



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

PAKISTAN
IAA reference: IAA20/08481

Date and time of decision: 15 July 2020 09:53:00
G Ma, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Pashtun Turi Shia from Parachinar, Pakistan. On 11 August 2017 he lodged an application for a safe haven enterprise visa (SHEV). On 3 June 2020, a delegate of the Minister for Immigration (the delegate) refused to grant the visa.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 30 June 2020, the IAA received a submission from the applicant's representative (the IAA submission). To the extent that it engages in argument with the delegate's decision by reference to materials that were before the delegate, I have had regard to it.
4. The IAA submission also refers to country information from the South Asian Terrorism Portal (SATP) and a "Pakistan Security Report 2019". This information was not before the delegate. It is new information.
5. This information purports to support the applicant's claims concerning the current security situation in Pakistan and that Shias in Pakistan are not safe. The source and date of the information has not been clearly identified. However, the contents of the information refer to a decrease of terrorist attacks in 2019 as compared to 2018, and the numbers of Shias killed in incidents of terrorism since 2001. This information pre-dates the delegate's decision. The information can be described as general country information rather than personal information in the relevant sense. There is a range of recent, authoritative and comprehensive country information about the situation for Shias and the current condition in Kurram and Pakistan that provide an in-depth statistical analysis on security incidents over a number of years before the delegate. I am of the view that this new information is of very limited value, and it does not add materially to the information that is already before me and the delegate. Considering all the relevant circumstances, I am not satisfied that there are exceptional circumstances to justify considering this new information. I am also not satisfied that s.473DD(b) is met.
6. I note that the delegate concluded that the applicant did not have a well-founded fear in his home region in Kurram mainly because he had no subjective fear of persecution, and that he would face a real risk of significant harm in Kurram, but it would be reasonable for him relocate to other areas in Pakistan. However, for the reasons expressed below, I have reached a different conclusion. In the particular circumstances of this case, I do not consider it necessary to obtain any new information from the applicant. Although he did not have the benefit of legal representation at the SHEV interview, his SHEV application and statutory declaration were prepared with the assistance of migration lawyers from '[a named agency]'. All the relevant issues, including matters relevant to the issue of risk of harm in Kurram, were canvassed by the delegate at the SHEV interview. He was assisted by an interpreter in the Urdu language during the SHEV interview. He also demonstrated a reasonable command of English language skills at that interview, where he responded directly in English on a number of occasions, and at times, he corrected the interpreter and clarified his evidence. He was on notice that he should address the issue of risk of harm in Kurram, which is the central issue for his case, and he did address it in his SHEV application and statutory declaration, and at the SHEV interview. He also took up

the opportunity to provide a submission to the IAA through his representative. I consider that he has had a number of real and meaningful opportunities to address this issue. Moreover, the delegate and I have before us multiple sources of independent and contemporaneous country information on this issue.

Applicant's claims for protection

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

- He is a Pashtun Turi Shia from [Town 1], Parachinar, Upper Kurram. He wife, [and specified family members] are now living at home in Parachinar. [Other family members are] married, and they are living in Islamabad and [Rawalpindi].
- The conflict between Shias in Parachinar and the Taliban has always been serious. There were two occasions where he nearly got killed by a suicidal bomb attack. One was on the Election Day for the Member of National Assembly. He was driving with his mother and sister and passed by a group of people. Five minutes after he passed by, he heard the sound of a bomb blast and people were killed in that attack. Another occasion was when he borrowed his cousin's car and he was driving to the city. He had to make a U-turn because of the heavy traffic at that time. After he made a U-turn, he heard a bomb blast from the road that he was on minutes ago.
- From January 2009 to October 2011, he lived and worked in [Country 1]. During this period he returned to Pakistan twice – to visit his family and to marry his wife in July 2011.
- In October 2011, he returned to Parachinar. He realized it was still dangerous and he feared for his life. He avoided areas with a lot of people whenever he went shopping in the city, to stay away from potential danger. He could not sleep at night because he feared being killed by the Taliban on the street or in a bomb blast. The two routes between Parachinar and Peshawar were monitored and ambushed by the Taliban.
- [In] May 2013, he left Pakistan for Australia.
- In June 2017, there were two bomb blasts which targeted Shias and Pashtuns living in Parachinar. As a result, one of his friends from the same school was killed.
- He fears harm from the Tehreek-e-Taliban (TTP) and other Sunni extremist groups such as Daesh, Lashkar-e-Jhangvi (LeJ), Sipah-e-Sahaba (SSP) because he is a Pashtun Turi Shia from Kurram.

Refugee assessment

8. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

9. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:

- the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
10. Based on the applicant's Pakistani passport and national ID card, I accept that he is a national of Pakistan. Pakistan is the relevant 'receiving country'.
11. I also accept that the applicant is a Pashtun Turi Shia from [Town 1], Parachinar, Upper Kurram. The Turi tribe is a Shia Pashtun Tribe of about 500,000 people. Most Turis live in Parachinar, lower and upper Kurram Agency, Orakzai, D.I Khan, Kohat and Hangu. Nearly all Turis are Shias. Shias live throughout Pakistan in urban areas. Kurram Agency has a significant Shia population. Upper Kurram is estimated to be around 80 percent Shias. Shias generally do not face discrimination in gaining employment in the public service or the private sector and in accessing education. Shias are well represented in parliament and there are no barriers preventing Shias from actively participating in democratic processes in Pakistan due to their sectarian affiliation. Generally, Shias are able to practise their Shia religion without official interference or discrimination. Turis tend to live in enclaves with other Turis, mitigating societal discrimination. Shia and Sunni communities are generally well integrated in Pakistan.¹
12. The applicant's wife, [and specified family members] are living at home in Parachinar, while [other family members] are living with their families in Islamabad and Rawalpindi. His uncle who used to live in [Country 1] financially supported him and his family in the past. He spent short periods in Peshawar, Lahore and [in another country], but except for his travel to Australia, he always returned to Parachinar. His evidence is that he does not know anyone and is not currently in touch with anyone in Lahore. I consider that he is very likely to return to his home in Parachinar if he returns to Pakistan, where he has family ties, tribal support and network.
13. It was submitted that there has been a long history of sectarian violence in Pakistan, "this situation is deeply prevailed in the politico-religious milieu of Pakistan's politics" and that "Pakistan is deeply compromised society and politically dominated by vested groups i.e. Sunni religious groups", which prevailed every part of Pakistan. It was also submitted that the applicant, being a Shia Turi from Parachinar, has a subjective fear of being seriously harmed by the Taliban and other groups in Pakistan. I note that the delegate found that the TTP and other Sunni militant groups, with anti-Shia objectives, are still present in the other districts of Khyber Pakhtunkhwa (KP), such as the North Waziristan District, and Nangarhar province in Afghanistan. Given the geographical proximity of the Kurram District to these areas, the delegate concluded that despite the improved security situation in Parachinar and Kurram, there remains ongoing threat of conflict and sectarian attacks against Turi Shias in Kurram. And

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Pakistan", 20 February 2019, 20190220093409.

therefore, the delegate found that there is a real risk of the applicant facing harm in his home area of Parachinar and Kurram.

14. I have considered the submissions, all the relevant factors that may affect the security landscape in Pakistan and Turi Shias from Kurram as referred to in the materials before me, including but not limited to the domestic politics, politically motivated violence, ethnic conflict, growing extremism and religious conservatism and intolerance, the objectives of the Sunni extremist groups, the historical relationship between Shia Turis from Parachinar and the Taliban, Daesh or other anti-Shia groups, the vulnerabilities of the Shia Turi communities, the international relations, influence and disputes with other countries such as India, Iran, Syria and Afghanistan, and the materials as a whole. However, I disagree with the delegate's conclusion. I am also not satisfied that the submissions and the anticipated effects of much of these factors are anything more than assumptions or conjecture. Notwithstanding the nature of the violence historically, it is patent from the information before me that there has been a sustained downward trend of violence in Pakistan over an extended period of time. And this was due to the ongoing security measures implemented by the Pakistani government since 2014. As the delegate pointed out in the primary decision, the Kurram District witnessed a 'remarkable decrease' in violent incidents and casualties, with a downward trend of attacks in the last few years. No militant attacks or civilian casualties were reported in Kurram in 2019. This is despite Kurram District's close proximity to these areas where anti-Shia militants continue to operate, and the factors that may affect the situation in Pakistan. I consider it speculative to conclude that the presence of anti-Shia militant groups in other areas of the KP and in Afghanistan will lead to a resurgence in conflict or violence in Kurram in the reasonably foreseeable future. I also consider it speculative to suggest that these factors, or the anticipated effects of these factors, will impact on the security situation or general situation in Pakistan, such that it would give rise to a real chance of harm to the applicant in the present case. Moreover, I am not satisfied on the evidence that the applicant being a Pashtun Turi Shia from Kurram would mean that he would be imputed by anyone as being against the Taliban or other groups, or support any State, group or person. I also do not accept the assertions that the Sunni militant groups or religious groups are discreetly supported by State institutions for ulterior motives. I consider these aspects of the claims and submissions to be speculative and not well supported by the evidence.
15. In the IAA submission, it was submitted that the delegate's decision "totally relies on DFAT report that is not the best way to judge the plight of Shias in Pakistan". The applicant said at the SHEV interview that the official government reports (regarding Pashtun Shias in Pakistan) are not based on, and did not consider all the effects and circumstances, and that they are based on official figures. The DFAT report does not rely only on government reports or official figures. It draws on DFAT's on-the-ground knowledge and discussions with various sources in Pakistan. It also takes into account of information from a wide range of government and non-government sources, including but not limited to information produced by: SATP, the US State Department, the UN Office of the High Commission for Human Rights, the World Bank, and reputable news organisations. Also, the DFAT report was prepared for the specific purpose of protection status determination. Moreover, the delegate did not rely "totally" on the DFAT report. It is clear from the primary decision that the delegate considered multiple sources of country information, such as reports from the Pakistan Institute for Conflict and Security Studies (PICSS) and the FATA Research Centre (FRC). Furthermore, I have not considered the DFAT report in isolation but have also had regard to a range of other authoritative and independent reports.
16. I accept that Shia Turis have faced a long history of violence, and that there was violence against them particularly in the period before and around the time the applicant left for

Australia in 2013. Country information² indicates that violence from militant groups in Pakistan is mainly caused by the separatist insurgency in Balochistan and the instability in the north-west of Pakistan resulting from the 2001 toppling of the Taliban regime in Afghanistan. The Afghan Taliban fled the invasion of an international coalition led by the US in Afghanistan, and settled in former FATA and the former North Western Frontier Province (now KP). Under their influence, some Pakistani groups with a similar ideology worked together and developed into a federation of armed groups, which resulted in the so-called 'Talibanisation' of the region. Taliban policies included a strict application of conservative Islamic principles, which resulted in violence against civilians and the authorities. Between around 2007 and 2014, Turis faced significant violence from Sunni extremist groups, such as the TTP, who targeted them for their Shia faith, especially in Parachinar. Militants frequently stopped and killed Turis travelling on roads, and a significant spike in profiling and targeted killings occurred between 2009 and 2014 along the Tall-Parachinar road, which links Kurram Agency and Peshawar. The evidence and information supplied by the applicant about the history and violence in this period are generally consistent with the other country information in the review material.³ I accept that the conflict started in 2007, there were target killings and bombings, many Shias in Kurram and those travelling on the roads were killed by the Taliban. I also accept that at that time, the applicant and his family would hear about attacks by Taliban against Shias in the city, some roads were blocked or monitored by the Taliban, and that there may have been instances where they drove past places where bomb explosions occurred minutes after they left.

17. There has however been a significant change in the situation in Pakistan since the applicant left in 2013. As corroborated by the submissions and evidence given by the applicant, extremist groups have maintained a presence in parts of Pakistan, and altered their strategies to adjust to the changing environment. It is also evident that Kurram remains of strategic interest to extremist groups because of its close proximity to Afghanistan, the security situation in Pakistan is complex and affected by various factors, and the threat of terrorism has not been completely eliminated. Some incidents of violence do occur. However, the overwhelming weight of information is that there has been dramatic, and now sustained, improvement in the situation in Parachinar and Kurram (particularly since 2017), and throughout Pakistan more generally. The frequency and the number of attacks in Parachinar and across Pakistan have continued to drop in the last few years.
18. In 2014, the Pakistani government launched military operation *Zarb-e-Azb* and announced a comprehensive plan of action, the National Action Plan (NAP) to confront the insurgent threat. Operation *Zarb-e-Azb* continued in 2015 and 2016. Although there was a spike in violence in 2017 in Kurram as compared to 2016 (such as an explosion in a market in January 2017, a suicide bomber attacked an Imambargah in Parachinar in March 2017, two devices detonated in a market in Parachinar in June 2017, where these three incidents killed more than 120 people), military operations *Radd-ul-Fasaad* and *Khyber-IV* were launched in response to this violence. This led to a sustained downward trend of violence in Parachinar and Kurram since 2017. Significantly fewer road attacks were reported by Turis in 2018, as military operations forced militants into the mountains. This restored confidence within the community for individuals, though not large groups, to travel on the Tall-Parachinar road during day time. More recently there have been even fewer reports of violence. The confidence of the minorities and the security situation have been improved by the continuing security measures, the building of military fencing in Kurram and the tightening of Afghanistan-Pakistan border

² DFAT, "DFAT Country Information Report Pakistan", 20 February 2019, 20190220093409; European Asylum Support Office (EASO), "EASO Country of Origin Information Report, Pakistan Security Situation", 16 October 2018, CIS7B8394110560: Pakistan Institute for Peace Studies (PIPS), "Pakistan Security Report 2018", 6 January 2019, 20190121110758.

³ Ibid.

controls. The Turi community advised DFAT that the military implements a 20 to 30 square kilometre area red zone for Parachinar, and a second, smaller red zone inside the outer red zone, in which markets and schools are located. Security forces have issued cards to access the red zones, which can be obtained by residents on presentation of identity documents (computerised national ID cards and passports). The Taliban's support base is primarily Pashtun (who are predominantly Sunnis, but not exclusively), and the NAP and the military operations against the extremists groups have reportedly led to official discrimination and racial profiling in terrorism-related arrests of Pashtuns by security forces in areas where they are a minority, particularly in Punjab. Shias have faced some risk of violence while travelling by road to Iran and Iraq on religious pilgrimage, however, the government has provided security assistance for such journeys. The anti-insurgency operations and security measures have considerably weakened the operational capacity of militant organizations, and substantially diminished the number and severity of attacks against Pashtun Shia Turis in Kurram. A loss of terrorist training infrastructure, hideouts and loss of local support within the Pashtun communities has deprived them from local recruits and sources of terror financing. These contributed to a higher level of security in Khyber, including former FATA.⁴

19. Nevertheless, I note that in its early 2019 report DFAT assessed that Turis in Kurram faced a 'moderate risk' of sectarian violence due to their Shia faith although it also assessed that Shias in the former FATA faced a 'low risk' of sectarian violence (within the context of a moderate level of militant and criminal violence across the region). The term 'moderate risk' is defined as DFAT being 'aware of sufficient incidents to suggest a pattern of behaviour', and the term 'low risk' is defined as it being 'aware of incidents but has insufficient evidence to conclude they form a pattern'. Notwithstanding this assessment, it is clear from the other authoritative reports, such as the publications from PICSS and Center for Research and Security Studies (CRSS), which contain detailed statistical information on events over the years, that there has been a visible trend of decreased reports of attacks against Shia Turis after 2017, which continued into 2019 and to date. This was due to the ongoing and substantial improvement in the security situation in Parachinar and the Kurram Agency. DFAT does not report on specific incidents during the relevant period that would indicate otherwise. Notably, these other publications do not indicate that there were any significant terrorist attacks or attacks against Pashtun Turi Shias in Parachinar or the Kurram Agency reported in 2018, 2019, and there are no reports before me of any similar attacks in 2020.
20. Some of the evidence given by the applicant contains information about threats and attacks against Turi Shias in Kurram, Shias in Pakistan and general information concerning the situation in Pakistan, such as the bomb blasts in June 2017. However, I am not prepared to accept his bare assertion that his friend was killed in an attack in June 2017. In any event, he did not claim, and I am not satisfied on the evidence that he will face a real chance of harm because of his friend. I consider that the evidence and submissions provided by the applicant concerning the threats and attacks against Turis Shias, Shias in Pakistan and general information about the situation in Pakistan are broadly consistent with the country information above, and do not contradict the fact that there has been no significant attack against Shia Turis in Parachinar and Kurram since 2018, and that there has been a sustained decreasing trend of violence.
21. The information from the authoritative, comprehensive and recent publications above makes plain that the significant, and now sustained, improvement in the security situation and general

⁴ DFAT, "DFAT Country Information Report Pakistan", 20 February 2019, 20190220093409; Pakistan Institute for Conflict and Security Studies (PICSS), "2019 Annual Security Assessment Report", 9 January 2020, 20200122140652; Mohammed Nafees, "CRSS Annual Security Report 2019", Center for Research and Security Studies (CRSS), 28 January 2020, 20200130161732; and Irfan U Din and Mansur Khan Mahsud, "Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2019", FATA Research Centre, 13 January 2020, 20200122123739.

situation in Pakistan in recent years is the result of the concerted anti-terrorism efforts by the government over the last six years. I do not accept the assertions that the government's efforts have not been effective in countering the violence or the growing influence of extremist forces, or that the State does not care about the lives or security of Shias, or that no sustainable military action was specifically initiated against Sunni militant outfits, or that the authorities made little effort to improve the situation. Also, the applicant's family members have been able to live in Pakistan without harm. His evidence at the SHEV interview was that his son has been attending school, which is about 15 to 20 minutes from home. He said that his family in Parachinar has not been harmed recently because the Sunnis and those "elements" have left, so there is no harm from the Sunnis, Parachinar is safe, and his family is safe. He explained that "those elements" meant that "in Parachinar, there are Sunnis and Shias. And when there was war, the Sunnis brought the Taliban there, and... the... power on the Taliban and when we hold power... then they had to leave, then they have left..." He also said that he does not fear persecution in Parachinar upon return, because the Sunnis and those elements have left Parachinar. This is broadly reflective of the country information above that there has been a ten-year downward trend of violence in Pakistan.

22. The applicant has not faced any past harm. He was not, and is not of any interest to the Taliban or other groups. His own evidence at the SHEV interview was that their house is close to the houses of people from the Bangash tribe, and the Turis and Bangash in their area live together without any discrimination. Also, the Sunnis and those "elements" have left, and Parachinar is safe. In light of the recent country information above, even noting the location of his home village, which is near Parachinar city, and close to the Afghan border, I am not satisfied that the chance of the applicant facing harm by anyone as a Pashtun Turi Shia from Kurram to be any more than remote. I consider that he would continue to be able to freely practise his Shia faith in the same manner upon return to Parachinar or Upper Kurram, which is a Shia majority area, without a real chance of harm. I am also not satisfied that upon return, there is a real chance of him facing harm when travelling on the roads, at the airports or other public points. I am also not satisfied on the evidence that there is a real chance of him facing harm by the government, the authorities, the Taliban or the other extremist groups, other religious sects, any other groups or anyone for reasons relating to his profile, or his real or imputed views or political opinion, or any particular social groups upon return. Although the above DFAT information notes that the NAP and the military operations have led to official discrimination and racial profiling of Pashtuns in terrorism-related arrests, the applicant is not a Sunni Muslim, and on his evidence, he can easily be recognized as a Shia from Parachinar by his name, language, his identity documents and the knife marks on his back as a result of the religious ritual 'Zanjeer Zani'. I consider the chance of him facing such harm to be remote.
23. The applicant is an able-bodied man of working age at [age] years old. He completed education up to grade [number] in Parachinar. He then started further studies in Peshawar but he withdrew from studies as his father's financial position was not good. The next year, his mother sent him to Lahore where he studied for three months but he failed. He then went to [Country 1]. He worked as [an occupation] for over two and a half years in [Country 1]. He gave evidence at the SHEV interview that he has been working [in a related occupation] in Australia, initially with another company, and now in his cousin's company. He can speak the Pashto, Urdu and English languages. As noted above, he has demonstrated a reasonable command of the English language skills at the SHEV interview. He can also read and write Urdu and English. Also, as the delegate pointed out, there is nothing to suggest that he could not undertake employment with physical demands. Further, given the substantial improvement in the condition in Pakistan, including for individuals travelling on the roads during day time, I am not satisfied that he will need to confine himself in Parachinar. Even noting his claims that he is the breadwinner for the family, his father cannot work, his brother does not want to work, and

that he can find a job in Parachinar but he may not be able to earn enough, I am not satisfied that he would be unable to access employment upon return or that there is a real chance he will suffer any harm in this regard.

24. Country information⁵ indicates that western influence is pervasive in many parts of Pakistan. Moreover, returnees who exited Pakistan on valid travel documents do not commit immigration offences under Pakistan law. Those who return voluntarily and with valid travel documentation are typically processed like any other citizens returning to Pakistan. The government issues 'genuine returnees', that is, those who left Pakistan legally, with temporary documents when they arrive. People suspected of, or charged with, criminal offences in Pakistan are likely to face questioning on return. Involuntary returnees may be questioned by the authorities upon return to determine whether they left Pakistan illegally, are wanted for crimes in Pakistan or committed any offences while abroad. Citizens who departed Pakistan on valid travel document and have not committed any other crimes are 'typically released within a couple of hours'. Generally, returnees do not face mistreatment during this process. Returnees are typically able to reintegrate into Pakistan community without repercussions stemming from the migration attempt. Individuals are not subjected to discrimination or violence as a result of them having spent time in western countries, or as a result of their attempt to migrate. The materials before me do not support that returning asylum seekers from countries such as Australia who are Pashtun Turi Shia from Kurram face a real chance of harm from anyone on these bases.
25. The applicant existed Pakistan legally with his own passport via the Islamabad airport, and there is no apparent reason why he would not return to Pakistan via that same airport. He has not committed any criminal offence, and will not be perceived as such. I am not satisfied on the evidence that the processing on arrival at the airport would give rise to a real chance of any harm to him. The evidence does not support that he would not be able to safely and legally access Parachinar, Upper Kurram upon return. I am not satisfied on the evidence before me that the applicant will face a real chance of harm from the anti-Shia organisations or anyone at the airports or other public points. I am also not satisfied on the evidence that he would face a real chance of any harm by anyone for being a Pashtun Turi Shia returnee failed asylum seeker who spent time abroad in Australia.
26. I am not satisfied that there is a real chance of the applicant facing any harm for the reasons claimed now or in the reasonably foreseeable future if he returns to Pakistan.
27. The applicant does not have a well-founded fear of persecution.

Refugee: conclusion

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

Complementary protection assessment

29. 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

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

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

30. 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.
31. 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.
32. I have found above that the applicant does not face a real chance of harm for any reason now or in the reasonably foreseeable future. Given that the 'real risk' test imposes the same standard as the 'real chance' test, for the same reasons expressed above, I find that there is no real risk of the applicant suffering harm if he were to return to Pakistan for the purposes of s.36(2)(aa).

Complementary protection: conclusion

33. 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.