



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

PAKISTAN
IAA reference: IAA21/08972

Date and time of decision: 5 May 2021 12:10:00
G Deal, 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 applicant (the applicant) claims to be a Bangash Shia from [Town], Pakistan. [In] July 2013 he arrived by boat in Australia. On 8 June 2017 he lodged an application for a Safe Haven Enterprise Visa (visa application) with the Department of Immigration, now the Department of Home Affairs. On 4 February 2021 the applicant was interviewed by a delegate of the Minister for Immigration (the delegate) by video conference with the applicant's representative also present.
2. On 26 March 2021 the delegate refused to grant the visa. The delegate accepted the applicant was a Pashtun from the Bangash tribe, of Shia faith and from [Town], Kurram, Pakistan. The delegate accepted as plausible that the applicant attended protests about the Taliban and the government response to the Taliban along with many others in the area from 2007 to 2009. However, the delegate did not consider the applicant was personally targeted by the Taliban, did not accept he received threatening calls from them or that he was personally targeted by them when travelling in his car. The delegate accepted the applicant joined a Human Rights Organisation but did not accept he had a profile of interest as a result, noting he left Pakistan a month later and before becoming actively involved in the Organisation's activities. The delegate did not accept the applicant had a mental health issue. Overall, the delegate found the applicant did not meet the relevant definition of refugee, did not face a real risk of significant harm and was not a person in respect of whom Australia had protection obligations.

Information before the IAA

3. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. No further information has been obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He is a Shia Pashtun from the Bangash tribe from [Village 1], which is near [Town], Pakistan. His father passed away in 1997 of natural causes. His mother, [brothers] and a sister are in Pakistan. One of his brothers remains in the family home in [Village 1] and is working, the others are at various other places (Kohat, near Islamabad and [Country]). After some education in Pakistan including high school and a [Qualification], the applicant worked in his own retail shop in [Town] and as a farmer. He has worked as an [Occupation] and in [work sector] in Australia but stopped this job in 2020 when he injured his [body part]. He also suffers from depression, "hyperlipidaemia" and back pain.
 - He was targeted by the Taliban (or their associates) as a Shia from the Bangash tribe and from [Town] while in Pakistan.
 - He protested against the Taliban and the government while in Pakistan.
 - He joined the Pakistan Human Rights Organisation because of the injustice he saw.

- He fears that news of his return will spread, and he will be targeted, kidnapped and his life will be threatened by the Taliban (or other similar groups) as a returnee from Australia who may be perceived as having money.

Refugee assessment

6. 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

7. 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.
8. Based on the applicant’s evidence, including his documentary evidence and the consistency and detail of his background information I accept his education and work history, that he is a national of Pakistan from [Village 1] (and that [Village 1]¹ is close to [Town]) in Kurram, Pakistan where he lived until his departure in 2013 and that he is of Pashtun ethnicity and Shia faith. I consider Pakistan the receiving country.
9. The applicant claims a smuggler helped him travel to Australia. He claims that he left Pakistan at the Islamabad International Airport on his genuine passport a copy of which shows it was issued in [2013] (and expires in 2023) and that the people smugglers organised the rest for his journey such as visas and airfares. Based on this description I consider he left Pakistan legally on his own genuine passport and without issue.
10. When the applicant was asked in the visa interview for his ethnicity, he said he was “Bangash”. When asked who the Bangash were he said they were Turi Shia living in [Town] and that he did not know about their history. When asked how the Bangash differed from other Pashto tribes he said there was no big difference but mentioned they had different names. The country information before me indicates that the Bangash are Pashtun, they live in Kurram valley, 40

¹ Also spelt as [Alternative spelling] at times.

percent are Shia (with those in Upper Kurram, closer to where the applicant comes from, being Shia) and that they are mostly referred to as Turi-Bangash as they are not dissimilar from the Turi and enjoy equal rights with them.² I am willing to accept the applicant is from the Bangash tribe.

11. The applicant claims to have been targeted by the Taliban as a Shia Bangash from [Village 1] near [Town] and that because of the violence in the area he protested against the Taliban and government and also joined Pakistan's Human Rights Organisation. In this regard the applicant has consistently detailed his experiences in Pakistan as follows. With the influx of the Taliban into his area after 2007 the security situation worsened significantly. Thousands of innocent lives were lost to fighting and killing. There were bomb blasts and missiles in their area. The Taliban influenced and even forced Sunnis in the area to target Shias. In 2009 he escorted his sister in law and her children to the doctors in Peshawar. It appeared that the army and police bases en route were unmanned. While fearful their driver pressed on. At one point there was shooting from [a] Mountain, however they escaped being hit. The vehicle behind them was hit and six people died. Eventually they arrived at a police station and reported the incident, however the police did not seem to care. They eventually returned home safely, accompanied by a police car for part of the journey from [Village 2] where there was a Taliban base. The applicant claims that his car was not targeted because of him personally or that they knew about him personally but rather because the Taliban were targeting all cars from [Town] and that nothing happened to him personally as a result of the incident. He assumed the attackers were the Taliban as the area was under their control. In 2007, 2008 and 2009 he protested, along with many others from his area, against the Taliban's actions and to the government demanding they do more to make their area safe. He attended a few of these but nothing happened to him as a consequence as they were peaceful protests. Seeing this injustice, he joined Pakistan's Human Rights Organisation to confront the Taliban cruelties in about June 2013 (he has provided a copy of what looks to be a genuine membership card which includes his personal details). However, because of the risk he left Pakistan shortly after joining (it appears less than a week after joining) and before becoming actively involved in the Organisation's work. He has also said he was not personally targeted by the Taliban (or other similar groups) but rather targeted as were all Shias in the community at that time. After a brief hiatus in 2013 the security conditions declined again in the region. He had a business in the area and feared something might eventually happen to him. Eventually in 2013, not being able to cope with the fear of persecution he left Pakistan to live in Australia peacefully without any fear of harm.
12. Country information before me³ notes that at the time the applicant departed Pakistan, Kurram had been in the grip of sectarian violence, exploited by the Taliban, since April 2007 with more than 1,500 people killed and 5,000 injured. In 2007 there was reportedly a dispute between Sunni and Shia at a procession in Parachinar resulting in escalated and sustained sectarian violence. The army reportedly used helicopter gunships to control Parachinar and Satta but fighting continued in the rural areas. There were also United States (US) drone missile attacks on Taliban camps. It is also reported that in June 2008 people from Kurram staged a demonstration in front of the Parliament House in Islamabad seeking the intervention of the Federal government, although instead of intervening, the government claimed the violence was due to foreign interference. Sunnis took control of certain routes. They took control of a route from Parachinar to Peshawar. Those who used these roads were often abducted, beheaded,

² Khyber.org, Khyber.org, 'Tribes of the Kurram', 1 March 2014, CIS27584; Department of Foreign Affairs and Trade (DFAT) 'DFAT Country Report: Pakistan', 20 February 2019, 20190220093409; Hurst & Company, Marian Abou Zahab, 'It's Just a Sunni-Shiite Thing': Sectarianism and Talibanism in the FATA of Pakistan', 1 January 2013, CIS29402.

³ Hurst & Company, Marian Abou Zahab, 'It's Just a Sunni-Shiite Thing': Sectarianism and Talibanism in the FATA of Pakistan', 1 January 2013, CIS29402.

killed in suicide bombings, or otherwise harmed. Even in 2013, the continuing struggle between Sunnis and Shiites showed little sign of abating.

13. On the evidence, including the documentary evidence, the applicant's consistent and detailed account of events and the country information above, I accept sectarian and militant violence increased, that there were missile attacks, and many died in the applicant's area commencing in 2007. I accept that a vehicle he was travelling in with his sister in law and her children was shot at, as were other vehicles from his area travelling those same routes which were controlled by Sunni militia at that time. I also accept that out of desperation given significantly increased violence in the area at that time he attended a few protests along with others from the area, but note this was years prior to his departure in 2013, he has not engaged in other similar political activities for some 12 years now and it is because of this (rather than out of a fear of harm) that I do not consider he will engage in similar activities, now or in the reasonably foreseeable future. I also accept he later joined Pakistan's Human Rights Organisation just prior to his departure from Pakistan. In the visa interview he said a friend requested he and several others join and that this friend organised their memberships. He said he never became actively involved and that he did not mention his membership in the arrival interview as he had not 'properly' worked for the organisation. I note this was several years ago now, he seemingly joined at the behest of a friend years after the applicant first experienced issues, he was not actively involved and he has not indicated any involvement in any human rights groups or other similar activities over the last eight years and it is for these reasons (rather than out of a fear of harm) that I do not consider he will engage in these sorts of activities, now or in the reasonably foreseeable future. I accept that he did not personally come to the adverse attention of the Taliban, government, or anyone else as a consequence of these activities. I also note he remained in his village some six years after violence first escalated in 2007 and his visa application indicates he continued to work in his shop in [Town] travelling the short journey there from his village most days until 2010 and that he then worked as a farmer in the area until his departure in 2013.
14. The applicant also claims to have received threatening phone calls from the Taliban while in Pakistan. However, for the following reasons I do not accept this aspect of his claims. This aspect of his claims was mentioned for the first time in his visa interview. Further, initially when the delegate asked the applicant in the visa interview if he had ever had any contact with someone from the Taliban the applicant said "I haven't talked to them directly" only indicating he knew others had received threatening calls. He subsequently said he had also received some calls including at his business as his number was everywhere. When asked if anything had ever happened to his family, he only mentioned that his brother had also received some of these calls while working for the applicant. He said they did not state who they were, and he indicated he just knew it was the Taliban. He said they asked where he studied and offered to help him with his studies. I note the applicant's visa application indicates he ceased operating this business in 2010, some three years prior to his departure from Pakistan indicating the calls must have occurred at around that time or prior. When asked why he did not mention these calls in his arrival interview or visa application he said that when he first arrived in Australia, he was tired, unwell and depressed indicating he struggled to recall a lot of details at that time; he incorrectly recalled his birthdate. He also said that as a result of his Pashtun culture he felt shy and uncomfortable about talking freely in front of the case manager and interpreter and could not remember things. Other than a brief reference to "Depressed" next to "30/11/2020" in the patient history of one referral letter from the applicant's General Practitioner (GP) (in relation to treatment for his workplace [body part] injury), no further supporting information in relation to his mental health has been provided.
15. In the visa interview the applicant indicated he was thirsty from medication he took for his mental health condition that morning. While I accept he may have been thirsty because of

medication taken that morning I do not accept this medication was to treat any mental health conditions as the referral letter he provided in support of this indicates the only medication he has been prescribed is "Lipidil" which is to be taken morning and night for treating "hyperlipidaemia" (and not mental health conditions) a condition which the applicant also suffers from as indicated in his patient history.⁴ While noting the GP's assessment of the applicant's mental health does not appear based on any tests or other formal assessments and that it is not a diagnosis by a psychologist, psychiatrist or other practitioner with specialisation in mental health I am willing to accept he suffers from depression. I note that the applicant appears to be managing his condition and has not sought ongoing treatment from a practitioner with expertise in mental health or that he takes medication for this. I also note he appeared able to comprehend and was able to respond to the delegate's questions in the visa interview in a meaningful manner and I do not consider his condition affected his ability to engage in the visa interview in a material way.

16. I am cognisant of the fact that arrival interviews are not intended as a substitute for visa interviews and that they suffer certain limitations. I am willing to accept that the applicant may have been fatigued and stressed at the time of this interview. I do note however that despite claiming he was shy or fearful he nevertheless provided details of claimed targeting, such as being shot at by the Taliban, in the arrival interview (as well as the visa interview). Leaving aside what was and was not said in the arrival interview, the explanations proffered do not explain the omission of the significant claim he received threatening calls from the Taliban in his visa application which was prepared and lodged with the assistance of his representative at that time. I do not accept he received threatening calls from the Taliban.
17. As detailed above (and with the exception of the claim regarding calls from the Taliban) the applicant said in the visa interview that he was not personally targeted by the Taliban. He said no consequences flowed from his attendance at a few protests and he left Pakistan legally and without issue and before he had any active involvement in the Pakistan Human Rights Organisation. I also note DFAT's⁵ report which indicates that the Pakistan government can prevent any person, including those with valid travel documents, from leaving Pakistan for a range of reasons. While I am willing to accept the applicant may have fled Pakistan in fear of his safety due to general insecurity in the area at that time I do not consider the applicant was being personally targeted or was wanted by the Taliban the government or anyone else when he left Pakistan in 2013.
18. The applicant lived in the family home near [Town], Kurram, until his departure from Pakistan in 2013, and one of his brothers still lives and works there. I consider if the applicant were to return it would very likely be to there, particularly in light of the country information detailed below which indicates significantly improved security conditions in the area since the applicant's departure in 2013.
19. DFAT⁶ reports that Pakistan is ethnically and linguistically diverse. With a population of over 200 million, it is the sixth most populous country in the world. Pakistanis tend to live in ethnically homogenous communities. It is reported that Pashtuns comprise the second-largest ethnic group at just over 15 percent of the population and Shias comprise 10 to 15 percent. Most Pakistani Shia are not physically or linguistically distinguishable from Pakistani Sunni. Shia are most prominent during Shia religious events. Shia and Sunni mosques are also distinguishable. The Turi, a Shia Pashtun tribe comprising some 500,000, mostly living in Parachinar and Kurram

⁴ Healthdirect, 'Band name: Lipitor', undated.

⁵ DFAT, 'DFAT Country Report: Pakistan', 20 February 2019, 20190220093409.

⁶ DFAT, 'DFAT Country Report: Pakistan', 20 February 2019, 20190220093409.

Agency (and other nearby areas) are not generally distinguishable from other Pashtuns in the area, which would include Shia Bangash (like the applicant). The European Asylum Support Office (EASO)⁷ reports that Kurram, part of the former Federally Administered Tribal Areas (FATA), and a once semi-autonomous region bordered with Afghanistan to the west, was merged with Khyber Pakhtunkhwa on 31 May 2018 (and now the entire region can be referred to as Khyber Pakhtunkhwa Tribal Districts). The former FATA has a population of some 35.5 million. Kurram tribal district has a population of some 619,553 and, DFAT notes, a significant Shia population comprising overall some 40 percent (and 80 percent in some parts).

20. I have considered the more recent independent assessments of the security situation in Kurram before me from DFAT, Pakistan Institute for Peace Studies (PIPS), EASO, Pakistan's Institute for Conflict and Security Studies (PICSS) and the Fata Research Centre (FRC).⁸
21. The sources note that following the Taliban's toppling in Afghanistan in 2001 militants fled across the border into Pakistan settling in the former FATA where they worked with other local groups following similar ideology. This resulted in the 'Talibanisation' of the tribal districts and the killing of many Shia. Militant groups exploited religious and ethnic divides in Pakistan to further their own cause. From 2007, through several military operations in the tribal districts, the Pakistani security forces worked to break the power of the Taliban and associated groups in the region. From 2009 these operations formed the main source of insecurity and displacement in the area. Militants also targeted Turis travelling on roads, with a significant spike in these incidents along the Tall-Parachinar road linking Kurram and Peshawar between 2009 and 2014. After failing to negotiate a peace agreement with the Taliban the Pakistani government launched a major offensive on 15 June 2014 (which continued into 2015 and 2016) against militant strongholds in North Waziristan (south of Kurram), codenamed '*Zarb-e-Azb*'. There were many casualties. On 25 December 2014 the government announced a 20-point comprehensive National Action Plan designed to confront the insurgent threat. Measures included the establishment of special courts for the speedy trial of 'terrorist suspects'; revoking the moratorium on capital punishment; the deployment of a large counter terrorism force across the country; and measures designed to choke the financing of terror organisations. Drone strikes, including by the US targeting al-Qaeda the Taliban and other militants who sought refuge in the erstwhile FATA, also took place in the region. There was a significant increase in deaths from terrorist attacks targeting Shia Turis in 2017 in Kurram Agency resulting from three terrorist attacks (by unknown perpetrators) killing some 120 people at an *imambargah* and two marketplaces in Parachinar. In 2017 the government announced a countrywide military operation codenamed '*Radd-ul-Fasaad*'. In that same year Pakistan commenced building a fence along the border with Afghanistan in an effort to prevent the movement of militants.
22. DFAT, EASO and PIPS reported that the overall security situation in Pakistan improved in 2018 compared to previous years, with a 29 percent decline in the number of reported terrorist attacks in 2018 (compared to a 16 per cent decline in 2017) making a nine year downward trend, and a 40 percent decline in sectarian violence in 2018 when compared with 2017, marking a two year downward trend. Consistent with this overall trend, in 2019 FRC noted a 'remarkable' decline in suicide attacks in Pakistan, for example, it reported 47 attacks in 2013, 30 attacks in 2014, 18 attacks in 2015, 17 attacks in 2016, 23 attacks in 2017, 18 attacks in 2018 and six attacks in 2019. PICSS reported that in 2019 militant attacks in Pakistan dropped to their lowest levels in fifteen years. PICSS also stated there has been a consistent improvement in the security

⁷ EASO, 'Pakistan Security Situation', 30 October 2019, 20191031160110.

⁸ DFAT, 'DFAT Country Report: Pakistan', 20 February 2019, 20190220093409; EASO, 'Pakistan Security Situation', 30 October 2019, 20191031160110; PIPS, 'Pakistan Security Report 2018', 6 January 2019, 20190121110758; Irfan U Din and Mansur Khan Mahsud, FRC, 'Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2020', 07 January 2021, 20210113125205; PICSS, '2019 Annual Security Assessment Report', 9 January 2020, 20200122140652.

situation in Pakistan and that this trend was likely to continue in years ahead, noting the more recent restoration of international cricket with a scheduled visit by the Sri Lankan cricket team and the re-establishment of the United Nation's offices in Islamabad as reflective of this.

23. DFAT and EASO noted that while the Pakistan government's military actions were violent and had a negative impact on local areas, they also broke the Taliban's hold over most of the tribal belt and significantly decreased the number and severity of attacks on Turi in the region. PIPS reported 125 terrorist attacks in the broader Khyber Pakhtunkhwa Tribal Districts in 2018 (mostly targeting security forces and law enforcement), with only one occurring in Kurram (resulting in one person being injured and seven killed). PIPS also reported a total of 13 operational strikes (none in Kurram), six armed clashes/encounters (none in Kurram), 15 cross border attacks (with only two in Kurram), six incidents of political/election-related violence and two inter-tribal clashes in 2018 over the entire Khyber Pakhtunkhwa Tribal District and one US drone strike injuring one suspected militant in Kurram on 17 January 2018. EASO reported a 'significant' decrease in violent incidents in Kurram in 2018 compared to 2017, with only three violent incidents and a similar downward trend in terms of casualties in that same year. EASO reported no 'terrorist attacks' or drone attacks in the first half of 2019 in the region. PICSS reported 52 militant attacks in the broader former FATA region in 2019, most in North Waziristan (and none in Kurram) mostly killing or injuring security forces personnel and that Pakistan had 'gained control' over militancy to a large extent. While noting a 'slight' increase in militancy in 2020, with three terrorism incidents and 19 casualties in 2020, FRC described incidents as sporadic and reported that Kurram largely remained peaceful, in particular toward the end of 2020. While in 2019 DFAT assessed that Turis in Kurram Agency faced a moderate risk of sectarian violence, meaning there was sufficient evidence to suggest a pattern of behaviour at that time, I note this was now some two years ago, reported off the back of the three terrorist attacks targeting Turis in Kurram in 2017 (covered in some detail in DFAT's report) and that other more recent country information detailed above indicates a continuing pattern of decline since then, even describing Kurram as largely 'peaceful' toward the end of 2020. Having regard to the population, the country information detailed above indicates the incidence of violence in Pakistan and Kurram more recently has been low.
24. I consider the applicant would very likely return to [Village 1] in Kurram which has a significant Shia population, is where many Pashtuns live, is where the applicant has lived most of his life and is where he has a family home and family. As discussed above, I do not consider the applicant was personally targeted or wanted by the Taliban the government or anyone else when he left Pakistan in 2013 and there is nothing to suggest he has since come to the attention of any of these groups. The applicant's brother remains in the family home in Kurram and works and the applicant has not particularised any incidents of harm in relation to his brother more recently. I acknowledge the country information above indicates violent incidents continue to occur in Pakistan including in the former FATA and Kurram. However, I note that following various military operations and other government action and a continual decline in violent incidents over the years across Pakistan as well as in the former FATA, the government has reportedly gained control over the militancy to a large extent in that region, the incidence of violence is now low, particularly in Kurram, and I consider the chances of the applicant being harmed on account of being a Shia Pashtun from the Bangash tribe from [Village 1] (near [Town]) and his experiences in Pakistan to be remote and I am not satisfied he faces a real chance of harm because of this.
25. I accept the applicant may be identifiable as someone who sought asylum in Australia. The applicant has briefly stated he fears being targeted based on a perception he has money because he has come from Australia. DFAT assessed that involuntary returnees are typically questioned upon arrival and will be released within a couple of hours if they did not leave Pakistan illegally

and had not committed crimes in Pakistan or while abroad. It also reported that returnees are typically able to reintegrate into their Pakistani community without repercussions stemming from their migration attempt and that they do not face a significant risk of societal violence or discrimination as a result of this or because they have lived in a Western country. There is no mention of targeting because of a perception a person has money. Nor is there anything to suggest a material change in DFAT's assessment. I also note the country information above which indicates significantly improved security conditions in Pakistan, including in the former FATA and Kurram. The applicant left Pakistan legally on his genuine passport in 2013 and it is still valid for about two years. As discussed above I do not consider the applicant was wanted by the Taliban, Pakistan government or anyone else when he left Pakistan in 2013. There is nothing to suggest he is wanted for crimes committed in Pakistan or elsewhere. As discussed above I am not satisfied the applicant faces a real chance of harm on account of where he comes from, his ethnicity, faith, tribal affiliation, or past experiences in Pakistan. Based on the applicant's profile and the country information detailed above I consider the applicant may be questioned on return, however, based on his profile and the country information above I consider he will be released within a couple of hours and I am not satisfied he faces a real chance of harm, whether at the airport or on his subsequent return home, for having sought asylum in Australia, for having been in Australia for several years or for being perceived as having money because of this.

26. Overall, I am not satisfied the applicant faces a real chance of harm on account of his origins, faith, ethnicity, tribal affiliation, past experiences in Pakistan or for having sought asylum in Australia, having lived in Australia for several years or a perception he has money.

27. I am not satisfied the applicant has 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). The applicant 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 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. In considering the applicant's refugee status discussed above, I have concluded that there was no 'real chance' the applicant would suffer harm on his return to Pakistan for the reasons claimed. 'Real chance' and 'real risk' involve the same standard. For the same reasons, I am also not satisfied the applicant would face a 'real risk' of significant harm.

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.