



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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PAKISTAN  
IAA reference: IAA19/06671

Date and time of decision: 28 June 2019 14:48:00  
S MacKenzie, Reviewer

**Decision**

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

*Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a citizen of Pakistan. He arrived in Australia [in] September 2012 as an unauthorised maritime arrival. On 13 December 2016 the applicant lodged a valid application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV).
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 28 May 2019, on the basis that the applicant did not face a real chance of serious harm or a real risk of significant harm upon return to Pakistan.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material). No further information was received by the IAA.
4. I have obtained new information relevant to the issue of the then Department of Immigration and Border Protection's (DIBP) data breach.<sup>1</sup> I consider it necessary to obtain that new information in order to determine this issue and in my view, there is insufficient information before me regarding the data breach for me to be able to properly assess the claim. For these reasons, I am satisfied there are exceptional circumstances to justify my considering that new information under s.473DD. Further, I note that new information is not specifically about the applicant and is just about a class of persons of which the applicant is a member, namely people whose information was included in the data breach, for the purpose of s.473DE(3)(a).

### *Request to extend time to provide submissions*

5. On 31 May 2019, the IAA contacted the applicant by email to confirm that the decision of the Minister of Immigration to refuse his protection visa had been referred to the IAA that same day (acknowledgement letter). In the acknowledgement letter, the IAA provided instructions on what to do if the applicant wished to appoint a person to act on his behalf. He was also provided an information sheet (with Urdu translation) and a copy of the Practice Direction for Applicants, Representatives and Authorised Recipients (Practice Direction) which outlined the timeframes for providing information to the IAA.
6. On 24 June 2019, the IAA received a telephone call from a person on the applicant's behalf. That person advised that his firm was reviewing the applicant's file and that he wished to know the deadline to provide a submission. As the applicant had not appointed a representative, the IAA advised the caller that case specific information could not be provided due to privacy reasons, and directed him to the IAA website where he could find the Practice Direction and an Appointment of Representative form (F2 form). The IAA also advised that the Practice Direction provided detailed information concerning the provision of any submissions and/or new information to the IAA.
7. Later on 24 June 2019, the IAA received an email from the same person advising that his firm now acted on the applicant's behalf. However, no F2 form was attached. Included in the email was a request for an extension of time until 15 July 2019 to provide written

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<sup>1</sup> Guardian (Australia edition), "Scott Morrison ensured asylum seeker data breach probe failed, court finds", 18 September 2015, CXBD6A0DE19005; *SZSSJ v MIBP* [2015] FCAFC 125

submissions to the IAA, on the basis that the applicant had only appointed them to act on 21 June 2019.

8. On 25 June 2019, the IAA responded to the email of the previous day advising that no F2 form had been provided and, that if he intended to represent the applicant, to forward a completed form.
9. As no response or F2 form was forthcoming, the IAA contacted the applicant by email on 26 June 2019 in relation to the extension of time request received on his behalf. He was advised that the request had been considered but not granted in this case. He was also advised that in accordance with the Practice Direction submissions should be given to the IAA within 21 days of the date on which the case was referred by the Department, and in his case, this ended on 21 June 2019. He was advised that a decision may be made at any time.
10. Later on 26 June 2019, the IAA received an F2 form by email from a now appointed representative confirming that the applicant was being legally represented the firm. The form had been completed that day. On 27 June 2019, the IAA acknowledged receipt of the F2 form and forwarded the representative a copy of the correspondence the IAA sent to the applicant the previous day advising that the request for an extension of time was not granted.
11. On 27 June 2019, the applicant's representative sent an email to the IAA acknowledging that the extension of time to provide submissions was not granted. However, she also stated that she was preparing submissions and would 'aim to have it finalised within 14 days'. She further stated that they would have tried to provide the submissions earlier but she had not received a response to an FOI request from the Department.
12. As outlined in the correspondence from the IAA, the Practice Direction states that submissions should be provided within 21 days of the case being referred to the IAA by the Department (in this case 21 June 2019). The applicant and his representative were both put on notice as to when submissions should be provided, advised that no extension of time had been granted, and that a decision would be made at any time. Even accepting that the representative has faced delays in receiving a response from the Department in respect of an FOI request, I note that the applicant only engaged the representative on or after 21 June 2019. As stated in s.473FB of the Act, the IAA is not required to accept new information or documents from a person if the person fails to comply with a relevant direction. The Practice Direction is a relevant direction. In all of the circumstances, I consider it is reasonable to proceed to make a decision.

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

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13. The applicant's claims can be summarised as follows:
  - The applicant is a Shia Bangash male of Pashtun ethnicity from [Location 1] in Kurram District, in the province of Khyber Pakhtunkhwa (KP)<sup>2</sup>, Pakistan;
  - He left Pakistan because the Shia community were being harassed and attacked by groups like the Taliban. His relatives and friends have been targeted and harmed;
  - If returned to Pakistan, the applicant fears he will be harmed or killed by groups like the Taliban due to:

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<sup>2</sup> Department of Foreign Affairs and Trade (DFAT) report that in 2018 the former Federally Administered Tribal Areas (FATA) which included Kurram District became a part of KP.

- his Shia religion
- his profile as a Shia Muslim from Parachinar
- his travel to Australia / a western country
- the data breach
- another person's identity documents being inadvertently sent to him in 2018.

## **Refugee assessment**

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14. 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**

15. 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.
16. Since his arrival in Australia, the applicant has consistently claimed to be a Shia member of the Bangash tribe and of Pashtun ethnicity. He has also consistently claimed to be a Pakistani citizen from [Location 1] (near Parachinar city) in Kurram District. He has provided a number of documents as evidence of his identity, including a copy of his 2010 issued Pakistani passport. On the evidence before me, I accept that the applicant's identity is as claimed. I find Pakistan to be the receiving country for the purpose of this decision.
17. On his SHEV application form, dated 9 December 2016, the applicant recorded a number of written protection claims. He stated that he left Pakistan because the Shia community were being harassed and attacked by groups like the Taliban. He also left due to the discrimination Shias faced. His home area has been targeted and attacked by the Taliban. His relatives and friends have also been targeted. An uncle was kidnapped and tortured. People are being fired upon during their travel. If returned to his area he will be kidnapped, tortured and killed by the Taliban, because he left Pakistan and because he is Shia.

18. In his interview with the delegate on 21 May 2019 (SHEV interview), the applicant reiterated that, while he had not experienced any targeted harm in the past, he feared returning to Pakistan due to his Shia faith and because he had left Pakistan and travelled to Australia / a western country. The delegate advised the applicant that his claim that he had not previously faced harm in the past was consistent with information he provided in earlier interviews before him and, on the information before me, I accept this to be the case. Although not reflected in the residential history section of the SHEV application form, the applicant confirmed that he lived and studied in Rawalpindi, near Islamabad, for about three years between 2008 and 2011. This too was consistent with information he had earlier provided soon after his arrival in Australia. He also clarified that the uncle who was kidnapped and tortured was in fact his father's cousin and that this incident occurred sometime before 2007. He also advised the delegate that he had been informed that the cousin had been killed. He believed that he was kidnapped and killed because he was Shia. He also advised that he knew people [in] Rawalpindi who had been kidnapped and killed. He further claimed that a relative of his mother had been kidnapped when he was in [a different country] because he was a Shia. The applicant said that he can be easily identified as a Shia due such things as his language, his name, and the scars on his body. He said that [Location 1] was [number] kilometres from the centre of Parachinar, and that due to the risk and danger he now faced he would need to stay in different places to live and work.
19. In a submission dated 24 May 2019 (post-SHEV interview submission), the applicant's former representative reiterated some of the applicant's claims and submitted that that violence against Shias in Pakistan continued not just from militant groups but from the Pakistan authorities too. In respect of Parachinar, it was submitted that there had been fighting amongst various factions and terrorist groups but that these incidents were not published in the media. It was further submitted that Shias in Parachinar faced danger and that only a small percentage of violence against Shias is reported in the public domain. The former representative also stated that the applicant faced harm due to his profile as a 'Shia Muslim from Parachinar'. I have had regard to these submissions.
20. The post-SHEV interview submission included a number of country information reports (or links to reports) said to evidence violence against Shias in Pakistan. The Dawn article, dated 26 December 2018, reported on the death of a prisoner who had been kidnapped a few years earlier while travelling to Parachinar city. The report also stated that protesters were demanding to know the whereabouts of nine missing persons from Parachinar. I note the report makes no specific mention of persons going missing in Parachinar, or that they were of the Shia faith. The Tribal Network News article, dated 16 April 2018, reported that a student at the University of Peshawar (who originated from Parachinar) was murdered when he visited Rawalpindi. He was reportedly shot when he failed to hand over his mobile phone to unidentified men. The Firstpost article, dated 29 November 2017, reported on the killing of two Shias outside a Shia imambargah in Islamabad by unidentified gunmen. The Dawn article, dated 1 April 2017, reported on two blasts in Parachinar in early 2017 targeting the Shia community. The Aljazeera article, dated 19 February 2015, reported on attacks on Shia mosques in Islamabad and Peshawar. The Let Us Build Pakistan article, which appears to have been published in 2012, reported on the targeted killing of Shias in Pakistan. Some of those targeted were originally from Parachinar or other parts of Kurram Agency. The Dawn article, dated 29 February 2004, reported on an attack on a Shia mosque in Rawalpindi. An undated article from The Nation reported that Shias living in Islamabad and other parts of Pakistan had been kidnapped by religious extremists. I have had regard to these reports.
21. The former representative also provided a hyperlink to a post made in February 2018 on online forum worldshiaforum.org. It is submitted that the post evidences a fundraising

campaign to wipe out Shias from Pakistan. According to the post, a militant group distributed an anti-Shia pamphlet in the Urdu language in Attock District (Punjab Province). The writer provides an English translation of the pamphlet that states that the group's objective is to 'wipe out Shias of Pakistan' and that it seeks donations. The post is consistent with other country information before me that there are anti-Shia groups operating in parts of Pakistan.

22. Included in the review material is a letter, dated 21 January 2019, from the applicant's Mental Health Social Worker-Counsellor (social worker). The social worker stated that the applicant had attended mental health counselling since August 2018, and that since October 2018 he attended scheduled appointments every two to three weeks. The social worker also provided a history of the applicant's life in Pakistan that was broadly consistent with information the applicant provided in his SHEV application and SHEV interview. However, I did note some inconsistencies. For example, his report to the social worker that due to fear he avoided attending mosque and participating in Shia processions differed from his evidence in the SHEV interview that he regularly did both of these things in Pakistan.
23. In its most recent report, DFAT assesses that Shias continue to face a threat from anti-Shia militant groups including LeJ, SSP, and factions of the Tehreek-e Taliban Pakistan (TTP). DFAT also assesses that most Shias in Pakistan face a low risk of sectarian violence, but that the risk varies depending on geographical location and for members of specific groups. For example, DFAT assesses that 'high profile' Shias in Pakistan face a 'moderate risk' of violence. DFAT defines 'moderate risk' as it is aware of sufficient incidents to suggest a pattern of behaviour. In the former FATA (Federally Administered Tribal Areas) of which Kurram Agency is a part, DFAT assesses that Shias face a 'low risk' of sectarian violence. DFAT defines 'low risk' as it is aware of incidents but has insufficient evidence to conclude they form a pattern. In respect of KP, DFAT assesses that the province has a low level of sectarian violence, within the context of a moderate level of militant and criminal violence across the region, but notes that the risk of sectarian violence for civilians in Kurram Agency, particularly Parachinar (near the applicant's home area), is higher than in other parts of the former FATA. DFAT reports that in the first half of 2017 there were three attacks targeting members of the Turi tribe in Parachinar due to their Shia faith, with more than 120 people killed. However, in 2018 there was a decrease in reports of attacks against Turis due to the improved security situation in Parachinar and Kurram Agency. DFAT assesses that this trend is likely to continue in 2019, noting that KP had seen a significant reduction in militant violence in recent years and that the security situation in Parachinar has improved. There is no mention by DFAT of targeting of Bangash.
24. In 2017, DFAT noted that Parachinar had experienced relative calm prior to the 2017 attacks targeting the Shia Turi community. I have considered the country information provided as part of the post-SHEV interview submission. Aside from Dawn's April 2017 article which reports on the 2017 attacks in Parachinar as also reported by DFAT, there appears to have been no further incidents involving the targeting of Shias in Parachinar. I am not persuaded by the argument in the post-SHEV interview submission that indicates there have been more recent incidents of violence against Shias in Parachinar not reported.
25. Included in the SHEV application, the applicant provided a domicile certificate that recorded he 'belongs to a recognized tribe of Bangash'. In the SHEV interview, the applicant advised the delegate that although he was a member of the Bangash tribe, "we are" perceived by outsiders as "Turi Bangash". The delegate asked him to explain why he would be perceived in this way, to which he responded that tribal marriages can be mixed. However, he did not claim that any of his parents were from the Turi tribe. Overall, I found the applicant's oral evidence in the SHEV interview that he would be perceived to be "Turi Bangash" vague and I

note in 2019 DFAT reported that Bangash and Turi are two separate tribes. The applicant's former representative made no further mention of the applicant being perceived as a member of the "Turi Bangash" tribe in the SHEV interview oral submission or in the post-SHEV interview submission. On the information before me, I am not satisfied the applicant would be perceived as a member of the "Turi Bangash" tribe in Pakistan. I find he is Bangash and would be viewed by others as such. The applicant did not advance any claim that he feared harm in Pakistan due to his tribal identity, although I note the delegate considered whether he would face harm on this basis.

26. Although not raised as a claim for protection, the delegate also considered whether the applicant faced harm due to his Pashtun ethnicity, as a Pashtun with Bangash tribal affiliations, or as a Pashtun Shia originating from Parachinar.
27. In 2019, DFAT reported that Pashtuns were the second largest ethnic group in Pakistan, comprising 15.4% of the population. Pashtuns in Pashtun majority areas, like KP, or locations where individuals have family or social connections face a low risk of official discrimination.
28. Having had regard to all of the information before me, including the country information, I accept the applicant's consistent evidence that members of his family and people that he has known have faced harm in the past and I accept that their Shia faith may have been a contributory factor. I also accept the applicant's home area has been targeted and attacked by the Taliban. I further accept that on return to his home area the applicant will be identified as a Shia and as a Pashtun. However, while I accept that in the past Shias have been targeted for harm in Parachinar, near the applicant's home area, there does not appear to have been any significant incidents targeting Shias in or around that area, or in Kurram Agency, since the attacks in the first half of 2017. Nor is there any credible evidence before me that persons of the Bangash tribe are being targeted for harm in or around Parachinar, or in Kurram Agency. Further, there is no credible information before me that Shias or members of the Bangash tribe are being targeted by the Pakistan authorities or militant groups such as the Taliban in the applicant's home area, or in the wider province of KP. The applicant has not claimed to have experienced harm or discrimination on account of his Pashtun ethnicity previously and, on the information before me, I am not satisfied he faces a real chance of harm in his home area for this reason.
29. Considering the country information before me about the attacks on members of the Bangash tribe and/or Shias, the improved security situation, and the implementation of security measures in and around Parachinar, I am not satisfied the applicant faces a real chance of harm for the reasons claimed. The country information does not indicate that Shias in [Location 1] or Parachinar are unable to practise their religion or travel safely between the two areas. Nor does the country information indicate that there have been recent attacks or threats of attacks on mosques or public religious events such as Muharram in the applicant's home area. I am not satisfied that the applicant faces a real chance of harm if he travelled to and lived in different parts of Parachinar (or surrounds), or for things like attending mosque or employment. Further, I am not satisfied the applicant would need to travel to different places to live and work due to him facing danger in his home area, as claimed in the SHEV interview. I also give weight to the applicant's evidence in the SHEV interview that his family continue to live in or around Parachinar without difficulty. His brother occasionally returns to Parachinar from overseas to visit family and at the time of the SHEV interview had been visiting for at least three months. I acknowledge DFAT's assessment that the risk of sectarian violence for civilians in Parachinar is higher compared to other parts of the former FATA. I also acknowledge there has been a history of sectarian violence in Kurram Agency, including near the applicant's home area, and I cannot discount the possibility that further attacks may

happen in the future. However, on the information before me, I find the chance that the applicant would be kidnapped or otherwise harmed in [Location 1] (or surrounding areas) now or in the foreseeable future due to his religion, his ethnicity, his tribal identity, as a Shia Bangash or Shia Muslim from Parachinar, or a combination of these profiles, to not rise to a real chance. I note DFAT's assessment that there exists a moderate level of militant and criminal violence in the wider province of KP; however, there is no indication in the country information that this is an issue affecting the applicant's home or surrounding area. I am not satisfied that applicant faces a real chance of harm on this basis.

30. I note that the delegate found that the applicant faced a real chance of harm in Kurram Agency for reason of his religion, referring in particular to information about past sectarian violence targeting Shia Muslims in that part of Pakistan. However, in considering the information in the review material I have reached a different conclusion that he does not face a real chance of harm in his home area on that basis. I am also mindful that both the applicant and his former representative were on notice in the SHEV interview that the delegate was considering whether the applicant faced a real chance of harm in his home area. Towards the end of the interview, the delegate stated that country information before him indicated an improved security situation in the applicant's home area and a significantly reduced likelihood of sectarian violence occurring. Both the applicant and the former representative were given a break to discuss these matters in private, and following this they both provided an oral response. As noted above, the former representative also provided a post-SHEV interview submission about the situation for Shias in Parachinar and Kurram Agency. As the issue of harm in the applicant's home area was squarely raised and addressed before the delegate, I do not consider it necessary to exercise my discretion to obtain new information or comment from the applicant under s.473DC.
31. I note the applicant mentioned in his written claims that Shias have been 'fired at' during travel. I accept there have been attacks on Shias travelling on the roads in Pakistan in the past and I accept that if the applicant was returned to Pakistan he would have to travel through KP to return to his home area.
32. In its most recent report, DFAT state that the overall security situation for all Pakistanis has improved in line with increased security across Pakistan, including in Parachinar and Kurram Agency. However, DFAT assess that travel in parts of the country is dangerous for all persons, regardless of sectarian, religious or ethnic affiliations. It assesses that in remote areas, such as KP and the former districts of FATA, persons are at greater risk of criminal or militant violence due to their isolation and the limited presence of security forces. DFAT report that between 2009 and 2014, Turis (also Shias) were frequently stopped along the Tall-Parachinar road linking Kurram Agency and Peshawar, but that by 2018 these attacks had significantly declined due to military operations that forced militants into the mountains. This has restored confidence within the community for individuals to travel on the Tall-Parachinar road. DFAT's 2019 reporting on incidents involving Shias on the Tall-Parachinar road is consistent with its 2016 report about Shias in Pakistan, which indicates that there have been no major incidents on that road since 2014. The country information before me does not indicate that Shias and/or members of the Bangash tribe are being targeted on the roads to Kurram from areas like Islamabad or Peshawar (where the applicant could re-enter Pakistan, via the airport). While the absence of recent attacks against the Shia or Bangash population on the roads leading to Parachinar and [Location 1] from these areas does not preclude the possibility of future attacks, when I consider the frequency of such attacks, and the improved security situation and security measures in the country, I consider the chance that he will be involved in an incident or attack on the road (such as being kidnapped), or put at additional risk because of his tribal, ethnic, or religious profile, to be remote. Further, on the

information before me, I am not satisfied the applicant faces a real chance of harm on the roads returning to his home area from criminal or other non-sectarian violence. I am satisfied the applicant is able to safely access his home area.

33. Although not specifically raised as part of his protection claims, the delegate considered the applicant's mental health on return to Pakistan. According to the letter from the social worker, the applicant attended mental health counselling between August 2018 and January 2019. He also noted that the applicant had reported to have undergone surgery for [Medical Condition 1] in 2018. Based on a clinical assessment interview and a self-report questionnaire, the social worker opined that the applicant is experiencing post-traumatic stress, and that there are indications that he is suffering from depression and anxiety. There is no indication from the social worker that the applicant has been diagnosed with a psychological condition or that he is taking medication. The social worker stated that the applicant has demonstrated a willingness to continue to address his mental state through continued counselling. I note the applicant's evidence in the SHEV interview that he was currently employed and had engaged in ongoing employment in Australia since 2015 in a number of roles. He has completed some vocational courses.
34. There is no evidence before me that the applicant's [Medical Condition 1] problems are ongoing and that he requires further treatment following his reported surgery in 2018. The applicant has not claimed that he fears harm in Pakistan in connection with any mental health or [Medical Condition 1 issues], or that he would be denied or unable to access medical treatment in the country if required. There was no mention of the applicant's health in the SHEV interview or post-SHEV interview submission. In 2019, DFAT report that basic health care in Pakistan is free despite factors that reduce quality and accessibility. Many religious and secular charities are said to provide health services and focus their support on the specific needs of their community or sect. Information in the review material does not indicate that mental health factors would contribute to a person having a risk profile, or that treatment for such conditions in Pakistan is intentionally withheld on the basis of a person's religion, ethnicity, or any other profile. On the evidence before me, I am not satisfied that the applicant faces a real chance of harm in Pakistan due to any health condition.
35. In his decision, the delegate states that the applicant's details were inadvertently published on the Department's website in February 2014 (the data breach), and that the applicant was informed of this by letter on 14 March 2014. He states that the applicant raised no claims of harm in respect of this. However, although not mentioned in his SHEV application, in the SHEV interview, or in the post-SHEV interview submission, according to social worker's letter, the applicant indicated to him that he feared for his safety because 'his data was mistakenly leaked by the Australian Government', which I infer to relate to the data breach. He also separately indicated to fear harm because 'his identity was mixed up with another person who had the same name'.
36. I have considered the information before me in respect of the claimed identity mix up. According to email correspondence from the applicant's former representative to the Department, the applicant claimed that in 2018 he received from the Department, in error, identity documents belonging to another person. There is no indication in the review material that the applicant's identity documents were inadvertently sent to another party. I also note that the delegate accepted that the applicant's identity is as claimed. On the information before me, I am not satisfied that the applicant faces a real chance of harm on account of another person's identity documents being inadvertently sent to him in 2018.

37. I have considered new information in relation to the data breach. That information indicates that personal identifiers of some people in immigration detention mistakenly were made publically available in a document on the website of DIBP for a period of approximately 14 days in February 2014.<sup>3</sup> The information indicates the information published included name, date of birth, nationality, gender, details of detention (when, why and where) and family members in detention (if any). The delegate states that the applicant was affected by the data breach and I accept this to be the case. The facts before the Full Court Federal Court in *SZSSJ*<sup>4</sup> are that the document was accessed 123 times and in its report to DIBP following the data breach, KMPG stated it was not possible to discount the authorities in another country may have accessed the document.
38. While the social worker's letter does not specifically state why the applicant said that he feared harm due to the data breach, I infer it relates to his claims before the delegate that he will face harm in Pakistan because he travelled to and lived in Australia / a western country. As noted above, the applicant advanced no claims in his SHEV application, in the SHEV interview, or in the post-SHEV interview submission about fearing harm due to the data breach. There is no evidence before me to indicate that any protection claims were published or that the material published has been accessed by persons the applicant fears. Nevertheless, I accept that it is possible that persons or groups such as the Taliban in Pakistan have accessed the information.
39. In his SHEV application, the applicant indicated that he would face harm on return to Pakistan because it is common knowledge that he left the country and 'tried to run away from their (the Taliban's) atrocities'. He stated that the Taliban are aware of every person's arrival and departure, and by virtue of his 'running away' from them it would be enough for him to be killed. He will be murdered to make an example of others. In the SHEV interview, he elaborated advising the delegate that, while he did not have any evidence to corroborate these claims, due to having resided in Australia he will be perceived as having been educated in a western country (whether he has or not) and will be harmed on this basis. He said he was aware of a case involving surgeon in Peshawar who was kidnapped after he had completed his studies in London. The applicant further claimed that persons in his home area who knew him had either joined or were supporting the Taliban.
40. As part of his assessment, the delegate considered whether the applicant faced harm in Pakistan due to his profile as a 'failed asylum seeker' and 'returnee from a western country'. I accept that if the applicant returns to Pakistan it may become known to the authorities that he is returning to Pakistan after failing to seek asylum and after spending a number of years in Australia. I consider that this would be apparent due to the circumstances of his return from Australia on temporary travel document given his previous passport is expired and was taken from him by an agent in Indonesia.
41. In 2017, DFAT reported that western influence is pervasive in many parts of Pakistan. DFAT also reported that western films and music are widely available, and western-branded retail chains operate throughout the country. Both Urdu and English are official languages, and English is taught in many schools and is widely spoken among Pakistan's elite. Many Pakistanis have relatives in western countries and many more aspire to migrate abroad. Those living abroad return to Pakistan frequently to visit relatives. DFAT assessed that persons aren't subject to additional risk of discrimination or violence on the basis of spending

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<sup>3</sup> Guardian (Australia edition), "Scott Morrison ensured asylum seeker data breach probe failed, court finds", 18 September 2015, CXBD6A0DE19005; *SZSSJ v MIBP* [2015] FCAFC 125

<sup>4</sup> *SZSSJ v MIBP* [2015] FCAFC 125

time in a western country or because of perceived western associations, despite a generally increasing conservatism and religiosity across the country. Similarly, in 2019, DFAT assesses that returnees to Pakistan do not face a significant risk of societal violence or discrimination as a result of their attempt to migrate, or because they lived in a western country. DFAT also indicate that returnees are typically able to reintegrate into Pakistani community without repercussions stemming from their migration attempt.

42. The applicant has not claimed that he fears harm on return to Pakistan due to a profile of 'failed asylum seeker' and, on the evidence before me, I am not satisfied he faces a real chance of harm for this reason. Further, there is no credible information before me to indicate that returnees to Parachinar or Kurram are being killed or being made examples of by the Taliban due to their travel abroad, or for any other reason. Nor is there any credible evidence before me that people, like the applicant, are having their movements monitored by the Taliban.
43. Even accepting that persons or groups such as the Taliban in Pakistan may have accessed information about the applicant as a result of the data breach, I consider the chance that he would face harm on this basis remote. I am not satisfied that the applicant's asylum claims were published so the Taliban or other persons would therefore not know his reasons for seeking protection. Having considered all of the information before me, I am not satisfied that the applicant had an adverse profile with the Taliban, or any other person or group, prior to his departure from Pakistan in 2012, and nor am I satisfied he will have such a profile in 2019 for the reasons claimed. Overall, I found the applicant's evidence that his movements have been monitored by the Taliban, and that persons in his home area known to him have joined, or are now supporters of, the Taliban unconvincing. On the information before me, I am not satisfied that, on return to Pakistan, there is a real chance that the applicant will be harmed due to his profile as a failed asylum seeker, due to the data breach, due to his time in Australia/the west, due to a perception he has received a western or Australian education, due to leaving his home area/travel to Australia, or a combination of these factors.
44. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

#### **Refugee: conclusion**

45. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

#### **Complementary protection assessment**

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46. 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**

47. 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.

48. I have concluded that the applicant does not face a real chance of harm in his home area from the Pakistan authorities or groups like the Taliban. I have also concluded that he does not face a real chance of harm in accessing or travelling around his home area. I have further concluded that the applicant does not face a real chance of harm for any other reason including due to militant and criminal violence, due to his health, due to him receiving identity documents belonging to another person, due to his ethnicity, due to his religion, as a Bangash, as a Shia Bangash, as a Shia from Parachinar, or related profiles, due to the data breach, due his time spent in Australia/the west, due to any perceived westernisation including a perception he has received a western or Australian education, due to leaving his home area/travel to Australia, or due to him being a returning failed asylum seeker who has resided in a western country. Based on the same information, I am not satisfied that the applicant has a real risk of suffering significant harm in [Location 1] (or accessing [Location 1]) or the surrounds.

49. 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**

50. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

#### **Decision**

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

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

...

***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.