



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

PAKISTAN
IAA reference: IAA20/07848

Date and time of decision: 2 March 2020 13:44:00
J Jennings, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be Shia Turi from Parachinar, Pakistan. On 6 June 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790. He claims that he fears harm from extremists in Pakistan.
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 31 January 2020. The delegate was not satisfied that the applicant had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in 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).
4. On 20 February 2020 the IAA received a submission from the applicant's representative comprising a statement which addressed the delegate's decision and findings and provided new information.
5. The submission referred to information from Turis which demonstrates they are still being persecuted in Pakistan and was accompanied by statements from a political leader in Parachinar and [an official] of the Pakistan Police Force. Both documents predate the delegate's decision.¹ There is no information before me to explain why this information could not have been made available to the Minister. Nor am I satisfied that the statements contain credible personal information. The statements provide general comments about the situation for Turis in Pakistan and while they refer to incidents of attack these are un-particularised; there are no dates for these attacks, or locations, or indication of the source of this information.
6. The information before the delegate, including in a comprehensive post-interview submission, is detailed in its account of incidents and generally provides the source of information in contrast to that provided with the IAA submission which is very general in nature and lacking detail. In the post-interview submission dated 26 January 2020 the applicant's then representative made reference to and cited country information regarding the situation in Pakistan, particularly for Shias and Turis, from a wide range of independent and authoritative sources. This included information from agencies such as the Center for Research and Security Studies, the European Asylum Support Office, the South Asia Terrorism Portal and the Pakistan Institute for Peace Studies. These agencies collect data from a broad range of credible and reliable sources and base their reporting on a range of sources including field researchers working in the region and reliable secondary sources and the South Asia Terrorism Portal manages a comprehensive and continuously updated database of all available information relating to terrorism and sectarian conflict in South Asia. Noting the very basic nature of the two statements attached to the IAA submission I am not satisfied as to their probative value in supporting the applicant's claims. Nor am I satisfied that any exceptional circumstances exist that justify the IAA considering the new information.

¹ Although the statement from a political leader is not dated the English language translation shows that it was translated on 7 October 2019

7. The IAA submission also included a report from [a named health service] dated November 2019. This report was not before the Minister and is new information. The report is credible personal information. However, the applicant did not advance any claims to fear harm or have other difficulties as a result of any mental health concerns, nor are any such claims now put to the IAA, and it is not apparent that this information, had it been known, may have affected the consideration of the applicant's claims.
8. The report noted symptoms of depression, stress and anxiety. The report referred to religious persecution, family dislocation and observations of various trauma in Pakistan. The report also referred to visa restrictions and detention after arrival in Australia as being issues. There is no reference to this report in the IAA statement or any explanation as to how the information in this report may be relevant to the applicant's claims or how it may affect the consideration of those claims. This report predates the applicant's interview with the delegate however the applicant made no reference to seeking counselling or psychological treatment at that interview, nor did he or his representative make any claims at that interview regarding his mental state or how his mental state may affect him should he return to Pakistan. Nor did he indicate that because of any depression, stress or anxiety he has experienced any difficulty in relating his claims, or that he has any memory or other concerns that may affect his ability to put forward his protection claims and there is no indication in the report itself that such is the case. I have listened to the audio recording of the SHEV interview and the applicant was seemingly able to engage with the delegate and provide relevant answers to her questions and was able to articulate his claims in a coherent manner.
9. I am not satisfied that the psychological report is information that had it been known may have affected the consideration of the applicant's claims. Nor am I satisfied that this information could not have been provided to the Minister. Furthermore, I am not satisfied that any exceptional circumstances exist that justify the IAA considering the new information.

Applicant's claims for protection

10. The applicant's claims can be summarised as follows:
 - The applicant is a Shia Pashtun from the Turi tribe.
 - The applicant was born in the Parachinar area, Pakistan. His village was located on the border between Shia and Sunni areas.
 - From 2007 sectarian violence broke out in the area and the Taliban and Sunni extremists attacked the Shias. Many people in the applicant's village were killed and at times the applicant and some members of his family relocated to the home of his grandparents to escape the conflict. Two of the applicant's [relatives] were killed by Sunni extremists.
 - The applicant's family, like other Turis, opposed the Taliban. The applicant was not involved in any fighting against the Taliban; his brothers may have been but he is not aware of their activities.
 - The applicant moved to Rawalpindi around mid-2011 to continue his education. Some of the students at the college were involved with Sunni extremist groups and the applicant was harassed by them. Stones were thrown at his hostel window and people would stand outside his room and make loud noises.
 - The applicant began to receive threatening letters at his hostel; one was thrown through his window with a rock and others were left at the hostel for him. The letters

abused him for being a Shia and threatened harm and told him to leave the college or he would be killed.

- The applicant complained to the hostel manager who reassured him not to worry.
- The applicant was concerned for his safety and he and his parents decided that he should leave Pakistan. The applicant obtained a passport and left Pakistan in March 2013 and travelled on to Australia.
- The applicant fears that should he return to Pakistan he would be harmed as a Shia and Turi. He fears terrorist networks in Pakistan who want to kill Shia people. His fear extends to all of Pakistan and he is unable to obtain protection from the authorities. As a Pashtun he cannot relocate within Pakistan.
- The applicant has provided a letter from the International Human Rights Commission which attests to sectarian violence in the applicant's village.
- In a post-interview submission the applicant's representative advanced that the applicant fears harm on the following basis:
 - ethnicity: as a member of the Shia Turi tribe from Kurram Agency
 - religion: as a Shia Muslim
 - actual/imputed political opinion; as an opponent of the Taliban and other Sunni extremist groups, as a Turi tribesman a tribe known for its vehement opposition of Sunni extremist groups, as a Shia Muslim who has spent years in a western country imputing him with a political opinion that is pro-western and in opposition to extremists
 - membership of a particular social group being; a failed asylum seeker returning from a western country, as someone with liberal values and appearance in a starkly traditional country; and as a perceived wealth person in a rural and largely lawless area.
- The applicant's father was injured in an incident at the Sadda Bazaar in October 2019.

Refugee assessment

11. 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

12. 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.
13. The applicant has consistently claimed to be a Shia Pashtun from the Turi tribe, born in the Parachinar area, Pakistan and has provided identity documents in support of his claimed identity. I accept the applicant's identity as stated and that Pakistan is the receiving country for the purpose of this review.
 14. I accept that his village was located on the border between Shia and Sunni areas.
 15. I accept that from 2007 the area was subject to sectarian violence and that on occasion his family relocated to his grandparents for their safety. The Kurram District, where the applicant's village is located, has been subject to sectarian dispute and conflict. Kurram, formally part of the Federally Administered Tribal Areas (FATA), became part of Khyber Pakhtunkhwa in 2018 and the area comprises both Shias and Sunnis. The area borders Afghanistan and Shias/Turis have been opposed the actions of the Taliban and Sunni militant groups seeking to use the area to gain entry to Afghanistan.² Noting the reporting of deaths in this sectarian violence I accept that his [relatives] were killed by Sunni extremists.
 16. I accept that as Shias and Turis the applicant's family was opposed to the Taliban and other extremist groups; however I do not accept that any family members were involved in any active fighting. At the SHEV interview the delegate asked the applicant about any involvement by his brothers, noting that in his statement of claims he referred to the family leaving the village during times of conflict. The applicant advised that at these times not all the family left and that someone usually stayed to look after the farm land. When asked if he ever talked about such activities with his family or brothers he advised that he had not as he was a just a student and he was sent to his grandparents. His account is that he does not know if his brothers fought but he contends that, because the Turis were opposed to the Taliban and because Turis acted together, his brothers may have done so, yet he never talked about this with them. I find this to be speculation and I consider it implausible that the applicant would have been unaware if his brothers fought against the Taliban if they were so involved. I find that the applicant's family was not involved in fighting against the Taliban.
 17. I accept that when the applicant was studying in Rawalpindi he came across students linked to Sunni extremist groups and that he was harassed by them. The applicant remained in Rawalpindi for over one year and continued to study although he was subject to this harassment and the more significant threat letters which brings into question his level of concern as to his safety at this time. Although he claimed that he avoided staying at the hostel and instead stayed with friends he continued to study at the college. There is no indication that he did not attend classes, rather he completed the school year and undertook the examinations. I am also surprised that he did not report these threats to the authorities

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Pakistan", 20 February 2019, 20190220093409; Marian Abou Zahab, "'It's Just a Sunni-Shiite Thing': Sectarianism and Talibanism in the FATA of Pakistan", Hurst & Company, 1 January 2013, CIS29402; McClatchy Newspapers, "Al Qaida-allied Afghan fighters seek new Pakistan haven", 24 December 2010, CX288770; New America Foundation, 'he Battle for Pakistan: Militancy and Conflict in Kurram", Mahsun, MK, April 2010, CIS18543

considering his claimed fear of harm as a result of these threats. I accept that the applicant wanted to complete the examinations at the end of [year] but his continued study and residence in Rawalpindi militates against his claimed fear of harm from this harassment and the threats. However, despite my concerns in this regard it is plausible that the applicant was threatened by Sunni extremist in the manner described and I accept this claim.

18. The applicant departed Pakistan in 2013 and he fears should he return he will be harmed by Sunni extremists groups who continue to operate in Pakistan. The IAA submission asserts that the applicant's subjective fear is evidenced by his decision to risk his life to flee Pakistan as have many other members of the Turi tribe. While I accept that the applicant may have a subjective fear of returning to Pakistan the refugee assessment requires me to assess if there is a real chance of harm. I also accept that the applicant experienced harassment and threats in the past and that his [relatives] were killed by Sunni extremists but the refugee assessment is a forward looking one and considering the country information discussed below which indicates a significant improvement in the security situation since the applicant's departure I am not satisfied that there is a real chance he would be harmed should he return to Pakistan.
19. The conflict between the Turis and the various Sunni militant groups dates largely from 2007 when the Taliban, Al Qaeda, Islamic State and similar groups became prominent in the area. Shias in the area, particularly the Turi tribe, opposed the actions and influence of such groups and fiercely guarded their tribal lands resulting in significant outbreak of violence with Sunni tribes in April 2007. The violence escalated with the involvement of the Taliban which had established a stronghold in lower Kurram and stepped into the dispute to support the Sunnis. However due to the threat of rising Islamist militancy, particularly Al Qaeda, and ongoing violent attacks by militants the Pakistani government responded with counter-terrorism measures designed to disrupt the militants' activities and influence. In 2014 the authorities launched operation Zarb-e-Azb in parts of the then FATA. This operation spread more widely into Khyber Pakhtunkhwa targeting terrorist, separatist and criminal groups. Operation Zarb-e-Azb and similar initiatives are credited with achieving a significant reduction in violent and terrorism related attacks. Throughout 2015/2016 military operations continued under a National Action Plan to target militant groups operating in the FATA.³
20. Initially these counter-terrorism actions resulted in a significant reduction in the number of casualties from terrorist attacks but in response militant groups launched a number of major attacks in 2017. Militants carried out a number of attacks in Parachinar in Kurram District including three bombings, one of which killed 72 people in a market leading up to the Eid festival. Further reports are of roadside bomb attacks in which a number of Shias and government officials were killed in 2017 and early 2018 and a number of sectarian incidents and reports of attacks on Shias between March and April 2018 although these shooting attacks occurred outside the Kurram District.⁴ Deaths and casualties from these incidents were high and in response the Pakistani government ramped up its counter-terrorism efforts. In 2018 national security operations resulted in a significant reduction in terrorism related attacks and in 2019 DFAT reported that military operations have forced militants into the mountains.⁵

³ DFAT, "Country Information Report – Pakistan", 20 February 2019, 20190220093409; DFAT, "Pakistan Country Information Report 1 September 2017", 1 September 2017, CISED50AD5515

⁴ DFAT, "Pakistan Country Information Report 1 September 2017", 1 September 2017, CISED50AD5515; Fata Research Centre, "FATA Annual Security Report 2017", 17 January 2018, CIS7B8394188; FATA Research Centre, "FATA Annual Security Report 2016", 24 January 2017, CISED50AD120; post-interview submission: European Asylum Support Office (EASO), "EASO Country of Origin Information Report - Pakistan Security Situation", 16 October 2018

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

21. In support of his claims the applicant provided a letter from [the International Human Rights Commission]. This letter referred to sectarian violence in the applicant's village [named] over the past two decades and stated [a number of] people had died due to such violence and that village land had been illegally possessed by the Taliban. The letter provides no detail as to the deaths, how or when they occurred. However noting the reported level of sectarian violence I accept that such deaths may have occurred in the region of the applicant's village over a period of two decades and that land had been illegally possessed by the Taliban. The letter is undated and the signature block refers to KPF-FATA indicating the letter pre-dates 2018 when the FATA became defunct. I am not persuaded it provides an accurate reflection of the current situation and I give it little weight, noting the country information from a wide range of sources reporting the downturn in attacks and that the Taliban have been restricted to the mountains.
22. Despite the reduction in terrorist attacks and the decline of effectiveness of militant groups who have become restricted to the mountains, the 2019 DFAT report commented that "the Taliban and Al Qaeda have gained significant ground in the former FATA, killing many Shi'a—especially in Parachinar, rendering Turis and other Shi'a tribes of the former FATA amongst the most vulnerable across Pakistan". However the same paragraph goes on to refer to "significant violence" between 2008 and 2014 indicating the references to Shia deaths relates to that period. This report details the significant number of attacks by militant groups throughout Pakistan in 2018 and noted that in 2018 Khyber Pakhtunkhwa reported the highest number of terrorist attacks in Pakistan but does not specify any particular incidents in the Kurram District since the first half of 2017 and the information before me does not indicate large-scale attacks or high levels of casualties since that period.
23. DFAT noted an overall reduction in the level of violence but assessed that sporadic large-scale terrorist attacks may still occur against a background of ongoing small-scale attacks (albeit at a reduced rate) and the risk of sectarian violence for civilians in the Kurram District remains higher than for civilians in other parts of the FATA. Despite the reduction in terrorist attacks and the effectiveness of militant groups, DFAT reported that Shia tribes in the former FATA are among the most vulnerable groups in Pakistan. DFAT noted the Turi community reported two attacks in early 2018 (which DFAT is unable to verify), in comparison to estimates from the community that in the previous year 200 Turis were killed and 1000 injured. However DFAT also noted that counter-terrorism measures have significantly decreased the number and severity of attacks on Turis and the community reported significantly fewer road attacks in 2018, restoring some confidence within the community travelling on the road.⁶ The government continues to maintain its security program and counter-terrorism activities to repress the influence of Sunni militant groups. Indicative of this are the continuing security arrangements put in place to secure mosque attendance and large Shia events such as Ashura.⁷
24. The post-interview submission submitted that although country information generally supports there has been a steady decline in sectarian conflict in Pakistan since the implementation of the National Action Plan "the majority, if not all of these same reports, claim that long-term, sustainable reconciliation along the Sunni/Shi'a schism has not yet been achieved, is perhaps irreconcilable and a degree of fragility to the current security arrangements continues to exist". The submission advanced that although there has been an overall decrease in total numbers of violent incidents and casualties, armed clashes were still

⁶ DFAT, "DFAT Country Information Report – Pakistan", 20 February 2019, 20190220093409

⁷ Dawn News, "Ashura observed peacefully amid tight security in KP", 23 September 2018, CXBB8A1DA35781; Geo TV, "Ashura processions culminate countrywide, majalis under way", 21 September 2018, CXBB8A1DA35780

reported in all four provinces of Pakistan and in the FATA and that militant groups continued to conduct attacks in 2017 and 2018, including suicide attacks, targeted killings, and sectarian-related violence. However of the incidents cited in the submission these largely related to the 2017 attacks noted above or were incidents in other areas and not in the Kurram District or were attacks on Hazaras or other groups. I note the reference to “multiple drone attacks” in 2017/2018 but it is important to note that the European Asylum Support Office reporting of drone attacks was of US forces targeting Sunni militants.⁸ The post-interview submission noted the death of six people killed in an explosion in January 2018 but I note that Dawn News reported there were conflicting accounts as to whether the victims were Shia or Sunni and that local officials were unclear whether the blast was a landmine or a roadside bomb planted by militants.⁹

25. I have considered the country information before me reporting history of attacks in Pakistan, and in the Kurram District specifically and I note the indications of a downward trend in such attacks as a result of increased security measures taken by the authorities.¹⁰ I acknowledge the situation in Pakistan is fluid. But the indications are that the Pakistani authorities have no plans to discontinue the security operations and counter-terrorism measures that have been successful in achieving a decline in militant attacks or that the greater stability now present in Khyber Pakhtunkhwa will diminish in the foreseeable future. I acknowledge the past history of sectarian attacks resulting in high levels of deaths and casualties in the FATA, and the upswing in attacks in early 2017, but considered overall I am not satisfied that the high level of violence has continued or may increase in the reasonably foreseeable future. I accept that the applicant may be readily identified as a Shia and Turi from the Kurram District but I am not satisfied that as such there is a real chance he would be harmed in the Kurram District. I note his concern that his village borders a Sunni area but the country information is that the extremists have been pushed into the mountains and that Shias and Turis report feeling more protected.¹¹ Nor am I satisfied that the chance he may be harmed or killed as a bystander in an attack is more than remote. I accept that the applicant would need to travel within Pakistan to return to his home in the Kurram District and I note his concern regarding road safety deterred him from returning home at the end of the school year in 2012. But the country information before me indicates that the road to Parachinar is now open and Pakistanis are travelling on this road to safely access Parachinar and Upper Kurram.¹²
26. At the SHEV interview the applicant advised that his father had been injured in a recent incident in the bazaar in an attack on Turis. The post-interview submission expands on this matter and informed that the applicant’s father was “present at the October 2019 Sadar Bazaar Protest, was injured by the Taliban who were trying to make a personal matter he was involved in into a sectarian issue” and contended “this demonstrates that the [applicant’s] family is known to the Taliban and the fact that the Taliban would target [his] father implies that they will stop at nothing to target [the applicant] as well”. The supporting country provided advised that riots were sparked in Sadda (Kurram District) in October 2019 following the killing of two people due to attend a court hearing for the earlier kidnap of two girls.¹³ The indications from this report are that the two deceased were killed in a feud between

⁸ Post-interview submission: European Asylum Support Office (EASO), “EASO Country of Origin Information Report - Pakistan Security Situation”, 16 October 2018

⁹ Dawn (Pakistan), “Six of a family killed in landmine blast in Kurram”, 31 January 2018, 20190912113354

¹⁰ FATA Research Centre, “FATA Annual Security Report 2017”, 17 January 2018, CIS7B8394188; European Asylum Support Office (EASO), “EASO Country of Origin Information Report - Pakistan Security Situation”, 16 October 2018. The EASO report also includes reporting from the Pak Institute for Peace Studies Security Report for 2017

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

¹² *ibid*

¹³ Post-interview submission: Dawn, “Double Murder Sparks Violent Protests in Kurram”, 16 October, 2019

families and escalated into a riot which was described by a local politician as “vested interests ... trying to turn a dispute between two families into sectarian issue”. While I accept it is possible the applicant’s father was present in Sadda at this time and was injured in the affray I am not satisfied that this was a targeted attack on him or that it points to the applicant or his family being of adverse interest to the Taliban or other extremists, other than for being Shia Turi. Nor is it apparent in the media article that the Taliban were present or involved in this incident. The indications are that this was a riot that flared as a result of the killing of the two accused. The media article reported the experience of an uninvolved passer-by whose car was attacked and set on fire by the mob and I am satisfied that the applicant’s father was similarly an uninvolved party who was injured in what was an incident of public disarray. Although I accept that Shia Turis have been targeted for harm by extremists, particularly in the bomb attacks designed to cause maximum carnage to Shia in public places, I do not accept that the applicant or his family were imputed as opponents of the Taliban and specifically targeted for harm. I have not accepted that the applicant’s family members were involved in any fighting against Sunni militants and there is no indication that any family members have been targeted for harm since the applicant departed Pakistan in 2013 and I do not accept the applicant’s father was targeted by extremists in the October 2019 incident or that the applicant would be imputed with a profile that would result in a real chance of harm from extremists.

27. I accept that this incident would have been of concern for the applicant but from the media report it is apparent the authorities took appropriate steps to contain the situation. The media article reports law enforcement agencies were deployed to the town to restore calm and that negotiations were underway between the officials and the local administration to defuse tension in the area and that security forces blocked main roads to traffic at different locations to control the situation.
28. It is advanced that the applicant may be imputed to be a liberal and his alleged wealth will attract the attention of bandits and thugs and that kidnappings for ransom are “common” in Pakistan. I have considered the media report cited in support of this concern and while this reports on kidnappings by criminal gangs, militant groups and by people settling personal scores , I am not satisfied that it supports that there is a real chance the applicant would be so harmed.¹⁴ I note DFAT assess that returnees to Pakistan do not face a significant risk of societal violence or discrimination as a result of their attempt to migrate, or because of having lived in a western country.¹⁵ I am not satisfied that there is a real chance the applicant would be harmed on the basis of being a failed asylum seeker returning from a western country, as someone with liberal values and appearance in a starkly traditional country, or as a perceived wealthy person in a rural and largely lawless area.
29. The continued decline in attacks indicates the effectiveness of the government’s counter-terrorism operations, which remain ongoing although the government has scaled these back, and point to a meaningful and sustained change in the Kurram District. I accept that the applicant may wish to “stand with [his] community” in Pakistan but I am not satisfied that he would experience harm in doing so. I am satisfied that there are effective and durable security measures in place and I am not satisfied that there is a real chance the applicant would be harmed in the reasonably foreseeable future for reason of his race, religion or actual or imputed political opinion, or as a failed asylum seeker returning from a western country, as someone with liberal values and appearance in a starkly traditional country, or as a perceived wealthy person in a rural and largely lawless area.

¹⁴ Post-interview submission: Herald, “Kidnapping for Ransom: Professionals, Amateurs and Con-Men”, 20 May 2016

¹⁵ DFAT, “DFAT Country Information Report – Pakistan”, 20 February 2019, 20190220093409

Refugee: conclusion

30. I am not satisfied that the applicant would experience persecution in Pakistan in the foreseeable future on any of the bases claimed, considered individually or cumulatively.
31. 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

32. 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

33. 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.
34. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
35. I have found there is not a real chance that the applicant faces harm on any of the bases claimed. Noting that the "real risk" test for complementary protection is the same standard as the "real chance" test, and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

Complementary protection: conclusion

36. 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.