



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

PAKISTAN
IAA reference: IAA19/06551

Date and time of decision: 4 June 2019 15:55:00
N Becke, 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 an referred applicant, or their relative or other dependant

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be from [City 1], Kurram Agency, Khyber Pakhtunkhwa Province, Pakistan, and a citizen of that country. On 28 April 2016 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 9 April 2019 a delegate of the Minister for Immigration (the delegate) refused to grant this visa.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 3 May 2019 the IAA received a submission from the applicant's representative ('the IAA submission'). The IAA submission reiterates claims made to the delegate that are contained in the review material. It also contains arguments in relation to issues before the delegate, which I have noted.
4. The IAA submission refers to a new piece of country information, a current affairs article from 'The Diplomat', which was not before the delegate and pre-dates the delegate's decision. This article refers to targeted attacks against anti-Sunni political parties in Pakistan during the July 2018 elections. The IAA submission does not explain, and it is not otherwise apparent, why this article could not have been provided before the delegate's decision; nor does it explain how, as general country information, it constitutes personal information in the relevant sense, and I am not satisfied that it does. The applicant's representative was present at his SHEV interview in July 2018 (which took place some two weeks after the election violence described in the article), and provided two post-SHEV interview submissions for the delegate's consideration, neither of which contained this new piece of country information. Overall, I am not satisfied exceptional circumstances exist to justify consideration of the new piece of country information or that the matters in s.473DD(b) are met.
5. The IAA submission also refers to a new source of country information, a news article from the British Broadcasting Corporation (BBC), which was not before the delegate and post-dates the delegate's decision. The article refers to an Islamic State terrorist attack in Quetta on 12 April 2019, which targeted the Shia Hazara community and resulted in 24 deaths. The article is said to illustrate recent developments in the security situation for Shias in Pakistan, which is central to this review. I am satisfied that it could not have been provided before the delegate made his decision and that there exceptional circumstances exist to justify its consideration.
6. On 3 May 2019 the IAA received a document from the applicant containing a number of hyperlinks to what appear to be publicly available sources, which he has identified as news articles to support his claim that he cannot relocate within Pakistan. Contrary to the IAA's 'Practice Direction' the information itself has not been provided nor extracted. As noted above, the applicant has retained the same representative, a registered migration agent, throughout his dealings with the Department and the IAA. The applicant was also provided a copy of the Practice Direction, and an information sheet in his own language which specifies the requirements regarding the provision of documents to the IAA. Nor has the applicant provided an explanation as to how the hyperlinks, or the document itself, meet 473DD(b). Accordingly, I have decided to make the following decision without accepting this information.

Applicant's claims for protection

7. The applicant's claims can be summarised as follows:

- In [year] the applicant was born in [City 1], Kurram Agency, Khyber Patunkhwa Province.¹
- The applicant is a member of the Bangash tribe. His sub-tribe is very well respected amongst Shia Muslims as they are direct descendants of the Prophet Mohammad.
- In 1999 the applicant travelled to [City 2, Country 1], to avoid being forcibly recruited by Shia militias in [City 1] who were engaged in sectarian conflict against Sunni militias.
- In 2005 the applicant returned to [City 1] for [number] months for his wedding.
- In 2007 the sectarian conflict escalated as Sunni groups such as the Taliban and Lashkar-e-Lashkar-e-Jhangvi (LeJ) attempted to take control in [City 1].
- In [2007] a Taliban mortar hit the applicant's family home in [City 1], which killed his nephew and two of his neighbours, and injured his brother.
- In [year] the applicant's mother, wife and child accompanied him to [City 2] and the applicant's second child was born there. The applicant's mother underwent medical treatment in [City 2] which she was not able to access in [City 1].
- At the end of 2011 the applicant and his family returned to Peshawar, Pakistan as their [Country 1] visas were about to expire. Due to the poor security situation on the main [road], they travelled from Peshawar through [Country 3] to reach [City 1]. On one occasion during the journey militants stopped their car but allowed them to proceed. The applicant later heard that his neighbour and his wife had been killed by militants on the same road.
- The applicant spent two to three weeks in [City 1] and then returned to Peshawar with a [group], and from there travelled to [City 2].
- In [Country 1] the applicant found out his visa would not be renewed again and he returned to Pakistan. In Peshawar he left his passport with an agent and returned to [City 1] on a domestic flight.
- One month later the applicant's [Country 2] visa was ready. The applicant travelled to Peshawar by bus and from there travelled to [City 2], where he stayed with his brother for five weeks, and then to [Country 2].
- In September 2012 the applicant travelled to Australia, via [another country], by boat.
- Since the applicant has been in Australia, the sectarian conflict has continued in [City 1]. In [2013] the applicant's uncle was killed by a bomb blast in [City 1]. In 2014 the applicant's cousin was badly injured when Sunni militants attacked the bus he was travelling on between [City 1] and Peshawar.
- The Pakistani authorities cannot protect the applicant because they are also the targets of the Taliban, LeJ, and other Sunni militant groups.

¹ Formerly the Federally Administered Tribal Areas (FATA).

- Sunni militant groups in Pakistan will subject him to serious harm including kidnapping, targeted killing and terrorist attack: because he is a Shia Muslim; he is a member of Bangash tribe; he is a 'Shia from [City 1]'; he has an imputed anti-Taliban political opinion; and he is imputed to be wealthy because he has remitted money to his family from overseas.
- He will face discrimination because of his Pashtun ethnicity.

Refugee assessment

8. 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

9. 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.
10. The applicant has been consistent in stating his identity since his arrival in Australia. In support, the applicant has provided his original Pakistani passport and National Identity Card (NIC), with a translation.
11. I accept that the applicant is a Shia Muslim of the Bangash tribe from [City 1], Kurram Agency, Khyber Pakhtunkhwa Province. The applicant's evidence at SHEV interview regarding his religion and place of origin was detailed and spontaneous. I accept the applicant's [tribe] is commonly associated with those Shia Muslims who are believed to be descended from the Prophet Mohammad, and that they are accorded respect for this reason. On the basis of the information before me I am satisfied the applicant's identity is as claimed and that Pakistan is the receiving country for the purposes of this assessment.
12. The applicant's representative has asserted that given the applicant is from [City 1], which is populated by Shia Muslims from both the Bangash and Turi tribes, he may be imputed to be a member of the Turi tribe. In its 2019 report, the Department of Foreign Affairs and Trade (DFAT) notes the "historical animosity" which exists between the Bangash and Turi tribes, and on the evidence I do not consider it credible that the applicant would be imputed to be a

Turi in his home area.² Nonetheless I have considered country information before the delegate relating to the security situation for Turis, in so far as that they are also Shia Muslims like the applicant.

13. On 31 July 2018 the applicant's representative emailed the delegate a hyperlink to a news article which he had referred to in his closing oral submission during the SHEV interview of 27 July 2018. On 1 February 2019 the applicant's representative emailed the delegate a lengthy written submission, in which he referred to numerous sources of country information about historical sectarian violence and militant attacks against Shias in Kurram Agency, and other parts of Pakistan. On 8 February 2019 the representative sent a further submission to the delegate containing more recent country information. I have had regard to the post-SHEV interview submissions from the applicant's representative, and the country information contained therein.
14. I accept in 1999 the applicant moved to [City 2] for work, as well as to avoid sectarian violence and the recruitment activities of Shia militias in his home area. I accept in 2005 the applicant returned to [City 1] to get married, stayed for six months and then returned to [City 2]. I accept in 2007 the sectarian violence in [City 1] worsened as Sunni militant groups, such as the Taliban, escalated their attacks on Shia communities in the area. I accept in 2007 the applicant's nephew and two neighbours were killed, and his brother injured, when a Taliban mortar struck their house; in 2013 his uncle was killed in a [bomb attack]; and in 2014 his cousin was badly injured [en route] to Peshawar. In his invalid 2013 Protection Visa (PV) (subclass 866) application the applicant referred to the Taliban kidnapping and murdering two of his cousins but he did not provide a date, and I note the incident is not mentioned in his 2016 SHEV application. I am prepared to accept however such an incident took place prior to 2013.
15. I accept that in 2011 the applicant's mother, wife and child accompanied him to [City 2] to seek medical treatment. While I note this claim is not included in the applicant's 2013 PV application, I consider his claim that there was limited access to goods or medical treatment in [City 1] at that time (the height of the sectarian conflict), to be plausible. I accept that the family returned by plane to Peshawar, from where they decided to travel to [City 1] via [Country 3], and that they were briefly stopped by militants on that journey. Country information does indicate there was a significant spike in targeted killings [between] 2008 and 2014 and it is plausible that the applicant would have decided to travel via [Country 3] instead to reach his home area.³ The evidence is not entirely clear as to whether the applicant and his family encountered the militants in [Country 3] or Pakistan; however I accept his neighbours were killed while travelling in the same area.
16. Several years later, in June 2014, *Operation Zarb-e-Azb* commenced in a number of Pakistani cities, targeting terrorist and criminal networks. The National Action Plan (NAP), established later that same year in response to an attack on a Peshawar public school in which more than 130 children died, ended Pakistan's unofficial moratorium on the death penalty, established military courts to try suspected militants, targeted sources of finance for militant organisations, took measures to restrict hate speech, and committed to policy reforms, particularly in the former Federally Administered Tribal Areas (FATA). In 2015 and 2016 the military operations and NAP continued, with the Pakistani army targeting a wide array of militant groups in the tribal areas. In 2017 the government introduced *Operation Raad-ul-*

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Pakistan", 1 September 2017, CISED50AD5515

³ [Source deleted].

Fasaad in response to some major attacks in early 2017.⁴ In 2018, the Pakistani government announced its second National Security Policy, and the Ministry of Interior is reportedly preparing NAP-2. Observers credit *Operation Zarb-e-Azb*, its successor *Operation Raad-ul-Fasaad*, and the NAP with a significant reduction in the number of violent and terrorism related attacks in Pakistan.⁵

17. For example, in 2013 3,000 civilians and 676 security force personnel were killed in terrorism related attacks, but in 2018 the total number killed was 595 people, including both civilians and security personnel.⁶ Reports from the FATA Research Centre (FRC) noted relatively few attacks in the FATA region in 2015, compared to 2014, and that most casualties in the first half of 2015 were militants or security forces.⁷ The European Asylum Support Office (EASO) reported in 2017 that the security situation in the FATA had improved significantly since the start of *Operation Zarb-e-Azb*.⁸
18. Amidst the trend of declining sectarian violence, Parachinar experienced three significant attacks in the first half of 2017: on 21 January 2017 militants detonated a remote controlled improvised explosive device in a market; on 31 March 2017 a suicide bomber attacked a Shia mosque; and on 24 June 2017 two devices were detonated in a market. The three attacks killed over 120 people.⁹ Since these attacks in the first half of 2017 there have been no more significant attacks in Parachinar.
19. DFAT reports that recent military operations to erect fencing and other border control measures have improved the security situation in Kurram Agency, with a 20 to 30 square kilometre 'red zone' around Parachinar now secured by the military. Shia Turis in Parachinar have reported significantly fewer road attacks, as militants have been forced into the mountains, and confidence has been restored in the community to resume travel on the Tall-Parachinar Road.¹⁰ The country information indicates there were no significant attacks reported in Parachinar in the second half of 2017, or 2018, or to date in 2019. During the SHEV interview the applicant acknowledged that the roads are safer due to the high number of security checkpoints, but also argued that if these were removed the danger to Shias would return. The country information before the delegate does not suggest that the Pakistani authorities intend to wind back the security measures which they have implemented since 2014 and I consider the applicant's evidence in this regard to be speculative. Given the country information, I do not accept that there is a real chance the applicant would be unable to access goods or medical [treatment] as was previously the case.
20. While Pakistani NICs do not indicate the bearer's religion, I accept the applicant's claim that his name and address in a known Shia area, his attendance at a Shia mosque, and participation in Shia religious ceremonies would all identify him as Shia. DFAT assesses that Shias in the former FATA faced a low risk of sectarian violence (within the context of a moderate level of militant and criminal violence across the region) but that for Shias in [Kurram Agency], the risk is higher than other parts of the former FATA.¹¹ DFAT defines "low risk" as meaning DFAT has knowledge of past incidents, but insufficient evidence to conclude

⁴ DFAT, "DFAT Country Information Report – Pakistan", 20 February 2019, CIS20190220093409; European Asylum Support Office (EASO), "EASO Country of Origin Information Report - Pakistan Security Situation", 7 August 2017, CISED50AD5088

⁵ DFAT, "DFAT Country Information Report – Pakistan", 20 February 2019, 20190220093409

⁶ Ibid.

⁷ DFAT, "Thematic Report- Shias in Pakistan", 15 January 2016, CIS38A801265

⁸ EASO, "EASO Country of Origin Information Report - Pakistan Security Situation", 7 August 2017 CISED50AD5088

⁹ DFAT, "DFAT Country Information Report – Pakistan", 20 February 2019, 20190220093409

¹⁰ Ibid.

¹¹ DFAT, "DFAT Country Information Report – Pakistan", 20 February 2019, 20190220093409

they form a pattern. DFAT notes that Turis in Kurram Agency face a moderate risk of sectarian violence from militant groups, because of their Shia faith.¹² As noted above DFAT assesses that Shias in [Kurram Agency] face a “higher risk” of sectarian violence, but has not gone so far as to suggest Shias [face] a “moderate risk”, which DFAT defines as meaning it is aware of sufficient incidents to suggest a pattern of behaviour.

21. As well as the 2019 DFAT report, I have had regard to country information in reports from EASO, the South Asian Terrorism Portal (SATP), and information provided by the applicant. The BBC article, “Pakistan Hazara minority protests after bombing in Quetta” discusses an April 2019 Taliban and Islamic State attack in Quetta which killed 24 people.¹³ I accept that this attack was targeted against the Shia Hazara community, and indicates that Sunni militant groups remain an active threat in Pakistan; however, the applicant is not a Hazara, who have an ethnically distinct appearance, nor is he from Quetta, which continues to have a much poorer security profile than [City 1]. Given the applicant’s particular circumstances I have given greater weight to the country information discussed below which notes that, with the notable exception of the 2017 bombings, the overall security situation in [Kurram Agency] has improved markedly over recent years.
22. I have also considered whether the applicant faces a real chance of harm for reason of his membership of the Bangash tribe. The Bangash tribe is around 40 per cent Shia Muslim, with the other 60 per cent being Sunni Muslim. The Bangash Shias live mainly in Orakzai Agency and other parts of Khyber Pakhtunkhwa Province.¹⁴ I accept that a significant proportion of the Bangash tribe are Shia Muslim, and I am prepared to accept the applicant’s evidence that members of the Bangash tribe often have pale skin and that this, along with their accents, clothing and jewellery makes them readily identifiable.¹⁵
23. The applicant has not provided any information to indicate otherwise, and the 2019 DFAT report does not refer to any targeting of the Shia Bangash community in recent years.¹⁶ Furthermore, the evidence before me does not indicate that those Shias with [a sub-tribe link] to the Prophet Mohammad, of itself, gives rise to a real chance of harm as a Shia [Bangash].
24. I accept the applicant’s claim that Shias in the former FATA have historically not allowed the Taliban to use their territory to attack international troops in [Country 3], and have cooperated with North Atlantic Treaty Organisation (NATO) forces against the Taliban. It is plausible, and I accept, that Shias from [City 1], such as the applicant, may be imputed to hold an anti-Taliban political opinion, and that the Taliban may target them for this reason, as well as because of their religion. However, given the country information regarding the improved security situation in the applicant’s [home area] and its surrounds, I am satisfied that the chance of him facing harm on the basis of his Shia religion, his membership of the Bangash tribe, his family name, his profile as a Shia from [City 1], or any imputed anti-Taliban political opinion to be remote.
25. The applicant also claims to fear harm because of his Pashtun ethnicity in areas of Pakistan such as the Punjab, where he claims Pashtuns face ethnic profiling and are imputed to be Sunni terrorists, even if they are Shia. Pashtuns make up the second largest ethnic group in Pakistan and traditionally live among their own tribes in the former FATA and Khyber

¹² Ibid.

¹³ British Broadcasting Corporation (BBC), “Pakistan Hazara minority protests after bombing in Quetta”, 13 April 2019

¹⁴ DFAT, “DFAT Country Information Report – Pakistan”, 20 February 2019, 20190220093409

¹⁵ Ibid.

¹⁶ Ibid.

Pakhtunkhwa Province. DFAT notes Pashtuns migrating to places such as Lahore and Karachi have reported ethnic profiling and harassment by local security officials. DFAT also assesses that Pashtuns may face a risk of such profiling in areas where they are in the minority, but that there is low risk of official discrimination against Pashtuns in areas where they form the majority, such as the applicant's home area.¹⁷ The applicant has not claimed to have experienced discrimination previously and I am not satisfied he faces a real chance of harm in his home area for this reason.

26. While the applicant did not specifically claim to fear that Shia militia will forcibly recruit him should he return to [City 1], the delegate considered this in his decision. Country information before the delegate indicates that Shia militias remain active in Kurram Agency, despite the stabilisation of the security situation, and both Turi and Bangash tribes have resisted government efforts to disarm them. However, since 2016 all areas of Pakistan have been considered as under government control.¹⁸ Two of the applicant's brothers reside in [City 1], and there is no evidence before me that Shia militias have ever attempted to recruit them, including prior to the 2007 mortar attack on their family home, in which one of them sustained injuries. I am satisfied the applicant does not face a real chance of harm in [City 1] on this basis.
27. The applicant has claimed that during the almost twenty years he has spent residing outside of [City 1] (in [Country 1] and Australia) he has remitted considerable sums of money home to his family. The applicant further claimed that this has benefitted both his family and their community, particularly during the worst of the sectarian conflict when resources in Kurram Agency were scarce. The applicant has claimed that these remittances, and his profile as a Shia Pashtun from the Bangash tribe, who has done business overseas, will also make him a target for Sunni militant groups. When the delegate questioned the applicant further about how these groups would be aware of the remittances, he responded that he had worked with Taliban supporters in [Country 1] and it would have been obvious that he was remitting money to his family.
28. This claim relating to the applicant's real or perceived wealth is not contained in his 2013 PV application, or his 2016 written SHEV statement, and he only raised it at the end of his SHEV interview after he had consulted with his representative. Given the timing with which it was raised, and the lack of supporting evidence, I consider this claim as it relates to the applicant's pro-Taliban colleagues in [Country 1], not to be credible. It is plausible, and I am prepared to accept, that others in the applicant's home area may be aware of his work overseas and the remittances he has been sending to his family since 1999, and that he may be considered wealthy for this reason.
29. The applicant has claimed that in 2005 he spent six months in [City 1] for his wedding, that on one occasion in 2011 he spent approximately three weeks in [City 1] and on another occasion in 2011 he spent a month there. Given the applicant's evidence in his 2013 PV application that he made five or six trips back to [City 1] between 1999 and 2011, I am satisfied that he also returned on at least two other unspecified occasions. However, there is nothing before me to indicate his regular movements in and out of Pakistan between 1999 and 2011 were of interest to any Sunni militants in the former FATA.

¹⁷ Ibid.

¹⁸ EASO, "EASO Country of Origin Information Report - Pakistan Security Situation", 7 August 2017, CISED50AD5088

30. DFAT notes that Pakistan exports labour to the Middle East and that approximately 2.5 million Pakistanis travelled overseas for employment between 2015 and 2018.¹⁹ There is no evidence before me that the applicant or his immediate family have ever been personally targeted in [City 1] because of his work overseas or his remittances. Nor do I consider it credible that the applicant's ability to speak English will raise his profile with Sunni militant groups as he has claimed. On the evidence I am not satisfied that the applicant would now face a real chance of any harm in [City 1] for these reasons or because of his real or perceived wealth.
31. The applicant has claimed that the Pakistani authorities cannot protect him from the Taliban, LeJ, and other Sunni militant groups in Pakistan, as the authorities are also the targets of those groups and because the authorities are corrupt. In his 2013 PV application the applicant refers to a July 2013 incident where the Taliban laid siege to a prison, killed Shia inmates, and set others free, as evidence the Pakistani authorities cannot even secure government buildings. I am prepared to accept such an incident took place.
32. In the first post-SHEV written submission the applicant's representative asserts that the applicant faces an absence of effective state protection for Convention reasons, but does not specifically articulate what those reasons are. Nor does this submission provide examples of the Pakistani authorities withholding state protection from people of the applicant's profile, and I do not accept that this is the case.
33. As discussed above, by February 2018 the Pakistani authorities had completed 40 per cent of military fencing in Kurram Agency which, coupled with tighter border controls, decreased the permeability of the Pakistan-Afghanistan border. Furthermore, the military has implemented a 20-30 kilometre red zone in Parachinar, which contains a smaller, second red zone in which markets and schools are located, and access to these zones requires the presentation of identity documents.²⁰ DFAT also notes, "Local observers, including officials, in Khyber Pakhtunkhwa also reported a trend of increased security, a reduction in reported killings and reduced fear within the community in 2018."²¹ DFAT assesses that despite a reduction in the level of violence, sporadic large scale terrorist attacks are likely to continue to occur against a background of ongoing smaller-scale attacks (albeit at a reduced tempo).²²
34. Country information before the delegate does indicate that corruption remains a serious issue within Pakistan's various security and law enforcement branches, particularly the police. I also accept the security situation in much of Pakistan remains fragile, and have had regard to the terrorist attacks which took place in [Kurram Agency] in 2017; however overall I am satisfied the situation has improved markedly since the applicant was last there. Given the overall enduring success of military operations to date, including the specific security measures which have been implemented in Parachinar, I do not accept the applicant's assertion that the Pakistani authorities are unable or unwilling to offer protection from terrorist elements. I acknowledge it cannot be said, with the history of sectarian violence in [Kurram Agency], that there is no chance of [Shias] being targeted in the future and I accept that the applicant will likely attend Shia mosques, publicly participate in Shia religious ceremonies and attend the market and other public places upon return to Pakistan. However, based on the applicant's personal circumstances and recent country information, I am not satisfied he will face real chance of harm in his home area of [City 1] and its surrounds, or when accessing his home area, because of his Shia religion, his Pashtun

¹⁹ DFAT, "DFAT Country Information Report – Pakistan", 20 February 2019, 20190220093409

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

ethnicity, his membership of the Bangash tribe, his family name, any imputed anti-Taliban political opinion, because he is a Shia from [City 1], because of his real or perceived wealth or because of the security situation. I am also not satisfied the applicant faces a real chance of being forcibly recruited by a Shia militia should he return to [City 1].

Refugee: conclusion

35. The applicant 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

36. 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

37. 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.
38. I have concluded that the applicant does not face a real chance of harm in his home area due to his Shia religion, his Pashtun ethnicity, his membership of the Bangash tribe, his family name, any imputed anti-Taliban political opinion, because he is a Shia from [City 1], because of his real or perceived wealth, because of the security situation or for any other reason. I am also not satisfied the applicant would face a real chance of harm when accessing his home area, or of being forcibly recruited by a Shia militia there. Based on the same information, I am not satisfied that the applicant has a real risk of suffering significant harm in [City 1] or its surrounds.
39. After having regard to the applicant's circumstances, I find that he does not face a real risk of suffering significant harm.

Complementary protection: conclusion

40. 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.