



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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PAKISTAN  
IAA reference: IAA21/09017

Date and time of decision: 12 May 2021 11:10:00  
M Tubridy, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The applicant claims to be a citizen of Pakistan and on 20 July 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV). On 7 April 2021 a delegate of the Minister (the delegate) refused to grant the visa. On 15 April 2021 the matter was referred to the IAA.

### 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). No further information has been obtained or received.

### Applicant's claims for protection

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3. The applicant's claims can be summarised as follows:
  - He is a citizen of Pakistan and an ethnic Pashtun and a Shia Muslim who was born on [Date] in [Location] in what was then Orakzai Agency (and is now Orakzai District) and was then part of the Federally Administered Tribal Areas (and is now part of Khyber Pakhtunkhwa Province) in Pakistan.
  - He resided in Orakzai's [Location] his entire life in Pakistan. Over 2008/2009 he worked as a farm labourer. From 2010 he worked as [an Occupation 2].
  - [In] May 2010 he married, and [in] April 2011 he and his wife had their first [child].
  - [In] 2011 he obtained a Pakistan passport.
  - In April 2012 there was a blast when he was driving his [vehicle] by the [Building] and the front of his [vehicle] was wrecked, and he was unhurt but was scared.
  - [In] July 2012 his second [child] was born.
  - On [Date 1] March 2013 he departed Iran via the Islamabad international airport. He travelled to [Country 1] and then [Country 2] and then [Country 3] where he boarded the boat by which he arrived in Australian territory on [Date 2] March 2013.
  - He claims to have left Pakistan because of the Taliban and because there were a lot of blasts, and when you want to go to the city the Taliban will try to kill you, and there had been an operation in his area for the last four years, and now there was a Taliban presence in the area, and they shoot missiles, and have destroyed all the schools and there is no education for children and they do not want females to be educated, and now there are other extremists in his area and other parts of Pakistan.
  - He fears that the Taliban would kill him because they are everywhere, and that they will not only kill him but everyone such that he is not safe in Pakistan. Also, if the Taliban learn that he has been in Australia he will be in real trouble and he will be arrested and/or imprisoned and/or killed by the extremists. Also, the terrorist are arresting and target killing Shia people, and they put bombs on the roads and he has escaped unhurt on one occasion, and his name and accent will reveal his Shia identity
  - He did not seek help in Pakistan because the police have no presence in the tribal areas (the areas of the former FATA), and the military are not able to protect the common citizen.

- He did not seek safety in another part of Pakistan because he cannot live anywhere else in Pakistan other than Orakzai's [Location] because he has a young family and is not familiar with other parts of Pakistan, and is too scared to move to another area of Pakistan, and no part of Pakistan is safe for Shia Muslims. His wife and children, and also parents and his sisters, all remain in Orakzai's [Location].

## Refugee assessment

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4. 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

5. 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.
6. The applicant arrived in Australia [in] March 2013 and some weeks later, on 10 May 2013, he participated in a Departmental entry interview. As per his subsequent SHEV application claims, he indicated that he was a citizen of Pakistan, and an ethnic Pashtun, and a Shia Muslim, and that prior to travelling to Australia he had lived all his life in Orakzai's [Location]. Asked why he had left Pakistan he referred to the Taliban, and that there were a lot of blasts, and that a blast had occurred at a [building] where he was driving his [vehicle]. Asked when he started making arrangements to come to Australia, he said two months prior to his departure, and that he had started arranging things a long time ago but had not had the money, but once he had the money it took about two months to organise.
7. On 20 April 2016 the Department mailed the applicant (at a [Suburb 1] address) an invitation to apply for a Temporary Protection visa or a Safe Haven Enterprise visa (SHEV), and this encouraged him to apply within 28 days but advised that if he required more time he could take up to 60 days (until 19 June 2016). The applicant was instructed that it was important that he must advise the Department of any changes in his contact details as soon as possible, and that he must do so in writing. More than a year later, on 28 June 2017 the applicant appointed a solicitor, a [Mr A] (also a registered migration agent), to act as his migration agent for the purpose of providing assistance with a SHEV application. On 28 June 2017 [Mr A] emailed the

Department a Form 956 appointment form in this regard, and he requested that the Department allow the applicant a further two weeks (until 12 July 2017) to lodge a SHEV application. But two weeks passed, and the applicant did not lodge his application. On 19 July 2017 the Department sent the applicant a final reminder to apply for either a TPV or a SHEV, and this informed the applicant that if he did not lodge an application within the next 14 days the Minister might revoke his decision allow him (the applicant) to lodge such an application.

8. On 7 April 2017 the applicant lodged his SHEV application with the assistance of his migration agent. I have already summarised above the claims which the applicant put forward in this regard. At this time the applicant gave his current address as the [Suburb 1] address, and a current telephone number, and he indicated that he did not have any email addresses and that he did not agree to be contacted by the Department electronically. He also attached the completed Form 956 (originally provided on 28 June 2017) in which his migration agent, [Mr A], agreed to electronic communication. On 21 August 2017 the Department confirmed that the application was valid, and this notification included advice that it was the applicant's obligation to tell the Department about any changes in his contact details as soon as possible, and that he must do so in writing.
9. On 25 November 2020 the Department emailed the applicant's migration agent and conveyed that: Due to health and social distancing practices in response to the COVID-19 pandemic, face-to-face protection visa interviews are not currently being held, and that he might be invited to attend a telephone interview, and that if he did not wish to proceed with this he would be scheduled for a face-to-face or video conference interview when these resumed at a future time. On 1 December 2020 the applicant's migration agent emailed the Department that the applicant did not want a telephone interview, and that the Department should notify him when a face-to-face interview was available. On 3 March 2021 the Department emailed applicant's migration agent that, while it was appreciated that the applicant's preference was for a face-to-face interview, the situation was such (with regard to ongoing COVID-19 considerations) that interviews would proceed by either teleconference or video conference. It would appear the applicant was subsequently invited to attend a telephone interview (about his SHEV application) scheduled for 19 March 2021. On 4 March 2021 the Department emailed the applicant's migration agent that the telephone interview which was scheduled for 19 March 2021 had been rescheduled to 18 March 2021. The Department's attached correspondence to the applicant listed him as residing at an address in [Suburb 2] (and this would remain the case in all successive communications).
10. On 16 March 2021 the applicant's migration agent emailed the delegate that over the last two weeks he had tried his best to contact the applicant about the interview which had been scheduled for 19 March 2021 (sic) and that he (the migration agent) had even contacted a few community members but that he had been unable to find the applicant's whereabouts such that it was uncertain whether the applicant would attend the interview scheduled for 19 March 2021 (sic). Later that day, 16 March 2021, the delegate emailed the applicant's migration agent that: he should note that on 4 March 2021 the Department had emailed him that the interview was scheduled for 18 March 2021; and that: she had also attempted to contact the applicant via two different telephone numbers (one of which was the number the applicant had nominated as his current contact telephone number in his SHEV application), and that [Mobile phone provider] had advised that both numbers were disconnected, and that the Department held an [Email provider] email address for the applicant, and the migration agent was asked if he had been able to contact the applicant via this email address. The delegate then used this [Email] address to attempt to email the applicant directly (copying the applicant's migration agent to this email).

11. It would appear that, on the morning of 18 March 2021, the applicant's migration agent telephoned the Department that he had been unsuccessful in his attempts to contact the applicant. In response, the Department emailed the applicant's migration agent that the interview which was scheduled for that day would be postponed. At around the same time, the delegate telephoned the applicant's migration agent and the Department's email was discussed, and it was confirmed that the migration agent and the Department had been unable to contact the applicant, and that the delegate would allow seven days for the applicant to be contacted, and that if this occurred an interview would be scheduled and if not submissions could be made if wished.
12. On 26 March 2021 the delegate emailed the applicant's migration agent and it was noted that the applicant had not attended his scheduled interview of 18 March 2021, and that the migration agent had indicated that he had not been able to get in contact with the applicant, and that the Department had provided seven days in which to continue efforts to locate the applicant so that an interview could be scheduled, and so that any submissions that might wish to be made could be made. The delegate invited a response (by close of business 29 March 2021) as to whether an interview could be scheduled for the applicant. That same day, 26 March 2021, the applicant's migration agent responded: We are relying on the postponement letter received on 18 March 2021.
13. Thus, the applicant's migration agent (in the unenviable position of attempting to do his best for a client who was not engaging with the process) appears have sought an indefinite postponement of the process (and without the applicant's providing an indication of when, if ever, he would re-engage). Quite reasonably, the Department endeavoured to move the matter forward and, on 29 March 2021, the Department emailed the applicant's migration agent that the applicant was invited to attend a telephone interview on 1 April 2021. According to the delegate's decision: attempts were made to contact the applicant by telephone (as per the mobile telephone numbers provided by the applicant to the Department) but these were disconnected; and: the applicant's migration agent also advised that they had been unable to contact the applicant; and: the applicant's migration agent was invited to make submissions but with the agent responding that he had no instructions from his client to make submissions; and: the applicant's migration agent was advised that the Department would progress the application and a decision would be made based on the information presently before the Department.
14. On 7 April 2021 the delegate refused the application, and the Department emailed the applicant's migration agent a notification of this refusal. This notification listed the applicant as residing at a [Suburb 2] address, and it advised the applicant that his matter had been referred to the IAA for review. Included in this notification was a copy of the delegate's reasons for refusing the application.
15. On 15 April 2021 the Department referred the matter to the IAA. In doing so the Department provided the IAA with what was said to be the last known residential or business address provided by the applicant for the purposes of receiving documents (which was the [Suburb 2] address), and the applicant's last known email address provided by the applicant for the purposes of receiving documents (which was the [Email] address). On 15 April 2021 the IAA mailed an "Acknowledgement of Referral" letter to the applicant at the [Suburb 2] address, and the IAA also emailed a copy of this to the applicant at his [Email] address. This communication included a copy of the IAA's *Practice Direction for Applicants, Representatives and Authorised Recipients* which directs that any submissions (about why the applicant disagrees with the Department's decision, and/or any matters which he considers were overlooked) should be, and that any new information must be, provided to the IAA within 21

days of the date on which his case was referred (that is, by 15 May 2021). The IAA also attempted to telephone the applicant via the only two telephone numbers known for him but the IAA found that these telephone numbers could not be connected (just as had been the result recorded by the Department). The IAA did not receive any delivery failure notifications with regard to the [Email] address, nor did the IAA receive any returned mail with regard to the letter which the IAA sent to the [Suburb 2] address.

16. It is now 11 May 2021. I note that the applicant was plainly advised that it was his responsibility to keep the Department advised of his contact details and, more broadly, to remain engaged with the process of pursuing his SHEV application. He has not done so. I have therefore proceeded with this review on the evidence before me, and without making any further attempts to contact the applicant.
17. The applicant claims to be a citizen of Pakistan from Orakzai's [Location] in Pakistan's Khyber Pakhtunkhwa Province. In support of these claims he has provided a copy of his Pakistan Computerised National Identity Card (CNIC) and his Pakistan passport, his marriage certificate, and a document which presents as a character certificate issued by the Orakzai Agency government authorities. I accept that the applicant is a citizen of Pakistan from Orakzai's [Location] in Pakistan's Khyber Pakhtunkhwa Province, and I find Pakistan to be the applicant's receiving country for the purpose of this review. By way of background, Orakzai District is located in the northwest of Pakistan and it was formerly an agency within the administrative area known which was known as the Federally Administered Tribal Area (FATA) which in May 2018 was merged into Khyber Pakhtunkhwa Province. It shares its borders with Khyber tribal district in the north, Kohat in the east, the districts of Kohat and Hangu in the south, and Kurram tribal district in the west.<sup>1</sup> Orakzai has a population of 245,356<sup>2</sup> and, like much of north-western Pakistan, it has a largely Pashtun population and like the rest of Pakistan it is almost entirely Muslim and (while 85 to 90 per cent of Pakistan's Muslim population are Sunnis) Orakzai and also neighbouring Kurram and Hangu are among the areas in Pakistan where a significant number of Shias can be found.<sup>3</sup>
18. At the time the applicant departed Pakistan the area of Orakzai and the surrounding FATA and a number of other areas of Pakistan were affected by rising levels of extremist violence, including sectarian violence. In 2012 the Pakistan Institute of Peace Studies (PIPS) recorded 1577 militant, nationalist, insurgent and sectarian attacks in Pakistan. The Tehreek-e-Taliban Pakistan (TTP; or Pakistani Taliban) was considered to be responsible for the majority of these attacks, which were aimed at state, military and civilian targets.<sup>4</sup> The TTP is an umbrella organisation for a number Sunni extremist militant groups which aim to displace secular governance in Pakistan and replace this with a strictly Sunni and very conservative style of Islamic law and government. Although it is widely considered that the Pakistan government has sometimes sponsored or at least tolerated some Sunni extremist groups which have been focused on perpetrating militant activity outside Pakistan (such as the Afghan Taliban, and Lashkar-e-Taiba), and although some commentators have also alleged that the Pakistan government has also supported Sunni extremist groups like those associated with the TTP, it is widely consider the case that the Pakistan government and its security forces have been broadly committed to eliminating groups (like those associated with the TTP) which have

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<sup>1</sup> EASO, "Pakistan - Security situation", October 2020, 20201102100212.

<sup>2</sup> EASO, "Pakistan - Security situation", October 2020, 20201102100212.

<sup>3</sup> DFAT, DFAT Thematic Report - Shias in Pakistan, 18 December 2013, CIS26834.

<sup>4</sup> DFAT, DFAT Thematic Report - Shias in Pakistan, 18 December 2013, CIS26834.

staged attacks inside Pakistan and against its own citizens, and security personnel, and persons and institutions of government.<sup>5</sup>

19. Even so, at the time the applicant departed Pakistan the results of these efforts had only limited success, and in June 2013 the Janes intelligence group reported that the Pakistan military was undertaking a number of offensives in response to such extremist groups, and that this had included a March 2010 offensive in Orakzai, but that despite such offensives extremist violence remained the most pressing threat to stability in Pakistan.<sup>6</sup> With regard to the situation for Shia Muslims in Orakzai at this time, I note that in December 2013 DFAT reported that, although violence between Sunnis and Shias was relatively low, there were some regions with higher sectarian tensions which might frequent acts of violence, and this included Orakzai, and that Orakzai was among those areas in Pakistan where sectarian attacks had occurred sporadically in 2012.<sup>7</sup> According to the Human Rights Commission of Pakistan (HRCP) the violence which had occurred in Orakzai in 2012 had included a sectarian attack which killed 13 Shia Muslims, and the broader insecurity affecting the area resulted in the displacement of some 106,960 persons.<sup>8</sup> On 8 February 2013 a bomb blast in Orakzai's capital of Kalaya killed 16 person and injured 17.<sup>9</sup>
20. This noted, and even so, the applicant's claim that the front of his [vehicle] was wrecked by an April 2012 blast in the vicinity of the [Building] is difficult to credit given that he has provided no corroborating evidence in support of this claim. DFAT's monitoring of security and militancy over this period did report that on 8 April 2012 the military killed 14 militants in a counter-insurgency operation in the Akhonkot and Adokhel areas in Orakzai Agency, and that several militant hide-outs were also bombed.<sup>10</sup> But it is not apparent from the evidence before me that there was a blast in vicinity of a [building] in Orakzai or the surrounding region in April 2012. Nor has the applicant provided any evidence in support of his claim that his vehicle (which would have been the source of his livelihood at the time) was damaged during this period. I am not satisfied that such an incident occurred.
21. Since the time of the applicant's departure from Orakzai the situation has improved considerably, both across Pakistan and in Orakzai specifically. As has been noted above, in 2012 PIPS recorded 1577 militant, nationalist, insurgent and sectarian attacks in Pakistan. By contrast, some eight years later PIPS recorded that of 433 incidents of violence in 2019 there had been 229 terrorist attacks. The improved situation has been less dramatic with regard to the former FATA which continues (as whole) to see a considerable level of violence, but significantly such violence as has continued to occur in the region over recent years has been largely confined to certain areas, specifically: North Waziristan, Bajaur, and South Waziristan. Additionally, in 2017 in Kurram, there was a concerning outbreak of sectarian violence when three bomb attacks by extremist groups in Parachinar resulted in the death of more than 120 Shia Muslims and as many injured. At the time this raised concerns about the risk of further such attacks in Kurram such that in April 2019 DFAT was of the view that Pashtun Shias in Kurram still faced a moderate risk of sectarian violence from militant groups, even though DFAT considered that more broadly Shias in Pakistan generally faced a low risk of sectarian violence.

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<sup>5</sup> CEP, "Pakistan: Extremism and Counter-Extremism", 5 October 2018, CIS7B839419753; DFAT, DFAT Country Information Report - Pakistan, 20 February 2019, 20190220093409; EASO, "Pakistan - Security situation", October 2020, 20201102100212; PICSS, "2019 Annual Security Assessment Report", January 2020, 20200122140652; FRC, "Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2020", 7 January 2021, 20210113125205; CRSS, "CRSS Annual Security Report 2020", February 2021, 20210211103243.

<sup>6</sup> UK Home Office, "Pakistan COI Report", 9 August 2013, CIS36DE0BB2517.

<sup>7</sup> DFAT, DFAT Thematic Report - Shias in Pakistan, 18 December 2013, CIS26834.

<sup>8</sup> UK Home Office, "Pakistan COI Report", 9 August 2013, CIS36DE0BB2517.

<sup>9</sup> CEP, "Pakistan: Extremism and Counter-Extremism", 5 October 2018, CIS7B839419753.

<sup>10</sup> DFAT, "Pakistan Security and Militancy Report - Week Ending 11 April 2012", 12 April 2012, CX284957.

But over the next three years Kurram would see little violence beyond that which occurred in May 2020 when a land dispute between Parachamkani and Balishkhel tribesmen saw 14 deaths and 40 injured in associated fighting.<sup>11</sup>

22. With regard to the situation in Orakzai specifically the situation has improved considerably since 2012 and normalcy would appear to have largely returned to the area (and in June 2019, Pakistan's Provincial Disaster Management Authority announced that 220 million Pakistani rupees would be provided for the people affected by war in Kurram, Orakzai and the Frontier Region Tank, and that the money would be provided to those families who have returned voluntarily to their areas before March 2015).<sup>12</sup> With regard to schools I note that in 2018 it was estimated that over 25 million boys and girls between the ages of five and 16 in Pakistan were attending school, and while the proportion of children out of school increased with age, and while there was a greater number of girls than boys out of school (and while this disparity is greatest in Khyber Pakhtunkhwa). It was also reported that access to education is affected by the poor security environment and that one faction of the TTP had announced that it would target schools, colleges and universities with violent attacks (with this announcement coming two days after militants attacked the Bacha Khan University near Peshawar in Khyber Pakhtunkhwa province, killing 21 people). In May 2018, militant group, Ittehadul Mujahideen North Waziristan, warned residents against sending 'grown-up' girls to schools after damaging two North Waziristan schools, and by December 2018, media reported almost all girls' schools in Mir Ali, North Waziristan had closed, and a significant attack also occurred against 12 schools in Gilgit Baltistan in August 2018 (and some years earlier on 16 December 2014 an attack on the Army Public School in Peshawar killed nearly 150 people, mostly children of army personnel, with the TTP claiming responsibility).<sup>13</sup> However, it is not apparent from the country information that Orakzai has been affected by problems of this kind.
23. The most significant instance of extremist violence to have occurred in Orakzai in recent years took place on 23 November 2018 when a bomb exploded at a market in Shia dominated Kalaya which killed some 35 people (including at least 22 Shias) and wounded as many. The attack reportedly occurred despite high security at and around Imambargahs (Shia congregation hall) and mosques following intelligence reports that terrorists might attack Friday congregations in the area, and the Sunni extremist group Islamic State claimed responsibility.<sup>14</sup> This noted, there has not been an attack of similar kind or scale in Orakzai since this time, and although over subsequent years some Sunni extremist groups have continued to occasionally perpetrate attacks in Orakzai there have been few casualties. From the extensive monitoring which is before me it is apparent that there were a further two violent incidents in Orakzai in 2018 but with few casualties (such that casualties from all three incidents amounted to 37 deaths and injury to 38), while in 2019 there was one violent incident (which resulted in five deaths and injury to three), and 2020 saw four terrorist attacks (though with low casualties: five deaths and injury to two).<sup>15</sup> The PIPS attributed two of the 2020 attacks to JuA and local Taliban, and

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<sup>11</sup> DFAT, DFAT Country Information Report - Pakistan, 20 February 2019, 20190220093409; EASO, "Pakistan - Security situation", October 2020, 20201102100212; PICSS, "2019 Annual Security Assessment Report", January 2020, 202001222140652; FRC, "Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2020", 7 January 2021, 20210113125205; CRSS, "CRSS Annual Security Report 2020", February 2021, 20210211103243.

<sup>12</sup> EASO, "Pakistan - Security situation", October 2020, 20201102100212.

<sup>13</sup> DFAT, DFAT Country Information Report - Pakistan, 20 February 2019, 20190220093409; EASO, "Pakistan - Security situation", October 2020, 20201102100212.

<sup>14</sup> UK Home Office, Pakistan - Shia Muslims, January 2019, 20190522151230.

<sup>15</sup> EASO, "Pakistan - Security situation", October 2020, 20201102100212; FRC, "Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2020", 7 January 2021, 20210113125205.



it was reported that the incident which occurred in March 2020 involved an attack on a police station by armed men.<sup>16</sup>

24. It is not apparent that Orakzai has, in recent years, seen any attacks upon schools, or upon persons who send their sons or daughters to be educated, or upon [Occupation 2], or that there have been any attacks which have targeted Shia Muslims in Orakzai since the attack of 23 November 2018. In January 2021 the FRC considered that the security situation in Kurram and Orakzai remained tense to the growing number of land disputes in the area, and the FRC expressed concern that this could lead to another wave of sectarian conflict, but even so the FRC considered Orakzai to be largely peaceful.<sup>17</sup> The applicant has given no indication that he has any involvement in a land dispute of some kind, and given the overall situation in Orakzai I consider that the possibility of his being harmed as a result of the ongoing occasional instances of violence is, for the reasonably foreseeable future, remote.
25. I note, moreover, that in the areas through which the applicant would have to travel (to return to Orakzai by way of arriving at Islamabad's international airport and then travelling through Punjab Province and Khyber Pakhtunkhwa Province) there has likewise been little in the way of sectarian violence, or in the way of generalised violence (and such travel would not entail his having to travel through areas like North Waziristan, Bajaur or South Waziristan).<sup>18</sup> In April 2019 DFAT reported that Pashtuns can face a medium risk of official discrimination in the form of terrorism-related and racial profiling by security forces in areas where they are a minority, particularly in Punjab, but I note that DFAT's reporting about such matters also indicates that such profiling as has occurred has affected Pashtuns migrating within Pakistan, particularly to Karachi and Lahore (rather than to persons transiting through such areas to return to their Pashtun dominated home areas), and it is not apparent that the situation has worsened over recent years.<sup>19</sup>
26. With regard to the applicant's claim that his having travelled to Australia will put him at risk, I note that Sunni extremist groups like the Pakistani Taliban (and more recently emerged groups like Islamic State) have espoused an antipathy towards western countries like Australia, and that historically some groups associated with the Pakistani Taliban have attacked persons selling western music or films (such as occurred in Swat District in 2007). This, however, has not translated into instances of attacks upon Muslim citizens of Pakistan (or specifically upon Pashtun and/or Shia Muslim citizens of Pakistan) simply for having returned from spending time abroad in a western country like Australia. In February 2019 DFAT assessed that returnees to Pakistan do not face a significant risk of societal violence or discrimination as a result of their attempt to migrate, or because of having lived in a western country (whether from extremist groups, or the government authorities, or any other actor), and it is not apparent that the situation has changed over recent years.<sup>20</sup>
27. I accept that in Pakistan the applicant would be identifiable as a Pashtun Shia Muslim from Orakzai (certainly to those who know him in Orakzai, and possibly to some strangers who he encounters also), and given that he may talk about his travels upon return I accept that it may become known to others in Pakistan that he has spent time in Australia (a western country).

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<sup>16</sup> EASO, "Pakistan - Security situation", October 2020, 20201102100212.

<sup>17</sup> FRC, "Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2020", 7 January 2021, 20210113125205.

<sup>18</sup> DFAT, DFAT Country Information Report - Pakistan, 20 February 2019, 20190220093409; UK Home Office, "Pakistan - Shia Muslims", January 2019, 20190522151230; EASO, "Pakistan - Security situation", October 2020, 20201102100212; PICSS, "2019 Annual Security Assessment Report", January 2020, 20200122140652; USCRIF, USCIRF 2020 Annual Report, 28 April 2020, 20200429103634; FRC, "Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2020", 7 January 2021, 20210113125205; CRSS, "CRSS Annual Security Report 2020", February 2021, 20210211103243.

<sup>19</sup> DFAT, DFAT Country Information Report - Pakistan, 20 February 2019, 20190220093409.

<sup>20</sup> DFAT, DFAT Country Information Report - Pakistan, 20 February 2019, 20190220093409.

But even so, given the overall situation discussed above, and even when the totality of the applicant's circumstances are considered (of his being a Pashtun Shia Muslim who would be returning to reside in Orakzai and after having been in Australia, and who intends to send his [children] to school, and even allowing for the possibility that he would return to [doing a job task] in order to earn his livelihood) I am not satisfied that the applicant would for the foreseeable future face a real chance of harm of any kind if he were to return to Pakistan. I am therefore not satisfied that the applicant would face a real chance of serious harm, and I am not satisfied that 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**

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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. For the reasons already given above I am not satisfied that that the applicant would face a real risk of harm of any kind if he were to return to Pakistan. I am therefore not satisfied that that the applicant would face a real risk of significant harm if he were to return to Pakistan.

### **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**

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

## Applicable law

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### **Migration Act 1958**

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

In this Act, unless the contrary intention appears:

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**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.