the Shia population in Pakistan. The applicant claims that as he was running his [store], he had many Shia customers and had very warm and respectable relationships with most Shias. He would supply his Shia customers with commodities, and they would pay him in instalments. The applicant claims that when clashes between Shias and Sunnis erupted, Shia people were besieged and were facing hardship in receiving [products]. He could not abandon his Shia customers and supplied them with [products] in secret.
23. Country information³ indicates that historically there was no Sunni-Shia problem in Kurram Agency and that the massive influx of Afghan refugees in the 1980s caused a distortion in the demographic and sectarian balance in the area. Before the arrival of refugees, Pashtuns took religion for granted and religion was not the cause of conflict and not emphasised nor used for political gain. The Afghan refugee influx is said to have disturbed the balance with incidents of sectarian violence and tribal disputes reported on in the 1980s, with the first major sectarian fight in 1987 which broke out in Sada, in Lower Kurram. This was sparked by a clash during the Moharram procession, in which hundreds of Shias and Sunnis were killed. It is reported that in the recent years, militant violence in the north-west of the country mainly resulted from the

³ Marian Abou Zahad, "it's Just a Sunni-Shiite Thing: Sectarianism and Talibanism in the FATA of Pakistan", Hurst & Company, 1 January 2013, CIS29402; Middle East Institute, "Sunni Deobandi-Shi'i Sectarian Violence in Pakistan: Explaining the Resurgence since 2007", December 2014, CIS2F827D91993; New America Foundation, "The Battle for Pakistan: Militancy and Conflict in Kurram", 1 April 2010, CIS18543.

2001 toppling of the Taliban in Afghanistan which led the Afghan Taliban to settle in the FATA and Khyber Pakhtunkhwa seeking access to Afghanistan through Kurram Agency. Several Pakistani groups with similar ideologies to the Taliban were formed in the region. The Taliban strict application of conservative Islamic principles resulted in violence against civilians, Shia Muslims and Pakistani authorities. It is reported that sectarian violence intensified in April 2007 after Sunnis chanted anti-Shia slogans and in the period between 2007 and 2011 more than 1,500 persons were killed, and 5000 others injured. Similar rounds of violence occurred in Parachinar in November 2007 and April 2008, and tensions continued to simmer.

24. Country information supports the applicant's evidence that Shias and Sunnis resided in peace and their religious differences were not always a cause for sectarian dispute and violence in Kurram Agency. I accept that the applicant operating his [store] in [City], with a mix of Sunni and Shia population, had Shia customers and that he built good relationships with his customers and assisted them by allowing them to make payments in instalments. Although incidents of sectarian violence between Shias and Sunnis is reported to have commenced after the influx of Afghan refugees in the 1980s, I consider it plausible, and accept, that prior to 2007, when sectarian violence intensified in the area, the applicant continued to operate his business and serve his Shia customers without facing any issues.
25. At the SHEV interview, the applicant stated his problems started in 2007. When asked to elaborate, the applicant stated that majority of his customers were Shias and that the Taliban "did not let them come". The applicant explained that the reason he opened his store in [City], a majority Shia town, was because there was no business in his home [village] and people generally went to a bigger city to shop. When asked about what happened after 2007, the applicant referred to the fighting between the Taliban and the Shias in the area and that the Taliban announced that Sunnis were not to deal with the Shia population. The applicant claimed that Sunni businesspeople were called and told not to do business with Shias. He stated that he received a call while he was working at his shop. The call was from the "leader" and that he asked for the applicant. The applicant claimed that although he agreed not to deal with Shia people, he continued to supply them with [products] during the nights. When asked if he continued to do this to generate an income for his family, the applicant stated that it was a source of income and that he also wanted to help his customers. He confirmed that he continued to supply his Shia customers with supplies for a long period and that it was working well for them.
26. The applicant's evidence in this regard has been presented in a broadly consistent manner in his SHEV application and at the SHEV interview. Given the situation at the time and the Taliban's violence towards Shias in the area, I accept that the applicant as a Sunni operating his business in a Shia populated area, was warned by the Taliban to stop dealing with the Shia community. I accept that although the applicant agreed to do so, he continued to supply his Shia customers with supplies discretely and that he was able to do so without attracting any adverse attention from the Taliban for an extended period if time.
27. In his SHEV statement, without providing any dates or specific timeframes, the applicant states that this method of supplying Shias with [products], through an intermediary, was effective until his cousin who had links with the Taliban heard from the applicant's children that he was delivering [products] to his friends. The applicant states that his cousin followed him and informed the Taliban of his business dealings. He claims that the Taliban came to his shop but didn't find the applicant as he was at home. The Taliban saw the applicant's brother "at the fields" and took him away. The applicant claims that the Taliban leader contacted him and told the applicant to meet with him at the Taliban centre in Parachinar. The applicant knew the immediate danger he was in, in that meeting with the Taliban leader meant he would be killed

and decided to leave the country immediately. The applicant claims that “he knew” that the Taliban would not kill his brother and had to free him eventually. He states that the Taliban tortured his brother after the applicant left the country and that after intervention by the village elders and a payment of ransom, his brother was freed when the applicant arrived in Australia. The applicant also claims that his brother assured the Taliban that he would hand over the applicant if the applicant returned home.

28. At the SHEV interview, the applicant stated that issues started when his children told his cousin, who had connections with the Taliban, that he was doing business with Shias. I note that at the time, the applicant’s children would have been between the ages of around [Age 1] and [Age 2]. Given their young age I have serious doubts that they would have been aware that the applicant was doing business with the Shia community which the applicant claims was done discretely and through intermediaries. When asked why his cousin would want to get him into trouble, the applicant referred to “jealousy” and that he was making an income and his cousin was poor. In the post-interview submission, the applicant’s former representative submits that the applicant was “implicated in a tribal feud when his cousin conspired against him due to familial jealousy and hostility”. The submission includes what is referred to as the tribal code, known as Pashtunwali, said to be strongly upheld by Pashtun tribes of Afghanistan and Pakistan. Without providing any further details of the claimed feud it was submitted that due to the code, the applicant faced ultimate retaliation of the opposing tribe of the applicant’s “distant cousin”. The submission also indicated that the applicant’s cousin had “historical jealousy and grudges against the applicant and always wanted to harm him due to past incidents”. No further details regarding the claimed tribal feud or past incidents or when they occurred was provided and I note that the applicant, at the SHEV interview, did not refer to any tribal feuds that he was implicated with or involved in. It was further submitted that as the applicant’s brother was abducted and due to “loss of property”, in accordance with the tribal code, the applicant is ought to seek revenge and that the Taliban and the applicant’s cousin would seek to harm him to eliminate the threat of retaliation by the applicant. Again, neither the applicant’s SHEV statement nor his evidence at the SHEV interview, referred to a tribal code that he would have to comply with or that if returned he would seek revenge for the kidnapping of his brother and that this would be another motivation for the Taliban or his cousin to harm him.
29. At the SHEV interview, the applicant stated a few days after his cousin informed the Taliban that the applicant was not obeying their orders, the Taliban took his brother who looks similar to the applicant. The applicant stated that his brother, who helped him in the shop because he could read and write, was tortured, and told the Taliban that he was not the applicant. He claimed that after two days, he received a call from the Taliban leader while he was at home, saying that they had his brother. The applicant claimed that he told them that he would come in a day or two, but because he knew he would be killed, he fled to Peshawar two days after the phone call. When asked how he knew that the Taliban would not kill his brother, the applicant stated that the Taliban follow the Sharia law and as he was the criminal, they would punish him. When asked why if the Taliban could not find him they would release his brother, the applicant stated that he was the criminal, not the person who was taken by mistake, and that the Taliban would not attack other members of his family.
30. The applicant’s SHEV application indicates that he departed Pakistan [in] June 2013 and arrived in Australia [in] July 2013. On the applicant’s evidence at the SHEV interview, it appears that his cousin found out about the applicant’s claimed dealings with his Shia customers not long prior to his departure in early June 2013. He stated that after his cousin informed the Taliban, a few days later his brother was kidnapped and within two days of the kidnapping the applicant received a call to meet the leader of the Taliban, an order which he did not comply with and

left his village for Peshawar within two days where he remained for 10 days and then departed for Australia [in] June 2013. He claimed that his brother was released when he arrived in Australia which was [July] 2013. This indicates that the applicant's brother was kidnapped around mid-May 2013 and was detained by the Taliban for around two months and released in July 2013. This also indicates that after having been ordered to cut ties with the Shia community in 2007, the applicant continued to supply his Shia customers with [products] for a further six years before his cousin informed the Taliban of his business dealing with the Shia community.

31. Country information⁴ before the delegate and a 2016 Herald news report cited in the applicant's post interview submission to the delegate indicate that apart from criminals, militants linked to the Taliban engaged in kidnapping of locals and foreigners for financial gain. They largely targeted persons and businesses able to afford to pay a ransom which was a key source of financing their activities.
32. I accept that the applicant continued to supply his Shia customers with [products] in a more discrete manner after 2007 when tensions between the Sunnis and Shias intensified due to Taliban presence in the area. I accept that he had good relationships with his Shia customers and his decision to continue to supply them with [products] was influenced by his intention to assist his long-term customers but as he said to the SHEV interview, he also continued to do so as it was a source of income for his family. On the applicant's evidence, I am not at all persuaded that his cousin, who may have had links with the Taliban, obtained information about his business dealings with the Shia community from his very young children and that he passed this information to the Taliban. I found the applicant's evidence regarding the claimed family feud and his cousin's jealousy towards him and his family unconvincing. The applicant's evidence, including his post-interview submission prepared with the assistance of his former migration agent, does not provide details of the claimed family feud nor does it indicate that the applicant or any of his family members ever experienced any harm or issues due to the claimed feud prior to his cousin obtaining information about the applicant's business dealings with the Shia community. In addition, the claim raised in the post-interview submission that the applicant is expected to seek revenge for his brother's kidnapping and "loss of property" was not claimed by the applicant at the SHEV interview nor did he allude to any code of conduct that would render him responsible for seeking revenge or that this would be a cause for the Taliban or his cousin to harm him if returned to Pakistan. I do not accept the applicant's claim that his cousin informed the Taliban about his business dealing with the Shia community and that this resulted in the kidnapping of his brother who was mistaken for the applicant.
33. I note the country information cited above which indicates that militants did engage in targeting of people or business able to comply with demands of ransom as a source of financing their activities. I also note the applicant's evidence at his arrival interview, held soon after his arrival in Australia, that the Taliban dropped letters at people's doors asking for money and that his brother was kidnapped requiring his family to pay a ransom to secure his release. Given the security environment in the applicant's area prior to his departure from his village in Kurram Agency and the applicant's consistent evidence that his brother, who worked with his at his [shop], was kidnapped, I accept that the applicant's brother was kidnapped by militants operating in the area and that his family paid a ransom to secure his release. While I consider it plausible that the applicant may have received a call from the militants seeking a ransom for his brother's release, I am not at all convinced of the veracity of the applicant's evidence that

⁴ European Asylum Support Office (EASO), "EASO Country of Origin Information Report: Pakistan Security Situation", 1 July 2016, CIS38A80121710; Middle East Institute, "Sunni Deobandi-Shi'i Sectarian Violence in Pakistan: Explaining the Resurgence since 2007", December 2014, CIS2F827D91993.

because he was the “criminal” and wanted by the Taliban, he was certain that his brother would not be harmed. Given the applicant’s evidence regarding the brutality of the Taliban at the time and his evidence to the delegate that his brother was tortured, I consider it implausible that if the applicant was at risk of being killed by the Taliban, that in failing to report to them that the Taliban would not have further harmed the applicant’s brother or other members of his family. I also find it difficult to believe that if the leader of the Taliban called and asked the applicant to report to them that they would have been satisfied with the applicant’s response that he would come in a day or two without specifying when he would report. I do not accept that the applicant’s brother’s kidnap was related to the applicant’s dealings with the Shia community or anything other than kidnap for monetary gain. I also consider it plausible that the applicant’s brother may have been mistreated while detained and released once the family complied with the militant’s demands.

34. At the SHEV interview the applicant confirmed that his wife, children and brother remain in their village in Kurram Agency. While the applicant referred to his children not going to school due to criminal activity in the area and it being unsafe for them to walk through the forest to reach the school, he did not indicate that his brother or other family members faced any further issues at the hands of militants, his cousin or that they have been threatened or harmed. He also stated that his shop is no longer in operation and that he owned his family’s farmland on which he worked prior to opening his [store]. He did not indicate that he would recommence his [store] business.
35. In light of the above, while I accept that the applicant continued to supply his Shia customers with [products], I do not accept that this information came to the attention of the Taliban in his area through his cousin or because of that activity, or that he was considered as a Shia sympathiser or activist by the militants or any other groups. I note that apart from supplying his Shia customers with supplies, albeit discreetly due to tension between Sunnis and Shias in the area, the applicant has not claimed to have engaged in any other activities or form of activism supporting the Shia community. I accept that the applicant’s brother was targeted and kidnapped by militants for financial gain and seen as having the ability to pay a ransom. I accept that the applicant’s brother was released after the family paid the ransom and there is no information to indicate that he, or the family, faced any further or ongoing issues. While I consider it plausible that the security situation at the time and the applicant’s brother’s kidnapping caused the applicant to rethink operating a business in such environment and led him to depart the country, I am not satisfied that the kidnapping was due to the Taliban having information about the applicant’s dealings with the Shia community or that he was perceived as anti-Taliban or against the militant’s ideology.
36. On the evidence before me, I am not satisfied that the applicant, apart from operating a business which was targeted for financial gain by militants, had any anti-Taliban or pro-Shia profile with the militants while in Pakistan. I also not satisfied that the applicant had any ongoing family feud with his cousin resulting in his brother’s kidnapping or that in accordance with the Pashtun tribal code, the applicant is expected to seek revenge.
37. At the SHEV interview, the applicant claimed that the Taliban were much stronger and that he would be harmed if returned to his village in Kurram Agency. When the delegate observed that the applicant was a Sunni Pashtun and that the Taliban were attacking Shias, the applicant stated that he was unsure whether the Taliban were Sunni or Shia and could include foreigners and that they were active and would harm the applicant if he was returned.
38. Although the security situation in Pakistan has been described as complex, volatile and affected by domestic politics, politically motivated violence, ethnic conflicts, sectarian violence and

international disputes with India and Afghanistan, the security situation in Kurram Agency has significantly improved since the applicant's departure from Pakistan in 2013. Country information⁵ reports that the improvement in the security situation has been attributed to the Pakistan federal government's establishment and deployment of counter terrorism operations across Pakistan since 2014. In June 2014, operation *Zarb-e-Azb*, targeting terrorist groups, was launched. After an attack by the Taliban on the Army School in Peshawar in December 2014, the Pakistani authorities also introduced a National Action Plan (NAP), which together with military operations formed a civil-military effort to combat terrorism. In 2017, further military operations, the *Radd-ul-Fassd* (succeeding operation *Zarb-e-Azd*) and *Operation Khyber-IV*, were launched. It is reported that the NAP and military operations led to significant reductions in the number of criminal and sectarian violence and terrorism related attacks.

39. Citing the 2022 DFAT report and news reports published in Aljazeera and Arab News, it is submitted that the security situation in Pakistan has deteriorated since mid-2021 with terrorist attacks being carried out by militants targeting civilians in KPK. It is argued that the Taliban act as an alternative state in some parts of Pakistan, including in KPK, an area influenced by the Taliban. It is also submitted that the Pakistani government commenced negotiations with the Taliban which is continuing.
40. The most recent 2022 DFAT report⁶ opines that the security situation in Pakistan has deteriorated since mid-2021. It refers to two sectarian attacks in Kurram in 2020. An IED blast in an imambargah in Shorko area in the Lower Kurram in May 2020 and blast at a Turi Bazar in Parachinar in July 2020 which killed one person and injured 14 others, although the intended target or persons responsible are not identified. The report does not include any information about sectarian violence targeting Sunnis or Sunnies with past connection with Shias, in the area nor refer to further incidents in Kurram Agency after mid-2020. The report indicates that most terrorist attacks happen in the North Waziristan, Balochistan and Karachi and that the Pakistan Armed Forces continue to conduct operations against terrorism groups. While the report indicates that contacts told DFAT of their concern that the deteriorating security situation in Afghanistan throughout 2021 would increase violence in Pakistan, it also reports that the militants have moved away from targeting civilians to focus on attacks against Pakistani military and government representatives and political and religious leaders. Regarding the applicant's submission that the Taliban act as an alternative state in some parts of Pakistan, the DFAT report notes area of particular influence to include Waziristan and surrounding districts, Tank, Quetta, Kuchlack Bypass, Pushtun Abad, Ishaq Abad, Farooqia Town and parts of Karachi. The report does not identify Kurram Agency, a majority Shia populated area, as an area where the Taliban operate as an alternative state.
41. The Aljazeera article dated 6 September 2022, reports on a gun battle between the Taliban and the Pakistani army in the northwest of the country, which occurred despite a ceasefire in place to facilitate peace talks. It is reported that the militants have accused the Pakistani government of bad faith citing attacks by the military in six districts, including Peshawar and KPK. While there has been rising concerns that the Pakistani Taliban are regrouping due to the return of Taliban in Afghanistan in 2021, Afghanistan has insisted that it would not allow its soil to be used by foreign fighters. It is claimed that the ceasefire which expired in May did not pave the way for peace and that the Pakistani government want the Taliban disbanded and for fighters to accept Pakistan's constitution. The article published in the Arab news reports on extortion demands made by militants targeting traders, transporters, and businesspeople in

⁵ DFAT, "Pakistan Country Information Report 1 September 2017", 1 September 2017, CISED50AD5515; DFAT, "DFAT Thematic Report – Shias in Pakistan", 15 January 2016, CIS38A801265; European Asylum Support Office (EASO), "EASO Country of Origin Information Report -Pakistan Security Situation" 1 July 2016; CIS7B8394110560.

⁶ DFAT, "DFAT Country Information Report – Pakistan", 25 January 2022, 20220125094359.

Peshawar. It is reported that although the increase in extortion demands has stirred fears of the comeback of insurgents to the north-western KPK, the Taliban have denied any links with the extortionists and that they are strongly against making such demands. The Pakistani authorities have noticed an increase in extortion demand but noted that not all were made by militants and that such demands also involved criminals and extortionists targeting wealthy people. It is reported that the authorities have responded to reporting of extortion demands and that police have increased patrolling areas. However, as this has been an ongoing issue for over two decades in the area, some experts, officials, and analysts are concerned that militants are conducting kidnapping and extortion to stockpile cash and make a comeback.

42. While these news reports indicate that militant attacks still occur in Pakistan and have increased in some areas after the Afghan Taliban's takeover of Afghanistan, the information does not indicate that the focus of the militants has been targeting civilians in Kurram Agency or that the Taliban operate an alternative state in the area. While there are concerns about the re-emergence of Taliban in Pakistan due to Taliban takeover of Afghanistan in 2021, the information indicates that the Pakistani government is alive to the potential security issues in areas bordering Afghanistan and have taken measures to curb terrorist and militant attacks in these areas. Moreover, the information does not indicate that Sunnis residing in Kurram Agency have been targeted by militants or that people of the applicant's profile face a real risk of harm in the area. I note that while extortion demands are continuing, by militants and also criminals, the applicant's evidence is that his business, which was targeted for extortion on one occasion in the past, has not been in operation since his departure in 2013 and there is no indication that his brother who has remained in their village has faced any further threats or that his family have been the subject of any extortion demands. Considering the evidence before me, I am not satisfied that the applicant faces a real chance of harm due to the situation in the country and although extortion attempts target wealthy individuals, the applicant has not claimed to be wealthy, and I consider the chances of him facing any harm in this regard to be no more than remote.
43. The applicant claims that he fears harm for reasons of his Pashtun ethnicity. He has also claimed that he belongs to [a] tribe but has provided any further details not claimed to have faced harm for this reason. DFAT reports⁷ Pashtuns are the second largest ethnic group in the country and traditionally live among their own tribes and subtribes in KPK. Pashtuns are represented at all levels of society in Pakistan and have dominated employment in transport in Pakistan. Although Pashtun-majority areas have historically experienced high levels of tribal, intra-communal and politically motivated violence, the overall security situation for Pashtuns has improved in line with increased security across Pakistan. It is noted that Pashtuns in Pashtun majority areas or locations where individuals have family or societal connections, face a low risk of official discrimination. The applicant resided in a Pashtun majority area and has not claimed to have personally faced any discrimination based on his Pashtun ethnicity in the past. In his post interview submission, in referencing 2017 news reports, the applicant claimed that racial profiling of Pashtuns in Pakistan led to perception that all Pashtuns were terrorists. It is claimed that, in Punjab, all Pashtuns were ordered to register their presence with the police in an attempt to keep surveillance on potential terrorist activities and that it affected the ability of Pashtuns to enjoy liberty and freedom of movement in Pakistan. I note that this information was provided in support of the applicant's submission that it was not safe or reasonable for him to relocate to other areas in Pakistan, including in Punjab. The applicant's evidence does not indicate that he faced any discrimination or restrictions in his movement while residing in Kurram Agency. He was able to operate his [business], obtain his passport and depart the

⁷ DFAT, "Pakistan Country Information Report 1 September 2017", 1 September 2017, CISED50AD5515; DFAT, "DFAT Country Information Report – Pakistan", 25 January 2022, 20220125094359.

country legally using his own passport. In addition, that applicant has not indicated that his family members residing in their village in Kurram Agency have been discriminated against or faced any harm for reasons of their Pashtun ethnicity or otherwise.

44. Having considered the applicant's circumstances and his personal profile in the context of the recent developments in the security situation in the Kurram Agency and decline in sectarian and generalised violence in the area, I consider the chances of the applicant facing any harm for any reason, including for reasons of his Pashtun ethnicity or tribe, as a [store] owner who traded with the Shia community prior to 2013, or in connection with his brother's kidnaping and extortion event in 2013, his relationship with his cousin, or due to generalised violence which has significantly reduced in the recent years, to be no more than remote.
45. I accept that the applicant will be returning to Pakistan after having lived in Australia for a prolonged period and as a returned asylum seeker. DFAT⁸ reports that people returned to Pakistan are typically questioned upon arrival to ascertain whether they left the country illegally, are wanted for crimes in Pakistan, or committed any offences while abroad. Those who left Pakistan on valid travel documentation and have not committed any crimes are typically released within a couple of hours. The applicant's SHEV application indicates that he departed the country legally using his own passport and at the SHEV interview, the applicant confirmed that he has never been charged for nor committed any offences. There is no information before me to indicate that the applicant has committed any crimes while residing in Australia. I do not accept that the applicant had any adverse profile with militants at the time of his departure from Pakistan and there is no indication that he was of any adverse interest to the authorities for any reason. I also do not accept that the applicant had a cousin who holds a grudge against him and wants to harm him.
46. DFAT⁹ also reports that returnees are responsible for arranging their onward transportation from their point of entry into Pakistan. The applicant's family are residing in their village in Parachinar, Kurram Agency. At the SHEV interview, the applicant confirmed that he has maintained contact with his family and has financially assisted his wife and children. I consider it very likely that he would return to his village in Kurram Agency to re-join his family. The information before me indicates that the Tall-Parachinar Road, which provides access to Kurram Agency, is reported to have remained open with federal security armed checkpoints along the road. No major security incidents on the road have been reported in the recent years. The country information set out above indicates that in the recent years, there has been few terrorist attacks targeting civilians in the area. I consider that the chances of the applicant facing any harm while traveling to his village from Peshawar to be no more than remote.
47. Travelling to and residing in a western country is common occurrence for Pakistanis. While DFAT¹⁰ notes that societal or official discrimination or violence can occur due to the reason people attempted to migrate, or because of behaviour or opinions they displayed while living abroad, it assesses that returnees are typically able to integrate into Pakistani community without repercussions and that they do not face a significant risk of societal violence or discrimination as a result of their attempt to migrate or purely because they have lived in a western country. I do not accept that the applicant departed the country because of any adverse profile with the militants or the authorities and he has not claimed to have expressed any views or opinions while in Australia that would be of any concern to anyone in Pakistan. While DFAT indicates that societal violence or discrimination for reason of attempted migration

⁸ DFAT, "DFAT Country Information Report – Pakistan", 25 January 2022, 20220125094359.

⁹DFAT, "DFAT Country Information Report – Pakistan", 25 January 2022, 20220125094359.

¹⁰ DFAT, "DFAT Country Information Report – Pakistan", 25 January 2022, 20220125094359.

can occur, it does not indicate that it is prevalent nor does the information provide details of the form or nature of discrimination or violence. The information also does not support a conclusion that targeting of returnees from western countries, including Pashtuns from Kurram Agency, rises to a real chance or that returnees who have been outside of Pakistan for an extended period, resided in a western country, or who have sought asylum abroad are attributed with adverse political profile or are targeted by militants. I consider the chances of the applicant facing any harm for reasons of his residence in Australia or having sought asylum to be remote.

48. In light of the above, I am not satisfied that the applicant faces a real chance of any harm for any of the claimed reasons in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5(J) of the Act.

Refugee: conclusion

49. 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

50. 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

51. 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.
52. 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.
53. I have found above that the applicant does not face a real chance of harm for any of the claimed reasons. The Federal Court¹¹ has held that 'real risk' imposes the same standards as the 'real chance' test. Having regard to my findings and reasoning above I am also satisfied that the applicant does not face a real risk of significant harm.

¹¹ MIAC v SZQRB (2013) 210 FCR 505.

54. I am not satisfied that there is a real risk that the applicant will suffer significant harm in 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.