



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

PAKISTAN
IAA reference: IAA18/05639

Date and time of decision: 19 December 2018 16:01:00
S Ryan, 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 national of Pakistan and arrived in Australia [in] March 2013. On 20 May 2016 he lodged an application for a Safe Haven Enterprise visa (SHEV). A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 4 September 2018 and referred the matter to the IAA on 7 September 2018.

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. Parts of the submissions are legal argument, argument responding to the delegate's findings, and reassertion of claims and evidence that was before the delegate and are not new information and I have had regard to those matters. The submission seeks to introduce the following new information: general country information, information about the living arrangements for applicant's family and new claims – his fear of harm on account of the proximity of the applicant's village to Taliban headquarters in [District 1], and on the basis of his Pashtun ethnicity.
4. Under s.473DD(b) the applicant must satisfy the IAA in relation to any new information given by the applicant that either the new information was not, and could not, have been provided to the delegate before the decision was made, or, that it is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims. Additionally, under s.473DD(a), the IAA must be satisfied that there are exceptional circumstances to justify considering the new information.
5. The IAA 'Practice Direction for Applicants, Representatives and Authorised Recipients' (the Practice Directions) states "If you provide or refer to new information such as country information reports or media articles, you must provide a copy of that information or extract part(s) of the information on which you rely. You must identify the source of the information. Lists of publicly available documents or hyperlinks to publicly available documents are not acceptable."
6. The applicant and his representative argue that the applicant's previous legal representative did not assist him in a professional and thorough manner, he was not provided with a Pakistani Pashto speaking interpreter despite having requested one, and that he knew prior to the interview that the delegate assessing his case was biased and this caused him to be distressed. The applicant and his representative contend that these circumstances 'severely disadvantaged' him and amount to exceptional circumstances that justify the IAA considering the new information being put forward.

Country Information

7. The submission puts forward observations about events in Pakistan at the time the applicant lived there, as well as historical and contemporary country information about Pakistani tribal culture, the activities of Islamic militants, the reasonableness of relocation, and the personal risk of harm faced by the applicant that it contends can be drawn from the new information. The sources of the information are identified and, aside from references to sources used by the

delegate, nearly all of the country information referenced in the submission is new information. It is difficult to gauge if the arguments are an accurate depiction of the assessments in these reports as the applicant's representative has made only brief references to the new information, and has not provided any extracts or copies of the reports. The information does not comply with a key aspect of the Practice Direction. I note that the applicant's representative is an experienced migration agent who is familiar with the Practice Direction, and that the IAA has provided a copy of the Practice Direction and information about that Direction to the applicant early in the process. I also note that the delegate referred to a range of credible country information concerning the security situation in the applicant's home region, and Pakistan more broadly. In the circumstances I have decided not to exercise my discretion to accept this information.

Former legal representative

8. The applicant has claimed that his former legal representative did not assist him in a professional and thorough manner in that he did not clearly articulate his claims, and did not submit any country information or a post-interview submission to the delegate. He has claimed his former representative did not enable him to adequately prepare for the interview by providing him with the document 'Important information about your Protection visa interview' (Information Sheet) prior to the SHEV interview and did not discuss the matters contained in this document with him. The information before me confirms that the Information Sheet was included with each of the three invitations to the SHEV interviews that were sent by email to the applicant's representative.
9. Having reviewed the audio record of the SHEV interview it is clear that the Information sheet was discussed with the applicant directly. The delegate indicated the purpose of the SHEV interview and then referred specifically to the 'Important Information' sheet provided together with the Invitation to Interview. The delegate indicated that the Information Sheet contained an explanation of Australia's protection obligations and then asked the applicant to confirm whether or not he had read and understood that information. The applicant confirmed that he had. The delegate also advised the applicant that it was his responsibility to raise all of his claims for protection and provide evidence in support of those claims. The delegate also advised that, in the event his application was refused and the application is reviewed, that he may not be able to raise new claims to be considered at that review. He asked the applicant whether he had any questions about the interview and he responded that he did not. The information before does not support the applicant's claim that the delegate did not advise him of the existence of the Information Sheet in the SHEV interview, and his affirmative response to the delegate's question about whether he had read and understood the Information Sheet contradicts his claim that he was unaware of its existence.
10. The applicant claimed that his ability to raise claims and respond to adverse information presented by the delegate in the SHEV interview had been affected by the former representative's holiday schedule which was the reason he did not make any further written submissions. This is not apparent from the evidence before me. The SHEV interview record shows that, when asked by the delegate, the applicant's former representative had indicated that he did not intend to provide a post-interview written submission as he felt the key points of concern had been covered. He had separately requested an additional seven days to provide an additional supporting document, advising that his reason for seeking the extension of time was that would be taking a week's holiday. The delegate provided his email address and advised the representative that he would need to make a written request for an extension of time in addition to the standard seven days. The delegate then directly addressed the applicant asking whether there was anything further he wished to add and the applicant

initially responded 'no' but then raised the matter of the 'private enmity' with persons in his village and the attack on his uncle. The delegate asked multiple questions about these events and did not interrupt the applicant's responses. The delegate then advised the applicant that any additional information he provided before the application was decided would be considered. The applicant did not indicate at that time that he wished to provide additional evidence or submissions. An additional employment document was submitted to the department on the same day of the interview, and the delegate finalised the decision on 4 September 2018, more than two weeks after the interview.

11. The applicant has also claimed that his ability to participate in the SHEV interview was impacted by his distress at knowing that the delegate would not fairly assess his claims and that he would be refused. I accept that the process of giving oral evidence in a protection interview can be stressful, however it is not apparent from the audio recording of the SHEV interview that the applicant was in a state of distress. On the contrary the interview appeared to be conducted in a calm and friendly manner. While I note that the applicant is critical of the assistance given by his former legal representative, there is no evidence before me that his representative has disregarded his instructions, acted in an unprofessional manner, or that the representative's conduct has been the subject of a formal complaint, or that any such complaint has been investigated and found substantiated. I do not regard these circumstances to be exceptional.

Interpreting

12. The applicant has claimed that the evidence he provided at the SHEV interview was affected by his difficulty in understanding the interpreter who spoke Pashtu with an Afghan accent. He speculated that this issue may have affected the delegate's understanding of his claims as he doesn't believe the delegate listened to his answers. The audio record of the SHEV interview confirms the applicant had requested a Pakistani Pashtun speaking interpreter at the beginning of the interview. The applicant had indicated to the delegate that his accent is different to the interpreter and that he understood the interpreter 'a little bit'. When the delegate asked him to clarify how much he understood and asked whether he was happy to proceed with the interview the applicant responded "*Actually I have understood and in case I don't understand I will ask*". The delegate then re-confirmed "*Again, this is important, do you have any objections to using this interpreter today?*" The applicant repeated that he needed an interpreter from Pakistan, someone who spoke Pakistani Pashtun. The delegate responded that he had interviewed a number of Pakistani Pashtuns using the same interpreter and had not experienced any issues, and asked again "*are you happy to continue with this interpreter?*". The applicant responded "*that's fine, if I don't understand I'll ask you anyway.*"
13. The applicant did not subsequently raise any issues with the standard of interpreting during the interview, nor were there any instances apparent to me where the flow of communication between the delegate, the interpreter and the applicant appeared to be substantially disrupted. I note a small number of instances when the applicant or interpreter briefly discussed a question or response to clarify meaning; however this did not occur frequently and did not disrupt the flow of the interview as one would expect if there had been significant issues affecting the applicant's or delegate's understanding of each other. Indeed such interactions are typical in interviews using an interpreter, and can be taken as indicative that the three parties are alert to the potential for confusion or misunderstanding and are working cooperatively to overcome such issues as they arise.
14. There were a small number of occasions where either the applicant or delegate spoke at length without waiting for the interpreter, and it is not clear on those occasions whether the

interpreter was able to relate the entire contents of their dialogue. However, on the whole, I am satisfied that all three participants regularly took effective and timely action throughout the interview to ensure that questions and responses were repeated or clarified where there was apparent confusion or doubt. I note that the applicant's evidence provided through the interpreter in the SHEV interview is consistent with the earlier written statement of claims and his responses provided through the interpreter were appropriate to the delegate's questions.

15. The applicant's submission provided one example of where he believed the interpreting may have affected the interview, where the delegate had not considered his evidence in relation to the full circumstances of the attack on his uncle and his family in Islamabad [in] January 2013. When asked about the attack the applicant had responded at some length without waiting for the interpreter and I note the interpreter paused and sought clarification from the applicant during his interpretation of the answer. The delegate asked a number of questions, including an open question "why were they shot?" At this point the interpreter again sought clarification from the applicant and discussed his response before interpreting. The applicant's answer indicated that the other party involved in the commercial dispute that led to the attack on his uncle were somehow associated with the former [senior office holder] of Pakistan [Mr A]. At this point the applicant did not appear to describe the group as Sunni Muslims or explain the significance of the group's association with [Mr A]. However at a later point in the interview when they returned to the attack on his uncle the applicant does draw a line between sectarian issues in Pakistan and the robbery of his uncle "*If you have a business problem with payment and money and the problem will straight away go to Shia problem – it will be there*".
16. The applicant has claimed that he had explained to the delegate that the attack on his uncle was sectarian in nature, and while he did not explicitly state this, I am satisfied that this inference could be reasonably drawn from the evidence provided by the applicant in the SHEV interview. However, I am not satisfied that the delegate's failure to consider this aspect of the applicant's evidence can be attributed to any interpreting errors or deficiencies. Aside from the above example, the submission does not provide any other specific instance of interpreter error, or identify any other aspects of the applicant's claims he was prevented from presenting.
17. I am satisfied the standard of interpreting at SHEV interview was competent and reasonable. While I accept that the applicant and delegate spoke Pashtu with different accents, and I accept that this may have had some impact on the evidence provided by the applicant during the SHEV interview, I am not satisfied that the interpreting has materially affected the applicant's ability to raise his claims and respond to the delegate's questions and concerns. On the evidence before me I am satisfied that the applicant was given notice during the SHEV interview of the key determinative issues in his case, and that he has had a real and meaningful opportunity to respond.
18. The applicant was assisted by a qualified legal practitioner in preparing his written application and was advised at multiple points throughout the assessment of his SHEV application that it was his responsibility to include all details relevant to his case and provide any supporting documentation. I am not satisfied that either the conduct of the SHEV interview or the actions of his former legal representative have 'severely disadvantaged' the applicant, or that any associated issues amount to exceptional circumstances that justify the IAA considering the new information being put forward.

Applicant's brothers

19. The submission seeks to introduce new information concerning the living arrangements for applicant's brothers who live in cities outside [District 1]. This information is presented in the context of the safety and reasonableness of relocation to another region. I have found that the applicant does not have a well-founded fear of persecution that relates to his home region and so the question of his ability to relocate to another area of the country is not a matter of material concern in my assessment. I am not satisfied that there are exceptional circumstances to justify the consideration of this information.

Taliban headquarters

20. The submission raises a new claim that the Taliban headquarters in [District 1] was in his village and that as a result the applicant will be targeted by the Taliban as he will be perceived to hold information about their identity and operations that he may disclose to their enemies. He has claimed in the IAA submission that he had provided this fact in the SHEV interview, however this is not apparent from the audio recording of the SHEV interview, or from any other information which was before the delegate. In the SHEV interview the applicant describes how there are many Sunni people in his area, and that the Taliban were very active in his area, but does not state at any point that the Taliban's [District 1] headquarters was in his village. These matters, taken with the fact that the applicant is only raising this claim now, lead me to have serious concerns with the credibility of this claim. I am not satisfied that there are exceptional circumstances to justify the consideration of this information. Nor has the applicant satisfied me as to either of the matters in s.473DD(b).

Pashtun ethnicity

21. The submissions raised a new claim that the applicant faces of risk of severe discrimination and harm outside his home region on the basis of his Pashtun ethnicity and refers to reports of instances of social discrimination toward Pashtuns by way of their being stereotyped as militants or sympathisers of radical Sunni Islamic sects. Neither the applicant nor his previous representative raised this claim during the SHEV application. The fact that the applicant has raised this claim only now, and without any explanation of why he did not do so to the delegate, raises real doubts about the credibility of his claim to hold such a fear. I note, moreover, that the applicant's current representative has provided little information in support of this claim, particularly in relation to how this would personally affect the applicant, who is, by his own account, readily identifiable as a Shia, as opposed to a Sunni Pashtun. The claim is raised in the context of discussing relocation to an area of Pakistan outside his home region. I have found that the applicant does not have a well-founded fear of persecution that relates to his home region and so the question of his ability to relocate to another area of the country is not a matter of material concern in my assessment. I am not satisfied that there are exceptional circumstances to justify the consideration of this information. Nor has the applicant satisfied me as to either of the matters in s.473DD(b).

Applicant's claims for protection

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

- He is a Shia Muslim from the [Clan 1] tribe. He lives in [Village 1] in [District 1] district in Pakistan. The Taliban entered his home region in 2004 and started fighting with Shia people. The situation worsened in 2007 and the Taliban were arresting and killing Shias.

- He ran a [specified goods] shop in [Town 1], [District 1] and on a few occasions he narrowly avoided bombs that the Taliban had placed on the on the road on the way to his shop. A car bomb exploded nearby his shop killing a few people.
- On one occasion he was working in his store when he was robbed at gun point.
- He fears harm from other persons in his village as his family has been in a land dispute since 2011. His cousin was killed in a related attack, and he was being watched as a result of the dispute.
- He was unable to attend his shop, closed it in 2013 and decided to flee Pakistan.
- He cannot relocate within Pakistan as it is not safe for him anywhere. His uncle and two other family members were attacked in Islamabad.
- He fears he will be harmed or mistreated by Pakistani security forces as operate in his home region, they are full of 'Taliban people', and they jail people for unknown reasons.
- He fears that, if he returned after having spent time in Australia, this fact will be identified to the Taliban by Sunni people that he has conducted business with and he will be arrested, imprisoned or killed.

Refugee assessment

23. 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

24. 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.

25. The applicant has provided certified copies of identity documents, namely his Pakistani passport, Pakistani Identity Card, Pakistani Domicile Certificate, Pakistani police certificate of good character. The applicant has presented consistent evidence in relation to his identity throughout the entry interviews and protection application process, and has provided a range

of credible biographical information. I accept that the applicant was born in [Village 1] in [District 1] in the erstwhile Federally Administered Tribal Areas (now merged with Khyber Pakhtunkhwa province) in Pakistan. I accept the applicant is a national of Pakistan and accordingly I have assessed him against Pakistan as the receiving country.

26. I accept that the applicant is a Shia Muslim who, aside from a six week pilgrimage to [Country 1], [Country 2], and [Country 3] in 2012, has lived in [District 1] for all of his life prior to leaving Pakistan in 2013. His parents and [a number of] siblings live in Pakistan. He has a wife and [several] children who also reside in his home village of [Village 1]. From 2000 to 2013 he was the co-owner of a [goods] shop in [Town 1] in [District 1]. He also worked as an [occupation] for [Company 1] between 2006 and 2013. The applicant travelled on a genuinely issued Pakistan passport and departed via Islamabad.
27. The applicant claims to be aware of, and have personally witnessed attacks by the Taliban causing harm suffered by similarly-situated individuals and fears that he faces a risk of experiencing similar harmful incidents if he were returned to Pakistan. I accept the applicant's evidence that, between 2007 and the time he left Pakistan in June 2013, his home region, [District 1] was the site of violent conflict involving various pro-Taliban militias, tribal militias and the Pakistan army. His recounting of his experiences of the Taliban and their activities at that time was consistent, detailed and plausible, and is supported by independent country information.
28. The applicant has claimed that he would be personally targeted by the Taliban if he returned to his home region or any part of Pakistan on account of being recognised as a Shia who has previously ran a business in [District 1]. The applicant has claimed he witnessed a Taliban car bomb attack near his store in [Town 1], but did not provide any details as to whether he was personally harmed, or whether his store was damaged in the attack. Nor did he specify the date of the attack, or whether he believed that he or his store was the target of the attack. Given the country information discussed below, I am willing to accept that the street in [Town 1] on which the applicant had a store was the site of a car bomb explosion at some point between 2007 and 2012 which killed a number of people. The evidence provided by the applicant does not suggest he suffered physical harm as a result of this attack, that his store was damaged, or that he or his store were targeted by the Taliban.
29. The applicant has also declared that the road between his village and his store was frequently the site of roadside bombs. The applicant has claimed that he escaped roadside bombings unharmed on one or two occasions, but does not suggest that these were attacks targeted at him. Noting that the applicant was driving on a public road in a conflict zone, and does not otherwise appear to have an adverse personal profile with by the Taliban, I find that the applicant witnessed, but was not the target of two roadside bomb incidents.
30. The applicant stated that will be identified to the Taliban by Sunni people that he has conducted business with and he will be arrested, imprisoned or killed. I accept that if he returned to [District 1] the applicant would be recognisable to Sunni people that he conducted business with. I note the applicant's evidence elsewhere that he is readily identifiable to Sunnis and other people living in [District 1] as a Shia and I accept this is the case. However it not apparent from the applicant's evidence that he was ever involved in a business dispute with Sunni people, and he does not explain why he believes any former business associates or customers would hold enmity towards him more than five years after he left Pakistan such that they report him to the Taliban, or any other Sunni extremist group. Given the lack of substance put forward by the applicant in relation to this claim, I find the applicants' conjecture on this point is far-fetched. On the information before me I am not satisfied that, if

he returned to [District 1], there is a real chance that the applicant's whereabouts would be monitored by a former business associate or customer and reported to the Taliban or any other Sunni extremist group.

31. I accept the applicant genuinely felt fearful for his and his family's safety during the period 2007 to 2013; particularly in the context of the strong presence of the Taliban, the frequency and nature of their attacks in the [District 1] during this period, as well as the general absence of a law and order in the region. However there is no evidence before me that either the applicant or his family have ever been personally targeted by the Taliban or any other Sunni extremist group. I also note that he does not claim to have ever been associated with, joined, trained or fought for an anti-Taliban tribal militia. I do not accept that the applicant has a personal, adverse profile with the Taliban or any other Sunni extremist group.
32. The applicant has claimed that he has been affected by a 2011 tribal dispute over land between his family and other parties that resulted in his cousin being killed. The applicant claimed that afterwards he was watched by persons involved in the dispute and that this made it difficult for him to go to his shop. He provided scant detail in his written statement and in the SHEV interview as to the origins, nature and scale of the dispute in his village, or the degree to which he has been personally involved. Beyond describing that he was 'watched' the applicant does not indicate if or how he was ever threatened or harmed. The applicant has argued that the delegate did not question him about the dispute, however it is evident from the audio recording of the SHEV interview that the applicant raised this claim on two separate occasions and on each occasion the delegate asked him questions and did not interrupt or otherwise seek to limit his responses. The delegate asked the applicant whether he was ever physically harmed as a result of the tribal dispute in his village and he responded by describing an incident when 'they' had come to his store with a gun and had taken petrol and refused to pay. The applicant described the same incident in the 2013 Entry Interview and in the 2016 written statement of claims as a robbery in his store conducted by [a few] unknown criminals and did not suggest it had any connection to the tribal dispute, or that the robbers were Taliban militants. Given that the applicant has consistently claimed to have been in his store when it was robbed at gunpoint, I am willing to accept the robbery has occurred, but I am not satisfied that the robbery on his store in [Village 1] was in any way connected with the tribal feud over land.
33. Country information confirms that tribal disputes over land and other resources are a common occurrence in the FATA and, in the context of general unrest, militarisation, and lawlessness in the region, they can sometimes lead to communal violence. In this particular case the applicant has not provided any details as to the nature and origins of the tribal dispute in his village that he has claimed led to the attack on his cousin in 2011. He has claimed he was 'watched' as a result of the dispute and was fearful about attending his shop, but it is not apparent from his evidence that he was ever personally threatened or harmed as a result of a land dispute in 2011. The applicant did not indicate that, aside from his cousin, any other members his family members have been followed, threatened, harmed, or affected in any other way by the dispute. I note that several adult male members of the applicant's family have remained in [Village 1], or returned to live in the village since 2011; including his father and his uncle. The applicant's does not provide any evidence that the claimed tribal dispute has led to any further incidents between the parties, which would appear to undermine his claim that the enmity continues to the present day. Given the scant evidence put forward by the applicant in relation to this claim I am not satisfied that a dispute exists between the applicant's family and other parties in his village that would result in him facing harm if he were to return to Pakistan.

34. The Center for Research and Security Studies (CRSS) reported in June 2018 that the population of [District 1] is around [number] and the applicant's tribe, [Clan 1], is considered one of the larger tribes. The European Asylum Support Office (EASO) describes [the size of District 1] as [compared to the other] seven districts which constituted the Federally Administered Tribal Areas (FATA) and that the majority of the Shi'a population of FATA is concentrated in [District 2] and [District 1]. Country information before me also confirms that [District 1] has been the site of generations of tribal and sectarian tension between Sunnis and Shias that has periodically catalysed into intense fighting. CRSS observed that for various reasons, especially poverty and illiteracy, FATA had become the hub of militancy. The arrival of the pro-Taliban Pakistani militias in 2007 caused violence to flare across the tribal areas, including [District 1]. Zahab described how [District 1] had become the 'centre of gravity' for the *Tehrik-e-Taliban Pakistan* (TTP) leadership by 2009, becoming a launching pad for attacks into Afghanistan and neighbouring agencies.
35. Contemporary country information describes how the TTP, and other Pakistani sectarian militant groups have been greatly weakened by the successive military operations undertaken by Pakistan's law enforcement, security and armed forces. The EASO 2017 report, DFAT's 2017 report, and the FATA Research Centre (FRC) 2017 report, all assess that the security situation in the FATA had improved significantly as a result of the continuous counter-terrorism operations that commenced in 2014 and continue to the present day (Operations 'Zarb-e-Azb', 'Rajgal', and 'Radd-ul-Fassad'). EASO now describe the Pakistani security forces' current operations in the tribal regions having emerged from the 'main combat phase', and that they are now able to focus on clearing isolated pockets of the insurgency. The FRC describe the mass surrender of militant groups across a number of agencies in the FATA through 2017 as an important achievement in degrading the influence and operational capacity of terrorist outfits in FATA.
36. I accept that the Sunni militant's significant territorial losses in the former FATA and Khyber Pakhtunkhwa Province (KPP) has not translated to the complete elimination of the threat posed by these groups. Contemporary country information before me indicates Pakistan continues to face significant security threats from insurgent, separatist and sectarian militant groups and highlights the highly regionalised nature of conflict and security risk in Pakistan, which makes it difficult to summarise with broad observations at a national level.
37. While diminished, the TTP and other Sunni sectarian groups have shown some capacity to undertake limited and sporadic attacks in Pakistan throughout 2017 and 2018. The Pakistani pro-Taliban groups, in particular, have shown that they have regrouped in Afghanistan, and were able to carry out a series of high profile and complex attacks in 2017 by infiltrating inside Pakistan with the help of local sympathisers. CRSS observed that the escalation of fatalities from violence in those provinces that earlier experienced a decline, while an inversely opposite trend was observed in other provinces, noting that violence in Balochistan spiked, while in the FATA and Sindh, it declined significantly.
38. Sectarian militant groups, including the TTP publicly declared in January 2017 their ongoing intention to target Shias in tribal areas and I note a sharp spike in attacks in [several districts] districts in the first half of 2017. The delegate cited the FRC 2017 report indicating [District 1] had suffered [a number of] violent incidents with [a number] casualties ([some] killed and [some] injured) in 2017. I note that nearly all of these incidents in [District 1] occurred in the first half of the year and the scale and that the nature of the attacks highlighted the vulnerability in the security arrangements that were in place in the FATA at that time, particularly for Shias.

39. The FRC observed that the Pakistani military had stepped up its counter terrorism activities across FATA as a specific countermeasure against the increased activities of terrorist outfits during the first six months of 2017. It reported Pakistani security forces had claimed to have killed 268 militants and destroyed their hideouts in Khyber and North Waziristan agencies, bases that had been used by the militant groups to undertake the increased number of attacks in the FATA in the first half of 2017. The FRC reported that violent incidents and resultant casualties declined significantly in [District 1] and across the FATA in the second half of 2017. The FRC noted the overall civilian casualty toll in [District 1] in 2017 of [a number of] civilian casualties ([some] killed and [some] injured). No deaths and only [a few] injuries were reported in the second half of 2017.
40. DFAT subsequently noted in September 2017 that the splintering of pro-Taliban militant groups meant that their capacity for cohesive campaigns of coordinated attacks had been reduced, but has also resulted in a larger number of smaller groups competing with each other, potentially resulting in more nimble and unpredictable security threats. EASO also observed in August 2017 that the reduced capacity of militant groups has led to an increase in more targeted attacks on individuals.
41. The delegate cited [a journal] as evidence that incidents involving the TTP have been ‘regularly reported’ in [District 1] district in August 2018. A closer reading of this material and its context shows that the authors provided a general, historical background of the TTP and in this context describe [District 1] as one of agencies in the former FATA in which TTP militants have traditionally been concentrated. The report does not state that the TTP have continued to regularly undertake attacks in [District 1] in 2018. The report later provides a highly specific timeline of the activities of the TTP in Pakistan under the heading [Heading] of the TTP’s activities in 2018 confirms their continued capabilities in undertaking targeted attacks, particularly in Balochistan, KPP and Karachi, but does not record any attacks in [District 1] District, or in the neighbouring [districts]. The attacks carried out by the TTP in 2017 and 2018 were predominately targeted at law enforcement and security personnel, as well as a number of attacks on political activists and rallies in Sindh Province, Peshawar in KPP, and South Waziristan. The TTP also made a number of attacks on Shia civilians in Quetta and Karachi.
42. The return of such large numbers of internally displaced persons to the tribal areas (including [District 1]) in recent years can also be seen as tangible evidence supporting the EASO observation in 2017 that the Pakistani government has had some success in regaining public trust from the people of the tribal areas in its ability to provide durable security in the region. Country information indicates the road connecting Peshawar to the FATA is open and has remained under control of the Pakistan authorities for a number of years without a major security incident. CRSS offered cautious and optimistic support for the May 2018 approval by Pakistan’s parliament of the merger of FATA into the Khyber Pakhtunkhwa province. CRSS observe that this offers new, equal constitutional status for all the tribes inhabiting these regions. They also note that the Pakistan military has supported the extension of Pakistan’s civil constitutional rights to the tribal region as it understands that, if Pakistan is to consolidate on the counterterrorism gains that it has made over the last few years, FATA should become a region that is fully regulated. CRSS observe that the presence of local governance mechanisms can only ensure that militants remain isolated and their ability to penetrate the region is constantly challenged. CRSS described how the succession of military operations in the former FATA have almost broken the infrastructure of terrorism in the region, that almost 80 percent of the temporarily displaced persons have been repatriated, and interpret this as meaning peace is returning to the former FATA agencies. I also note the FRC’s 2017 report observed that the Pakistani government had been allocating significant resources to improve the

fencing and border management of Pakistan-Afghan border to prevent militant groups exploiting the porous border to undertake attacks in Pakistan.

43. In his statements in the SHEV interview and the submissions made to the delegate in August 2018, and in the submission to the IAA in September 2018 the applicant has reiterated his claim that his home region, [District 1], is not safe. I note that the applicant has had the benefit of being represented by an experienced legal practitioner and that none of the information presented by the applicant or his representative indicates that there has been any further significant violent incidents in [District 1] district since the spike in in the first half of 2017, and has not provided any persuasive information that the security situation in [District 1] has deteriorated in 2018.
44. It is clear that some of the underlying causes for insurgent and sectarian militancy in [District 1], the tribal regions, and Pakistan more broadly remain unresolved, and that, despite improvements, there remains a degree of fragility to the current security arrangements in [District 1]. Nevertheless it is also clear that the scale of the violent unrest and the frequency and severity of sectarian attacks in the former FATA has been reduced significantly over a number of years. The absence of further militant actions after the attacks in [District 1] in the first half of 2017 suggests those events do not appear to represent the commencement of a new pattern of violence or unrest. I do not regard they amount to a reversal of the longer term security trend showing a steady decline in sectarian and other forms of violence in the former FATA, which is evidence of the significant diminishment of the capacity of the Taliban and other sectarian militant groups to undertake attacks in [District 1]. Rather, in the context of the more recent history of the area, the absence of any ongoing attacks for what may now be regarded as a sustained period indicates a significant reduction in the risk of harm.
45. The applicant has claimed Shias are the subject of discrimination in Pakistan and that this affects any business disputes in which they are involved. He made this claim in the context of the 2013 attack on his uncle in Islamabad that was the result of a business dispute over unpaid goods and claims that the attack on his uncle also had a sectarian element. While I accept that the applicant's own store in [District 1] was robbed, it appeared to be a singular incident that occurred whilst [District 1] was effectively a conflict zone and security was diminished there as a result. The applicant did not suggest that the robbers were Sunnis, or that the robbery was the result of a business dispute, or that his business was targeted because he was Shia. Regardless, in considering his circumstances if he returned to [District 1], I accept that the applicant may seek to establish a retail business and that he would be identifiable to his customers as a Shia Muslim. DFAT assesses that Pakistani law enforcement authorities are broadly willing to protect Shia communities and that, as part of the campaigns targeting insurgent and sectarian groups, government and military crackdowns have also sought to tackle violent and organised crime across the country. While reliable data are unavailable, DFAT understands that serious crime across Pakistan has reduced significantly since the commencement of Operation Zarb-e-Azb and the NAP. Considering the broader context of the significant improvements in the security situation in [District 1], and the transition away from military to civil governance and rule of law, I am not satisfied that the applicant would face a real chance of harm on this basis.
46. The applicant claimed that he feared harm from Pakistani government and security forces as they are 'full of Taliban', that the Pakistan government's intelligence organisation, Inter-Services Intelligence (ISI) is active in his home region and that they jail people for reasons he does not know. In the SHEV interview he indicated he is aware of the Pakistan government sending many people to jail for three years after having returning from [Country 1]. DFAT are aware of Shias having being targeted by Pakistan security forces after having returned from

[Country 1], as they known or suspected as having fought for the [regime] in [Country 1]. The applicant does not specify why the persons he referred to were jailed, but he did specify they were returning from [Country 1] and I infer from these circumstances that they may have convicted and jailed as they were Shias returning to Pakistan who had contravened Pakistani law by fighting for the [Country 1] state. I note that the applicant has spent one day in [Country 1] in January 2012, as part of a religious pilgrimage in which the majority of his time was spent in [Country 2] and [Country 3]. The applicant does not suggest that he departed or returned to Pakistan illegally in 2012, or that upon return to Pakistan in March 2012 he came to the adverse attention of the Pakistani authorities as a result of this travel, or for any other reason. There is no information before me that would indicate that he has since come to their attention or that, if returned to Pakistan, he would come to the attention of the ISI or another Pakistani government agency on account of his previous travel to [Country 1].

47. DFAT also advise that some returnees to the tribal areas of Pakistan have come to the attention of Pakistani security forces after being identified by ISI as “suspects or collaborators” either of the militants or of some Pashtun nationalists. The applicant has claimed that he is readily identifiable in Pakistan as a Shia Muslim and I accept this is the case. Given this, it is highly unlikely he would be suspected by ISI to be a TTP collaborator. He does not claim to have ever trained with or been associated with Shia militant groups or Pashtun nationalist groups, or claim that he has ever been suspected of such activity. There is no information before me that would indicate that, if returned to [District 1] district he would be of any risk of coming to the attention to Pakistani security forces on this basis.
48. The applicant claims to fear harm from the Taliban on the basis that he would be returning to Pakistan after having lived in Australia. The evidence before me does not indicate that having spent time in a Western country like Australia will place a person such as the applicant at greater risk of harm. [The journal] of the TTP targets confirm that the TTP have been known to target the TTP has also targeted foreign diplomatic personnel, nationals of Western countries, I note DFAT’s assessment in 2017 that, despite an increasing conservatism and religiosity across the country, individuals in Pakistan are not subject to additional risk of discrimination or violence on the basis of having spent time in Western countries or because of perceived Western associations. DFAT further notes that the influence of the West is pervasive in Pakistan, and that many Pakistanis live abroad and return to Pakistan, or have relatives who do so. DFAT assesses that people who have spent time living in Western countries are not subject to discrimination or violence on this basis.
49. The applicant departed Pakistan on a valid travel document and claimed at the SHEV interview to still be in possession of his original passport and his original CNIC. There is no information before that suggests the applicant has contravened any Pakistani immigration laws, or is wanted for any offences in Pakistan, or has committed any offences in Australia.
50. On the evidence before me I am not satisfied that the applicant has ever had an adverse profile with the Pakistani government or its intelligence agencies, or that there is a real chance he would develop an adverse profile if returned to Pakistan.
51. I am not satisfied the applicant faces a real chance of harm on the basis that he is a Pashtun Shia member of the [Clan 1] tribe, his family is in a tribal dispute, having previously ran a business in [District 1] district, having previously travelled to [Country 1], having returned from a Western country, or as a result of any combination of these matters.

Refugee: conclusion

52. I am not satisfied the applicant has a well-founded fear of persecution. 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

53. 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

54. 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.

55. I have concluded above that the applicant does not face a real chance of any harm on the basis that he is a Pashtun Shia member of the [Clan 1] tribe, his family is in a tribal dispute, having previously ran a business in [District 1], having previously travelled to [Country 1], having returned from a Western country, or as a result of any combination of these matters. As 'real risk' and 'real chance' involve the application of the same standard, I am also not satisfied that the applicant would face a real risk of significant harm for the purposes of s.36(2)(aa) on these grounds.

Complementary protection: conclusion

56. 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.